

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

In the Matter of:)	
)	
Suburban Cable TV Co., Inc. and Lenfest)	
Atlantic, Inc.)	CSR-4953-A
And)	CSR-4866-M
Maranatha Broadcasting Company, Inc. v.)	
Suburban Cable)	
)	
Petitions for Reconsideration		

ORDER ON RECONSIDERATION

Adopted: [Click here to insert date]

Released: [Click here to insert date]

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Before the Cable Services Bureau (“Bureau”) are two petitions seeking reconsideration of a market modification order and one seeking reconsideration of a must carry order adopted by the Bureau. The following orders and petitions are involved: 1) a petition for reconsideration filed by Suburban Cable TV Co., Inc. and Lenfest Atlantic, Inc. (“Suburban”) of the Bureau order in *Suburban Cable TV Co., Inc. and Lenfest Atlantic, Inc.*;¹ 2) a petition for partial reconsideration filed by Maranatha Broadcasting Company, Inc., licensee of Station WFMZ-TV (Ind., Ch. 69), Allentown, Pennsylvania (“WFMZ-TV”) of the Bureau order in *Suburban Cable TV Co., Inc. and Lenfest Atlantic, Inc.*;² and 3) a petition for reconsideration filed by Suburban of the Bureau order in *Maranatha Broadcasting Company, Inc. v. Suburban Cable*.³

II. BACKGROUND

2. In its initial request for modification, Suburban sought to exclude WFMZ-TV from carriage in the cable communities it serves in the counties of Bucks, Chester, Delaware, and Lancaster, Pennsylvania, and Atlantic, Camden, and Gloucester Counties, New Jersey. Suburban maintained that WFMZ-TV did not meet any of the market modification criteria and that grant of its request was warranted. The Bureau disagreed with Suburban’s analysis with regard to the Pennsylvania communities and denied that portion of its request. However, it accepted Suburban’s analysis with regard to the New Jersey communities and granted the requested exclusion. In WFMZ-TV’s must carry complaint against Suburban, WFMZ-TV requested that the Bureau order Suburban to commence carriage of its signal. The

¹13 FCC Rcd 4757 (1997)(CSR-4953-A).

²*Id.*

³12 FCC Rcd 10302 (1997)(CSR-4866-M).

Bureau granted WFMZ-TV's complaint, based on Suburban's failure to prove poor signal quality and WFMZ-TV's statement that it would provide, at its own cost, any equipment necessary to ensure the delivery of a good quality signal.

3. In the instant petitions, Suburban is requesting that the Bureau reverse that portion of its decision in *Suburban Cable* which denied Suburban's request with respect to the Pennsylvania communities and also that the Bureau overturn the original grant of WFMZ-TV's must carry complaint in *Maranatha Broadcasting*. WFMZ-TV is requesting in its reconsideration that the Bureau overturn its partial grant of exclusion to Suburban in *Suburban Cable*. We consolidate consideration of these petitions in the interest of administrative efficiency. The discussion of each reconsideration request will be addressed separately herein.

III. SUBURBAN'S PETITION FOR RECONSIDERATION (CSR 4953-A)

A. Argument

4. In support of its request, Suburban argues that it clearly demonstrated the appropriateness of excluding its Pennsylvania communities from WFMZ-TV's market. Suburban maintains that in denying this portion of its request, despite WFMZ-TV's failure to meet any of the four specifically enumerated statutory criteria and WFMZ-TV's inability to identify any compelling mitigating circumstances, the Bureau disregarded the governing statutory scheme. Suburban argues that the Bureau's analysis in *Suburban Cable* was flawed because the Bureau minimized the importance of the market modification criteria and gave significant weight to two other factors. First, Suburban indicates that while the Bureau suggested that WFMZ-TV's lack of historic carriage was because it was a "weaker" station, it did not cite any unusual reasons for WFMZ-TV's failure to be carried over the past 20 years.⁴ Suburban argues that WFMZ-TV's failure to act on its must carry status for almost 20 years, despite numerous opportunities to do so, should not be overlooked in its failure to meet this factor.

5. Second, Suburban states that signal strength tests reveal that WFMZ-TV fails to deliver a good quality signal to the systems' principal headends, particularly because the Bureau acknowledged in *Suburban Cable* that over 81 percent of the subject communities are located outside of WFMZ-TV's Grade B contour.⁵ Suburban argues that in relying on WFMZ-TV's pending application to upgrade its transmitter facility the Bureau acted prematurely. Moreover, Suburban points out that even WFMZ-TV's proposed Grade B contour, when effective, will not provide coverage to over 68 percent of the communities. Suburban maintains that because the Bureau has decided to utilize a station's Grade B contour as probative of whether a station provides local coverage to a community, it should adhere to that standard objectively. Therefore, it argues, if a community is on the fringe, beyond a station's coverage area, this is evidence that the community is located outside of the station's market. Suburban asserts that in *Suburban Cable*, the Bureau adopted a shifting and ever-expanding definition of "fringe" in an effort to conclude that a majority of the cable communities are within the station's service area. Suburban contends that the Bureau has in the past excluded cable communities on the fringe of a station's Grade B contour from the ADIs of several stations.⁶ In addition, Suburban argues that the Bureau denied its request with regard to the Pennsylvania communities based upon the fact that the Bensalem, Coatesville and Delaware

⁴See *Suburban*, 13 FCC Rcd 4747, 4766 (1997).

⁵*Id.* at 4764, 4767.

⁶See *e.g.*, *Cablevision Systems Corporation*, 11 FCC Rcd 6453 (1996); and *Comcast Cablevision of Danbury, Inc.*, 1997 WL 54849.

County cable systems each served at least some communities which would be covered by WFMZ-TV's upgraded Grade B contour. Suburban points out that the modification factors clearly indicate that Congress intended the Commission to review such requests on a community-by-community rather than a system-by-system basis.⁷ Indeed, Suburban states that in other comparable situations, the Bureau has "split the system" based on Grade B coverage.⁸ Suburban maintains that the Bureau should have done so here.

6. Suburban argues further that the Bureau overlooked WFMZ-TV's failure to meet the second, third and fourth modification factors, relying instead on non-statutory factors. Suburban states that although the Bureau relied on the evidence of WFMZ-TV's nearby carriage, the only community it cited was Philadelphia, even though there are dozens closer to the system communities. In any event, Suburban maintains that WFMZ-TV's carriage in Philadelphia is not probative since the station is being carried solely because of the must carry requirements. Suburban states that the Bureau itself has previously found that when other systems currently carry a station when mandated by law it "is not highly probative of establishing a history of carriage . . . particularly when, as in this instance, [the station] has been operating for over a decade."⁹ In addition, Suburban states that although the Bureau relied on the importance of local listings in *Suburban Cable*, it was shown in the modification petition that WFMZ-TV's program listings were not included in any local newspapers or the edition of *TV Guide* which serves the communities. Even if it were listed, however, Suburban contends that it would hardly be compelling evidence for market modification purposes.

7. In opposition, WFMZ-TV maintains that Suburban's petition does not consider the needs and interests of its subscribers, who have been deprived of WFMZ-TV's programming, but rather its own interest in using its subscriber base and alliances to create programming and cable advertising services that compete directly with WFMZ-TV for viewers and advertising revenue. WFMZ-TV points out that Suburban has amassed 970,000 subscribers in southeastern Pennsylvania, Delaware and New Jersey and continues to obtain new cable system acquisitions.¹⁰ Moreover, WFMZ-TV states that Suburban's new local news channel, focusing on Pennsylvania, New Jersey and Delaware, directly competes with WFMZ-TV on a substantial number of cable systems in the Philadelphia market.

8. WFMZ-TV argues that Suburban's reconsideration request disregards the permitted scope of the Commission's discretion and should be rejected. WFMZ-TV states that, in its original review, the Commission considered each of the market factors at length and correctly concluded with regard to historic carriage, carriage of other stations and viewership that these factors should be assigned little, if any, weight. Further, WFMZ-TV contends that Grade B coverage is neither an exclusive nor a dispositive matter and this factor, by its own terms, allows the Commission to consider whether a station provides coverage or other local service. WFMZ-TV argues that the statute clearly permits the Commission to consider other factors and it is entirely appropriate to look at such information in determining the breadth of WFMZ-TV's economic market and service area.¹¹

⁷47 U.S.C. §534(h)(1)(C)(ii).

⁸See e.g., *Continental Cablevision of Western New England, Inc.*, 11 FCC Rcd 6488 (1996); *Time Warner New York City Cable Group*, 11 FCC Rcd 6514 (1996); and *Time Warner Cable*, 11 FCC Rcd 2902 (1996).

⁹See *TKR Cable Company*, 12 FCC Rcd 8414, 8422 (1997).

¹⁰Opposition at 3.

¹¹*Id.* at 9. WFMZ-TV points out that since July 25, 1997, it has been carried on C-TEC's cable system serving Princeton, New Jersey. In addition, installation of antennas to receive WFMZ-TV's signal has been

(continued...)

9. WFMZ-TV maintains that Suburban's petition does not meet the threshold requirements for reconsideration and presents no new or additional facts.¹² Moreover, WFMZ-TV states that the conclusions Suburban advocates are premised on misleading characterizations and selective omissions. For instance, WFMZ-TV states that while Suburban portrays WFMZ-TV's coverage of Bucks, Chester and Delaware County affairs as not "meaningful," it overlooks the information presented by WFMZ-TV in this regard in its opposition to Suburban's original petition.¹³ Also, WFMZ-TV points out that besides its carriage in Philadelphia, Suburban ignores WFMZ-TV's carriage by several cable operators in Bucks, Chester and Delaware Counties, including Suburban's own Pottstown cable system. Finally, WFMZ-TV argues that Suburban's arguments as to local listings are inconsistent. WFMZ-TV points out that copies of *TV Guide* purchased in Bensalem, and Chester and Delaware Counties, include WFMZ-TV's program schedule.

10. In reply, Suburban maintains that if WFMZ-TV were local to its communities it would have no objection to carrying the station. However, since it is not, Suburban requests that the Bureau reconsider its decision so as to relieve it from any obligation to carry the signal. Suburban asserts that WFMZ-TV is incorrect in stating that the instant petition does not meet the threshold requirement for reconsideration. Suburban points out that Section 1.106(b)(1) of the Commission's rules indicates that "any party to [a] proceeding . . . whose interests are adversely affected by any action taken by . . . [a] designated authority, may file a petition requesting reconsideration of the action taken."¹⁴

11. In a supplement to its opposition, WFMZ-TV states that since the Bureau's action, the cable system has refused to permit WFMZ-TV to install equipment at its headends to assure the availability of a good quality signal and has never honored its must carry rights. WFMZ-TV states that while Suburban is apparently carrying its signal on its Chester County system on cable channel 63, such carriage falls far short of meeting Suburban's must carry obligations. WFMZ-TV states that, according to the channel line-up on Suburban's web site, WFMZ-TV is not carried as part of the basic cable service but as part of its standard cable programming package.¹⁵ WFMZ-TV argues that carriage on channel 63 is inconsistent with Section 614(b)(6) of the Act and that Section 614(b)(7) of the Act guarantees it the right to have its signal provided to every subscriber to the cable system and not just those willing to pay an additional fee to receive it.¹⁶

12. WFMZ-TV states that its request to increase its power has been granted. WFMZ-TV indicates that it has also filed for a further power increase which, if granted, will allow it to place a Grade B contour over most, if not all, of the communities in Chester and Delaware counties which are at issue

(...continued from previous page)

completed at the headends of TKR Cable Company's systems serving Maple Shade and Hamilton, New Jersey. WFMZ-TV states that since these cable systems are near to petitioner's systems, such carriage supports the Bureau's original conclusions as to WFMZ-TV's service area.

¹²Opposition at 8 citing *WWIZ, Inc.*, 37 FCC 2d 685, 686 (1994), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F. 2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

¹³Opposition at 10, Citing Opposition to Petition for Special Relief at 11-12.

¹⁴47 C.F.R. §1.106(b)(1).

¹⁵WFMZ-TV states that it was given no notification of this carriage by Suburban and the fact of its carriage at all calls into question Suburban's repeated assertions that WFMZ-TV was not able to provide a good quality signal to Suburban's Chester County headend.

¹⁶47 U.S.C. §534(b)(6) and (7).

here.¹⁷ In addition, WFMZ-TV states that its program schedule is now listed in two Bucks County newspapers, the *Courier Times* and the *Intelligence Record*, and the *Philadelphia Inquirer's* Bucks Count edition. Finally, WFMZ-TV points out that, despite its lack of carriage, it has continued to provide coverage of newsworthy events in Bucks, Chester and Delaware counties.¹⁸

13. In a second supplement to its opposition, WFMZ-TV cites two events that have occurred since its earlier filing – the Commission's release of *Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, Order on Reconsideration and Second Report and Order ("*Market Modification Final Report and Order*"),¹⁹ and the recent cable system consolidations in the Philadelphia television market. WFMZ-TV argues that the *Market Modification Final Report and Order* reached two conclusions that are significant to this particular case. The first was that programming "is particularly useful in determining if the television station provides specific service to the community," a factor which the Bureau pointed to in its original decision.²⁰ The second specifically held that cable operators ordered to begin carrying a television station are not excused from complying with such orders pending reconsideration or further review.²¹ WFMZ-TV states that more than two years after the Bureau's original decision ordering Suburban to carry its signal, the system has not complied despite the fact that no order staying the effectiveness of the original decision has been issued.²² Further, WFMZ-TV points out that recent arrangements between AT&T/Suburban and Comcast will ultimately give Comcast ownership or control of the majority of cable subscribers in the Philadelphia market. WFMZ-TV argues that unless the Commission promptly enforces *Suburban Cable* and confirms WFMZ-TV's must carry rights, Comcast's clustering of cable systems may bode ill for its signal's future carriage. WFMZ-TV asserts that such defiance of *Suburban Cable* has caused it serious, irreparable injury and resulted in lower measured viewing in the Philadelphia market and lower advertising revenues, as well as decreased opportunities to purchase high-quality syndicated programming.

14. In response, Suburban states that WFMZ-TV's arguments contain misleading and inaccurate statements. Although WFMZ-TV implies that Suburban has willfully violated previous Commission orders requiring it to carry WFMZ-TV on its Bensalem, Coatesville and Delaware County systems, Suburban points out that neither of these *Orders* were self-effectuating.²³ Suburban states that it was allowed the opportunity to file an engineering showing with regard to WFMZ-TV's poor signal quality at the Coatesville headend; a showing which, to date, has not been acted on by the Bureau.²⁴ With regard to the Bensalem/Delaware County system, Suburban states that it was required to carry WFMZ-TV only after such time as the station provided the specialized equipment necessary to deliver a good quality signal at the system's principal headends. However, Suburban states, WFMZ-TV has never provided such equipment and it therefore has no current obligation to carry the station.

¹⁷Supplement at Exhibit A.

¹⁸Supplement at Exhibit E.

¹⁹14 FCC Rcd 8366 (1999).

²⁰14 FCC Rcd 8366, 8391.

²¹*Id.* at 8393.

²²See e.g., *Maranatha Broadcasting Company, Inc. v. Suburban Cable*, 12 FCC Rcd 10302 (1997)(Coatesville system); and *Maranatha Broadcasting Company, Inc. v. Suburban Cable*, 12 FCC Rcd 21500 (1997)(Bensalem/Delaware County system).

²³*Id.*

²⁴This showing will be treated as a petition for reconsideration and addressed our decision herein.

15. WFMZ-TV in reply states that Suburban's claim as to the Coatesville *Order* obscures the fact that Suburban had been unlawfully carrying WFMZ-TV since the summer of 1998. However, WFMZ-TV states that on or about the date of its above-described response, Suburban deleted its carriage of WFMZ-TV. With regard to the Bensalem/Delaware County order, WFMZ-TV states first that Suburban's argument that specialized equipment is necessary is specious because all of the Bensalem system is within its station's Grade B contour, and much within its Grade A contour. Second, it points out that the Bensalem and Delaware County systems both carry WLVT, a noncommercial station broadcasting from the same location as WFMZ-TV. Third, WFMZ-TV states that since the release of the Bureau's decision in *Suburban Cable*, Suburban has actively frustrated WFMZ-TV's efforts to install any preamplifiers and antennas necessary for its carriage.

16. Suburban argues in response that WFMZ-TV was erroneously added to its Coatesville system through means of a fiber-link that was not discovered until Suburban began preparing its response to WFMZ-TV's first supplement. Suburban states that it recognized that such carriage was not pursuant to the must carry rules and deleted the signal from the fiber-link. Suburban points out that the fact that WFMZ-TV's unintended carriage was through a fiber-link and not accomplished by off-air reception supports the argument that the station does not provide a good quality signal to the Coatesville headend. Suburban states that recent signal measurements show that WFMZ-TV still fails to deliver an adequate signal not only to the Coatesville system, but also to the Bensalem and Delaware County systems as well.²⁵ Moreover, Suburban states that with regard to the Bensalem and Delaware County systems, WFMZ-TV has produced no written support its claims as to conversations with cable system representatives regarding installation of equipment. Suburban states that it recognizes, however, that WFMZ-TV is entitled to take steps to improve its poor signal and will cooperate with the station in installing any equipment necessary.²⁶ Suburban notes that since the antenna structures utilized by Suburban at each of the three relevant headends are owned by a third party, American Tower Corporation, any testing and installation of specialized equipment will require the involvement of that party as well. If and when WFMZ-TV is able to utilize its equipment to deliver an adequate signal, Suburban states that it stands ready to add the signal to its line-up.

17. In an opposition to the response filed by Suburban, WFMZ-TV states that when it responded to Suburban's expressed willingness to cooperate as detailed above, it did install antenna and pre-amplification equipment at each of the three cable system headends and its measured signal at each location exceeded the required signal strength levels.²⁷ Therefore, WFMZ-TV states, under the terms of Suburban's response, it should have begun carriage of WFMZ-TV no later than November 21, 1999 for the Coatesville and Delaware County systems and November 23, 1999 for the Bensalem system. WFMZ-TV points out that among Suburban's conditions for permitting WFMZ-TV to permanently install its reception equipment was a requirement that WFMZ-TV enter into tower lease agreements with American Tower.²⁸ However, in the course of arranging for installation, WFMZ-TV indicates that it discovered that no other television station carried by Suburban is obliged to pay tower rent for a reception antenna. WFMZ-TV asserts that Suburban's insistence on a lease agreement between WFMZ-TV and American Tower places a burden on WFMZ-TV not contemplated by the must carry provisions of the Cable Act. Indeed, it indicates, the Commission recently stated in another Suburban case, that tower rental fees cannot

²⁵Response to Reply at Exhibit A.

²⁶Response to Reply at Exhibit B.

²⁷Opposition at 2.

²⁸Response to Reply at Exhibit B.

be imposed on television stations asserting must carry rights.²⁹ Moreover, in its *Must Carry Order*, the Commission made it clear that a television station's obligation to bear the expense of delivering a good quality signal to the cable system's principal headend extends only to improved or upgraded equipment.³⁰ WFMZ-TV requests, therefore, that the Bureau resolve any ambiguity as to its decision in the Coatesville order and hold that Suburban may not require WFMZ-TV to bear the costs of renting tower space. WFMZ-TV also requests that the Commission impose monetary forfeitures against the system.

B. Discussion

18. Suburban's principal argument appears to be that the Bureau erred by minimizing the importance of several of the statutory modification factors, relying instead on non-statutory factors involving, for example, carriage patterns of nearby cable systems and local TV listings. With respect to this point, the statute does not direct the Commission to just take the specifically identified factors into account but to act "by taking into account such factors as" those that are enumerated. Thus, it does not limit the scope of the inquiry in the manner suggested. In *Time Warner Entertainment Co. v. FCC*, it was stated that when Congress directs an agency to consider certain factors, the agency simply "must reach an express and considered conclusion about the bearing of a factor, but is not required to give any specific weight to it."³¹ In *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues ("Must Carry Order")*, the Commission stated that it did "not want to restrict the types of evidence that parties can submit to demonstrate the propriety of changing a station's must-carry market." It did not find it is advisable to prejudge the importance of any of the factors specified since each case was likely to be unique.³² In this proceeding all of the available evidence was evaluated to determine the scope of the WFMZ-TV market. As has been indicated in many decisions under Section 614(h), an unduly literal reliance of the four standards enumerated in the statute, could result in decisions conflicting with the basic objectives of the mandatory carriage rules. That is, stations lacking significant over-the-air audience as well as historical carriage even in areas clearly within their economic market could be denied carriage rights. As the Commission has stated, relying exclusively and explicitly on the referenced factors "could severely narrow the carriage rights of stations even within what is undeniably their local market area."³³ Thus, we reject Suburban's argument in this regard.

19. Further, we do not agree that the use of non-statutory criteria is statutorily or logically irrelevant. There is nothing in the Commission's rules or the statute that precludes the Commission in its review from considering other additional factors that may have an impact, either positively or negatively, on the outcome. Factor I expressly requires the Commission to take into account "whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community."³⁴ Historical carriage of a station on adjacent cable systems is relevant evidence of the scope of a station's market in that it reflects a nexus between the station and the area in question. Although

²⁹See *Sonshine Family Television, Inc.*, (DA 99-1877) 1999 WL 71725 citing Section 614(b)(10) of the Cable Act ("[a] cable operator shall not accept or request monetary payment or other valuable consideration in exchange for carriage of local commercial television stations . . .").

³⁰8 FCC Rcd 2965, 2991 (1993).

³¹56 F. 3d 151, 175 (D.C. Cir. 1995); *accord Omnipoint Corp. v. FCC*, 78 F. 3d 620, 633-634 (D.C. Cir. 1996).

³²8 FCC Rcd 2965, 2977 (1993).

³³*Cablevision Systems Corp.*, 11 FCC Rcd 6453, 6474 (1996).

³⁴*Must Carry Order*, 8 FCC Rcd 2965, 2976 (1993).

not as probative as carriage with the specific community involved, it is entitled to consideration pursuant to the statutory instruction that the Commission consider evidence “such as” historical carriage in the community in order to “better effectuate the purposes of” the statutory mandatory carriage requirement. The Bureau’s reference to the fact that some station’s have not had an opportunity to build a record of carriage for reasons not necessarily reflecting a judgment as to the geography of the market involved, was intended to suggest that regulatory constraints, the technical facilities involved, and considerations specific to the popularity of the programming content of a particular station are not necessarily determinative of the mandatory carriage market of the station in question. Because that statute in general accords stations carriage throughout an DMA, the general requirement is that stations be accorded carriage rights far beyond their Grade B service area.

20. With regard to the question of Grade B, while we have often found that, as a general matter, Grade B coverage demonstrates service to cable communities and serves as a measure of a station’s natural economic market, it is not an exclusive test.³⁵ WFMZ-TV’s impending technical upgrade at the time of our decision indicated an intention to serve the areas in question and strengthened WFMZ-TV’s showing as to the existence of a market connection. WFMZ-TV’s application for a second power increase has also been granted and thus WFMZ-TV’s authority to operate at this increased power is now clear. WFMZ-TV’s application for a power increase was a factor that was relevant to the matter at hand and could not be overlooked. Moreover, we do not agree with Suburban that our previous denial should have only involved those communities already within WFMZ-TV’s Grade B contour. The circumstances in this situation were quite different from those cited by Suburban in *Cablevision Systems Corporation*.³⁶ In the situation herein, WFMZ-TV’s Grade B contour, which was in the process of being expanded, already encompassed the majority of the Bensalem system, and at least a third of the Coatesville system and after completion of its upgrade would encompass even more communities of those systems and nearly a third of the Delaware County system. As a result, there was significant coverage before the upgrade and after its upgrade, a majority of the communities in all three systems appeared to be within or on fringe of WFMZ-TV’s Grade B contour. In light of these factors, as well as the technically-integrated nature of the cable systems involved, the station’s carriage in other nearby communities, and the station’s expressed ability to deliver a good quality signal to the individual system headends, a selective exclusion was not necessary.

21. With regard to Suburban’s condition that WFMZ-TV enter into tower lease agreements with American Tower for any antenna it wishes to permanently install, we note that the Communications Act and the Commission’s rules mandate that cable operators may not shift the costs of routine reception of broadcast signals to those stations seeking mandatory carriage status. Cable operators may “require a broadcast station to pay only for antennas, equipment and other needed improvement that are directly related to the delivery of its signal and not to contribute to the general maintenance of the cable system’s facilities.”³⁷ As a result, Suburban cannot require WFMZ-TV to obtain a lease agreement with American Tower for installation of reception equipment comparable to that used for the reception of other signals.

22. Finally, we decline to assess a forfeiture against Suburban. Suburban is correct that the

³⁵*Id.* at 2977.

³⁶11 FCC Rcd 4757, 4766 (1996).

³⁷Section 614(b)(10) reads in pertinent part: “[a] cable operator shall not accept or request monetary payment or other valuable consideration in exchange either for carriage of local commercial television station [except that] any such station may be required to bear the costs associated with delivering a good quality signal or a baseband wide signal to the principal headend of the cable system.” 47 U.S.C. §534(b)(10) and *Clarification Order* at 4145.

must carry decisions granting WFMZ-TV carriage on its Coatesville and Bensalem/Delaware County systems were conditional on WFMZ-TV providing a good quality signal. However, we caution Suburban that, given our action herein, and WFMZ-TV's apparent capability of providing a good quality signal upon the installation of the proper equipment, no further delays are warranted.

23. In view of the foregoing, we find that a grant of Suburban's request for reconsideration is not in the public interest.

IV. WFMZ-TV'S PETITION FOR PARTIAL RECONSIDERATION (CSR-4953-A)

A. Argument

24. In support of its request, WFMZ-TV states that, with respect to the Bureau's decision to grant Suburban's requested exclusion of the New Jersey communities, *Suburban Cable* does not reflect the Commission's duty, under the Administrative Procedure Act, to either follow the reasoning of recent decisions in comparable circumstances or provide an "adequate explanation why . . . [its] alteration or adaptation may seem to be rational and to escape the domain of the seemingly arbitrary."³⁸ WFMZ-TV argues that the facts on which the Bureau based its conclusion have been found in other instances to support the completely opposite view. WFMZ-TV maintains that if the erroneous factual assumption of its lack of carriage and the reasoning of other cases applied herein, the Bureau should conclude that these communities are also part of WFMZ-TV's economic market and service area.

25. WFMZ-TV states that the Bureau released four separate decisions prior to *Suburban Cable*, all involving WFMZ-TV and the requested exclusion of New Jersey communities and that none of these decisions assigned any significance to the interposition of the Delaware River between Philadelphia and New Jersey.³⁹ Indeed, WFMZ-TV states that in *Garden State* the Bureau found that "the distances and geography involved are not so extreme in terms of the core area of the cable system as to suggest that no market nexus with the communities exists."⁴⁰ On the other hand, WFMZ-TV notes that each of these decisions found of "significant importance" in favor of WFMZ-TV's carriage the station's "efforts to provide programming targeted to New Jersey, including Burlington, Camden and Gloucester counties" and "evidence relating to cable carriage in other adjoining communities."⁴¹ WFMZ-TV asserts that both of these factors are present here. WFMZ-TV states that it presented virtually identical evidence regarding its programming service to New Jersey in its opposition to Suburban's original request and this was acknowledged in *Suburban Cable*. Moreover, WFMZ-TV points out that since the release of *Suburban Cable*, carriage of its signal has commenced on the Comcast and Garden State cable systems in communities immediately adjacent to the instant communities pursuant to the Bureau's decision's in *Comcast Cablevision of Burlington County* and *Garden State*.⁴² WFMZ-TV maintains that because *Suburban Cable* does not articulate the Bureau's rationale for treating the instant communities differently, it renders the grant of exclusion of these communities to be arbitrary and capricious.

³⁸5 U.S.C. §706. See also *Federal Trade Commission v. Lucas*, 530 F. 2d 510, 514 (D.C. Cir. 1970).

³⁹See e.g., *TKR Cable Company*, 13 FCC Rcd 1595 (1997); *Comcast Cablevision of Burlington County, Inc.*, 13 FCC Rcd 1629 (1997); *Comcast of Central New Jersey*, 13 FCC Rcd 1656 (1997); and *Garden State Cablevision, L.P.*, 13 FCC Rcd 1616 (1997).

⁴⁰13 FCC Rcd 1616, 1626.

⁴¹*Id.*

⁴²Petition at Exhibit A.

26. In opposition, Suburban argues that WFMZ-TV offers no compelling arguments to demonstrate that the New Jersey communities are part of its local market and requests that the Bureau affirm its prior decision. Suburban states that it demonstrated in its original request that WFMZ-TV was not local to the New Jersey communities and that it should be relieved of mandatory carriage of the station. Suburban points out that the communities at issue here are considerably more distant than those of other New Jersey communities identified by WFMZ-TV which have been denied exclusion in other Bureau decisions and the station's Grade B contour does not now, nor will it in the future, encompass the subject communities.⁴³ In addition, Suburban indicates that, despite WFMZ-TV's claims, the station is not currently carried on Comcast's and Garden State's cable systems and there is no assurance that it will be carried anytime in the near future.⁴⁴

27. In reply, WFMZ-TV cites arguments it outlined in its opposition to Suburban's separate request for reconsideration in which it seeks to overturn the Bureau's denial of exclusion of its Pennsylvania system communities. WFMZ-TV maintains that the facts in this proceeding show that its programming is directed to Suburban's New Jersey communities and that Suburban has discriminated against WFMZ-TV to achieve its own anti-competitive objectives.

B. Discussion

28. We do not agree with the arguments raised by WFMZ-TV herein and deny its partial reconsideration request. The circumstances for which a grant of exclusion was necessary initially have not changed and WFMZ-TV has not presented any new information which alters those circumstances. Moreover, we note that with regard to these New Jersey communities, not only will the initiation of the most-recently granted Grade B modification for WFMZ-TV not alter the failure of the station's Grade B contour to encompass these communities, but these communities are served by a entirely separate physical system from those serving the Pennsylvania communities.

V. SUBURBAN'S PETITION FOR RECONSIDERATION (CSR-4866-M)

A. Argument

29. In granting WFMZ-TV's complaint against Suburban, the Bureau allowed Suburban 15 days from the release date of *Maranatha Broadcasting* to submit an engineering showing to substantiate its claim of poor signal quality with regard to its Coatesville cable system. Suburban submitted this showing in a supplement within the required time allowed.

30. In support of its request, Suburban argues that although the engineering showing it originally provided in opposition to WFMZ-TV's complaint substantiated WFMZ-TV's poor signal quality, the Bureau indicated in *Maranatha Broadcasting* that the showing was deficient in two areas: a) that the test failed to include the age and most recent calibration date(s) of the equipment used in its tests; and b) that the 30-foot measurement height used by Suburban in its test of WFMZ-TV's signal was apparently considerably less than that called for when compared to the normal placement of antennas on Suburban's 350-foot headend tower.⁴⁵ Suburban states that it resubmits its original signal strength test, as well as a more recent test conducted at its Coatesville headend, both of which were conducted using the

⁴³See footnote 39 above.

⁴⁴Suburban notes that there are pending reconsiderations of these matters.

⁴⁵*Maranatha Broadcasting*, 12 FCC Rcd 10302, 10305.

same equipment.⁴⁶ Moreover, Suburban maintains that it tests all of the signals of stations not currently carried at the 30-foot measurement height. It states that this is the height of the roof-mounted search antenna that it always uses to detect the presence of off-air television signals and that a number of local broadcast stations have achieved positive signal results at this level. Suburban argues that WFMZ-TV should be treated no differently from other stations in this regard.

31. Suburban points out that the Commission has clearly distinguished between what is required in testing signals which are currently carried from testing signals seeking carriage for the first time. In the former situation, Suburban states that the cable operator is required to make signal quality measurements “using the equipment now used by the cable operator to receive such signals.”⁴⁷ In the latter, Suburban states that the Commission determined that “to the extent that the cable operator is able to do so, the signal level shall be determined on measurements made with generally acceptable equipment that is currently used to receive signals of similar frequency range, type or distance from the principal headend. Where such similarities do not exist or if the measurement were made at a designated headend that is not the current reception location (headend) for the broadcast signal, we expect the cable operator to follow good engineering practices for the measurement of the broadcast signals in question.”⁴⁸ Suburban states that it believes that *Maranatha Broadcasting* fails to recognize this distinction and that it is unreasonable to expect Suburban to send one or more of its employees to the top of a 350-foot headend tower for testing purposes every time a station requests carriage. Suburban asserts that tests conducted at the 30-foot level are conducted according to Commission guidelines and that where signal quality thresholds are not met, it provides the station with a reasonable opportunity to demonstrate, at the station’s expense, that it delivers a good quality signal to the system’s headend. Suburban therefore concludes that the information in its original opposition to the complaint and its supplement demonstrate that WFMZ-TV is not entitled to carriage on its system.

32. In comments, WFMZ-TV argues that Suburban’s supplement adds nothing to substantiate the system’s claims of poor signal quality. WFMZ-TV states that Suburban not only incorporates the results of its original signal strength test, but adds the results of a new test which repeats the faults of the original by using the same antenna at the same 30-foot height. WFMZ-TV argues that, instead of conducting dispositive tests, Suburban complains about the burden of testing WFMZ-TV’s signal with equipment and at a height comparable to that used for the reception of other UHF stations it currently carries. WFMZ-TV points out that the *Clarification Order* clearly states that “[t]he cable operator . . . should use an antenna placed at the same height as that currently used by the cable systems to receive broadcast signals.”⁴⁹ While Suburban claims that it tests all signals not currently carried on the Coatesville system at the 30-foot height, WFMZ-TV maintains that this is not the issue. Moreover, WFMZ-TV points out that Suburban does not say that all or even any of the UHF signals it currently carries would provide a good quality signal at that level. WFMZ-TV states that it is entitled to have its signal tested with equipment comparable to the stations which are carried rather than those that are not carried.⁵⁰

⁴⁶Petition at Exhibits A and B. Suburban indicates that in conducting these tests it used a Scientific-Atlanta low periodic UHF antenna, model QCA-UHF, a Wavetek SAM 4040 spectrum analyzer, and a 19-inch Sony television. Petition at 2. The age and calibration dates of this equipment is detailed.

⁴⁷See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues (“Clarification Order”)*, 8 FCC Rcd 4142, 4143-4144 (1993).

⁴⁸*Id.*

⁴⁹*Id.* (Emphasis added.)

⁵⁰Comments at Attachment A. WFMZ-TV states that Suburban has never described the equipment used
(continued...)

33. WFMZ-TV maintains that the only new information Suburban supplies is to reinforce the fact that both of the system's signal tests did not conform to good engineering practices. WFMZ-TV points out that the test antenna is 15 years old and has been mounted continuously on the roof. WFMZ-TV states that Suburban does not provide any calibration data to show that this aged antenna is performing in accordance with the manufacturer's specifications after 15 years of exposure to the elements.⁵¹ WFMZ-TV argues that it has sought to cooperate with Suburban in providing a good quality signal and has offered to provide, at its own expense, any equipment reasonably necessary.⁵² WFMZ-TV states that it remains willing to mount, at its own expense, a test antenna on the Coatesville headend tower, at a comparable height to other UHF stations, to demonstrate the receipt of a good quality signal under the proviso that Suburban agree to carry its signal if the test shows compliance.

B. Discussion

34. We do not agree with the arguments raised by Suburban and deny reconsideration of WFMZ-TV's must carry complaint. While Suburban provided, as required, the age and most recent dates of calibration of the equipment used in its more signal strength tests, it conducted these tests at the same 30-foot level previously found to be inappropriate. This position is supported by numerous previous decisions in which the Bureau found that a station's signal should be tested at the same level the cable operator uses to receive other similar stations it currently carries.⁵³ As WFMZ-TV correctly notes, the Commission's *Clarification Order* requires that "[t]he cable operator . . . should use an antenna placed at the same height as that currently used by the cable systems to receive broadcast signals." The fact that Suburban alleges that it initially tests all new signals at a 30-foot level is irrelevant and does not preclude the system from testing WFMZ-TV's signal in a manner comparable to other UHF stations it currently carries.

VI. ORDERING CLAUSES

35. Accordingly, **IT IS ORDERED** that the petition for reconsideration filed by Suburban Cable TV Co., Inc. (CSR-4053-A) **IS DENIED**.

36. **IT IS FURTHER ORDERED** that Suburban permit WFMZ-TV to install any specialized equipment necessary and conduct signal quality tests at Suburban's principal headends within thirty (30) days of the release date of this order.

37. **IT IS FURTHER ORDERED**, that the petition for partial reconsideration filed by

(...continued from previous page)

to receive other UHF signals it carries. However, WFMZ-TV states that according to an engineering statement the test equipment described by Suburban is not a receiving system that customarily would be used by cable operators in the reception of UHF signals.

⁵¹Comments at Exhibit A.

⁵²Complaint at Attachment A.

⁵³See e.g., *Time Warner Cable*, 10 FCC Rcd 936 (1995); *United Broadcast Group II, Inc. v. Falcon Cable TV*, 12 FCC Rcd 10262 (1997); *Larry L. Schrecongost v. TCI of Pennsylvania, Inc., et al.*, 12 FCC Rcd 13194 (1997); *Central Missouri State University v. Douglas Cable Communications*, 12 FCC Rcd 16400 (1997); *Seeway Broadcasters v. Continental Cablevision of Ohio, Inc.*, 13 FCC Rcd 20835 (1998); *Rural California Broadcasting Corporation v. TCI Cablevision of California*, 10 FCC Rcd 10342 (1995); and *Vision 3 Broadcasting, Inc. v. Time Warner Cable*, 1999 WL 710290 (F.C.C.).

Maranatha Broadcasting Company, Inc. (CSR-4953-A) **IS DENIED.**

38. **IT IS FURTHER ORDERED**, that the petition for reconsideration filed by Suburban Cable TV Co., Inc. (CSR-4866-M) **IS DENIED.**

39. These actions are taken pursuant to authority delegated by Sections 0.321 and 1.106 of the Commission's rules.⁵⁴

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson, Deputy Chief
Cable Services Bureau

⁵⁴47 C.F.R. §§0.321 and 1.106.