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FILE

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

THE MCPHERSON BUILDING  
901 FIFTEENTH STREET, N.W., SUITE 1100  
WASHINGTON, D.C. 20005

425 PARK AVENUE  
NEW YORK, N.Y. 10022  
(212) 836-8000  
1999 AVENUE OF THE STARS  
SUITE 1600  
LOS ANGELES, CA 90067  
(213) 788-1000

(202) 682-3500  
TELECOPY NUMBER  
(202) 682-3580

ADMIRALTY CENTRE  
TOWER 1, 32<sup>ND</sup> FLOOR  
18 HAR COURT ROAD  
HONG KONG  
(852) 865-7676  
SQUARE DE MEEÛS 30  
1040 BRUSSELS, BELGIUM  
(322) 514-4300

WRITER'S DIRECT DIAL NUMBER

(202) 682-3538

June 2, 1992

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FEDERAL COMMUNICATIONS COMMISSION  
OF THE SECRETARY

Ms. Donna R. Searcy  
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: GC Docket No. 92-52  
Reexamination of the Policy Statement  
on Comparative Broadcast Hearings

Dear Ms. Searcy:

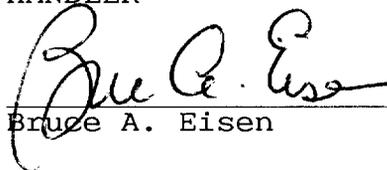
On behalf of Arnold Broadcasting Company, there is transmitted herewith its comments in response to the Commission's Notice of Proposed Rulemaking, FCC 92-98, released April 10, 1992.

Should any questions arise with respect to this matter, kindly communicate directly with this office.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS  
& HANDLER

BY:

  
Bruce A. Eisen

Enclosure

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## SUMMARY

The Commission, by virtue of its Notice of Proposed Rulemaking, proposes to negate the 1965 Policy Statement on Comparative Broadcast Hearings. It would be precipitous to do so.

The Notice of Proposed Rulemaking responds to the United States Court of Appeals for the District of Columbia Circuit admonition that the Commission spell out the reasons that the comparative criterion of integration of ownership and management helps insure that a licensee will be more sensitive to community problems and needs. There is no way to "study" the principle. The Court should be satisfied with a priori reasons to retain the integration criterion.

In addition to retaining the integration criterion, the Commission should do away with the Anax doctrine and impose a "three year rule" for applicants who obtain construction permits through the hearing process. These changes would help end manipulation by applicants of comparative criteria and also curtail the unnatural business arrangements noted by the Court.

The point system intended to expedite comparative hearings should not be implemented. It would both frustrate and dehumanize the process, and it would not result in any constructive benefit.

**TABLE OF CONTENTS**

	<b>PAGE</b>
Summary . . . . .	i
I. Background . . . . .	2
II. Discussions . . . . .	2
III. Conclusion . . . . .	15

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

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

COMMENTS OF ARNOLD BROADCASTING COMPANY

Bruce A. Eisen, Esquire  
KAYE, SCHOLER, FIERMAN, HAYS &  
HANDLER  
901 1th Street, N.W.  
Suite 1100  
Washington, D.C. 20005  
(202) 682-3500

Counsel for Arnold Broadcasting  
Company

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BEFORE THE  
**Federal Communications Commission**  
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FEDERAL COMMUNICATIONS COMMISSION  
OF THE SECRETARY

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

**COMMENTS OF ARNOLD BROADCASTING COMPANY**

Arnold Broadcasting Company, by its attorney, hereby submits its comments in response to the Commission's Notice of Proposed Rulemaking, FCC 92-98, released April 10, 1992 ("NPRM"), which discusses and proposes significant changes in the manner in which comparative broadcast hearing cases are resolved before the Commission. In particular, the NPRM calls for the general repeal of the Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393 (1965) ("Policy Statement"), the principles of which have governed comparative broadcast hearings for nearly three decades. In support thereof, the following is shown:

## I. BACKGROUND

A number of the proposals contained in the NPRM are unworkable. There are, however, certain suggestions advanced by the Commission which deserve adoption in modified form. Perhaps what is most disturbing about the NPRM is the premise that "a revised [comparative hearing] system could produce swifter, more certain choices among applicants for new broadcast facilities, while preserving the real public interest benefits of making such choices".<sup>1</sup> To hasten the process ("a point system won't significantly speed matters along), the Commission would turn its back on a generation of regulation which has served the public well, notwithstanding imperfections which cannot be overlooked and which should be retooled. Adjustments to the system are overdue. However, it would be wrong to tear down the framework of a flexible, idealistic design, and there is no reason to disparage the concept of the ideal in the regulatory system, even if its achievement is never fully realized.

## II. DISCUSSION

There are two present elements of the comparative hearing process that are justly criticized. First, the time and expense to both the Commission and the parties applicant is often enormous. Second, the process has devolved into the routine analysis of an applicant's bona fides, as if most parties who

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<sup>1</sup> NPRM, par. 1.

choose to weather a comparative hearing are intent upon deception from the outset. This latter element, which gave rise to the description of "sham applicant",<sup>2</sup> must be removed if the public interest is to be served and hearings expedited to conserve time and money. It is, after all, the public's interest that the most qualified applicant be awarded a license within a reasonable amount of time.

Some years ago the Commission was questioned for excessively regulating its policy on the ascertainment of community problems and needs, a procedure which was ultimately streamlined to the point where it no longer has any real relevance to comparative broadcast hearings. The imposition of additional and changing ascertainment standards was built upon good intentions, but they became a burden on applicants, the public, and the Commission. That was at least in part the fault of the Commission which had insisted that mutually exclusive applicants follow a comprehensive primer to achieve compliance, and allowed applicants to "fly speck" problems in the ascertainment showings of competing applicants. See, e.g., El Rio Broadcasting. \_\_\_ FCC 2d \_\_\_, 39 RR2d 1272 (1976).

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<sup>2</sup> Recently, the Commission held that the "ambiguity" connected with the word "sham" should result in its disuse and, instead, integration proposals should be analyzed "in terms of their overall reliability". Evansville Skywave, Inc., 7 FCC Rcd. 1699-1700 (1992). The difference is negligible. Applicants often lose on integration because purportedly insulated principals are not what they appear to be.

Comparative broadcast hearings tried pursuant to the Policy Statement have also been built upon good intentions and, like outdated ascertainment policies, have become fraught with difficulties, some of which are of the Commission's own making.

Most of the good and much of the bad that surrounds the comparative hearing process derives from the criterion of integration of ownership into the day-to-day management of the station. The NPRM refers to the Policy Statement "presumption" that owners integrated into the day-to-day management of the station would "inherently" provide better service to the community because they would likely be more sensitive to local needs. The Commission now questions this precept, citing "the highly competitive nature of today's broadcast market and the professionalism of today's broadcast operations".<sup>3</sup> The Commission also refers to the finding of the United States Court of Appeals for the District of Columbia Circuit that the Commission has not spelled out why an owner/manager will be more sensitive to community needs than an owner who hires a professional manager.<sup>4</sup> The advantages of the integration factor may be elusive, but they surely exist.

Some things cannot be proved or disproved through reference to hard data. The NPRM's reference to professionalism in broadcast operations is not adequately defined, and one

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<sup>3</sup> Par. 14.

<sup>4</sup> Bechtel v. FCC, 957 F2d 873 (D.C. Cir. 1992).

questions the extent to which professional broadcasters are involved in the start-up operations which result from comparative hearing winners. The Commission also wonders whether an integrated owner might not necessarily provide a more responsive service than would a non-integrated owner, and thereby takes its cue from the Bechtel Court inquiry. It must be emphasized that the Court has not called for any kind of study, just for an answer of "why" an integrated owner will be more attuned to community problems. There is no way to empirically demonstrate the advantages to a community of integration of ownership into the day-to-day management of a radio station. The benefits are a priori, incapable of quantification, but self-evident, nevertheless, and highly desirable.

Analogies to the Commission's integration criterion exist in businesses other than broadcasting. For instance, the McDonald's Corporation, a well known "fast food" restaurant chain with facilities located throughout the country, seeks out franchisees who will commit themselves to residing in the areas in which the restaurants are located and to working "full-time" in operating the businesses. One cannot qualify for a franchise if he or she is an absentee or part-time owner. The commitment made by McDonald's franchisees is not window dressing. It represents an institutional policy which the organization believes will result ultimately in increased revenues for both the franchisees and the company. Hence, McDonald's believes that integration of ownership and management places the restaurant

operator into direct contact with the very community that he or she serves on a daily basis. This, it urges, results in a heightened consciousness of the changing needs of the community and also provides knowledge of community problems that have some relationship to McDonald's business. The company expects its franchisees to become involved in various community projects, many of which have some connection with the restaurant business. For instance, McDonald's franchisees have been involved in campaigns to educate the public in the disuse of certain materials considered bad risks for the environment. They are encouraged to take active roles with area schools, local sports teams, charities and civic organizations because it helps build positive sentiment that may prove invaluable in the future.

McDonald's has found that its integrated franchisees work hard to maintain the quality of the company's reputation and service. This, in turn, leads to greater profits for both the company and the franchisee who, knowing the community and becoming involved in its affairs, is identified personally with the local business, thereby helping to ensure customer loyalty.<sup>5</sup>

Similar concerns apply to broadcasting, and the parallel to the broadcasting industry should not be lost. Professionalism in broadcast operations has undoubtedly advanced over the years. However, to the extent that the Communications Act still requires the broadcaster to serve the public interest,

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<sup>5</sup> This information was obtained from McDonald's Corporation.

the integration criterion remains an important force, especially insofar as it favors local residents who promise to work at the station in question. A local owner will generally be more sensitive to local complaints and to the changing nature of his service area. How could it be otherwise? Linking ownership with localism and full-time involvement clearly transcends the idea of a professional manager operating a radio station under some far flung entrepreneurial regime. A professional manager cannot be expected to have the same stake in the operation of the station as a local owner has.

Anyone who attempts to show this by the numbers will fail. There can be no "study" or compilation of data to prove this truism. A local owner who works full-time at his or her radio station will have a heightened sense of responsibility to the community of license and an increased sensitivity to the needs of the service area. It is a matter of one's natural ties to a community and the sense of ownership that outdistances professional management, no matter how efficient the latter may be. Perhaps one can argue that the smaller the community, the deeper these ties exist. If there is less of an argument for retaining the integration criterion in large communities, the Commission may nevertheless take official notice that the majority of comparative broadcast hearings are for construction permits in small to medium size communities of license, i.e. the very kinds of communities where local integration of ownership and management are likely to provide the greatest benefits.

Beyond the social reasons that underlie the need to retain the integration criterion, there are other factors which render its repeal of more serious concern. In the absence of local integration of ownership and management as a comparative factor to help determine the permittee in a comparative hearing, the prospect of speculation in broadcast properties will increase. Construction permits will be sought, obtained, and traded like ordinary commodities. Applicants with no roots in, or connections to, the community of license can be expected to have a diminished regard for the problems and needs that confront the listening area, and while perhaps such ownership's commitment to serving the public interest can be tested at renewal time, this should not be the Commission's "safety valve". That is to say, a license renewal expectancy is no substitute for the initial anticipated public commitment derived from an applicant's existing relationship with his or her community and knowledge of the community's needs and interests. There is just no reason to play fast and loose with human nature, and the Court should be presented with such a viewpoint.

Indeed, the concept of speculators utilizing the comparative hearing process to their own ends, raises another question that the NPRM fails to adequately address. While it is true that the Commission offers the prospect of a "service continuity preference" as a new criterion favoring applicants who commit themselves to owning and operating the station for at

least three years,<sup>6</sup> it is submitted that by imposing a three year "anti-trafficking" rule on all applicants who obtain construction permits through comparative hearings, that some of the problems which the Court believes eviscerate the process would be neutralized. Rather than awarding credit to applicants who commit themselves to own and operate the station for at least three years, it seems more logical to require such a commitment from the beginning.

The Court would probably be satisfied if the Commission took two actions in the modification of comparative hearings. First, the imposition of a three year rule on all applicants that obtained their construction permits through hearing and, second, the repeal of the Anax doctrine. The Commission had an opportunity to alter the Anax doctrine during the course of a prior inquiry, but chose not to.<sup>7</sup> The doctrine may have been adopted for solid, well-meaning reasons, but it has resulted in a wholesale distortion of the hearing process because of the time and expense competing applicants devote to proving that a competitor with allegedly active and passive principals is nothing more than the aforementioned "sham applicant", or an applicant which unknowingly has crossed the threshold so that its insulation should be lost.

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<sup>6</sup> NPRM, par. 28.

<sup>7</sup> Proposals to Reform the Comparative Hearing Process, 5 FCC Rcd. 4050, 4053 (1990).

The NPRM refers to the "manipulation" by applicants of comparative criteria and the Bechtel Court's allusion to "strange and unnatural" business arrangements.<sup>8</sup> It is not the integration criterion that has led to this problem. Given the value of broadcast frequencies and the comparative standards that become important in licensing them, there will always be attempts by some applicants to circumvent the system. Cf. Raynel Broadcasting Company, Inc., 5 FCC Rcd. 3350 (Rev. Bd. 1990); Berryville Broadcasting Company, 70 FCC 2d 1 (Rev. Bd. 1978); Henderson Broadcasting Company, Inc., 63 FCC 2d 419 (Rev. Bd. 1977). Right or wrong, the Bar, the Administrative Law Judges, and the Commission, itself, have spent much time and energy on questions relating to the debunking of real-parties-in interest, often scrutinizing applicants which have voting and non-voting principals.

No one who frequently tries mutually exclusive broadcast cases in hearings has avoided the problem, whether on behalf of his own client or with regard to a competing proposal. So much time is devoted in the discovery stage, the pleading stage, and the testimony stage in an attempt to discredit purportedly insulated owners, that the entire process unravels into a dark labyrinth of who did what and when. Substantial resources could be conserved by all parties and by the Commission if pre-Anax law were used to test the qualifications of a two-

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<sup>8</sup> NPRM pars. 2 and 15.

tiered applicant. That is to say, limited partners and non-voting stockholders would be attributed ownership interests for purposes of determining quantitative credit under the integration criterion. It is respectfully submitted that the increased entry of minority applicants into broadcast ownership that might have resulted from continued processing under the Anax doctrine, is not enough to offset the wasteful litigation that has grown up and around this unwieldy precept.

Among other matters set forth in the NPRM, the Commission questions whether or not proposed program service,<sup>9</sup> past broadcast record<sup>10</sup> and auxiliary power<sup>11</sup> should be retained in any way as material considerations in comparative hearings. Cases are not won on the basis of those three criteria. Few parties attempt to demonstrate that there should be some advantage from proposed program service and/or past broadcast record. The showings necessary to the addition of these issues are so difficult to compile that there does not appear to be any need to retain them. Auxiliary power is inconsequential. No case has been decided on its provision or lack thereof. The NPRM rightfully states that auxiliary power is desirable and readily implemented. But there seems to be no good reason to attach this element to the comparative hearing process, especially without

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<sup>9</sup> NPRM, par. 16.

<sup>10</sup> NPRM, par. 18.

<sup>11</sup> NPRM, par. 19.

policing existing stations to determine whether or not auxiliary power commitments have been implemented as originally proposed.

Assuming that the Commission retains its integration criterion as an important aspect of the comparative hearing process, it would be wrong to eliminate consideration of minority ownership integrated into the day-to-day operation of a particular proposal in hearing. However, it is respectfully submitted that racial minority ownership, by itself and without regard to integration, should be of some comparative significance. The court has previously held that ownership best ensures diversification of media voices and content. See TV 9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir., 1973), cert. denied, 418 US 986 (1974). The same questions which surround the Anax doctrine and which have caused so much counterproductive bickering over who really controls an applicant, could be eliminated by aggregating minority ownership into a quantitative enhancement without the need for integration into the day-to-day operation of the station. The amount of minority ownership, in this regard, should exceed 35% so that a de minimus amount of ownership doled out by applicants largely for purposes of gaining comparative advantages would be ended.

The NPRM discusses the implementation of a "point system" intended to achieve public interest benefits in a more efficient manner.<sup>12</sup> Under this system, an applicant would

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<sup>12</sup> NPRM par. 31.

receive a specified number of points based on its attributes under each comparative criterion, and the winner would be determined by adding up the total number of points to which it is entitled.

A point system intended to expedite comparative hearings is ill-advised and will frustrate the intended purpose. Even under the point system proposed by the Commission in its NPRM, the points would be awarded to applicants on a highly subjective basis. That means that someone would still have to decide whether or not a discrete applicant was entitled to a given number of points. Applicants and their attorneys could tirelessly wrangle over the number of points awarded to an applicant just as surely as they presently argue over all criteria subsumed under the standard comparative issue. A point system will not improve the process. It is no better than awarding credit, be it minor, substantial, or otherwise, to applicants who make affirmative showings that they are entitled to certain quantitative and qualitative enhancements set forth in the Policy Statement. The point system just dehumanized the process.

Some of the elements discussed in the NPRM and referenced under the "point system" are of interest. For instance, the Commission offers the possibility of a tie-breaker for substantial broadcast experience, although it questions whether or not that would disadvantage women and minorities.<sup>13</sup>

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<sup>13</sup> NPRM, par. 36.

Past broadcasting experience has not been given its due as a comparative criterion in the past. It is respectfully suggested that the amount of importance to be given past broadcasting experience under the integration criterion should be increased. Most cases cite past broadcasting experience as of minor significance. However, where the Commission's hearing process has focused so strongly on real-party-in interest questions and other matters relating to the bona fides of an applicant, integrated principals who have solid past broadcasting experience can more readily be expected to honestly meet their commitments to the station than those who have never had hands on experience. While it is true that this is another factor that cannot be empirically shown, nevertheless, one who has worked his way up the ladder through years of service at other broadcast facilities, can reasonably be expected to meet a commitment at his own radio station with increased fervor and devotion. Rather than discouraging new entrants into broadcasting, the use of this criterion will help insure more stability and honesty in following through on integration pledges. Relegating past broadcasting experience to a minor corner is a mistake. It should be viewed as a significant qualitative enhancement, just below local ownership.

### III. CONCLUSION

Through some modification and further fine tuning, the Commission's comparative hearing process should be retained. All that is needed is a return to pre-Anax regulation, the imposition of a three year rule, and some of the other improvements suggested in these comments. It is believed that by following this course of conduct, the Court of Appeals will be satisfied and the viability of the Policy Statement assured for another generation.

Respectfully submitted,

**ARNOLD BROADCASTING COMPANY**

By:   
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Bruce A. Eisen  
Its Attorney

KAYE, SCHOLER, FIERMAN, HAYS  
& HANDLER  
901 15th Street, N.W.  
Suite 1100  
Washington, D.C. 20005  
(202) 682-3500

June 2, 1992