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SUMMARY

The Federal Communications Bar Association ("FCBA") supports the Commission's desire to reevaluate the criteria governing the comparative hearing process. However, the Commission should fully explain any changes that are made and make certain that they are consistent with other policy objectives.

The FCBA is concerned that a number of the proposals set forth in the Notice of Proposed Rule Making are vague. Moreover, no proposed rules have been set forth for comment, and it is unclear how the proposed changes will interact with existing rules. The FCBA has a particular concern over the proposed implementation of a point system which could well encourage the kind of sham applications that the Commission has strived to eliminate. It is essential that competing applicants retain the right to test a competitor's proposals through discovery and cross-examination to ensure that the best-qualified applicant is chosen.

criteria to govern the comparative hearing selection process.^{2/} Therefore, the purpose of these comments is to offer the FCBA's thoughts on the procedural aspects of the proposals set forth by the Commission.

3. First, regardless of the criteria adopted, the Commission should carefully evaluate and articulate the policy rationale for each criterion it ultimately determines to use in any revised comparative hearing process. This review should both ensure consistency with other Commission policy objectives and the assumptions underlying those policies, and address the concerns voiced by the court of appeals in Bechtel v. FCC, 957 F.2d 873 (D.C. Cir. 1992).

4. In addition, the FCBA urges the Commission to consider the procedural consequences of its proposals and to make certain that the rules ultimately adopted are coherent with the reforms adopted in the Commission's Report and Order in the Matter of Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases ("Comparative Hearing

^{2/} The FCBA Committee reviewing the Commission's proposals in this docket did agree on one substantive issue, that being that one of the alternative methods of breaking "ties" which might result after the application of the comparative criteria should not be used. The FCBA believes that the Commission should not use a tiebreaker which relies on the timing of the filing of an application for determining which applicant should be preferred. The filing of an application during a filing window is often decided by nothing more than luck, e.g. in learning about the new channel, in locating a proposed transmitter site, or in finding an engineering consultant who is available to work on the project. The FCBA sees little or no value in predicting the abilities of a potential licensee by the date on which an application is filed, and thus urges that this criterion be rejected as a potential tiebreaker.

Reform") 6 FCC Rcd 157 (1990) recon. granted in part, 6 FCC Rcd 3403 (1991). In addition, the FCC should preserve the procedural rights of competing applicants to test each other's claims. The instant comments are directed to these objectives.

I. The Commission Should Ensure That The Criteria Selected Are Consistent With Its Other Policy Objectives and Supported by a Clearly Articulated Policy Rationale

5. As the Commission observed in the Notice of Proposed Rulemaking ("NPRM"), this proceeding represents the first comprehensive review of the comparative criteria since they were adopted nearly 30 years ago in the Policy Statement. NPRM, ¶15. In view of the vast changes that have taken place in the mass media industry in the last three decades, the Commission is correct to question whether use of the existing criteria continues to result in selection of the applicant that will best serve the public interest, particularly since those criteria were adopted without a notice-and-comment rulemaking proceeding. NPRM, ¶19. In addition, the Commission has been instructed by the court of appeals in Bechtel v. FCC, supra, to demonstrate why its focus on the integration criterion is still in the public interest. Although the Bechtel decision focuses only on integration, the court's insistence that the Commission explain its retention of a rule or policy in the face of substantial changes in the factual or legal underpinnings for that rule or policy applies with equal force to some of the other comparative criteria identified in the Policy Statement. For all of these reasons, therefore, it is critically important for the Commission

to carefully evaluate and articulate the policy rationale for any actions taken in this proceeding, both to ensure consistency with its other policy objectives and the assumptions underlying those policies and to satisfy the requirement that it "present evidence and reasoning to support its substantive rules." See Bechtel v. FCC, supra.

6. The importance of adopting criteria that are consistent with other policy objectives and the assumptions underlying those policies can be illustrated with several examples drawn from the current comparative criteria and the proposals contained in the NPRM. Under the current criteria, past broadcast experience (which is not addressed in the NPRM) is deemed to be a factor of minor significance, because the Commission assumes that successful applicants eventually can learn to become good broadcasters. On the other hand, the Commission awards considerable credit to an applicant who has resided in the community for a substantial period of time on the assumption that the applicant who is a local resident has knowledge about the community that will enhance that applicant's ability to provide a programmatic response to local needs and concerns. Presumably, an applicant who can learn the intricacies of the broadcasting business can also learn about his or her community of license. However, the Commission has never explained the seeming inconsistency in its treatment of these two factors.

7. The Commission's proposed criteria reflect a similar inconsistency. On the one hand, the Commission proposes to eliminate the integration criterion because it assumes that a

professional manager can provide the same (or better) quality of service as an inexperienced integrated owner. If this assumption is valid, however, it calls into question the legitimacy of the Commission's proposal to retain local residence as a criterion: On what basis can the Commission place reliance on the owner's past and present local residence in the community if that owner simply hires a professional manager to run the station? This question becomes even more troublesome where the applicant has more than one owner. For example, what is the basis for awarding credit to a principal who is a local resident but who holds only a 10 percent interest in the applicant and will not work at the station? In what manner will that principal's knowledge of the community influence the station's programming?

8. A similar dilemma confronts the Commission in assessing the diversification criterion. In its recent action expanding the number of radio stations that may be owned or controlled by a single entity, the Commission justified its action by explaining that audiences in a particular market "perceive program and viewpoint diversity in terms of the ideas available to them locally, regardless of what ideas are available to them in other broadcast markets." See Revision of Radio Rules and Policies, 70 RR2d 903 (1992). That perspective, however, may not be fully consistent with the current application of the diversification criterion in comparative proceedings where ownership of a broadcast station -- no matter how distant from the community in

question -- is counted as a demerit against the applicant holding such an interest.^{3/}

9. As noted above, the FCBA does not intend by these comments to endorse or reject any particular substantive criteria. The foregoing discussion is intended merely to illustrate the interconnectedness of the comparative criteria with other policy objectives of the Commission and the assumptions underlying those policies. Because of this interconnectedness, the Commission must carefully evaluate the impact of the proposed criteria on the attainment of its overall policy objectives and must take care to articulate a reasoned and reasonable basis for adopting criteria that may be somewhat inconsistent with those other policies if its actions in this docket are to withstand judicial scrutiny.

II. It Is Unclear How The Commission's Proposed Changes Will Be Implemented

10. The Notice of Proposed Rule Making ("NPRM") adopted by the Commission does not include any proposed rules and it is not evident how the proposals advanced in the NPRM, particularly the system of numerical preferences, would be implemented. Furthermore, the NPRM does not reveal how the proposed changes would dovetail with the changes effectuated August 1, 1991 in the

^{3/} In comparative proceedings, the Commission may wish to consider the benefits of diverse ownership differently that it considers such benefits in the multiple ownership context. The multiple ownership rules set forth certain minimal eligibility requirements and the Commission may want to have a standard in comparative hearings which more broadly encourages diversity. In any case, the Commission should explain its choice of policy.

Comparative Hearing Reform proceeding. The FCBA is concerned about these omissions and urges the Commission to circulate and obtain comments on any proposed rules before they become effective lest a period of confusion arise. These comments illustrate the FCBA's concerns.

11. In order to evaluate comparative criteria, the Commission is proposing a point system under which an applicant would receive a specified number of points based on its attributes under each comparative criterion. However, the basis for the allocation of points is not clear, and it is possible that the point system will not produce the intended result of serving the public interest.^{4/} For instance, under the current Policy Statement, the local residence and minority preferences--two factors which the Commission may retain--are considered enhancements to the integration criterion and are weighed in proportion to the ownership interest of the principal proposing integration who possesses those attributes. To that extent, the current system is quite specific and easily implemented. It is relatively simple to calculate the credit for an applicant with a principal who owns 30% of the applicant and is an ethnic minority and a local resident. The qualitative "enhancing" credits are triggered only if there is a quantitative integration proposal.

^{4/} The NPRM states that the proposed point system is similar to one adopted in the instructional television fixed service. However, the preferences used in that service are much simpler and more capable of being easily quantified than those proposed for the broadcast services. Moreover, applicants for the ITFS service are chiefly educational institutions.

12. The analysis could well become far more difficult under the point system described in the NPRM. The Commission suggests that local residence will be a factor that stands on its own irrespective of the integration criterion. It is unclear whether applicants would receive equal points for local residence regardless of the length of local residence of their principals. For instance, would someone with 30 years of local residence receive the same number of points as someone with 5 years of local residence? It is likewise unclear what role civic involvement will play. At the present time, civic activities can qualitatively enhance the local residence factor. The Commission has not indicated how it proposes to compare a person who has 30 years of local residence but no civic involvement with a person who has 10 years of local residence and extensive civic activities. In fact, the FCBA has a serious concern that the point system simply will not be able to take into account all of the numerous variations in the proposals of applicants that the present system does consider.^{5/}

13. Similar problems arise in the proposed allocation of points for minority ownership. The NPRM indicates that this criterion could be credited even in the absence of integration credit. According to the NPRM, the elimination of integration as

^{5/} ALJs presently are able to assign proportionate weights to the various comparative criteria. There appear to have been few cases where the relative weights assigned to such criteria have been disturbed on appeal. Instead, most successful appeals turn on questions of whether an applicant should receive any credit at all, either because its integration credit should have been rejected, or because some basic qualifying issue should have been considered.

a prerequisite would "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." NPRM at ¶24. However, tax certificates and distress sales are authorized only in situations where the minority person or persons are in control of the applicant. The Commission has not indicated whether "control" would be necessary to obtain minority credit in the comparative setting or considered the implications of such a change. Thus, it is not clear whether an applicant would be entitled to any points if its minority owner or owners did not have a controlling interest or how many points would be assigned to a non-controlling interest. Problems could also arise even if points were confined to minority-controlled applicants. The NPRM does not indicate whether there would be any difference in the allocation of points between one applicant controlled by a minority but also with non-minority owners versus another applicant which is 100% minority-owned.

14. The difficulties in the proposed point system extend to the other areas of comparison as well. For example, under the Policy Statement, numerous factors come into play in determining an applicant's diversification status. The Commission presently considers the proximity of other media interests to the community of license, the extent of ownership in the other media interests and even the presence of other media in the community where an applicant's or principal's media interest is located. Presumably, these factors would still be used in any

diversification analysis but that is not clear from the NPRM. It is clear, however, that it would be difficult to allocate points for diversification. Would 100% ownership of a broadcast station 1,000 miles away from the proposed community of license receive the same points as ownership of a station 100 miles away? And how would the point allocation be affected if the ownership of other media is held by an owner who does not have a controlling interest in the applicant? Other situations can be conceived, but the foregoing queries are sufficient to demonstrate the need for a precise formula to guide the allocation of points.

15. One obvious difficulty with the proposed point system is that, unlike the present system, the point system is not easily adaptable to changes in the Commission's rules or policies. Under the present system, each factor is weighed under prevailing Commission policies and given a suitable credit or demerit. The point system would substitute a set of rigid criteria that would require extensive revision of Commission forms and current procedures. Moreover, it is not evident how future policy changes could easily be incorporated into the point system. We urge that the Commission carefully address all of these issues in reaching any decision revising these rules.

III. The Right to Test A Competitor's Claims Must Be Preserved

16. The FCBA is concerned that the proposed point system will engender the very kind of sham applicants that the Commission has strived to prevent unless there continues to be a mechanism (discovery and cross-examination) by which competing

applicants can test the points proposed. The NPRM does not contain any indication as to how the proposed point system will fit into the existing hearing framework. The FCBA submits that if applicants are to propose the points to which they believe they are entitled, discovery should be permitted to test the points that are claimed and cross-examination should continue to be permitted where appropriate, under the discretion of the Presiding Judge. Although the Commission is rightfully interested in expediting hearing cases, there can be no substitution for the adversary process to test the claims of parties. Indeed, due process requires that competing applicants be given the opportunity to challenge an opponent's proposals. The Commission has already learned in the financial certification arena that the mere checking of a box is an insufficient basis to know whether an applicant is entitled to the credit it claims. The same risk attends virtually any criteria the Commission might adopt for the comparative hearing process. Indeed, unless an applicant knows that its claims may be tested in the crucible of an adversary hearing, it may be tempted to make unjustified claims. Thus, discovery and cross-examination at a hearing can be critical in determining whether a minority person in a two-tiered organization is in fact in control, whether a daytime preference is warranted, and whether the applicant is otherwise entitled to be credited as a bona fide applicant. The Commission should therefore reaffirm the applicability of the procedural rules in Section 1.201 et seq. and Section 1.301 et seq.

IV. Any Changes Made By The Commission Must Be Consistent With The Current Rules, Policies And Procedures Governing The Conduct of Comparative Proceedings

17. The FCBA urges the Commission to take care to ensure that any changes it makes are consistent with the current rules, policies and procedures for comparative hearings. The Notice makes reference to a desire to avoid frivolous litigation over trivial differences and, to that extent, implies that current rules governing hearings would remain in place. However, the Notice does not expressly address the procedures to be followed. It would be useful if the Commission could explicitly state that the current rules and policies -- with the modifications proposed below -- remain in effect. That clarification would provide assurance to applicants and guidance to ALJs that parties would still be entitled to the production of documents, the conduct of depositions, and the presentation of evidence at an oral hearing (subject to the limitations of Section 1.248). To the extent the Commission does change the comparative criteria, consideration should be given to the retention, revision or adoption of rules, policies and procedures which govern the conduct of comparative proceedings.

18. First, the Commission would have to revise its Form 301 application to require the identification of all credits or preferences to be claimed by an applicant (which could include minority preference, daytime preference, and local

residence).^{6/} The Commission should also preserve the current policies and procedures which require the identification of all comparative credits in the Form 301 application and prohibit any subsequent upgrading. Any change in these latter policies and procedures would result in the kind of gamesmanship which the Commission has rightfully criticized in the past.

19. Second, the Standard Document Production Order under Section 1.325(c)(1) would have to be amended to eliminate references to criteria (such as integration, local residence, civic participation, and prior broadcast experience) to the extent that any of those factors may no longer be applicable. In all other respects -- including organization documents -- a standard document production would remain unchanged, especially if the Commission retains the policies promulgated under Anax Broadcasting, 87 FCC2d 483 (1981).

20. Third, the Commission would have to amend the Standardized Integration Statement required under Section 1.325(c)(2) to the extent integration and other enhancement factors are no longer to be considered. Instead, the applicant would have to submit information concerning claims under the new criteria.

21. It is important, therefore, that the implications of any changes made by the Commission be carefully thought through. There are a large number of rules involved in the comparative

^{6/} A party need not claim any credit for spectrum efficiency. Preferences on that criteria are based upon the engineering showings in the respective applications.

hearing process which may need appropriate adjustment if the comparative criteria change.

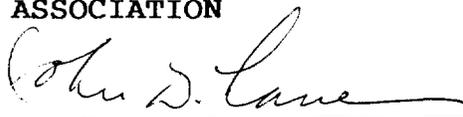
22. The FCBA agrees with the Commission that any new criteria and procedures should be applied only prospectively to applications which have not yet been designated for hearing. Any other course would be unfair and would probably result in more extensive litigation (with its corresponding delays) as applicants dispute the wisdom and legality of any retroactive application.

Conclusion

WHEREFORE, in view of the foregoing, it is respectfully requested that the Commission consider the foregoing comments in the adoption of any new comparative criteria for proceedings involving new broadcast stations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sybil Briggs, hereby certify that I have this 2nd day of June, 1992, mailed by first class United States mail, postage prepaid, copies of the foregoing "COMMENTS OF THE FEDERAL COMMUNICATIONS BAR ASSOCIATION" to the following:

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