

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

In the Matter of:)	
)	
Comcast of Central New Jersey)	
)	CSR-4934-A
Petition 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. Comcast of Central New Jersey (“Comcast”), operator of a cable television system serving the communities of East Windsor Township, Hightstown Borough, and West Windsor Township, all located in Mercer County, New Jersey, has requested reconsideration of the Cable Services Bureau’s (“Bureau”) decision denying Comcast’s request for market modification for purposes of the cable television mandatory broadcast signal carriage rules.¹ An opposition to this petition was filed on behalf of Maranatha Broadcasting Company, Inc., licensee of Station WFMZ-TV (Ch. 69), Allentown, Pennsylvania, to which Comcast replied.² Various supplements were also subsequently filed by WFMZ-TV to which Comcast responded.

II. BACKGROUND

2. In its request Comcast sought to exclude WFMZ-TV from carriage in its cable communities. Comcast maintained that its request met the market modification criteria and that grant of its request was warranted. The Bureau disagreed with Comcast’s analysis, citing WFMZ-TV’s carriage in nearby communities, certain locally-focused programming, and the cable communities’ location on the edge of WFMZ-TV’s to be expanded Grade B contour. Comcast’s petition was therefore denied.

III. ARGUMENT

3. Comcast argues that in denying its request, despite WFMZ-TV’s failure to meet any of the four market definition criteria and WFMZ-TV’s inability to identify any compelling mitigating circumstances, the Bureau disregarded the governing statutory scheme, its own precedents and common sense. Comcast maintains that although there might be exceptional cases where application of the statutory

¹*Comcast of Central New Jersey*, 13 FCC Rcd 1656 (1997)(“*Order*”).

²We note that at the time it filed its reconsideration request, Comcast filed a request for stay of the Bureau’s original decision. In view of our action herein, there is no need to discuss the issues raised in this request or its respective opposition.

market modification test might warrant further consideration, the present case is not one of them. It asserts that this is not an instance where a cable operator is attempting to deny a station access to its intended market, but where a geographically-distant station should not be entitled to expanded cable carriage. Comcast points out that despite the Bureau's previously noting that "the broadcast signal carriage rules were not intended to transform an otherwise local station into a regional 'super-station' that must be automatically carried in every single community in an ADI[,]" that is exactly what it has done in this instance.³ The result, Comcast argues, is an unwarranted commercial windfall for WFMZ-TV.

4. Comcast argues that the Bureau's analysis in its previous *Order* was flawed because the Bureau minimized the importance of two of the market modification factors and gave significant weight to two other non-statutory factors. First, Comcast indicates that while the Bureau suggested that WFMZ-TV's lack of historic carriage was because "[s]ome stations have not had the opportunity to build a record of historic carriage for specific reasons that do not necessarily reflect a judgment as to the geography of the market involved[,]" it fails to explain the "specific reasons" why WFMZ-TV was denied carriage during the past 20 years.⁴ It points out that WFMZ-TV's claim that its lack of carriage was due to copyright fees is immaterial since all stations had such fees within their own markets prior to the Copyright Act amendment.⁵ Comcast notes, however, that it was another three years after this amendment before WFMZ-TV sought carriage. Second, Comcast indicates that the Bureau acknowledged that even after its proposed technical upgrade, WFMZ-TV's Grade B contour would still not encompass any of the communities at issue.⁶ Comcast argues that it was premature for the Bureau to rely on the promised enhancement of WFMZ-TV's signal, particularly because even after the proposed upgrade, WFMZ-TV's over-the-air signal will still be marginal at best. Third, Comcast asserts that the Bureau cannot seriously consider the minimal local programming cited by WFMZ-TV to be sufficient to meet the local programming criterion. Comcast submits that relying on WFMZ-TV's meager efforts to provide programming targeted to New Jersey reflects a serious misunderstanding of WFMZ-TV's programming.

5. With regard to the non-statutory factors, Comcast argues that the Bureau's reliance on the evidence of nearby carriage is evidently offered to counter WFMZ-TV's own lack of historic carriage herein. Comcast points out that although WFMZ-TV is carried in Philadelphia and Trenton pursuant to the must carry statute, it is not carried in several other cable systems near Comcast's communities.⁷ Comcast 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."⁸ In addition, Comcast argues that the fact that WFMZ-TV began to be listed in the Philadelphia edition of *TV Guide* in June 1997 begs the question as to why it had not been listed in the past. Comcast contends that such listing is hardly compelling evidence since there is no criteria in evidence as to how or why *TV Guide* identifies a particular station. In any event, Comcast points out that WFMZ-TV is still not listed in the Gloucester County edition of the *Philadelphia Inquirer* program guide, the southern New Jersey *Courier-Post's* weekly guide,

³See e.g., *Continental Cablevision of Western New England, Inc.*, 11 FCC Rcd 6488, 6506 (1996).

⁴See *Comcast of Central New Jersey*, 13 FCC Rcd 1656, 1664.

⁵Satellite Home Viewer Act of 1994, P.L. 103-369, 108 Stat. 3477 (1994).

⁶Petition at Exhibit 1. Comcast indicates that its system communities are anywhere from 6.4 to 10.8 miles outside WFMZ-TV's proposed Grade B contour.

⁷Petition at 9.

⁸See *TKR Cable Company*, 12 FCC Rcd 8414, 8422 (1997).

the Asbury Park Press guides for Monmouth and Ocean Counties, or the *Trenton Times*' weekly listings for Burlington and Mercer Counties.⁹

6. In opposition, WFMZ-TV states that Comcast's reconsideration petition disregards the permitted scope of the Commission's discretion in shaping actions to meet Congressional objectives and should be rejected. WFMZ-TV states that in its original review, the Bureau 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 Commission's treatment of this factor in this instance does not warrant reconsideration. WFMZ-TV argues that the statute clearly permits the Commission to consider other factors and it is entirely appropriate to look to such information in determining the breadth of WFMZ-TV's economic market and service area.¹⁰

7. Comcast argues in reply that while it may be true that the Commission is not required to give equal weight to all factors in every situation, all four factors supported exclusion of the subject communities. Comcast states that not only is WFMZ-TV unable to reconcile its position with previous Commission decisions, but it failed to identify any reason why the Bureau should ignore all of the statutory factors. Comcast argues that despite WFMZ-TV's position that granting the instant reconsideration would nullify the purpose of the must carry statute, Congress never intended an ADI assignment to be the final word in determining a television station's market. Indeed, Comcast points out, the four-factor statutory test was enacted to empower the Commission to modify a market to reflect a station's true marketplace.

8. In a supplement to its opposition, WFMZ-TV cites two significant 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*"),¹¹ 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.¹² 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.¹³ WFMZ-TV states that in the time after the Bureau's original decision ordering Comcast 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.¹⁴ Further, WFMZ-TV points out that

⁹Petition at Exhibit 3.

¹⁰Opposition 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 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 close to Garden State's, such carriage supports the Bureau's original conclusion as to WFMZ-TV's service area.

¹¹14 FCC Rcd 8366 (1999).

¹²*Id.* At 8391.

¹³*Id.* at 8393.

¹⁴*See Maranatha Broadcasting Company, Inc. v. Comcast Cablevision*, 12 FCC Rcd 4715 (1997).

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 enforces its original *Order* 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 the Commission's *Order* 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.

9. WFMZ-TV states that it is now operating with the proposed facilities discussed in the original modification petition. As a result, it states that its Grade B contour now encompasses portions of West Windsor Township.¹⁵ WFMZ-TV states that in an effort to provide even more coverage to the New Jersey counties, it has applied for a further increase in power which, if granted, will allow its Grade B contour to at least partially encompass all three of Comcast's communities.¹⁶

10. In a response to the supplement, Comcast argues that very few of the facts presented therein are relevant to the four-factor statutory market modification criteria. Comcast points out that the supplement provides no update on WFMZ-TV's local programming, but instead boasts of the station's newly-expanded Grade B contour. Comcast argues, however, that the facts continue to show that its cable communities are still on the fringe of WFMZ-TV's Grade B. Moreover, as an implicit acknowledgement of the weakness of its current off-air coverage, Comcast indicates that WFMZ-TV has found it necessary to file yet another license modification application. Finally, Comcast states that it is not flouting the Bureau's *Order* in this case. It points out that it filed a petition for stay at the same time it filed the petition for reconsideration and that this stay request is currently still pending. Comcast points out that, in any event, the original must carry *Order* granted to WFMZ-TV only required Comcast to carry the station within 60 days after it provided the necessary specialized equipment to ensure delivery of a good quality signal and WFMZ-TV has yet to provide such equipment.

IV. DISCUSSION

11. Comcast's principal point seems to be that the Bureau erred in not relying solely on the four market modification criteria. 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."¹⁷ 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.¹⁸ 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

¹⁵Supplement at 7.

¹⁶*Id.* at Attachment A.

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

¹⁸8 FCC Rcd 2965, 2977 (1993).

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.”¹⁹ Thus, we reject Comcast’s argument in this regard.

12. Comcast has argued that the Commission has never before denied a market modification request when all the factors it identifies here were present. Comcast is mistaken in this regard. The market modification process is intended to be a search for the logical boundaries of a station’s market area. That process was followed here as it has been in numerous other cases where all the evidence germane to the issue has been considered. The use of criteria beyond the four specifically mentioned in the statute is not statutorily or logically irrelevant. There is nothing in the Commission’s rules or the statute that precludes the Bureau in its review from considering other additional factors that may have an impact, either positively or negatively, on the outcome.

13. Comcast is also incorrect in its supposition that, with respect to historical carriage, the only relevant consideration is whether the signal in question has been carried on the specific system in question. Factor I, of Section 614(h)(1)(C)(ii), requires the Commission to take into account whether the station “and other stations located in the same area” have been carried on the cable system or systems within such community.²⁰ However, 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 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.

14. Comcast also disputes the Bureau’s consideration of WFMZ-TV’s potential Grade B upgrade. With regard to this question, while the Commission has often found that Grade B coverage demonstrates service to cable communities and serves as a measure of a station’s natural economic market, it is but one indicia of service and market connection.²¹ WFMZ-TV’s impending technical upgrade, which has now been granted by the Commission, strengthened WFMZ-TV’s showing in this regard. WFMZ-TV’s authority to operate at this increased power is now clear.

15. With regard to the specific Comcast communities herein, we believe our prior holding serves the public interest. Not only did the activation of WFMZ-TV’s initially proposed power increase enlarge the station’s Grade B coverage area to encompass, in part, one of the three communities at issue, but the initiation of its most recently granted power increase will enable WFMZ-TV to include a portion of each of the subject communities within its predicted Grade B contour. Moreover, it should not be overlooked that the Trenton, New Jersey cable system, which currently carries WFMZ-TV, which is also located in Mercer County, is geographically contiguous with Comcast’s system.

16. Finally, we note that the Commission’s action on WFMZ-TV’s complaint against Comcast was conditioned on WFMZ-TV’s ability to provide a good quality signal. As far as the record of this

¹⁹*Cablevision Systems Corp.*, 11 FCC Rcd 6453, 6474 (1996).

²⁰*Must Carry Order*, 8 FCC Rcd 2965, 2976 (1993).

²¹*Id.* at 2977.

proceeding reflects, this has not yet been done. With 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.

V. ORDERING CLAUSES

17. Accordingly, **IT IS ORDERED** that the petition for reconsideration filed by Comcast Cablevision of New Jersey **IS DENIED**.

18. This action is taken pursuant to authority delegated by Sections 0.321 and 1.106 of the Commission's rules.²²

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson, Deputy Chief
Cable Services Bureau

²²47 C.F.R. §§0.321 and 1.106.