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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	GC Docket No. 92-52
	)	
Reexamination of the Policy	)	
Statement on Comparative	)	
Broadcast Hearings	)	
	)	RM-7739
	)	RM-7740
	)	RM-7741

NOTICE OF PROPOSED RULEMAKING

Adopted: March 12, 1992 ; Released: April 10, 1992

Comment Date: May 26, 1992

Reply Date: June 15, 1992

By the Commission: Commissioner Duggan issuing a statement.

I. INTRODUCTION

1. In this notice, we invite commenters to address the efficacy of the Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393 (1965) (1965 Policy Statement), which detailed the criteria to be used to select among competing applicants for new broadcast facilities, and we request comment on certain proposals to revise the comparative process to remedy any perceived shortcomings of the existing system. We expect that adoption of a revised system could produce swifter, more certain choices among applicants for new broadcast facilities, while preserving the real public interest benefits of making such choices.

2. The criteria used to select among mutually exclusive applicants for new broadcast facilities have not been comprehensively reviewed for nearly 27 years. Their continued unexamined use after this time interval poses a series of problems for the Commission because broadcasting has continuously evolved during this period. Given the passage of time and the dramatic

changes that have occurred in the broadcast marketplace, in broadcast technology, and in the Commission's regulatory policies for broadcasting, a reexamination of the comparative criteria is eminently warranted. Moreover, our experience with some of these criteria over time raises questions of whether these criteria have become too subjective and imprecise to be used effectively in the public interest. Comparative hearings, in which these criteria are applied, tend to be protracted and have often turned on relatively slight distinctions among the applicants. The difficulties with this process are exacerbated by the possibility that the comparative criteria may unduly lend themselves to manipulation by the applicants.

3. The shortcomings of the comparative hearing process have frequently inspired criticism. Recently, for example, commenters in our proceeding adopting procedural reforms to expedite the hearing process urged the Commission to revise the current comparative criteria. Proposals to Reform the Commission's Comparative Hearing Process, 6 FCC Rcd 3403, 3406 ¶ 26 (1991). Similarly, there was general agreement among the expert panelists at the FCC Adjudicatory Practice Conference, "Making the Adjudicatory Process Work", held June 14, 1991 that the Commission's comparative policy should be reexamined and revised. See FCC Adjudicatory Practice Conference June 14, 1991 (videotape), on file in the Audio Visual Management Office, Office of Managing Director, FCC. See generally Anthony, Towards Simplicity and Rationality in Comparative Broadcast Licensing Proceedings, 24 Stan. L. Rev. 1 (1971).

4. The Commission has full authority under the Communications Act to review its regulations to consider whether they continue to serve the public interest. Indeed, it is obligated to do so. As the Supreme Court has noted:

> If time and changing circumstances reveal that the "public interest" is not served by application of the [existing] Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations [and change them].

NBC v. US, 319 U.S. 190, 225 (1943). See also FCC v. WNCN Listeners Guild, 450 U.S. 582, 603 (1981); ACLU v. FCC, 823 F.2d 1554, 1565 (D.C. Cir. 1987), cert. denied, 108 S. Ct. 1220 (1988). In this regard, the United States Court of Appeals for the District of Columbia Circuit, in Bechtel v. FCC, No. 91-1112 (D.C. Cir. 1992), commented pointedly on the Commission's continued use of the comparative criteria in the face of criticism. The court stated that the Commission had: "a duty to reexamine its policies over time to ascertain whether they work -- that is, whether they actually produce the benefits the Commission originally predicted they would." Slip Op. at 15-16. In particular, the court noted that: "changes in factual or

legal circumstances may impose upon the agency an obligation to reconsider a settled policy or explain its failure to do so." Id. at 15. We agree that the time for reexamining our comparative criteria is overdue. We undertake that reexamination in this proceeding.[1]

II. BACKGROUND

5. Currently, the Commission resolves comparative hearings using criteria set forth in the 1965 Policy Statement. Although the Commission has clarified and modified these criteria on an ad hoc basis from time to time,[2] there has been no comprehensive

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1 In this proceeding, we will attempt a comprehensive review of issues regarding the criteria used in comparative proceedings for new broadcast facilities. We will not address the distinct issues raised in comparative renewal proceedings, where a new applicant challenges the renewal of an incumbent licensee. Comparative renewal proceedings are the subject of an unresolved inquiry in another docket. See Formulation of Rules and Policies Relating to Broadcast Renewal Applicants, 4 FCC Rcd 4780 (1989); 3 FCC Rcd 5179 (1988). Comparative renewal proceedings differ from new applicant proceedings because of the great importance in comparative renewal proceedings given to whether the incumbent has earned a "renewal expectancy" based on its past broadcast record. See 3 FCC Rcd at 5180 ¶¶ 3-5. Nonetheless, in comparative renewal proceedings where the incumbent has not earned a renewal expectancy, the applicants are compared as if they were all new applicants. WIOO, Inc., 95 FCC 2d 974, 991-92 ¶ 42 (1983). Under those circumstances, it would be appropriate to use the criteria developed in this proceeding. We seek comment on the implications for comparative renewal proceedings of the revisions adopted in this proceeding.

2 See, e.g., WPIX, Inc., 68 FCC 2d 381, 411-12 ¶¶ 85-88 (1978) (taking into account credit for minority ownership pursuant to TV 9, Inc.v. FCC, 495 F.2d 929 (D.C. Cir. 1973), cert. denied, 419 U.S. 986 (1974)); Mid-Florida Television Corp., 69 FCC 2d 607, 652 ¶ 95 (Rev. Bd. 1978), set aside on other grounds, 87 FCC 2d 203 (taking into account credit for female ownership); Anax Broadcasting, Inc., 87 FCC 2d 483, 488 ¶ 15 (1981) (clarifying the treatment of limited partners and nonvoting stockholders in the comparative analysis); Ruarch Associates, 103 FCC 2d 1178, 1180-81 ¶ 5 (1986) (ruling on the enforceability of divestiture commitments made in comparative proceedings), modified in Reform of the Commission's Comparative Hearing Process, 6 FCC Rcd 157, 160 ¶ 21 (1990); FM Broadcasting Assignments, 101 FCC 2d 638, 645-47 ¶¶ 20-23 (1985), aff'd sub nom. National Black Media Coalition v. FCC, 822 F.2d 277 (2d Cir. 1987) (adoption of credit for daytime-only licensees who apply for new FM channels). See also note 3, infra.

review of these criteria since they were adopted nearly three decades ago. Moreover, although the 1965 Policy Statement reflected years of experience adjudicating comparative proceedings, the Commission did not conduct a formal rulemaking or receive public comment in formulating its policy.

6. The 1965 Policy Statement defines two primary objectives of the comparative licensing process: (1) maximum diffusion of control of the media of mass communications; and (2) best practicable service to the public. To achieve these objectives, the 1965 Policy Statement sets out seven criteria for comparing competing applicants. These are: (1) diversification of control of the media of mass communications; (2) integration of ownership into management; (3) proposed program service; (4) past broadcast record; (5) efficient use of the frequency; (6) character;[3] and (7) other factors. In an addendum to the 1965 Policy Statement, the Commission added the use of auxiliary power equipment as a comparative factor. Comparative Broadcast Hearings, 2 FCC 2d 667 (1966).

7. Under the current system, other factors are deemed to enhance the quantitative credit due for integration. These are: local residence and past participation in civic affairs; minority ownership; daytimer status; female ownership; and past broadcast experience.[4]

8. Within each criterion, the differences between the applicants are characterized by a system of preferences and demerits. These are described by various adjectives, such as "slight," "moderate," "substantial," and "strong." Once this comparison is completed within each criterion, all of the preferences across all of the criteria are considered in terms of their number and magnitude, and the relative importance of each criterion. See, e.g., Greater Wichita Telecasting, Inc., 96 FCC 2d 984 (1984); Alexander S. Klein, Jr., 86 FCC 2d 423 (1981).

III. DISCUSSION

9. In light of changes in Commission policy, the realities of the broadcast industry, and the current state of broadcast technology, we question whether use of the existing criteria

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3 The Commission subsequently eliminated character as a comparative factor and now treats it only as a basic qualifications issue. Character Qualifications, 102 FCC 2d 1179, 1231-32 ¶¶ 111-13 (1986), recon. denied, 1 FCC Rcd 421 (1986).

4 See note 1, supra, for the actions adding these criteria to the comparative analysis.

continues to result in selection of the applicant that will best serve the public interest. Moreover, comparative hearings using these criteria often appear to become bogged down in litigating subjective or trivial distinctions and the criteria themselves may invite manipulation by the applicants. Thus, there is a question whether these proceedings delay the initiation of new service to the public and also a question whether the applicant chosen will in fact best serve the public interest.[5]

10. We therefore propose to consider the following modifications of the comparative process. First, we will consider whether to retain, eliminate, or modify four criteria. Three of these criteria -- integration, proposed program service, and past broadcast record -- seek to predict the quality of future broadcast service. We seek comment on whether these assumptions continue to be valid. A fourth criterion -- auxiliary power -- also seems open to question. In addition, we seek comment on whether to add new criteria to help us select the most qualified applicant. Specifically, we will consider whether to use a new criterion called a "service continuity preference", designed to enhance the public interest in the comparative process by encouraging comparative applicants to retain the stations they are attempting to secure through the comparative hearing for a certain period of time. We also wish to explore the possibility of instituting a "finder's preference" for applicants successfully petitioning for a new allotment of a frequency. And we ask interested parties to propose other new criteria for our consideration.

11. Second, we will consider whether to modify the manner in which the resulting criteria are evaluated. Specifically, we believe that a point system may provide a basis for evaluating applicants that is more objective and rational than current practice. Use of such a system may expedite adjudication and provide results that are more certain and defensible. The point

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5 We need not discuss our concerns in this regard at length. They are not new, and we have closely examined them in earlier attempts to remedy the flaws of the comparative process. See Proposals to Reform the Comparative Hearing Process, 5 FCC Rcd 4050 (1990) (proposing expedited hearing procedures); Amendment of Section 73.3525 of the Commission's Rules, 5 FCC Rcd 3921 (1990) (proposing measures to discourage the filing of abusive applications); Amendment of the Commission's Rules, 4 FCC Rcd 2256 (1989) (proposing elimination of the comparative hearing process in favor of a lottery). While the records compiled in these earlier proceedings amply demonstrated the flaws in the existing system, they did not result in reform of the comparative criteria themselves. In particular, we concluded that replacing use of these criteria with a lottery was not warranted. Amendment of the Commission's Rules, 5 FCC Rcd 4002 (1990).

system contemplated involves: (1) defining the weight of each preference in terms of an absolute number of "points", rather than in terms of relative adjectival preferences and demerits; (2) precisely defining the circumstances under which points are awarded under each criterion; and (3) providing a "tie-breaker" procedure for resolving cases in which no applicant receives a dispositive preference under the comparative criteria.

12. Although such proposals would substantially change the comparative selection process, we believe they can be fully reconciled with the "full hearing" requirement of 47 U.S.C. § 309(e). See also Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945). For the reasons discussed in detail at paragraph 24, infra, we also believe that our action here is fully consistent with the Congressional prohibition on reexamining our minority and gender preference policies.[6]

A. REEXAMINATION OF CERTAIN FACTORS

13. We reaffirm the goal of the 1965 Policy Statement that we should seek to grant applications that will provide the best practicable service to the public. Indeed, this policy remains integral to Commission regulation generally. Nonetheless, in light of changing circumstances, we have over the years reevaluated how this goal may best be achieved. The nature of broadcast regulation has changed significantly since 1965, raising the question of whether some of the criteria in the 1965 Policy Statement may no longer be consonant with our regulatory approach. We stress that we do not depart from our conviction that licensees must serve community needs. Rather, we seek comment on whether the criteria set forth in the 1965 Policy Statement provide a realistic basis for predicting whether one applicant will better serve community needs than other applicants.

14. Integration. The 1965 Policy Statement presumed that an owner integrated into the day-to-day management of the station would "inherently" provide better service than a nonintegrated owner by linking legal responsibility and day-to-day performance and by being more sensitive to local community needs. 1 FCC 2d at 395. While these assumptions are not unreasonable, current circumstances warrant inquiry as to their validity in practice. For example, the highly competitive nature of today's broadcast market and the professionalism of today's broadcast operations suggest that an integrated owner might not necessarily provide a more responsive service than would a nonintegrated owner. The court, in Bechtel, expressed a similar view: "The Commission has not spelled out why an owner/manager will be more sensitive to

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6 In view of the scope of the changes proposed by this notice, we may decide, in later action in this proceeding, to sever one or more of the issues raised herein for separate resolution.

community needs than an owner who hires a professional manager". Slip Op. at 12. (Emphasis in the original.) Thus, the court concluded: "the Commission must demonstrate why its focus on integration is still in the public interest, if indeed the Commission concludes that it is." Slip Op. at 16.

15. Moreover, the integration criterion provides an incentive for applicants to fashion proposals which may not realistically be effectuated -- what the court, in Bechtel, referred to as "'strange and unnatural' business arrangements." Slip Op. at 14. Examination of potentially unreliable proposals can be a time-consuming and uncertain process. See Evergreen Broadcasting Co., 6 FCC Rcd 5599, 5600-01 ¶ 12 (1991); Royce International Broadcasting, 5 FCC Rcd 7063, 7063-64 ¶¶ 4-10 (1990), recon. denied, 6 FCC Rcd 2601 (1991). Accord, Metroplex Communications, Inc., 5 FCC Rcd 5610, 5611-12 ¶¶ 11-21 (1990) (applicant's integration proposal rejected after consideration at length). Indeed, in one particularly egregious case, we found that an applicant's integration proposal constituted misrepresentation and lack of candor before the Commission. Mid-Ohio Communications, Inc., 5 FCC Rcd 940 (1990), recon. denied, 5 FCC Rcd 4596 (1990). We therefore seek comment as to whether the integration criterion should be retained or modified and, if so, what rationale or empirical evidence supports such action. We also seek comment on whether credit should be granted as well for the use of professional management and, if so, whether some lesser weight should be given to it.

16. Proposed program service. Although the 1965 Policy Statement reflects a determination that most distinctions in programming proposals have no significance in the comparative evaluation, it holds out the possibility that some differences may reflect a superior devotion to public service. 1 FCC 2d at 397. We have suggested, for example, that applicants may be able to demonstrate that they have devoted substantially greater time, effort, and resources to meeting ascertained community needs than other applicants. In such situations, where an applicant can show an unusual attention to local community matters for which there is a demonstrated community need, a preference would be awarded. Chapman Radio & Television Co., 7 FCC 2d 213, 214-15 ¶ 5 (1967). Assuring to the greatest extent possible that applicants will serve the special needs and interests of their communities remains a touchstone of Commission regulation of broadcasting.

17. At the same time, however, evaluating program service proposals in the comparative licensing process may be difficult. For example, in renewal cases we have been skeptical of the probative value of "paper proposals." See, e.g., Cowles Broadcasting, Inc., 86 FCC 2d 993, 1013 ¶ 62 (1981), aff'd sub nom. Central Florida Enterprises, Inc. v. FCC, 683 F.2d 503 (D.C. Cir. 1982), cert. denied, 103 S.Ct. 1774 (1983). Moreover, examination of program proposals in comparative proceedings raises questions with regard to the policy expressed in the radio and television deregulation proceedings, in which we

found that the nature of today's broadcasting marketplace militates against a priori judgments about program content. Deregulation of Radio, 84 FCC 2d 968, 982-83 ¶ 34 (1981), aff'd in part and remanded in part sub nom. Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983); Commercial TV Stations, 98 FCC 2d 1076, 1076-77 ¶ 2, 1080 ¶ 8, 1087-88 ¶ 23 (1984), aff'd in part and remanded in part sub nom. Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987). Further questions are raised by the fact that litigation of proposed programming questions is often complex and seldom dispositive. See, e.g., Religious Broadcasting Network, 3 FCC Rcd 4085, 4102-03 ¶¶ 57-60 (Rev. Bd. 1988). We therefore ask commenters to address whether the benefits of retaining the proposed program service criterion outweighs the detriments and, if so, how the preference could be more workably administered.

18. Past broadcast record. As in the case of proposed programming, the 1965 Policy Statement reflects a determination that most differences in applicants' past broadcast records are insignificant. 1 FCC 2d at 398. The 1965 Policy Statement does suggest, however, that some records reflecting an applicant's past ownership and participation may be "unusually good" or "unusually poor" and should therefore be considered as part of the comparative process. We believe that past behavior may, in some circumstances, serve as a predictor of future conduct. At the same time, we recognize that this may not always be the case and that, as in the case of proposed programming issues, litigation concerning past broadcast record tends to be complex and dispositive only in extraordinary cases. See, e.g., Knoxville Broadcasting Corp., 103 FCC 2d 669, 689-96 ¶¶ 24-33 (Rev. Bd. 1986). We thus ask commenters to address the desirability of retaining past broadcast record as a comparative criterion.[7] In particular, commenters are invited to address the validity of this criterion and whether there may be more objective means of structuring it to avoid overly subjective and burdensome litigation.

19. Auxiliary power. The Commission adopted the auxiliary power preference in response to the November 1965 northeastern power failure. 2 FCC 2d at 667. By giving comparative credit to applicants proposing to use auxiliary power equipment (i.e., a generator that would provide backup power in the event of a power failure), we hoped to encourage stations to have this capability in case of a similar power outage. Upon reflection, we question

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7 We emphasize that we are dealing only with the issue of past broadcast record in new applicant proceedings. The renewal expectancy analysis in comparative renewal proceedings rests on policy considerations that have no counterpart in new applicant proceedings. See Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, 3 FCC Rcd at 5187-88 ¶¶ 51-60.

the suitability of the comparative process for addressing this concern. Auxiliary power is obviously desirable and readily implemented. If we were concerned that broadcasters were not voluntarily integrating auxiliary power capabilities into their operations, we might consider regulatory intervention with respect to the industry as a whole. We question, however, the rationale for focusing any concern in this regard only on those stations that happen to be involved in a comparative hearing. We thus invite commenters to address whether the auxiliary power criterion should be retained or eliminated.

B. TREATMENT OF OTHER FACTORS

20. Notwithstanding the questions raised above, we continue to believe that the comparative process can promote substantial public interest goals. We will therefore seek comment on the future use of the other current comparative factors as well as the new "service continuity preference" and "finder's preference" proposed in this notice.

21. Diversification. The diversification factor reflects the Commission's traditional goal of seeking to promote diversity of viewpoints and to prevent undue concentration of economic power. See FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 780 (1978). Congress has demonstrated the same concern by making this factor relevant in lotteries conducted pursuant to 47 U.S.C. § 309(i). On the other hand, the Commission has recognized in other contexts that permitting at least some degree of co-ownership among radio and television stations can better promote program diversity than maximized separate ownership would. See Amendment of Section 73.3555, 100 FCC 2d 17 (1984). The Commission is now considering whether allowing an increased degree of co-ownership would be sound public policy given the current state of the broadcast marketplace. See Revision of Radio Rules and Policies, FCC 92-97 (adopted Mar. 12, 1992); Review of the Policy Implications of the Changing Video Marketplace, 6 FCC Rcd 4961 (1991). In light of these findings, it is appropriate to inquire whether we should alter the current way in which we comparatively consider diversification. For example, it may be that the diversification factor should not automatically receive the same weight in all cases, regardless of community size and the number of media voices. Also, if we decide to use a point system, for example, it may be more consistent with our substantive approach to joint ownership to award points to applicants who do not own other broadcast properties but not to subtract various numbers of points from those who do own one or more properties. Accordingly, we seek comment on how diversification should be weighed as a preference factor in a reformed comparative selection process.

22. Minority and Gender Preferences. Minority preferences in comparative broadcast proceedings represent one aspect of our attempt, endorsed by Congress, to remedy the effect of past racial and ethnic discrimination and to promote programming diversity.

Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3009-10 (1990). See also Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979 (1978). The policy responds to the recommendation that:

> Unless minorities are encouraged to enter the commercial broadcasting business, a substantial portion of our citizenry will remain underserved and the larger, non-minority audience will be deprived of the views of minorities. . . .

FCC Minority Ownership Task Force, Report on Minority Ownership in Broadcasting (1978) at 1. Congress has demonstrated the same concern by making this factor relevant in lotteries conducted pursuant to 47 U.S.C. § 309(i). The gender preference serves similar goals with respect to women.[8] Currently, we treat minority and female ownership as factors enhancing an applicant's integration credit. However, because we may eliminate integration as a comparative factor, we propose to consider how minority and female ownership should be treated as separate factors[9] pursuant to a revised system of comparative selection.[10] Additionally, we

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8 Our discussion of the gender preference in this notice reflects our current practice. Recently, however, the United States Court of Appeals for the District of Columbia Circuit held that the Commission had not shown that the gender preference policy is substantially related to achieving programming diversity and that it is therefore unconstitutional. Lamprecht v. FCC, No. 88-1395 (D.C. Cir. Feb. 19, 1992). Accordingly, our discussion of the gender preference may require modification depending on the ultimate outcome of Lamprecht.

9 We discuss our proposed treatment of another current enhancement factor, broadcast experience, at paragraph 36, infra.

10 The continued use of minority and female credit raises a subsidiary question. Under Anax Broadcasting, Inc., 87 FCC 2d 483 (1981), the Commission does not take the interests of passive owners -- such as limited partners or nonvoting stockholders -- into account in the comparative analysis. The so-called "Anax doctrine" has led to the formation of many applicants, the sole active principals of which are minorities or others who are integrated into management and often entitled to dispositive comparative credit. This in turn has spawned much litigation to determine whether the putative control that the nominally active principal has in such applicants is reliable. Royce International Broadcasting, supra. Although we may eliminate the integration criterion, the use of the diversification, minority and female ownership criteria would provide a continued opportunity to form questionable two-tiered applicants. The Anax problem would thus remain relevant. In a previous proceeding, we recognized that it would be desirable to reduce such burdensome litigation by

seek comment on whether minorities should have to have a minimum degree of equity for applicants to receive minority credit to prevent abuse of the policy. Those answering this question in the affirmative are also asked to address the further issue of whether Commission implementation of such a policy would be legally sustainable in light of Congress' express intent that no "retroactive [ ] . . . changes" be made to the current minority preference system. See paragraph 23, infra.

23. We stress that in proposing to treat minority and female ownership as separate comparative factors it is not our intention to change the proportionate weight currently given these factors in the comparative evaluation, and any change made to the comparative criteria as a consequence of this notice will preserve these factors' current relative weighting. For this reason, we believe that our proposal to treat minority and female ownership as separate comparative factors can be reconciled with Congressional enactments intending to prohibit the Commission from eliminating or diluting these preferences, originally adopted in 1987 and most recently reenacted by Act of October 28, 1991, Pub. L. 102-140. In these appropriation measures, Congress provided:

> That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing . . . to expand minority and women ownership of broadcasting licenses . . .

See also Reexamination of the Commission's Comparative Licensing, 3 FCC Rcd 766 (1988) (terminating a proceeding designated to reexamine the various Commission minority and gender policies). Accord, 47 U.S.C. § 309(i).

24. Although an expansive reading of this language might be taken to preclude any change in the comparative process, we

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modifying or eliminating the Anax Doctrine. Proposals to Reform the Commission's Comparative hearing Process, 5 FCC Rcd 4050, 4053 ¶¶ 21-23 (1990); 6 FCC Rcd 157, 161-62 ¶¶ 31-34 (1990). We did not, however, alter the Anax Doctrine in that proceeding. In view of our determination here to take further measures to reduce unnecessary litigation in comparative proceedings, we will revisit the Anax question. We invite commenters to address whether active owners should be required to have a minimum investment or equity in the applicant, whether the Anax Doctrine should be repealed, and other matters relevant to this issue.

believe that our proposed action fully comports with Congress' directive. In our view, this measure is intended as a prohibition on Commission action to repeal or weaken policies designed to expand minority and female ownership. Our proposal herein, however, is not designed either to eliminate or reduce the comparative credit now awarded for minority and female ownership. Rather, under our proposed system of comparative selection, we intend that minorities and women would continue to receive the same proportional credit as under the current system. The sole change would be that the minority or female owner would no longer need to be integrated in station management to receive comparative credit. Not only would this make it easier for qualified individuals to claim credit, it would also conform the comparative treatment of minority ownership to the administration of our tax certificate and distress sale policies, in which integration is not a prerequisite. We thus believe that our proposed approach would be consistent with the directive of Congress.

25. Local residence. The Commission traditionally has enhanced an applicant's integration credit for past or proposed local residence and civic participation to take into account the applicant's continuing familiarity with local interests and needs. 1 FCC 2d at 396. It may be that if integration of ownership into management is no longer found to be worthy of retention as a comparative criterion, local residence of the owner may take on even greater importance to ensure a degree of contact and familiarity with the service area. Conversely, as the court suggested in Bechtel, professional management, so prevalent in broadcast operations today, may vitiate the continued relevance of local residence. Slip Op. at 12. We therefore seek comment on this issue. As in the case of minority and female preferences, abolition of the integration criterion would mean that we would in the future treat local residence as a separate comparative factor.

26. Efficient use of the frequency. Under this criterion, we have awarded preferences to applicants proposing greater coverage than their opponents, especially coverage to areas receiving no or only one existing service. See, e.g., Capital City Community Interests, Inc., 2 FCC Rcd 1984, 1990 ¶ 33 (Rev. Bd. 1987). This practice represents one aspect of the Commission's role in ensuring "a fair, efficient, and equitable distribution of radio service." See Apogee, Inc., 59 RR 2d 941, 945 n.16 (1986). We propose to continue awarding credit for efficient use of the frequency. We invite commenters to propose objective criteria -- as to area, population, number of other services, etc. -- by which the Commission can judge whether a given applicant is entitled to credit on this point. Moreover, we also invite commenters to propose novel indicia -- other than the traditional comparative coverage analysis -- by which efficent use of the frequency can be recognized.

27. Daytimer preference. We currently award enhancement credit in FM radio proceedings to the operators of existing daytime-only AM stations in response to the disadvantages that

daytimers have historically faced. FM Broadcasting Assignments, 101 FCC 2d 638, 643 ¶ 14, 645-46 ¶ 20 (1985). Although we have made substantial efforts to alleviate the problems of the AM service, we recognize that disadvantages still remain.[11] Moreover, we found that " . . . there is an especially strong likelihood that [daytimers] will operate a full-time FM facility in the same community in a manner which furthers the public interest." 101 FCC 2d at 645 ¶ 20. We therefore propose that daytimer credit should be part of a revised comparative selection system for FM facilities. As in the case of the minority preference, the daytimer preference would have to be revised to be a separate criterion if integration were eliminated as a comparative factor.

28. Service continuity preference. Additionally, we propose a new criterion to be included in the comparative evaluation. We propose to award credit to applicants committing themselves to own and operate the station for at least three years.[12] In proposing this factor, we intend to extend the public interest benefits of choosing licensees in the comparative process, to discourage potential abuse of the comparative process, and to prevent disruption of service. We thereby acknowledge the observation of the Court of Appeals that rapid transfer of a station awarded after a comparative selection appears to "eviscerate" the rationale of the comparative process. Bechtel, Slip Op. at 13. We propose to enforce the applicant's representation that it will hold the station for at least three

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11 See Review of the Technical Assignment Criteria, 6 FCC Rcd 6273 (1991). In particular, see id. at 6275-76 ¶ 4, describing our intensive actions over five years to identify and address the problems of the AM service.

12 The service continuity preference would thus be in addition to the provisions of 47 C.F.R. § 73.3597(a)(1), which require all permittees and licensees acquiring their stations pursuant to Commission decisions in comparative proceedings to own and operate the stations for one year. We note that our rules impose no such restriction on licensees acquiring their stations through assignments, under most circumstances, because these situations do not raise comparable concerns about the integrity of our processes. See Transfer of Broadcast Facilities, 52 RR 2d 1081 (1982) (repealing the former "anti-trafficking" rule). We stress that our action is premised on the belief that applicants voluntarily undertaking to hold their stations for three years offer a benefit to the public. Our action therefore should not be construed as imposing any additional restrictions on licensees who did not seek the service continuity preference. Nonetheless, commenters may wish to address whether the rationale of the service continuity preference would warrant our applying it to all new licensees selected by the comparative hearing process.

years by approving premature sales of the station only at a distress sale price to a minority buyer.[13] Cf. Lee Broadcasting Corp., 76 FCC 2d 462, 463 ¶ 2 (1980) (explaining the Commission's minority distress sale policy). We also expect to review any application to sell prematurely to determine whether the applicant had misrepresented its intention to operate for three years.

29. Finder's preference. The Commission has before it petitions proposing that we award comparative preferences to those applicants who successfully request the allotment of new broadcast frequencies through rulemaking.[14] These petitioners contend that the public interest would be served by recognizing that such finders have taken the initiative in and undertaken the burden of introducing a new service to the community. This rationale for such a preference is somewhat analogous to that of the "pioneer's preference" we award to those seeking the development of new communications services and technologies. Establishment of Procedures, 6 FCC Rcd 3488 (1991). In addition, petitioners suggest that a finder's preference would help "facilitate the award of licenses to minorities, women, and other newcomers." Ex Parte Presentation by counsel for Jeffrey Rochlis in Gen. Docket No. 90-264 (Apr. 29, 1991). Specifically, petitioners point to various comparative proceedings in which minority applicants would have

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13 We seek comment as to whether, as is the case with 47 C.F.R. § 73.3597, the restrictions against premature transfer by those receiving a service continuity preference should not apply where the licensee or permittee made a satisfactory demonstration that capital to operate the station was unavailable, that the station's principal had died or become disabled, or that other compelling circumstances justified the transfer. 47 C.F.R. § 73.3597(a)(4). We do not want the application of these exceptions in a comparative licensing system to undercut the basis for the service continuity preference. In addition, we do not intend that the restrictions on transfer would apply if the applicant claiming the service continuity preference received its grant through a settlement. See Pan Pacific Television, Inc., 3 FCC Rcd 6629, 6631 ¶¶ 13-14 (1988). In this regard, we have recently amended the rule relating to settlements to discourage abuse of our processes. Amendment of Section 73.3525, 6 FCC Rcd 85 (1990), recon. granted in part, 6 FCC Rcd 2901 (1991).

14 Petitions were filed on September 16, 1987 by Gerald Proctor (RM-7739), on March 8, 1991 by Jeffrey Rochlis (RM-7740), and on May 16, 1991 by Larry G. Fuss, et al. (RM-7741). Although the Commission could have adopted the finder's preference pursuant to the outstanding petitions, we considered it more advisable to address the matter in the context of this more comprehensive proceeding. However, we may revisit this determination if the instant proceeding is delayed or otherwise inconclusive.

prevailed, or the comparative process would have been less protracted and costly, if a finder's preference had been in place. See, e.g., Dunlin Group, DA 90-1090 (MMB Sept. 10, 1990); Hubbard Broadcasting, Inc., DA 91-374 (MMB Apr. 17, 1991). See Rochlis Response to Comments in RM Nos. 7740 and 7741 (Aug. 8, 1991) at 7-13. We believe there may be merit to this proposal and seek further comment on it. Because the finder's preference would be one of several comparative criteria used to select among competing applicants, we request comment on the weight that should be accorded in the comparative process.

30. Additional criteria. We recognize that changes in broadcast technology and the broadcast marketplace may suggest new comparative criteria that we have not anticipated in this notice. We invite commenters to propose such additional criteria.

C. AN OBJECTIVE AND RATIONAL SYSTEM OF PREFERENCES

31. To achieve the public interest benefits of the comparative process in an efficient manner, we will consider whether to adopt a new system for evaluating the comparative criteria. This system would be designed to clarify and expedite the evaluation of competing applicants while preserving the relative weighting that the retained criteria receive under the present subjective approach. It would also seek to avoid frivolous litigation over trivial differences among the applicants under the criteria, which has been a continuing problem with the present system.

32. Under the proposed system, an applicant would receive a specified number of points based on its attributes under each comparative criterion.[15] For example, under minority ownership, an applicant might receive +3 points for controlling minority ownership and +2 points for attributable ownership. Under diversification, an applicant with no attributable outside media interests might receive +3 points. We stress that the examples given are merely illustrative of point values that might be assigned. We invite commenters to propose appropriate point values for the various criteria.

33. The number of points that an applicant receives under each criterion would reflect: (1) the public interest significance of the criterion itself -- for example, the greater intrinsic weight of minority ownership as compared with female ownership,

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15 The proposed system is similar to one we have adopted in the instructional television fixed service (ITFS). 47 C.F.R. § 74.913. See Amendment of Part 74, 101 FCC 2d 49 (1985), recon. denied, 59 RR 2d 1355 (1986), rev'd on other grounds sub nom. Telecommunications Research and Action Center v. FCC, 836 F.2d 1349 (D.C. Cir. 1988).

and (2) the applicant's strength in relation to that criterion -- for example, an attributable interest rather than a controlling interest. The system therefore could be used to express the public interest benefits of a particular applicant in clear, measurable terms. Furthermore, because the point values would not change with every minor variation in the applicant's attributes, such a system could be used to distinguish between differences that have public interest significance and those that are de minimis.

34. The winner in a proceeding would be determined by adding up the total number of points to which each applicant is entitled. The applicant receiving the highest number of total points would be granted the permit. The total points that an applicant receives would reflect the overall public interest in granting its application, and comparing the point total of different applicants would provide an objective and rational basis to evaluate the public interest in granting one over the other.

35. Under the proposed system, cases may arise in which two or more applicants each share the highest number of total points in a particular proceeding. We believe that such a result is justifiable. It does not necessarily hold that any difference between applicants -- even the most miniscule or subjective -- necessarily has public interest significance. Thus, two or more applicants may rationally be deemed equivalent from a public interest standpoint. In this eventuality, such cases could be decided by means of a "tie-breaker" procedure. A tie-breaker procedure that is fair, objective, and known in advance is fully consistent with the parties' due process rights and the public interest. See Lottery Selection Among Applicants, 57 RR 2d 427, 431 ¶¶ 15-17 (1984), aff'd sub nom. National Latino Media Coalition v. FCC, reported at 62 RR 2d 1552 (D.C. Cir. 1987); Amendment of Part 74, 101 FCC 2d at 67 ¶ 42.

36. In this regard, we propose three possible tie-breakers. In a tie situation, we might grant the application of the applicant first filing for the facility in question. Such a tie-breaker would recognize that this applicant has taken the initiative in developing a proposal for a particular facility, and would thereby encourage the efficient use of the spectrum. Cf. FM Application Processing, 58 RR 2d 776, 785 ¶ 33 (1985), recon. denied, 59 RR 2d 100 (1985). Another possibility would be to use substantial broadcast experience as a tie-breaker under the theory that, all else being equal, an experienced broadcaster may be more efficient in bringing new service to the public than a novice. Cf. Global Broadcasting Group, Inc., 94 FCC 2d 809, 812-13 ¶ 7 (1983). In this regard, however, we ask commenters to specifically address whether the use of broadcast experience as a tie-breaker would disadvantage women and minorities. A third

possibility would be to choose the winning applicant randomly.[16] We invite comment on the use of these criteria as tie-breakers, as well as on any other possible tie-breakers.

37. Although the foregoing proposal represents a significant departure from current practice, we believe our statutory authority is broad enough to encompass use of the proposed system. We recognize that under 47 U.S.C. § 309(e), mutually exclusive applicants for broadcast facilities are entitled to a "full hearing" as to whether their applications should be granted. See also Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945). We also recognize that the full hearing required has traditionally been interpreted in terms of the exhaustive inquiry we now conduct. See Johnston Broadcasting Co. v. FCC, 175 F.2d 351 (D.C. Cir. 1949). We do not, however, believe that the full hearing requirement necessarily precludes adoption of the proposed point system.

38. As the Supreme Court explained in U.S. v. Storer Broadcasting Co., 351 U.S. 192, 202-03 (1956), the hearing requirement does not withdraw from the Commission the rulemaking authority necessary for the orderly conduct of its business. Thus, the Commission need not hold a hearing as to questions that have already been determinined in a rulemaking where no substantial and material factual questions remain unresolved. Because telecommunications is a rapidly developing field, Congress has given the Commission broad powers of regulation. We anticipate that our experience and the record to be compiled in this proceeding will give us a sound basis to limit and clarify the selection process. We note, moreover, that the point system we employ for ITFS (which is also subject to the requirements of 47 U.S.C. § 309(e)) has been before the United States Court of Appeals for the District of Columbia Circuit. The court accepted the validity of the point system without comment, describing it as "a modified comparative hearing system." Telecommunications Research and Action Center v. FCC, 836 F.2d at 1356. We emphasize that use of the point system would not preempt consideration of any substantial and material questions that may appear on a particular record. Applicants would still be able

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16 We note that 47 U.S.C. § 309(i), which governs the use by the Commission of any "system of random selection," requires that any such lottery be weighted to further the diversification of ownership of the mass media. See Telecommunications Research and Action Center v. FCC, 836 F.2d 1349 (D.C. Cir. 1988) (setting aside the tie-breaker lottery adopted for ITFS because of failure to demonstrate compliance with the provisions of 47 U.S.C. § 309(i)). Thus, it appears that any tie-breaker lottery would have to provide for the preferences set forth in the statute. We ask commenters to specifically address this issue.

to challenge their competitors' basic qualifications and their competitors' entitlement to the comparative credit claimed pursuant to the procedures provided for under 47 U.S.C. §§ 309(d)(1), (d)(2), and (e). We invite commenters to address the validity and desirability of the proposed point system or any alternatives and whether use of such a system would reduce the length and complexity of comparative hearings.

D. NONCOMMERCIAL STATIONS

39. Under current practice, applicants for noncommercial stations are not compared using the same criteria as those used for commercial applicants. Instead, noncommercial applicants are evaluated as to the extent to which each of the proposed operations will be "integrated into the overall operations and objectives" of the respective applicants. New York University, 10 RR 2d 215, 217-18 ¶¶ 8-9 (1967). Upon reflection, it appears that use of such a vague standard may make rational choices among noncommercial applicants difficult, if not impossible. We note, for example, that the Review Board, for this very reason, recently urged the Commission to reexamine the comparative analysis to be applied in these cases. Real Life Educational Foundation of Baton Rouge, Inc., 6 FCC Rcd 2577, 2580 n. 8 (Rev. Bd. 1991), application for review pending.

40. We tentatively conclude that the vague standard set forth above should be eliminated. Rather, we will consider whether to use a modified version of the point system, including a tie-breaker, that we propose for commercial applicants. We also invite commenters to address whether the criteria used to select commercial applicants are relevant in noncommercial proceedings and whether we should use different or additional criteria. We also seek comment on whether a different comparative approach should be followed for state-owned public broadcasters as opposed to other noncommercial applicants.

E. APPLICABILITY

41. We propose to apply the revised criteria to all applicants not in hearing as of the effective date of our action in this proceeding.[17] By promptly implementing the revised system, we anticipate that the public will immediately receive the

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17 Accordingly, we will not in this proceeding treat the the manner in which the comparative criteria will be applied to the Bechtel case on remand or to other pending cases already designated for hearing. We will resolve questions concerning the applicability of the comparative criteria to these cases in forthcoming adjudications.

benefits of adjudications that are more rapid and certain than under the present system and less costly. In limiting the applicability of the revised criteria to applications not yet in hearing, we seek to avoid prejudice resulting from the detrimental reliance on the current comparative system by applicants that have already paid the hearing fee or incurred other expenses associated with the hearing process. We believe that designation for hearing represents a reasonable cut-off in this regard. Nonetheless, we note that an agency may change its rules prospectively, and that a party has no vested right in the application of the former rules, although it may have proceeded on the assumption that the former rules would remain in force. See Multi-State Communications, Inc. v. FCC, 728 F.2d 1519, 1525-26 (D.C. Cir. 1984), citing, FHA v. Darlington, Inc., 358 U.S. 84, 91 (1958). We would anticipate giving applicants affected by the new criteria an opportunity to amend their applications to conform to the new criteria. We seek comment on the desirability of applying the revised criteria in this manner.

F. QUESTIONS FOR COMMENT

42. In view of the foregoing, we seek comment on the following issues:

(a) Whether and to what extent the 1965 Policy Statement has produced the public interest benefits intended by the Commission.

(b) Whether integration, proposed program service, past broadcast record, and auxiliary power should be retained, modified, or eliminated.

(c) Whether the Commission should award credit, similar to, but less than, that for integration, for the use of professional management.

(d) Whether and to what extent comparative credit should be given for the remaining factors currently used as comparative criteria as well as for a new "service continuity preference," "finder's preference," or other novel comparative criteria. With respect to the service continuity preference, whether exceptions should be made to the restrictions on the transfer of stations where such a preference has been claimed, and whether a holding requirement should be imposed on all licensees selected through the comparative hearing process.

(e) Whether the award of credit for minority ownership should depend on minorities owning a minimum level of equity in the applicant.

(f) Whether the proposed point system should be adopted and, if so, what point values should be assigned to the various criteria under the system.

(g) Whether the proposed or other tie-breaker procedures should be adopted; whether the use of broadcast experience as a tie-breaker would disadvantage women and minorities; and whether any lottery used as a tie-breaker must be weighted consistent with 47 U.S.C. § 309(i).

(h) Whether the Commission should modify or repeal its policy regarding the use of limited partnerships and two-tiered corporations set forth in Anax Broadcasting, Inc., 87 FCC 2d 483, 488 ¶ 15 (1981), for example, by requiring active owners to have a minimum investment or equity interest in the applicant.

(i) whether the Commission has the authority to adopt the proposed modified comparative criteria in light of the full hearing requirement of 47 U.S.C. § 309(e) and whether adoption of revised criteria would reduce the length and complexity of comparative hearings.

(j) whether the proposed modified comparative criteria are consistent with the limitation on the reexamination of minority and gender preferences imposed by Congress.

(k) Whether a form of the proposed point system should be applied to noncommercial applicants and, if so, what comparative factors should be considered and how should state-owned public broadcasters be treated vis-a-vis other noncommercial applicants.

(l) Whether and to what extent the proposed modifications of the comparative process should be applied to pending commercial and noncommercial applicants that have not been designated for hearing.

(m) Whether there are alternatives to the proposed modified comparative criteria to reform the current comparative process that would better serve the public interest.

(n) What impact adoption of the proposed modified comparative criteria should have on comparative renewal proceedings.

IV. PROCEDURAL MATTERS

A. Ex Parte Rules -- Non-restricted Proceeding

43. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission rules.

B. Regulatory Flexibility Act

44. An Initial Regulatory Flexibility Analysis is contained in the Appendix to this notice.

C. Authority

45. Authority for this rulemaking action is contained in 47 U.S.C. §§ 154(i), 154(j), 303(r), 309(g), 309(i), 403.

V. ORDERING CLAUSES

46. ACCORDINGLY, IT IS ORDERED, That NOTICE IS HEREBY GIVEN of t proposed regulatory changes described above, and that COMMENT IS SOUGHT on these proposals.

47. IT IS FURTHER ORDERED, That pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's Rules, comments SHALL BE FILED on or before May 26, 1992 and reply comments SHALL BE FILED on or before June 15, 1992 thereafter. To file formally in this proceeding, commenters must file an original and four copies of all comments, reply comments, and supporting comments. If commenters want each Commissioner to receive a personal copy of their comments, they must file an original plus nine copies. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. In addition, commenters should file a copy of any such pleadings with the Office of General Counsel, Room 610, 1919 M Street, N.W., Washington, D.C. 20554. Commenters should also file one copy of any documents filed in this docket with the Commission's copy contractor, The Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

48. For further information, contact David S. Senzel, (202) 632-7220, Office of General Counsel.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy

Donna R. Searcy
Secretary

APPENDIX

INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS

Reason for Action

The Commission has determined that the comparative hearing process, which is currently used to select from among competing applicants for new broadcast facilities, is potentially out of date.

Objective

The Commission seeks to adopt a simplified hearing process to select new broadcast licensees on an expedited and more rational basis.

Legal Basis

Action is being taken pursuant to 47 U.S.C. §§ 154(i) and (j), 303(r), 309(g) and (i), and 403.

Reporting, Record Keeping and Other Compliance Requirements

This proposed would reduce such requirements by eliminating and simplifying litigation involved in prosecuting a contested application for a new broadcast facility.

Federal Rules which Overlap, Duplicate or Conflict with the Proposed Rules

None.

Description, Potential Impact, and Number of Small Entities Affected

This proposal would benefit all entities seeking a license for a new broadcast facility by reducing the administrative burdens associated with the comparative hearing process.

Any Significant Alternative Minimizing Impact on Small Entities and Consistent with the Stated Objections

None.

March 12, 1992

Separate Statement
of
Commissioner Ervin S. Duggan

In re: Reexamination of the Policy Statement on Comparative Broadcast Hearings

Just as I supported the procedural reforms that the FCC adopted last year to streamline and expedite the comparative hearing process for broadcast licenses, I endorse most of the substantive licensing reforms that we propose today. The current process -- particularly the so-called integration criterion -- has spawned much litigation and led to a deep cynicism about our licensing process, leading the D.C. Circuit to question the integrity of our process in a recent decision.

I strongly support the proposed service continuity preference for applicants who promise to hold their stations for at least three years. This should encourage greater stability in the industry as new broadcast stations enter the market, and the public interest will undoubtedly be better served by station owners who make a long-term commitment to their stations. Indeed, I would consider adopting a mandatory three-year holding period for all new broadcast station licensees.

I am troubled, however, by the proposal to eliminate the comparative criterion for proposed program service. Although I can appreciate the litigation and enforcement difficulties that may persist if we continue to use this factor, I believe that the public interest is served by encouraging applicants to embrace an explicit commitment to news, public affairs, minority and foreign language programming, and other types of public service programming. I intend to review the comments on this issue carefully, especially as to how we can avoid some of the problems that have affected our implementation and enforcement of this factor in the past.