

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

In the Matter of:	)	
	)	
Garden State Cablevision, L.P.	)	
And	)	CSR-4932-A
Maranatha Broadcasting Company, Inc. v.	)	CSR-4882-M
Garden State Cable TV	)	
	)	
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. Garden State Cablevision, L.P. (“Garden State”), operator of a cable television system serving 58 communities located in the counties of Burlington, Camden, Gloucester, Ocean and Salem, New Jersey, has requested reconsideration of the Cable Services Bureau’s (“Bureau”) decision denying Garden State’s market modification request for purposes of the cable television broadcast signal mandatory carriage rules.<sup>1</sup> 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 Garden State replied.<sup>2</sup> Various supplements were also subsequently filed by WFMZ-TV to which Garden State responded.

**II. BACKGROUND**

2. In its request, Garden State sought to exclude WFMZ-TV from carriage in its cable communities. Garden State maintained that its request met the market modification criteria and that grant of its request was warranted. The Bureau disagreed with Garden State’s analysis, citing WFMZ-TV’s carriage in nearby communities, the existence of some locally-focused programming, and the cable communities’ location on the fringe of WFMZ-TV’s imminently-expanded Grade B contour. Concurrent with the denial of Garden State’s request, the Bureau granted WFMZ-TV’s must carry complaint against Garden State and the cable system was ordered to commence carriage of WFMZ-TV when the station

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<sup>1</sup>*Garden State Cablevision, L.P.*, 13 FCC Rcd 1616 (1997)(“*Order*”).

<sup>2</sup>We note that at the time it filed its reconsideration request, Garden State 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.

provided a good quality signal to the cable system's principal headend.<sup>3</sup>

### III. ARGUMENT

3. In support of its request, Garden State argues that in denying its request, despite its satisfying all of the four market 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. Garden State maintains that although there might be exceptional cases where application of the statutory 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 is seeking expanded cable carriage. Garden State 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.<sup>4</sup> The result, Garden State argues, is an unwarranted commercial windfall for WFMZ-TV.

4. Garden State 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, Garden State 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 arbitrarily denied carriage during the past 20 years.<sup>5</sup> 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.<sup>6</sup> Garden State notes, however, that it was another three years after this amendment before WFMZ-TV sought carriage. Second, Garden State 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.<sup>7</sup> Garden State 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, Garden State asserts that the Bureau cannot seriously consider the minimal local programming cited by WFMZ-TV to be sufficient to meet the local programming criterion. Garden State 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. Garden State contends that while the New Jersey programming WFMZ-TV does provide may, to some extent, mitigate how severely this factor weighs against WFMZ-TV, it should not transform this factor into a compelling favorable argument.

5. With regard to the non-statutory factors, Garden State 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. Garden State maintains, however, that such reliance is irrelevant. Garden State points out that

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<sup>3</sup>See *Garden State*, 13 FCC Rcd 1616, 1627 (CSR-4882-M).

<sup>4</sup>See *Continental Cablevision of Western New England, Inc.*, 11 FCC Rcd 6488, 6506 (1996).

<sup>5</sup>See *Garden State*, 13 FCC Rcd 1616, 1625.

<sup>6</sup>Satellite Home Viewer Act of 1994, P.L. 103-369, 108 Stat. 3477 (1994).

<sup>7</sup>Petition at Exhibit 1. Garden State indicates that its system communities are anywhere from 3.5 to 25.2 miles outside WFMZ-TV's proposed Grade B contour.

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 Garden State's communities.<sup>8</sup> Garden State 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."<sup>9</sup> In addition, Garden State 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. Garden State 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, Garden State 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, the Asbury Park Press guides for Monmouth and Ocean Counties, or the *Trenton Times's* weekly listings for Burlington and Mercer Counties.<sup>10</sup>

6. In opposition, WFMZ-TV states that Garden State'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.<sup>11</sup>

7. Garden State 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, it was demonstrated in the modification request and the Bureau agreed, that all four factors supported exclusion of the subject communities. Garden State 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. In any event, Garden State 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, Garden State 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

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<sup>8</sup>Petition at 9.

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

<sup>10</sup>Petition at Exhibit 3.

<sup>11</sup>Opposition 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 near Garden State's, such carriage supports the Bureau's original conclusion as to WFMZ-TV's service area.

Order (“*Market Modification Final Report and Order*”),<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> WFMZ-TV states that more than two years after the Bureau’s original decision ordering Garden State 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. 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 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, in whole or in part, three Garden State communities – Camden City, Florence Township and Pennsauken Township.<sup>15</sup> 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 fully or partially encompass an additional 24 communities, with six more within a mile or less of the Grade B contour.<sup>16</sup>

10. In a response to the supplement, Garden State argues that very few of the facts presented therein are relevant to the four-factor statutory market modification criteria. Garden State 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. Garden State 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, Garden State indicates that WFMZ-TV has found it necessary to file yet another license modification application. Finally, Garden State 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 pending. Garden State points out that, in any event, the original *Order* only required it to carry WFMZ-TV within 60 days after the station provided the necessary specialized equipment to ensure delivery of a good quality signal and that WFMZ-TV has yet to provide such equipment.

11. WFMZ-TV argues that Garden State’s response attempts to shift the blame for its noncompliance with the Bureau’s *Order* to WFMZ-TV for its failure to supply the required equipment. WFMZ-TV states that although it was allowed to install an antenna on Garden State’s headend tower in December 1996 in order to conduct a signal strength test, the results of which were favorable, it was forced

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<sup>12</sup>14 FCC Rcd 8366 (1999).

<sup>13</sup>*Id.* at 8391.

<sup>14</sup>*Id.* at 8393.

<sup>15</sup>Supplement at 7.

<sup>16</sup>Supplement at Attachment A.

to remove the equipment at the conclusion of the test. WFMZ-TV indicates that repeated attempts to arrange for re-installation of the equipment between the release of the modification decision and the system's petition for reconsideration were unavailing. WFMZ-TV indicates that more recent attempts have met with the response that the system would permit the installation of equipment for testing purposes, but would not permit such installation for the purpose of providing WFMZ-TV's signal to subscribers. WFMZ-TV therefore requests the maximum possible monetary forfeiture be imposed on the cable system.

12. Garden State contends that WFMZ-TV's forfeiture request is both premature and inappropriate. Garden State reiterates that it is not flaunting Commission authority and stands ready to carry WFMZ-TV if its request for stay is denied. Garden State concludes that its good faith efforts to minimize viewer disruption while seeking resolution of this matter should not be treated as a sanctionable offense.

#### IV. DISCUSSION

13. Garden State has asserted most generally that the Bureau erred by minimizing the importance of several of the statutory modification factors, promoting instead non-statutory factors involving carriage on 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."<sup>17</sup> 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.<sup>18</sup> 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."<sup>19</sup> Thus, we reject Garden State's argument in this regard.

14. 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."<sup>20</sup> Historical carriage of a station on adjacent cable systems is relevant evidence of the

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<sup>17</sup>56 F. 3d 151, 175 (D.C. Cir. 1995); *accord Omnipoint Corp. v. FCC*, 78 F. 3d 620, 633-634 (D.C. Cir. 1996).

<sup>18</sup>8 FCC Rcd 2965, 2977 (1993).

<sup>19</sup>*Cablevision Systems Corp.*, 11 FCC Rcd 6453, 6474 (1996).

<sup>20</sup>*Must Carry Order*, 8 FCC Rcd 2965, 2976 (1993).

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. The Bureau's reference to the fact that some stations 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 the statute in general accords stations carriage throughout an ADI, the general requirement is that stations be accorded carriage rights far beyond their Grade B service area.

15. Garden State is also not correct in its assertion that the Bureau agreed that all four factors supported exclusion of the subject communities. In particular, statutory factor two involves a consideration of evidence that the station in question provides "local service to such community." The decision here concluded that there was some evidence that the station was broadcasting material directed toward New Jersey viewers, including material specifically targeted to Burlington, Camden and Gloucester Counties.

16. With regard to the Grade B question, 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.<sup>21</sup> 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.

17. Our initial decision in this matter noted that the evidence before us was not adequate to permit distinctions to be made between the 58 individual communities involved. However, it now appears, as reflected in Commission records, that there are only actually five physical systems among the communities cited in Garden State's modification petition.<sup>22</sup> Separate physical systems generally denote communities which, though commonly-owned by one cable operator, are served by separate headends. In this instance, five distinct physical system entities for the Garden State communities have been identified. Three of these physical systems serve communities that have not and will not be encompassed by WFMZ-TV's present or expected Grade B contours and are significantly more distant from WFMZ-TV: a) Carneys Point Township; b) Fort Dix, McGuire AFB, Pemberton Borough, Pemberton Township, and Woodland Township; and c) Pitman Borough.<sup>23</sup> Due to the fact that these three cable systems apparently operate as completely separate physical entities from the other communities at issue here, we grant Garden State's request for reconsideration with regard to these specific communities.

18. With regard to the remaining communities, which constitute two separate physical systems according to our records, 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 a number of these systems' communities, but the initiation of its most recently granted power increase will enable WFMZ-TV to include approximately half of these communities within its Grade B

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<sup>21</sup>*Id.* at 2977.

<sup>22</sup>Garden State registration information filed with the Cable Services Bureau's Engineering and Technical Services Division.

<sup>23</sup>*Id.*

contour and substantially decrease the geographic distances of those remaining communities located on the contour's fringe. Moreover, it should not be overlooked that TKR's Gloucester City cable system, which currently carries WFMZ-TV, serves communities in Camden and Burlington County which are geographically contiguous with those of Garden State.

19. Finally, we decline to assess a forfeiture against Garden State. While it is true that no stay was granted to Garden State during the pendency of this proceeding, we note that grant of WFMZ-TV's complaint against Garden State was premised on WFMZ-TV's ability to provide a good quality signal. WFMZ-TV has alleged that Garden State has not allowed WFMZ-TV to install the necessary equipment to provide an adequate signal. We caution Garden State, 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.

#### V. ORDERING CLAUSES

20. Accordingly, **IT IS ORDERED** that the petition for reconsideration filed by Garden State Cablevision, L.P. **IS GRANTED** to the extent indicated in paragraph 17 above, and is otherwise **DENIED**.

21. This action is taken pursuant to authority delegated by Sections 0.321 and 1.106 of the Commission's rules.<sup>24</sup>

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson, Deputy Chief  
Cable Services Bureau

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<sup>24</sup>47 C.F.R. §§0.321 and 1.106.