

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

In the Matter of)	
)	
Cox Communications Las Vegas, Inc.)	
)	CSR-8125-A
For Modification of the Las Vegas, Nevada)	
DMA)	

MEMORANDUM OPINION AND ORDER

Adopted: June 11, 2009

Released: June 12, 2009

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Cox Communications Las Vegas, Inc. (“Cox”), filed the above-captioned petition for special relief seeking to modify the Las Vegas, Nevada designated market area (“DMA”) with respect to television broadcast station KEGS (Ind., Ch. 7), Goldfield, Nevada (“KEGS”). We note that, while KEGS’ city of license is physically located in the Reno, Nevada DMA, Nielsen has assigned the station to the Las Vegas DMA. Specifically, Cox requests that KEGS be excluded, for purposes of the cable television mandatory broadcast signal carriage rules, from communities it serves which are located in Clark County, Nevada.¹ An opposition to this petition was filed on behalf of Nevada Channel 3, Inc., Debtor-in-Possession, licensee of KEGS, to which Cox replied. For the reasons stated below, we grant Cox’s request.

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act and implementing rules adopted by the Commission, commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station’s market.² A station’s market for this purpose is its “designated market area,” or DMA, as defined by Nielsen Media Research.³ A DMA is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-

¹Cox’s Clark County cable system serves the following communities: Boulder City, Henderson, Las Vegas, North Las Vegas, and unincorporated areas of Clark County, Nevada.

²*Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2976-2977 (1993) (“*Must Carry Order*”).

³Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station’s market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. *See* 47 U.S.C. §534(h)(1)(C). Section 76.55(e) requires that a commercial broadcast television station’s market be defined by Nielsen Media Research’s DMAs. 47 C.F.R. § 76.55(e); *see Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, 14 FCC Rcd 8366 (1999) (“*Modification Final Report and Order*”).

market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.⁴

3. Under the Act, however, the Commission is also directed to consider changes in market areas. Section 614(h)(1)(C) provides that the Commission may:

with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's market to better effectuate the purposes of this section.⁵

In considering such requests, the 1992 Cable Act provides that:

the Commission shall afford particular attention to the value of localism by taking into account such factors as in -

- (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
- (II) whether the television station provides coverage or other local service to such community;
- (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community;
- (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.⁶

The legislative history of the provision states that:

where the presumption in favor of [DMA] carriage would result in cable subscribers losing access to local stations because they are outside the [DMA] in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the area in which they serve and which form their economic market.

* * * *

⁴For a more complete description of how counties are allocated, see Nielsen Media Research's *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

⁵47 U.S.C. § 534(h)(1)(C).

⁶*Id.*

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.⁷

In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.⁸

4. In the *Modification Final Report and Order*, the Commission, in an effort to promote administrative efficiency, adopted a standardized evidence approach for modifications that requires the following evidence be submitted:

- (1) A map or maps illustrating the relevant community locations and geographic features, station transmitter sites, cable system headend locations, terrain features that would affect station reception, mileage between the community and the television station transmitter site, transportation routes and any other evidence contributing to the scope of the market.
- (2) Grade B contour maps delineating the station's technical service area and showing the location of the cable system headends and communities in relation to the service areas.⁹
- (3) Available data on shopping and labor patterns in the local market.
- (4) Television station programming information derived from station logs or the local edition of the television guide.
- (5) Cable system channel line-up cards or other exhibits establishing historic carriage, such as television guide listings.
- (6) Published audience data for the relevant station showing its average all day audience (*i.e.*, the reported audience averaged over Sunday-Saturday, 7 a.m.-1 a.m., or an equivalent time period) for both cable and noncable households or other specific audience indicia, such as station advertising and sales data or viewer contribution records.¹⁰

⁷H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

⁸*Must Carry Order*, 8 FCC Rcd 2965, 2977 n.139.

⁹Note to Paragraph (b)(2): Service area maps using Longley-Rice (version 1.2.2) propagation curves may also be included to support a technical service exhibit. The Longley-Rice model provides a more accurate representation of a station's technical coverage area because it takes into account such factors as mountains and valleys that are not specifically reflected in a traditional Grade B contour analysis. In situations involving mountainous terrain or other unusual geographic features, Longley-Rice propagation studies can aid in determining whether or not a television station actually provides local service to a community under factor two of the market modification test.

Petitions for special relief to modify television markets that do not include the above evidence shall be dismissed without prejudice and may be re-filed at a later date with the appropriate filing fee. The *Modification Final Report and Order* provides that parties may continue to submit whatever additional evidence they deem appropriate and relevant.

III. DISCUSSION

5. The issue before us is whether to grant Cox's request to exclude KEGS from mandatory carriage on the subject cable system. All of the communities at issue are located in the Las Vegas DMA, as is KEGS, which is licensed to Goldfield, Nevada. Considering all of the relevant factual circumstances in the record, we believe that the market modification petition is a legitimate request to redraw DMA boundaries to make them congruous with market realities.

6. The first statutory factor is "whether the station, or other stations located in the same area have been historically carried on the cable system or systems within such community."¹¹ Cox states that, although KEGS has been in operation since at least April 11, 2002, it has never been carried in the subject communities, nor by any other cable operator in the Las Vegas metropolitan area.¹² In addition, Cox states that, to its knowledge, KEGS has never sought carriage on any cable system in the area.¹³ Cox argues that the Commission has long recognized that historical carriage patterns generally provide "insight into the structure of the market involved" and help to differentiate among communities in the market.¹⁴ Cox asserts that the uniform and consistent absence of KEGS from any cable system serving the Las Vegas metropolitan area reflects a recognition of the geographic limits of KEGS' service area and its lack of local service to the communities herein.¹⁵

7. The second statutory factor is "whether the television station provides coverage or other local service to such community."¹⁶ Cox argues that there is an average of 177 miles of barren and mountainous terrain located between KEGS's facilities in Tonopah and the subject communities in the Las Vegas metropolitan area.¹⁷ As a result, Cox states that neither KEGS' analog Grade B contour, nor its associated digital noise limited contour, fall anywhere near the subject communities.¹⁸ Indeed, Cox

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¹⁰47 C.F. R. § 76.59(b).

¹¹47 U.S.C. § 534(h)(1)(C).

¹²Modification at Exhibit B. Cox points out that Eagle West, which operates a cable television system in the Las Vegas metropolitan area that overlaps the communities at issue, also does not carry KEGS. *See id.* at Exhibit C.

¹³*Id.* at 4.

¹⁴*Id.*, citing *Armstrong Utilities, Inc.*, 12 FCC Rcd 2498, 2504 (1997); *Kansas City Cable Partners*, 10 FCC Rcd 3807, 3809 (1995).

¹⁵*Id.* at 5.

¹⁶47 U.S.C. § 534(h)(1)(C).

¹⁷Modification at 5. Cox notes that the Commission has previously considered stations and cable communities situated as close as 39 miles apart to be in different markets. *Id.* at 7, citing *Armstrong Utilities, Inc.*, 12 FCC Rcd 2498 (1997) (39-55 miles); *A-R Cable Services, Inc.*, 11 FCC Rcd 21080 (1996) (48 miles); *Time Warner Cable*, 11 FCC Rcd 13149 (1996) (45 miles).

¹⁸*Id.* at Exhibit D.

states that KEGS' analog and digital service contours, as predicted both by the Commission's standard methodology and by Longley-Rice analysis, cover only a small part of the vast area between KEGS' transmitter in Nye County and the communities in Clark County.¹⁹ Moreover, even discounting the terrain and distance factors, Cox argues that any actual reception of KEGS' signal would still be impaired by interference from co-channel operation of KLAS-DT (Ch. 7), Las Vegas, Nevada ("KLAS-DT"), whose service contour encompasses almost all of Clark County.²⁰ In addition, Cox states, that because almost all Las Vegas television stations operate from transmitter sites on the south side of Henderson, Nevada, over-the-air viewers in the communities would most likely orient their antennas to maximize reception of these stations.²¹ Therefore, even if KEGS's signal reached the communities, receive angle discrimination would reduce the ability of viewers to receive KEGS' signal.²² Cox notes that in *Market Modification and the New York Area of Dominant Influence*, the Commission stated that "Grade B contour coverage . . . is an efficient tool to adjust market boundaries because it is a sound indicator of the economic reach of a particular television station's signal," but even where a station places a theoretical Grade B contour over the relevant communities, "other determinative market facts" may confirm that a station and the communities operate in separate markets.²³ In addition to lack of Grade B coverage, Cox argues that KEGS' service area is also physically limited by terrain obstacles such as the Kawich, Belted, Eleana, and Spotted mountain ranges, which are located between KEGS' transmitter and the subject communities.²⁴ Cox maintains that this mountainous terrain prevents KEGS from obtaining a line-of-sight propagation path to Cox's Las Vegas area receive site in Henderson and physically separates the markets served by Cox and KEGS.²⁵ Cox argues that the Commission has frequently acknowledged that terrain features such as mountain ranges can serve to divide market areas.²⁶

8. Cox argues further that a review of KEGS' programming confirms that the station offers no local programming directed to the communities at issue.²⁷ Cox points out that, until January 4, 2009, KEGS merely rebroadcast the programming carried on stations affiliated with RTN, the Little Rock, Arkansas, based "Retro Television Network."²⁸ Cox states that RTN's programming consists entirely of

¹⁹*Id.* Cox states that KEGS' signal does not even come close to reaching the northwestern border of Clark County.

²⁰*Id.* at 6 and Exhibit D.

²¹*Id.*

²²*Id.*, citing *CoxCom, Inc. d/b/a Cox Communications Orange County*, 19 FCC Rcd 4509, 4517 (2004) ("In addition, it appears that viewers in the Los Angeles County communities may have a problem with over-the-air viewing based on the station's transmission location and subsequent antenna angle discrimination.").

²³*Id.* at 6-7, citing 12 FCC Rcd 12262, 12268 (1997) ("*New York ADI Order*"), *aff'd*, *WLNY-TV, Inc. v. FCC*, 163 F.3d 137 (2d Cir. 1998). Cox states that among the "other determinative market facts" the Commission specifically identified were terrain obstacles such as a mountain range or clear proof that the contour fails to reflect actual coverage. *See id.*

²⁴*Id.* at 7.

²⁵*Id.* at Exhibit D.

²⁶*Id.*, citing *CoxCom, Inc. d/b/a Cox Communications Phoenix*, 20 FCC Rcd 13474, 13480-1 (2005) ("distance and terrain factors in this case . . . strongly indicate that the communities served by Cox are too distant to properly be part of [the station's] television market."); *CoxCom, Inc. d/b/a Cox Communications Orange County*, 19 FCC Rcd at 4517; *Mediacom California*, 18 FCC Rcd 14575, 14579-80 (2003); *Costa de Oro Television, Inc.*, 13 FCC Rcd 4360, 4374 (1998).

²⁷*Id.* at 8.

²⁸*Id.* at n.31.

decades-old syndicated situation comedy and drama series and late-night infomercials.²⁹ Cox asserts that KEGS' broadcast of general interest programming, rather than locally-oriented programming, only confirms that the communities at issue are not "a particular focus of the station or are in any sense served in a manner that establishes a specific market connection."³⁰

9. The third statutory factor is "whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community."³¹ Cox maintains that the subject communities already receive substantial coverage of local interests and concerns from the ten other Las Vegas broadcast stations currently carried on its cable system.³² Cox states that its subscribers have access to at least 166 weekly hours of local news, sports, and public affairs programming from local broadcast stations.³³ In addition, Cox states that it also provides abundant local non-broadcast programming on its five government, educational, and public access channels.³⁴

10. The fourth statutory factor concerns "evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community."³⁵ Cox argues that, as demonstrated by Nielsen Media ratings information, KEGS had no reportable ratings in the Las Vegas DMA in 2008.³⁶ KEGS is also not included in the daily or weekly television program listings of the area's major newspaper, *The Las Vegas Review-Journal*, or other local television guides such as *TV Guide*.³⁷ Cox asserts that the complete lack of ratings for KEGS in the communities weighs heavily in favor of granting the instant petition.

11. In addition to it being physically located in the Reno, Nevada DMA, Cox points out that several nationally recognized, objective market classifications also place the subject communities and KEGS in separate markets: 1) Rand-McNally's Ranally Metro Area ("RMA") standard excludes Goldfield from the Las Vegas RMA; 2) the U.S. Office of Management and Budget's ("OMB") Metropolitan Statistical Area ("MSA") classification standard places the subject communities and Goldfield in different MSAs; and 3) according to U.S. Census data, no workers living in Clark County work in Esmeralda County and only 14 workers from that county travel to Clark County for work.³⁸ Cox

²⁹*Id.* at 8-9. Cox states that RTN features only two original programs – *Closing Remarks with Jason Roberts* and *Unreliable Sources*.

³⁰*Id.* at 9, citing *Charter Communications Properties LP*, 19 FCC Rcd 8655, 8661 (2004).

³¹47 U.S.C. § 534(h)(1)(C).

³²Modification at 9 and Exhibit B.

³³*Id.* at Exhibit G.

³⁴*Id.* at 10.

³⁵47 U.S.C. § 534(h)(1)(C).

³⁶Modification at Exhibit H. Cox states that KEGS failed to meet Nielsen's minimum reporting standards during any of the 2009 "sweeps" periods – the DMA "cume" rating for KEGS was less than 2.5 percent in each reporting period.

³⁷*Id.* at 10-11.

³⁸*Id.* at 12-13.

notes further that KEGS and the communities are not only in separate counties, but different congressional districts as well.³⁹

12. In its opposition, KEGS argues that Cox has failed to meet its burden under the statutory requirements for excluding the subject communities from KEGS' market.⁴⁰ Moreover, KEGS asserts, not only would exclusion of the communities contradict a 2006 Commission order finding that KEGS is properly assigned to the Las Vegas DMA, but in light of the recent bankruptcy filing of KEGS' licensee and its parent and sister subsidiaries, the filing of Cox's petition constituted a violation of the automatic stay provisions of the Bankruptcy Code.⁴¹ KEGS states that, despite the fact that its assigned city of license, Goldfield, is located in the Reno DMA, Nielsen granted KEGS' request to be reassigned to the Las Vegas DMA due to the fact that both its transmitter and the majority of its "Grade B" service signal coverage are located in the Las Vegas DMA.⁴² KEGS argues that this assignment was upheld by the Commission in *Nevada Channel 3, Inc.*, in which a waiver of Section 76.66(e)(3) of the Commission's rules was granted, allowing KEGS to be considered part of the Las Vegas DMA for satellite carriage purposes.⁴³ In spite of the fact that nothing has changed in this regard, KEGS maintains that Cox's instant petition essentially asks the Commission to overturn the *DBS Waiver Order* and that doing so would be contrary to the public interest.⁴⁴ KEGS argues that, because it has never demanded carriage on Cox's cable system, there appears to be no compelling reason why Cox should file a market modification petition at this time, except preemptively, and it asserts that the Commission should not allow Cox to use the provisions enacted in the Communications Act in an anti-competitive manner.⁴⁵

13. In any event, KEGS maintains that Cox has not met the statutory burden for market modification. First, while it is true that the station has no historical carriage in the communities at issue, KEGS argues that this factor should not be given any weight since it has only been on-the-air since September 2002 and is, in essence, a "new" station.⁴⁶ Also, given the fact that it was an affiliate of the ImagineAsian network from 2004-2005, KEGS contends that it also meets the criteria for a "specialty" station and the Commission has long discounted the lack of historic carriage when considering the carriage rights of foreign-language and other "specialty" stations.⁴⁷ Second, KEGS does not deny that both distance and terrain limit its ability to place a Grade B signal over the communities.⁴⁸ However,

³⁹*Id.* at 13.

⁴⁰Opposition at 1.

⁴¹*Id.* at 1-2. KEGS states that on December 16, 2008, Nevada Channel 3, Inc. filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). KEGS argues that Cox's petition does not fall within the policy and regulatory exception to the automatic stay applicable to all entities seeking bankruptcy and action by the Commission during the pendency of the bankruptcy proceeding would be a violation of Section 362 of the Bankruptcy Code by both Cox and the Commission. *Id.* at 12-14.

⁴²*Id.* at 2-3. KEGS states that Nielsen granted this request on November 3, 2004. KEGS maintains that it filed a rule making petition with the Commission on August 16, 2002 that sought to change its community of license to Tonopah, but that the Commission has yet to act on it.

⁴³*Id.* at 5, citing 21 FCC Rcd 1884 (2006) ("*DBS Waiver Order*").

⁴⁴*Id.* at 6-7.

⁴⁵*Id.* at 7.

⁴⁶*Id.* at 9, citing *Charter Communications Properties LP*, 19 FCC Rcd 8655, 8663 (2004); *Time Warner Entertainment Co., LP*, 12 FCC Rcd 22069, 22077 (1997); *Time Warner Cable*, 11 FCC Rcd 8047, 8053-54 (1996).

⁴⁷*Id.* at 9-10, citing *Paragon Cable*, 10 FCC Rcd 9462, 9466 (1995).

⁴⁸*Id.* at 10.

KEGS argues that the Commission has held that lack of adequate signal is less relevant in market modification proceedings than in must carry proceedings, especially in mountainous areas.⁴⁹ KEGS asserts that the Commission should not ignore the fact that the Las Vegas DMA has a broad geographic reach, encompassing geographic areas well beyond the Grade B signal contour of any station in the market.⁵⁰ With regard to the issue of local programming, KEGS states that the Commission must take notice of the fact that it takes significant monetary resources to produce substantial local programming, which is difficult for a struggling rural station such as itself.⁵¹ Stripping it of its carriage rights, however, does not solve the problem. Third, while KEGS contends that Cox's assertion of the amount of local programming its subscribers currently receive cannot be adequately verified, it nevertheless points out that this criterion was intended to be used only to the benefit of a station facing deletion, not against the station.⁵² Fourth, KEGS argues that just as the Commission will not give great weight to the lack of historic carriage against a new or "specialty" station, the lack of ratings also cannot be given substantial consideration.⁵³

14. In reply, Cox argues that, while it is sympathetic to KEGS' financial difficulties, they are irrelevant to this proceeding.⁵⁴ Cox maintains that, despite KEGS' assertions, the station's September 15, 2008 letter not only notified Cox of its election of must carry status over retransmission consent, but also stated its expectation that KEGS would be afforded mandatory carriage rights on its over-the-air channel as of January 1, 2009, and demanded written verification from Cox concerning its carriage and channel positioning on the subject cable system.⁵⁵ Cox states, therefore, that it reasonably interpreted this must carry notice as an anticipatory demand for carriage and, given the tenor of the correspondence, sought to clarify the scope of its mandatory carriage obligations by filing the instant market modification.⁵⁶ Cox argues that KEGS' attempt to divert attention from the determinative factors governing this proceeding by characterizing itself as a "weakened," "new," "independent," "specialty station" victimized by the Commission's channel allotments and Cox's cable system on which KEGS has never been carried.⁵⁷ Cox states, however, that KEGS' claim to be a "new, specialty station," is less than accurate.⁵⁸ KEGS maintained that it was a "new" station because it had been operating for only 7 years, and that it was a "specialty station" because it briefly carried an "Asian-focused" programming network approximately 5 years ago.⁵⁹ Cox points out that television stations cannot be deemed "new" under Commission precedents if they have been operating for more than three years.⁶⁰ Moreover, Cox maintains that KEGS'

⁴⁹*Id.*, citing *Time Warner Cable Avenal*, 11 FCC Rcd 8047, 8055 (1996).

⁵⁰*Id.* at 10-11.

⁵¹*Id.* at 11.

⁵²*Id.* at 11-12.

⁵³*Id.* at 12, citing *Erie County Cablevision, Inc.*, 13 FCC Rcd 6403, 6411 (1998).

⁵⁴Reply at 1.

⁵⁵*Id.* at Exhibit 1.

⁵⁶*Id.* at 2.

⁵⁷*Id.* at 4.

⁵⁸*Id.* at 5.

⁵⁹*Id.*

⁶⁰*Id.* at 6, citing *Cable Satellite of South Miami, Inc.*, 13 FCC Rcd 298, 306 (1998) ("stations can take up to three years to establish their viewing patterns"); *Gulf & Pacific Communications L.P.*, 12 FCC Rcd 21986 (1997); *DeSoto Broadcasting, Inc.*, 10 FCC Rcd 4991 (1995); *Amendment of Part 76 of the Commission's Rules and* (continued....)

brief affiliation with the ImagineAsian network more than 4 years ago fails to make it a “specialty” station.⁶¹ Cox points out that KEGS currently broadcasts the programming of the AMGTV network, which features classic movies, sports, lifestyle and family programming, none of which qualifies as “specialty” programming.⁶² Even if KEGS were both a “new” station and a “specialty” station, however, Cox asserts that the Commission has consistently held that “[t]he fact that a station is new or of specialized appeal does not mean that its logical market area is without limits or that it should be exempt from the Section 614(h) market modification process.”⁶³ Cox notes that the Commission has stated that “[a]lthough less reliance is put on audience with regard to specialty stations, simply because of their status, in all other respects they are subject to the same rights and restrictions as any other television broadcast station.”⁶⁴

15. Cox argues further that KEGS also misunderstands the relevance of its DMA assignment to this proceeding and its arguments in that regard are misplaced.⁶⁵ Cox states that the must carry rules adopted by Congress in 1992 were intended “to ensure that television stations be carried in the areas which they service and which form their economic market.”⁶⁶ However, Cox points out that Congress also understood that “a community within a station’s [DMA] may be so far removed from the station it cannot be deemed part of the Station’s market.”⁶⁷ Moreover, Cox notes, the Commission has held that granting a station the ability to reach all viewers in its DMA, as KEGS advocates, would be inconsistent with the value of localism “by distracting a station’s focus from its community of license.”⁶⁸ As a result, Cox argues, Nielsen’s re-assignment of KEGS to the Las Vegas DMA, at the station’s request, is inapposite to this proceeding and the instant petition is entirely consistent with congressional intent to allow DMA market modifications that will align carriage requirements with market realities.⁶⁹ In addition, Cox states that KEGS’ reliance on the *DBS Waiver Order* is similarly misplaced because this proceeding addressed DBS, rather than cable, carriage requirements and involved a waiver of the Commission’s rules regarding

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Regulations to Permit Showings that Certain Television Broadcast Stations are Significantly Viewed Based on County-Wide Surveys, Report and Order, 56 FCC 2d 265, 270 (1975) (three years “afford[s] adequate time to affected stations to establish audience levels sufficient to meet the significantly viewed criteria.”).

⁶¹*Id.* at 6. Cox points out that, in any event, the programming that KEGS carried from the ImagineAsian network was English-language “Asian-focused” ethnic programming which does not constitute specialty programming under the Commission’s precedents. *Id.* at 7.

⁶²*Id.*

⁶³*Id.* at 7, citing *Cable Satellite of South Miami, Inc.*, 13 FCC Rcd at 306; *Cablevision Systems Corporation*, 11 FCC Rcd 6453, 6475 (1996).

⁶⁴*Id.* at 7-8, citing *Comcast Cablevision of New Mexico, Inc.*, 16 FCC Rcd 12440, 12446 (2001) (citing *Continental Cablevision of Jacksonville, Inc.*, 11 FCC Rcd 14904, 14921 (1996); *Time Warner New York City Cable Group*, 12 FCC Rcd 13094, 13104 (1996)).

⁶⁵*Id.* at 8.

⁶⁶*Id.* at 8-9, citing H.R. Rep. No. 102-628 at 97 (1992) (“House Report”).

⁶⁷*Id.*

⁶⁸*Id.* at 10, citing *Digital Television Distributed Transmission System Technologies*, Report and Order, 23 FCC Rcd 16731, 16746 (2008) (“DTS Order”).

⁶⁹*Id.* at 10.

the specific Nielsen Station Index applicable to DBS operators rather than the Section 614 market modification process – a process inapplicable to nationwide DBS operators.⁷⁰

16. With regard to the market modification factors, Cox argues that KEGS frankly admits that it has failed to satisfy any of the factors in this case.⁷¹ KEGS admits that it does not meet either the historic carriage nor viewership factors, but claims these should be overlooked due to its “new, specialty station” status.⁷² It does not deny that both distance and terrain limit its ability to provide a Grade B signal to the communities, but Cox maintains that KEGS’ assertion that the lack of an adequate signal is less relevant in market modification proceedings demonstrates the station’s lack of understanding regarding the difference between the Commission’s must carry and market modification rules.⁷³ Cox states that the issue herein is not whether KEGS can provide a good quality signal to Cox’s principal headend, but whether its Grade B contour covers the subject communities, which KEGS admits it does not.⁷⁴ Cox states that KEGS also rationalizes its failure to provide any locally-focused programming due to a lack of monetary resources.⁷⁵ Finally, Cox argues that KEGS’ arguments relative to the Bankruptcy Code are unpersuasive. Cox states that the automatic stay provided by Section 362(a)(1) of the Code is inapplicable to the Commission’s market modification proceedings under the plain language of the Code because those proceedings are neither actions against a debtor nor actions to obtain possession of a debtor’s property.⁷⁶ Even if market modification proceedings were subject to Section 362(a)(1), however, Cox states that the regulatory exemption provided by Section 362(b)(4) of the Code would apply here because in clarifying Cox’s carriage obligations under Section 614 of the Act, the Bureau “is acting in a regulatory capacity (*i.e.*, interpreting the statutory duties and obligations of a regulated entity).⁷⁷

17. We agree with Cox and will grant its request for market modification. With regard to the procedural arguments raised by KEGS, we agree with Cox that the issue of the station’s bankruptcy is irrelevant to this proceeding and the applicability of the Bankruptcy Code does not apply in this situation. Moreover, the issue of KEGS’ DMA assignment is relevant only insofar as it determines whether KEGS does indeed have potential must carry rights on Cox’s Las Vegas area cable system. KEGS’ reliance on the *DBS Waiver Order* is misplaced, therefore, because it does not apply to carriage on cable television systems.

18. Section 614(h)(1)(C) of the Communications Act authorizes the Commission to include or exclude particular communities from a television station’s market for the purposes of ensuring that a television station is carried in the areas which it serves and which form its economic market.⁷⁸ Section 614(h)(1)(C)(i) specifically and unambiguously directs the Commission, in considering requests for market modification, to afford particular attention to the value of localism by taking four statutory factors

⁷⁰*Id.* at 11, citing *TV 34, Inc. v. EchoStar Communications Corp.*, 10 FCC Rcd 8747, 8748 (2005).

⁷¹*Id.* at 12.

⁷²*Id.* at 12 & 16.

⁷³*Id.* at 13.

⁷⁴*Id.* at 14.

⁷⁵*Id.* at 13.

⁷⁶*Id.* at 17, citing 11 U.S.C. § 362(a)(1).

⁷⁷*Id.* at 17-18, citing 11 U.S.C. § 362 (b)(4) and 47 U.S.C. § 534; *see also Bell Atlantic-Delaware, Inc. et al. v. MCI Telecommunications Corp.*, 17 FCC Rcd 15918 n.3 (2002).

⁷⁸47 U.S.C. § 534(h)(1)(C).

into account.⁷⁹ The record unambiguously demonstrates that KEGS has no history of carriage and no discernable viewership in the communities at issue. While KEGS has argued that we should overlook its failure to meet these factors because it is both a “new” station and a “specialty” station, we disagree. KEGS has been on-the-air for at least 7 years and, other than a statement that it once briefly carried Asian-focused programming, there is no substantiation that its current programming can be classified as “specialty” programming. As such, we will take KEGS’ failure to meet these factors into account. In addition, KEGS has specifically stated that it does not provide any locally-focused programming to the communities and does not cover the subject communities with its over-the-air signal. It is also clear that KEGS is geographically distant from the from the communities at an average distance of 177 miles and that KEGS and the communities are separated by mountainous terrain. For the subject communities, therefore, the factors weigh in favor of granting Cox’s request. In light of this, we find that a grant of Cox’s request to exclude KEGS from carriage in the communities of Boulder City, Henderson, Las Vegas, North Las Vegas and unincorporated areas of Clark County, Nevada to be in the public interest.

IV. ORDERING CLAUSES

19. Accordingly, **IT IS ORDERED**, pursuant to Section 614(h) of the Communications Act of 1934, as amended, 47 U.S.C. § 534, and Section 76.59 of the Commission’s rules, 47 C.F.R. § 76.59, that the captioned petition for special relief (CSR-8125-A), filed by Cox Communications Las Vegas, Inc. **IS GRANTED** for the communities set forth in paragraph 18 above.

20. This action is taken pursuant to authority delegated by Section 0.283 of the Commission’s rules.

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Senior Deputy Chief, Policy Division
Media Bureau

⁷⁹47 U.S.C. § 534(h)(1)(C)(i).