

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 )  
Broadcast Hearings )  
 ) RM-7739  
 ) RM-7740  
 ) RM-7741

**RECEIVED**

**JUN - 2 1992**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

TO: The Commission

## COMMENTS

James E. Martin, Jr., InterMart Broadcasting Gulf Coast, Inc., InterMart Broadcasting of Palm Beach, Inc., and Emision de Radio Balmaseda, Inc. (hereinafter referred to as the "InterMart Companies"), through their attorney, hereby file their comments in the above referenced Notice of Proposed Rulemaking ("NPRM") proceeding.

The InterMart Companies advocate the following changes to the Commission's comparative hearing rules and policies:

(1) The elimination of the integration criteria or alternatively the adoption of an integration criteria that would give equal weight to applicants proposing integration of ownership into management and applicants proposing to hire a professional on-site manager; (2) the elimination of diversification in comparative hearing proceedings unless a threshold showing is made that the grant of a construction permit to a particular applicant would adversely effect the Commission's goals of promoting diverse viewpoints and

No. of Copies rec'd  
List A B C D E

0 + 14

preventing undue concentration of economic power; (3) the adoption of a Finder's Preference; and (4) the adoption of the new rules retroactively, with an opportunity for applicants to adduce new evidence based on the modified rules.

The InterMart Companies currently have pending before the FCC four applications for new FM facilities.<sup>1</sup> The InterMart Companies are all owned or majority control is held by James Martin, Jr. Mr. Martin has been actively involved as a Commission licensee for many years. Mr. Martin is currently the controlling stockholder of InterMart Broadcasting of Georgia Coast, Inc., licensee of WGOO (FM), Midway, Georgia. Mr. Martin has also held controlling or participatory interests in the following FM radio stations: KMMK, Las Vegas, WMMO, Orlando, Florida, WAYP Holmes Beach, Florida and WXDJ, Homestead, Florida. Mr. Martin's interests in the above stations were acquired as the result of negotiated settlements stemming from the Commissions comparative hearing process. Mr. Martin has filed approximately twenty-two applications for new FM radio facilities in different regions of the country. Based on

---

<sup>1</sup> (1) InterMart Broadcasting Gulf Coast, Inc., applicant for a new FM station at Punta Rassa, Florida; (2) InterMart Broadcasting of Palm Beach, Inc., applicant for a new FM station at Jupiter, Florida; (3) James E. Martin, Jr., applicant for a new FM station at Harrisburg, North Carolina; and (4) Emision de Radio Balmaseda, Inc., applicant for a new FM station at Ponte Vedra Beach, Florida.

his experience as an applicant before the FCC and as an operator of radio stations, Mr. Martin, through the InterMart Companies, files the following comments.

It is the opinion of the InterMart Companies that the 1965 Policy Statement<sup>2</sup> no longer serves the purpose for which it was designed. The Court of Appeals for the District of Columbia Circuit in Bechtel v. FCC, No. 91-1112 (D.C. Cir. 1992) 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. 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.

The 1965 Policy Statement sets out different criteria for comparing applicants. Of these, two are of primary importance in choosing the comparatively superior applicant; (1) diversification of control of the media of mass communications; and (2) integration of ownership into management.<sup>3</sup> As the Commission stated in the NPRM:

---

<sup>2</sup> Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393 (1965).

<sup>3</sup> 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; AM daytimer status; and past broadcast experience.

"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." Id. para. 10. It has been the experience of the InterMart Companies that comparative hearings routinely digress into litigation over trivial interpretations of the Commission's comparative criteria without addressing how these artificially drawn distinctions will lead to choosing a licensee that will better serve community needs. For example, is an applicant that has lived in the community of license for forty years really better qualified to serve the community's needs than an applicant who has lived in the same community for thirty five years?<sup>4</sup>

The InterMart Companies urge the Commission to eliminate or significantly diminish the preferences awarded under the integration criteria. The business of broadcasting has changed dramatically since the 1965 Policy Statement was adopted. With the entry of new competitors such as cable and the expanded number of radio channels, broadcasters find themselves competing for an increasingly fragmented segment of advertising revenue. To serve the needs of their communities broadcasters must adopt new tactics to survive. In the past few years, satellite

---

<sup>4</sup> See e.g., Kennelwood Broadcasting Company, 7 FCC Rcd 520 (1992).

program delivery services have taken over, in many radio stations, the day to day responsibility of programming the music and much of the news an affiliated station airs. Even stations with live programming increasingly rely on consultants and services that advise them on the types of music and programs they should air. Thus the needs of the public for music and news are being filled more and more by sources external to the management of the station.

As radio changes, the rational, perhaps once valid, for awarding a preference for integration of ownership into management diminishes. As the Bechtel Court stated: "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." Slip Op. at 12. Though Mr. Martin is actively involved in the station operations, he relies on professionals to manage the day to day affairs of his stations. The needs of the listening public are in no way less served by this method of operation. As long as ultimate responsibility rests with the owner, an applicant should be free to propose, in the comparative hearing context, that a professional manager will be hired to oversee the day to day affairs of the station.

The InterMart companies advocate the elimination of the integration criteria. Alternatively, the InterMart Companies advocate the adoption of a standard that would give equal weight to applicants proposing integration of

ownership into management and applicants proposing to hire a professional on-site manager.

A more practical method of choosing among competing applicants would be to award a preference to those applicants who can demonstrate that they have experience in owning or operating a radio station. A dispositive preference should be awarded to an applicant which can demonstrate a past record of constructing a new radio station, placing it on the air and operating it for at least six months. A construction permit awarded to an applicant experienced in building and operating stations has the greatest likelihood of being utilized to serve the public interest.

An operator that has made his station a financial success has done so by being responsive to the needs of the community he serves. In 1965 there were a limited number of stations. Today, listener can choose from a plethora of stations, serving different needs within the community. A station that does not serve the needs of its community will lose listeners and consequently will not be financially successful. Thus, an applicant with a proven record of success in the radio business is most likely to operate, a facility awarded by the Commission, in the public interest.

The 1965 Policy Statement gives little credit for broadcast experience. In Bechtel, the Court wondered whether the public interest was better served by giving the

amateur, favored by the happenstance of local residency or minority preference, a preference over those who have found through years of experience, that success in broadcasting means getting out and becoming involved with those who are the heartbeat of the Community -- the governmental officials, the merchants, the religious groups, the civic organizations.

To know these groups exist and to know from experience that success in broadcasting means success in dealing with these core groups are two different things. An experienced broadcaster should be entitled to credit where it can show what it has done in the past to meet the needs of the communities it has served -- "What is past is prologue." The current system of preferences is more based on speculation than empirical evidence.

The increase in radio stations and the number of non-radio outlets competing with radio for audiences and advertising revenues has fragmented the structure of the broadcasting industry. Fragmentation in radio since the 1965 Policy Statement was issued has eviscerated the rationale supporting a diversification demerit in comparative broadcast hearings. The diversification factor reflects the Commission's traditional goal of seeking to promote diversity of viewpoints and to prevent undue concentration of economic power. The emergence of new radio stations and non-radio outlets providing music and news programming has

contributed to the diversity of voices now heard on the radio. The Commission has recognized that permitting a greater degree of co-ownership among radio and television stations can better promote diversity than maximized separate ownership would. Revision of Radio Rules and Policies, 70 RR 2d 903 (1992). The InterMart Companies believe that diversity should not be a factor in comparative hearings unless a threshold showing is made that the grant of a construction permit to a particular applicant would adversely effect the Commission's goals of promoting diverse viewpoints and preventing undue concentration of economic power. Accordingly, the comparative diversity criteria should be modeled after the Commission rules adopted in its Revision of Radio Rules and Policies.

The InterMart Companies also support the adoption of a Finder's Preference. The Finder's Preference would reward those applicants who took the time and trouble to find a new frequency that can be allocated to the community they wish to serve. The awarding of a Finder's Preference would serve the public interest because an applicant interested enough in allocating a new frequency to a community is likely to spend the time and money to make the new facility viable. A viable, successful facility, in turn will serve the public interest. The InterMart Companies believe that the Finder's Preference should not be dispositive, but should be a substantial preference in the comparative hearing process.

Finally, the InterMart Companies request that when the Commission's new rules on comparative broadcast hearings are adopted they should be applied to pending applications and cases already in the hearing process. Applicants should be permitted to reopen the record and adduce evidence based on the new comparative hearing proceedings.

Respectfully submitted,

**JAMES E. MARTIN, JR.,**

**INTERMART BROADCASTING GULF COAST, INC.**

**INTERMART BROADCASTING  
OF PALM BEACH, INC.**

By:

  
Arthur V. Belendiuk  
Gary S. Smithwick  
Their Counsel

**SMITHWICK & BELENDIUK, P.C.**  
1990 M Street, N.W.  
Suite 510  
Washington, DC 20036  
(202) 785-2800

June 2, 1992