

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

In the Matter of:	)	
	)	
John Wiegand v. Post Newsweek	)	CSR 4179-M
Pacifica Cable, Inc.	)	
	)	
Modification of the Television Market	)	CSR 3885-A
of Television Station WFSB	)	
	)	
Modification of the Television Market	)	CSR 3989-A
of Television Station WVIT	)	
	)	
Application for Review/Petition for	)	
Reconsideration of Orders of the	)	
Cable Services Bureau	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 21, 2001**

**Released: August 24, 2001**

By the Commission:

**I. INTRODUCTION**

1. By this Order, we consolidate the above-captioned proceedings. The Commission has before it an Application for Review filed on behalf of John Wiegand and the Consumer Federation of America ("Applicants"). Applicants request review of a Memorandum Opinion and Order of the Cable Services Bureau ("Bureau") which dismissed Mr. Wiegand's complaint against cable operator Post Newsweek Pacifica Cable, Inc. ("Post").<sup>1</sup> Also before us is a Petition for Reconsideration filed by the Attorney General of the State of Connecticut ("Attorney General" or "Petitioner") requesting a review of the Bureau's Memorandum Opinion and Order which denied the Attorney General's request for a waiver of Section 76.59 of the Commission's rules, which limits market modification filings to a broadcaster or cable system.<sup>2</sup> The Bureau Orders at issue address the common question as to who has standing to initiate a proceeding regarding the signal carriage rights of a television station. Accordingly, we will consolidate the Application for Review and the Petition for Reconsideration and review both in this Order. After examining the record, we deny the Application for Review and the Petition for Reconsideration.

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<sup>1</sup> *Complaint of John Wiegand Against Post Newsweek Pacifica Cable TV, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 87 (Cable Services Bureau 1995) ("Weigand Order"). Since the filing of the Application, the ownership of the cable system has changed. The system is now owned by AT&T.

<sup>2</sup> *Modification of the Television Market of Television Station WFSB*, Memorandum Opinion and Order, 10 FCC Rcd 4939 (Cable Service Bureau 1995) ("WFSB Order").

2. The *Wiegand Order* addressed Mr. Wiegand's complaint, which alleged that Post had violated the Commission's rules requiring carriage of local television stations on cable systems in their broadcast areas ("must carry").<sup>3</sup> The Bureau dismissed Mr. Wiegand's complaint, finding that "[n]either the 1992 Cable Act nor our rules give subscribers standing to file complaints alleging violations of our signal carriage rules."<sup>4</sup> Similarly, the *WFSB Order* addressed two petitions seeking to modify the markets of television stations. A commercial television station and a cable system must be within the same designated market area before the station may demand carriage on the cable system.<sup>5</sup> The first petition was filed by the Attorney General, and the second was filed by the State of Connecticut Department of Public Utility Control ("DPUC"). In the *WFSB Order*, the Bureau noted that the Commission had restricted the parties who are eligible to seek market modifications to the involved broadcast stations and cable system operators.<sup>6</sup> Nonetheless, the Bureau chose to act on the petitions after concluding that "consideration of the requests is appropriate but only because the stations have themselves requested the market modifications involved in their supporting comments."<sup>7</sup>

3. Congress added the must carry and market modification provisions to the Communications Act ("the Act") in Section Five of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").<sup>8</sup> This Section defines the obligations of cable systems with respect to the carriage of television stations.<sup>9</sup> Must carry complaints seek to resolve the question of whether a television station must be carried on a particular cable system. A market modification request involves the determination of a broadcast station's market area for mandatory carriage purposes. Both types of proceedings are inherently linked in that each may ultimately result in the carriage of a television station by a cable system.

## II. DISCUSSION

### A. Statutory Language

4. With respect to the *Wiegand Order*, Applicants argue that the Bureau's decision to dismiss their complaint for lack of standing is contrary to the plain language of the statute and the legislative history of the 1992 Cable Act. In opposition to the Application for Review, Post argues that granting a subscriber the right to bring a must carry complaint is inconsistent with both the 1992 Cable Act and Congress' intent in imposing must carry on cable operators. Post argues that the purpose of must carry is not to increase the viewing options of cable subscribers, but rather to protect competition in local markets.<sup>10</sup>

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<sup>3</sup> See 47 C.F.R. §§ 76.59-61.

<sup>4</sup> *Wiegand Order*, 10 FCC Rcd at 87.

<sup>5</sup> *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd 2965, 2968 (1993). Section 614(h)(1)(C) of the Communications Act, as amended, 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).

<sup>6</sup> *WFSB Order*, 10 FCC Rcd at 4942.

<sup>7</sup> *Id.*

<sup>8</sup> Pub. L. No. 102-385, 106 Stat. 1460 (1992). Sections 614 and 615 of the Communications Act of 1934, as amended, regulate a cable operator's carriage of local television broadcast signals. See 47 U.S.C. §§ 534-5.

<sup>9</sup> H.R. Rep. No. 102-628 at 92 (1992).

<sup>10</sup> Post Opposition at 7-8.

5. After reviewing the record, we find no basis for overturning the *Wiegand Order*. At the outset, we begin our review of the Bureau's actions by looking to the language of the statute.<sup>11</sup> We then review the relevant Commission rule in a manner consistent with the language and legislative history of the statute.<sup>12</sup> Regarding must carry, an enforcement remedy is designated only for aggrieved broadcast stations. Section 614(d)(1) of the Communications Act, which contains the remedies portion of the cable carriage obligations, states specifically that a "local commercial television station that is denied carriage . . . may obtain review of such denial by filing a complaint with the Commission."<sup>13</sup> Based on this language, Section 76.61(a)(3) of the Commission's rules, which delineates the procedures for bringing a must carry complaint, states that a "local commercial television station or qualified low power television station that is denied carriage . . . may file a complaint with the Commission."<sup>14</sup> This language provides no basis to support Applicants' claim that cable subscribers have standing to file must carry complaints.<sup>15</sup>

6. The Petition for Reconsideration of the *WFSB Order* submits that the Bureau erred in refusing to grant the Attorney General's request to waive the standing requirement of Section 76.59. The petition argues that the plain language of the relevant section of the Act does not limit the parties who may request market modifications, and that the Attorney General has standing to participate in signal carriage matters even in the absence of a specific provision in the 1992 Cable Act because of the important interest members of the public have in receiving local broadcast stations.<sup>16</sup> No Oppositions or Replies were filed in response to the Petition for Reconsideration of the Attorney General.

7. Regarding market modification requests, we believe that the Bureau was correct to follow the language of the Commission's rule, which limits standing to broadcast stations and cable systems.<sup>17</sup> The express language of the Act permits the Commission to add communities or to subtract communities to a television station's market following a written request, but does not specify who may make such a request.<sup>18</sup> Prior to its adoption of rules to implement this Section of the Act, the Commission sought comment as to who is an appropriate party to make market modification requests.<sup>19</sup> Based on the

<sup>11</sup> See *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("the starting point for interpreting a statute is the language itself").

<sup>12</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

<sup>13</sup> 47 U.S.C. § 534. Section 615(j) contains a similar remedies provision for noncommercial educational television stations.

<sup>14</sup> 47 C.F.R. § 76.61(a)(3).

<sup>15</sup> We contrast Section 614(d)(1) with Section 632(f)(1) of the Communications Act, which states that "[a]ny person aggrieved by any act of a cable operator in violation of this section may bring a civil action in a United States district court." 47 U.S.C. § 551(f)(1) (protection of subscriber privacy).

<sup>16</sup> Petition for Reconsideration at 4.

<sup>17</sup> See 47 C.F.R. § 76.59(a).

<sup>18</sup> 47 U.S.C. § 534(h)(1)(C)(i) states:

For purposes of this section, a broadcasting 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, except that, following a written request, the Commission may, with respect to a particular television broadcast station, include additional communities from such station's television market to better effectuate the purposes of this section. In considering such requests, the Commission may determine that particular communities are part of more than one television market.

<sup>19</sup> *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, 7 FCC Rcd 8055, 8059 (1993).

comments, the Commission determined that both broadcasters and cable operators may file such petitions as reflected in Section 76.59.<sup>20</sup> Section 76.59 does not specify any other parties that may file market modification requests. We believe that this rule is in agreement with the statutory language, and as discussed below, the rule is also consistent with the intent of Congress.<sup>21</sup>

## **B. Legislative Intent and Policy Issues**

8. With respect to the *Wiegand Order*, Applicants next claim that the legislative history of the 1992 Cable Act requires the conclusion that subscribers should have the ability to seek redress under the must carry statute. Applicants submit that the legislative history contains references to the public's interest in receiving various and diverse information from local broadcast stations.<sup>22</sup> Applicants argue that these references imply an intent by Congress to allow subscribers to pursue this interest via the must carry complaint process. To the contrary, Post contends that the legislative history indicates Congress' concern about the competitive relationship between cable and local television broadcasters, and viewers have no place in the must-carry/retransmission consent scheme.<sup>23</sup>

9. Regarding the *WFSB Order*, Petitioner argues that subscribers are the intended beneficiaries of the 1992 Cable Act, and should be able to protect their interests.<sup>24</sup> Petitioner submits that no other party can adequately represent the public's interest in signal carriage matters.<sup>25</sup>

10. We agree that in the 1992 Cable Act, Congress stated its policy of making available to the public a diversity of views and information through cable television and other sources. As noted by the United Supreme Court in *Turner Broadcasting Sys., Inc. v. FCC*, must carry was designed to serve three important, interrelated governmental interests: (1) preserving the benefits of free, over-the-air local broadcast television; (2) promoting the widespread dissemination of information from a multiplicity of sources; and (3) promoting fair competition in the market for television programming.<sup>26</sup> We do not agree that Congress indicated that making available a diversity of views and information through cable television should be accomplished by allowing entities other than the affected broadcaster or cable operator to file must carry complaints and market modification requests in order to force a cable operator to carry a particular broadcast station.<sup>27</sup> We believe the fact that Congress made must carry an elective choice for broadcasters diminishes the argument that third parties have standing to demand carriage of a broadcast station on a cable system. A subscriber's ability to receive the benefits provided from must carry is predicated upon a station's election to exercise its rights under the statute. No statute or Commission rule

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<sup>20</sup> No party raised the issue of Attorney General or citizen standing. *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd 2965, 2977 (1993).

<sup>21</sup> To the extent that the Attorney General is asking the Commission to reconsider the adoption of Section 76.59, we note that the filing period for reconsideration of this rule has expired. See 47 C.F.R. § 1.106(f).

<sup>22</sup> Application for Review at 8, citing S. Rep. No. 102-92 at 59 (1992) ("If local television stations are not carried on their cable systems, cable subscribers will be denied access to federally-allocated broadcast stations, and will be deprived of the diversity of voices Congress intended them to have under the 1934 Act").

<sup>23</sup> Post Opposition at 8.

<sup>24</sup> Petition for Reconsideration at 8.

<sup>25</sup> *Id.* at 10.

<sup>26</sup> 520 U.S. 180, 189 (1997) (upholding constitutionality under First Amendment of the must carry requirement of the 1992 Cable Act).

<sup>27</sup> See Section 2 of the 1992 Cable Act.

requires a broadcaster to allow its signal to be carried on a local cable system because another party wishes to view it. Instead, broadcasters are given a choice whether to demand carriage under must carry, to negotiate carriage under the retransmission consent provisions, or not to be carried on a particular cable system at all.

11. Likewise, a subscriber would not necessarily receive access to a broadcast station via a cable system by filing a market modification request. The granting of a request to expand the market of a television station merely allows a broadcaster the option to seek must carry status on cable systems added to its market. A broadcaster is not required to seek carriage of its signal on all of the cable systems in its market.

12. There are many practical reasons to limit standing in the must carry and market modification contexts. As Petitioner acknowledges, various factors may inhibit broadcasters from filing market modification petitions.<sup>28</sup> A broadcaster's decision whether to exercise its must carry rights involves the consideration of several conditions to which a third party is not privy. Further, if a broadcaster does elect must carry status, the statute requires it to undertake additional actions in order to exercise those rights.<sup>29</sup> The Bureau correctly noted in the *WFSB Order* some of the procedural and substantive difficulties that weigh heavily against expanding filing eligibility:

The 1992 Cable Act and the Commission's rules place many of the decisions concerning broadcast signal carriage directly in the hands of broadcasters and cable operators with the view that service to the public will result from their decisions. For example, as noted above, television broadcast stations have the option of not following the mandatory carriage rules and may opt for negotiating carriage under the Act's retransmission consent provision. Moreover, a station's program purchasing decisions because of contractual exclusivity requirements could be adversely influenced by carriage outside of industry recognized market areas. In addition, whether to opt for carriage may depend on the interest or ability of stations to deliver a good quality signal.<sup>30</sup>

13. We note that even without standing to file must carry complaints or market modification petitions, subscribers are still able to participate when such proceedings are brought before the Commission by broadcasters or cable operators. Both types of filings are put on Public Notice for comment.

14. In summary, we find that the Applicants and the Petitioner fail to establish that either the language of the statute or the legislative history of the 1992 Cable Act contain an intent by Congress to allow subscribers standing to enforce the must carry rights of television stations or to pursue market modification requests. Given these findings, as well as the complications that extending the must carry remedies to subscribers would create, we affirm the Bureau's conclusions. Because we find that subscribers do not have standing in this instance, we will not address the Attorney General's contention it should be permitted to act as *parens patriae* for subscribers.

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<sup>28</sup> Petition for Reconsideration at 11.

<sup>29</sup> In the case of commercial broadcasters seeking carriage on a cable system, the broadcaster must first demand carriage in writing from the cable operator. The cable operator has 30 days from the receipt of the written notification to either comply with the demand or give a written response explaining why it believes it is not required to comply. Only after completing the demand requirement and waiting 30 days for a response may a broadcaster that has been denied carriage seek Commission review of the denial. 47 U.S.C. § 534(d)(1).

<sup>30</sup> *WFSB Order*, 10 FCC Rcd at 4942.

**III. ORDERING CLAUSES**

15. Accordingly, **IT IS ORDERED** that John Wiegand's Application for Review in the above-captioned proceeding **IS DENIED**.

16. **IT IS FURTHER ORDERED** that Attorney General of the State of Connecticut's Petition for Reconsideration in the above-captioned proceeding **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary