

**ORIGINAL**

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

**ORIGINAL  
FILE**

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

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**JUN - 2 1992**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

TO: The Commission

**COMMENTS OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS**

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## Summary

The National Association of Broadcasters ("NAB") welcomes the Commission's reexamination of its comparative hearing standards. Replacement of the comparative hearing process with a random selection system would be inconsistent with the Communications Act's mandate of selecting licensees who will best serve the public interest.

NAB believes, however, that the Commission should focus its attention first on the standards it will apply in comparative renewal proceedings, rather than in hearings on applications for new or unused facilities. NAB urges the FCC to complete action on its pending rulemaking dealing with comparative renewal cases.

One reason for looking at renewal standards is that, if the Commission adopts new allocation policies, the number of initial licensing proceedings should decline. For AM radio, the FCC has new allocation policies in place, and NAB has advocated similar policies for new FM radio facilities in order to prevent the quality of FM service from being degraded.

For initial comparative hearings, NAB supports the FCC's proposed elimination of the integration criterion, and recommends that the diversification standard be abolished as well. These structural standards rest on assumptions that the best broadcast service will be provided by a single station owner who operates the station him or her self. The day is long past when the Commission believed that such stations serve the public better than professionally managed group-owned stations. Indeed, the FCC has recognized the benefits to the public from the efficiencies which

group operation of stations can achieve. It would be irrational to continue selecting new licensees on the basis of these outdated structural models.

Abolition of the integration standard will change the way in which the Commission's minority preference policy operates. NAB believes that the Commission can and should continue to take the benefits of increased minority ownership into consideration in its licensing policies whether or not the minority preference is applied in a somewhat different form than it is now.

Rather than relying primarily on structural criteria, NAB supports the adoption of standards which focus on applicant behavior likely to lead to operation of a station in the public interest. The Commission should utilize factors which indicate applicants' intentions to construct and operate stations in a community over the long term. To this end, NAB supports proposals which would give a preference to applicants who have identified an opportunity for a new station. Applicants who have undertaken the expense and effort to locate an unused frequency demonstrate a commitment to bringing new broadcast service to a community.

NAB also favors the FCC's proposal to award a preference to applicants who voluntarily commit to operating the new station for at least three years. Particularly with new stations, the public benefits from stable ownership and management committed to building a new community service. This limited voluntary preference should be distinguished from the FCC's former mandatory three-year holding period for all stations, which NAB opposed as creating unwarranted distortions in the broadcast marketplace.

Finally, the Commission should require all applicants for new facilities to include in their applications a detailed business plan for the new station, indicating the needs which the applicant identifies for new broadcast service in its community and the applicant's plans for achieving a profitable operation. Comparing such business plans will assist the Commission in choosing licensees who will in fact provide a viable new service.

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**COMMENTS OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters ("NAB")<sup>1/</sup> submits these comments in response to the Commission's *Notice of Proposed Rulemaking* released April 10, 1992. NAB believes that the Commission's licensing policies deserve reexamination and should be significantly altered. As we will explain, however, NAB suggests that the greater need for reconsideration of licensing policies exists in connection with comparative license renewal proceedings, instead of hearings on comparative applications for new or unused facilities.

NAB disagrees with suggestions that the Commission abandon comparative hearings as a means of selecting broadcast licensees. The operation of a successful

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<sup>1/</sup> NAB is a nonprofit, incorporated association of radio and television broadcast stations and networks. NAB serves and represents America's radio and television stations and all the major networks.

broadcast station requires owners to be aware of the needs and interests of their communities and to provide programming and other services which meet those needs and which attract an audience. Certainly, all applicants are not alike in their ability and commitment to provide quality public service. A random selection process would reflect an abandonment any effort to achieve the Communications Act's goal of public service. The Commission should therefore continue to require comparative evaluations of applicants for new or unused broadcast facilities. It should, however, shift the focus of such comparisons from outdated structural criteria to preferences which reward behavior indicative of a commitment to operation in the public interest.

**I. The Commission Should First Resolve its Pending Comparative Renewal Proceeding**

The Commission recognizes (*Notice n.1*) that this proceeding does not address the "distinct issues raised in comparative renewal proceedings," and refers to a long-pending inquiry into the standards which should be applied in comparative renewal cases. *See Broadcast Renewal Applicants*, 4 FCC Rcd. 4780 (1989). At the same time, the Commission acknowledges that, in the absence of any separate decision on standards for renewal hearings, any standards which the Commission adopts in this proceeding will be applied to comparative renewal cases with the added factor of the renewal applicant's renewal expectancy. Although the application of the criteria for selection of new licensees to renewal applicants has been the *de facto* standard since an earlier separate renewal standard was rejected in *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971), this resulted from an absence of any other

available guide to decisionmaking, rather than from an analytical conclusion by the Commission that the *1965 Policy Statement* establishes appropriate criteria for renewal proceedings.

Similarly, the conclusions about revised rules which the Commission reaches in this proceeding should not be permitted to again become the default criteria for comparative proceedings. Instead, NAB urges the Commission to proceed with dispatch to craft separate decisional standards for renewal proceedings, taking into account their unique characteristics. Criteria appropriate for selecting new licensees with a view to achieving certain ownership policies should not be applied without careful consideration to renewal applicants which have an established record of service to the public.

A further reason that the Commission should focus its attention more on criteria for renewal hearings than on hearings for new facilities is that the Commission should adopt allocation policies which strictly limit the number of new stations, and thus the number of comparative initial hearings that the Commission will be asked to resolve. The Commission has already taken steps to reduce the number of operating AM radio stations. *AM Broadcast Assignment Criteria*, 6 FCC Rcd. 6273 (1991). NAB recently petitioned the Commission to review its policies for acceptance of new applications for FM stations and to adopt allocation policies generally limiting the availability of new FM allocations. *See Commercial FM Allotment and Licensing Policy*, RM-7933 (filed Feb. 10, 1992). NAB at the same time also urged the

Commission (RM-7932) to suspend processing most FM applications and petitions during the policy review.

In RM-7933, NAB demonstrated that the average radio listener had access in 1988 to 26.4 radio stations and that increased numbers of FM stations would ineluctably lead to degradation of FM service, in the same manner that the Commission's policies favoring increased numbers of AM stations resulted in a loss of AM signal quality. Moreover, NAB demonstrated that FM station financial performance steadily declined since 1987 to the point where the average FM station in 1990 lost nearly 15,000 dollars. Data assembled for the soon to be published 1992 NAB *Radio Financial Report* confirms the radio industry's declining financial base. The median FM station in 1991 suffered an 18.4% decrease in net revenues. Median net revenues for all station types declined from 1991. These developments threaten the future availability of diverse radio "voices" serving the public interest, particularly if the untrammelled growth of FM allocations continues. NAB, therefore, proposed that new radio facilities be limited to those for which an economic need is established, not merely where a new station can be shown to be technically feasible.

NAB reemphasizes the need for the Commission to alter its radio allocation policies to focus more on improvement of existing facilities instead of the addition of new services. Doing so, of course, would radically reduce the number of comparative proceedings for new broadcast facilities. The need for the Commission to formulate criteria for such hearings would also be reduced, while the potential for comparative hearings on renewal applications would continue unchanged. Thus, the

Commission should refocus its attention to the issues presented by renewal proceedings. Nevertheless, since the Commission has proposed to change its standards for comparative hearings for new and unused facilities, we will proceed to comment on those criteria.

## **II. The Commission Should Eliminate the Integration and Diversification Criteria**

The Commission proposes to do away with the present preference for applicants who propose to integrate ownership into station management (*Notice* ¶¶ 14-15), and asks for comments on the preference it now grants to applicants who do not own other broadcast facilities (*Notice* ¶ 21). Both of these preferences should be abolished.

NAB recognizes that the current minority ownership preference is tied to the integration criterion, and that the Commission is barred from changing the preferences it now awards to women and minorities. *Notice* ¶ 23.<sup>2/</sup> The effect of the Commission's proposal would be to grant preferences to applicants with substantial minority ownership even if the minority owners might have little or no involvement with station operations.

NAB supports the Commission's efforts to ensure greater opportunities for minorities to become owners of broadcast stations. Although the removal of the

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<sup>2/</sup> As the Commission acknowledges (*Notice* ¶ 22 n. 10), the decision in *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992), requires it to reconsider its gender preference policy. NAB expresses no views on whether adequate support might be found in support of a renewed gender preference to meet the court's constitutional objections.

integration factor may, as the Commission suggests, make it easier for applicants to obtain a preference for minority ownership, there is reason to be concerned about greater opportunities for applications with sham minority involvement structured solely to obtain a comparative preference. Also, minority ownership unrelated to station operations might raise concerns about whether a resulting preference meets the objectives which the Supreme Court found underlay the current minority preference policies in *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990). The Commission should, therefore, carefully monitor the applications it will receive claiming a preference for minority ownership. If necessary, the Commission can consider whether to require some participation in management of the station as a condition for receiving a preference for minority ownership.

The general integration and diversification criteria rest on an assumption that the best broadcast service to a community will come from a station owner who is directly involved in station management and has no other broadcast interests. The development of the Commission's station ownership policies demonstrates that these assumptions are unwarranted. The Commission has long permitted ownership of multiple stations, both locally and nationally. In recent months, it dramatically expanded the number of radio stations which one owner can control,<sup>3/</sup> and it is proposing significant relaxation of the television ownership rules.<sup>4/</sup> These actions

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<sup>3/</sup> *Revision of Radio Rules and Policies*, 7 FCC Rcd. 2755 (1992), *pet. for recon. filed* (May 29, 1992)[hereinafter *Radio Deregulation*].

<sup>4/</sup> *Action in Docket Case — Relaxation of National and Local TV Ownership Restrictions Proposed* (MM Dkt. No. 91-221), FCC News, May 14, 1992.

were based not just on a conclusion that group operation of broadcast stations served the public interest as well as operation by single owners, but indeed that group-operated stations are *better* able to serve the public interest. "Evidence adduced in this and earlier proceedings indicates that greater consolidation could increase the variety of programming available to the public, including local news and public affairs programming." *Radio Deregulation* ¶ 21.

Given this conclusion, it would be irrational for the Commission to continue to rest its initial licensing standards on a contrary preference for owners with no other broadcast interests, in other words, to prefer owners who are the least able to take advantages of business efficiencies to improve the service they offer to the public. Particularly with respect to applicants who have interests in stations in other markets, no meaningful diversification interest is served by treating them less favorably than applicants without other broadcast interests, for the Commission has recognized that "national broadcast ownership limits . . . ordinarily are not pertinent to assuring a diversity of views to the constituent elements of the American public." *Multiple Ownership*, 100 FCC 2d 17, 37 (1984), *recon.*, 100 FCC 2d 74 (1985).

Similarly, the Commission's acknowledgment of the benefits of group ownership cannot be squared with a preference for ownership integrated into local station management. Group owners necessarily hire professional managers to operate their individual stations who may have no ownership interest in the stations they run. There is no evidence to support a conclusion that stations run by professional managers serve the public less well than stations directly managed by their owners.

Preserving a preference for integrated ownership and management runs directly counter to the broadcasting industry's experience and cannot be sustained on the basis of any predicted benefits to the public.<sup>5/</sup>

Further, as the Commission points out (*Notice* ¶ 15), the integration factor has been the progenitor of any number of fanciful proposals, few of which appear to have been proposed with any intent of being put into place once the license has been obtained. Although the Commission cites several recent cases where integration proposals have been viewed with skepticism, this trend is hardly new. See *Fidelity Television, Inc. v. FCC*, 515 F.2d 684, 704 (D.C. Cir. 1975)(denying rehearing *en banc*). The Commission should not continue relying on a comparative factor which appears primarily to promote the submission of suspect applications.<sup>6/</sup>

Although it is appropriate for the Commission to consider questions of industry structure in licensing new stations, the current integration and diversification preferences are at odds with the Commission's conclusions about the benefits of group ownership. Predicted service to the public provides no reason to continue to make decisions based on these factors. The Commission, therefore, should delete the integration and diversification factors from its comparative hearing standards.

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<sup>5/</sup> Indeed, NAB agrees with the suggestion in Paragraph 15 of the *Notice* that an applicant proposing professional management with established qualifications and experience should be granted a preference.

<sup>6/</sup> The *Notice* (¶ 25) acknowledges the close relationship between the integration factor and the Commission's granting of a preference for an applicant's local residence. Since the Commission recognizes the benefits which professional management of stations can bring to a community, it should no longer take applicants' residence into consideration.

Instead, the Commission should consider adopting new standards which may be used to predict desirable licensee behavior.

**III. The Commission Should Adopt Criteria Which Demonstrate a Commitment to Good Service**

The best service to the public is likely to be provided by an applicant which has made a serious commitment to build and operate a station in a community, rather than one which is only trying to take an opportunity to make a quick profit. The criteria for selecting licensees should therefore reward factors which demonstrate such a commitment and careful analysis of the operation of a proposed station. NAB sets forth three such factors — a finder's preference, a service continuity preference, and a business plan preference.

Under the Commission's current rules, one who expends the effort to identify an unused frequency and convinces the Commission to authorize a new station receives no additional consideration in determining who will be awarded the license for the resulting station. Substantial expenditure may be required to perform required engineering studies and submit proposals to the Commission before a new station is authorized. All of this expenditure may be lost if another entity comes in with an application better tailored to the Commission's comparative criteria. If the Commission adopts the new allocation criteria proposed by NAB, the effort required for a proposal for a new allocation would be even greater since an economic study would also be mandated for those seeking new channel assignments. In the *Notice* (§ 29), the Commission asks for comments on three pending petitions for rulemaking which

ask that the Commission award a preference to applicants who previously proposed allotment of the new frequency.

NAB supports the adoption of such a preference to be awarded significant weight in awarding licenses.<sup>7/</sup> Although NAB believes that the number of situations in which new frequencies will be allocated should be relatively few, the Commission's obligation to promote efficient nationwide broadcasting services suggests that the Commission encourage parties to identify areas in which additional service is needed. If licenses are awarded without regard to the effort of the party which identified the frequency and the need for service, few will wish to undertake the effort and expense to have a new frequency allocated to a community.

Further, granting a preference to parties who previously proposed allocation of a frequency also promotes good licensing policy. Such parties demonstrate a willingness to make a substantial investment in bringing broadcast service to a community with the expectation of a long-term reward, rather than a short-term profit. The effort to identify and promote a new frequency, particularly if NAB's proposed allocation criteria are adopted, will be a clear indication of a significant commitment to a community's needs. The Commission should, therefore, give that applicant a

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<sup>7/</sup> NAB previously filed comments supporting preferences for parties who identify opportunities for the introduction of a new service. *See* Comments of the National Association of Broadcasters, RM-7739 (filed July 25, 1991); Reply Comments of the National Association of Broadcasters, RM-7739 (filed Aug. 9, 1991).

significant preference in the licensing proceeding which follows allocation of a new frequency.<sup>8/</sup>

The Commission proposes to give credit for another indicator of a long-term service commitment — a new service continuity preference. *Notice* ¶ 28. NAB supports adoption of this preference for applicants who make a binding promise to operate their stations for at least three years. Like the finder's preference, rewarding a commitment to long-term service to the community helps to assure that new licensees are not interested only in making a quick return on an investment, but are committed to establishing a valuable new service. The Commission's renewal preference policy reflects the same conclusion that the public is not served by continuous turnover of broadcast ownership. Further, a preference for applicants pledging themselves to serve the community for a substantial period helps guard against applications containing unrealistic proposals since a party contemplating three years of operation is more likely to consider carefully the specific promises it is making.<sup>9/</sup>

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<sup>8/</sup> NAB does not agree with arguments that recognition of a finder's preference is either inconsistent with a minority preference or that a finder's preference would necessarily vitiate the Commission's minority ownership policies. There is no reason why both factors cannot be part of the FCC's new comparative hearing criteria.

<sup>9/</sup> The service continuity preference proposed by the Commission should not be confused with proposals for mandatory holding periods for stations acquired other than through a comparative hearing, such as the three-year holding period the Commission once imposed on licensees. NAB has consistently opposed such restrictions on the free transfer of broadcast stations, since they distort the broadcast marketplace and disserve the public interest by requiring licensees to operate stations in which they may no longer be interested. The service continuity preference, by contrast, would apply only to new facilities  
(continued...)

The Commission asks whether it should enforce a service continuity commitment against a licensee whose principal subsequently dies or becomes disabled, capital to operate the station is no longer available, or other events beyond the licensee's control occur subsequent to the grant which makes continued operation impossible. Although NAB agrees that an applicant which commits to long-term service should not obtain the full value of its station if it reneges on that commitment, it would serve no public purpose to view the service continuity preference in a punitive light. Where an applicant has made the service commitment in good faith and subsequent events beyond its control prevent it from carrying through with its promise, the Commission should not impose any limitations on the sale of the station. In particular, if a new station is in bankruptcy and all of the proceeds of any sale will go to the station's creditors, requiring that it be sold only at a discounted price would only harm innocent creditors and perhaps reduce the availability of capital for other new stations or for broadcast facilities generally.

NAB proposes the adoption of a third criterion which will demonstrate the ability of an applicant to actually provide service in the public interest to its community . In advocating new allocation criteria, NAB urged the Commission to require petitioners for new or unused FM frequencies to submit a particularized showing addressing "whether the market proposed to be served has enough economic activity to support the additional proposed FM facility." *Commercial FM Allotment and*

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<sup>2/</sup>(...continued)

without an established presence in a community, and would also only be undertaken voluntarily by applicants.

*Licensing Policy*, RM-7933 (filed Feb. 10, 1992) at 19-20. NAB pointed out that much of the data which would be necessary to make such a showing is readily available from commercial sources. This showing is appropriate since it does little to advance the public interest to authorize an additional service which is unlikely to be economically viable, but which may force existing services into unprofitable operations. Rather than having more service, the public would likely end up with less.

In like fashion, the Commission should require all applicants for new or unused broadcast frequencies to submit a detailed business plan showing that there is an unserved need for broadcast services in the community, the manner in which the applicant proposes to operate the station, and the applicant's proposed revenues and expenditures, including a projection of when the new station would reach profitability. NAB expects that where such business plans differ markedly in quality or in the accuracy of the assumptions on which they are based, a comparative issue would be designated for hearing on the quality of the applicants' business plans. Applicants proposing a carefully considered business plan would receive a preference based on their greater likelihood of actually constructing and operating the proposed station.

The Commission authorized a similar showing in the initial round of applications for cellular telephone service. In *Domestic Public Cellular Radio Communications Service*, 49 RR 2d 809, 833 (1981), the Commission indicated that it would consider on a comparative basis applicants' surveys of public need for cellular service and the way in which applicants' proposed systems were tailored to the public needs they identified.

NAB believes that a required business plan would oblige applicants to investigate the broadcast services now available in the communities they propose to serve and determine whether there is in fact a need for new service. This will result in better applications more carefully tailored to the communities involved, and will also reduce the potential for new stations to simply duplicate existing services without any substantial public benefit. We stress that the comparison of these plans should not be a means for judging the way in which applicants propose to operate their stations on a subjective basis. The issue to be addressed by the business plan comparison is not whether the Commission approves of a particular proposal to run a new station, but only whether the applicant has demonstrated an understanding of the market and has constructed a realistic plan for a viable business.<sup>10/</sup>

Requiring applicants for new or unused facilities to provide the Commission with a business plan will thus help to ensure that applicants chosen in comparative hearings are likely to provide quality broadcast service, the Commission's goal in establishing comparative criteria. NAB thus urges the Commission to add consideration of applicants' business plans to the finder's preference and service continuity preferences proposed in the *Notice*.

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<sup>10/</sup> The requirement of a business plan will also help the Commission to ensure that applicants are financially qualified to construct and operate a new station.

### **Conclusion**

NAB agrees with the Commission that its comparative hearing criteria are outdated. Rather than focusing first on the criteria employed in choosing among applicants for new or unused facilities, however, the Commission should instead complete action on its longstanding proceeding concerning the standards and procedures to be used in comparative renewal proceedings.

With respect to the criteria for initial comparative hearings, the Commission should discontinue relying on outdated structural criteria as predictors of future licensee behavior. There is no reason to believe that applicants with no other broadcast interests or who will be integrated into local station management will provide a superior service to applicants who will operate other stations as well or who have experience operating stations with qualified professional managers. The Commission should be careful, however, to ensure that its licensing criteria continue to give a preference to applications which will increase minority participation in broadcast ownership.

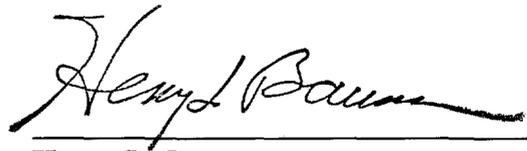
The Commission should shift its focus to criteria which identify applicants who are committed to serving the community. It should therefore give preferences to applicants who have identified the need for new services in a community, to applicants who commit to long-term operation of a new station, and to applicants whose

business plan demonstrates a realistic proposal to ensure successful operation of the new facility.

Respectfully submitted,

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