Pacific Gas & Electric Co. v. FPC, supra, provides an apt illustration of the distinction between a rule and a general policy statement. In the face of growing natural gas shortages, the FPC issued a "Statement of Policy" which set forth the priorities to be followed by pipeline companies in curtailing distribution. Some pipeline companies filed an appeal, arguing that the FPC's curtailment policy constituted a set of rules which could not be adopted except after appropriate public notice and comment proceedings. The court disagreed. The court observed that the FPC curtailment policy statement was not like the FCC's chain broadcasting rules, where "issuance of the regulations caused the immediate cancellation of or failure to renew plaintiff's contracts." 506 F.2d at 42, citing Columbia Broadcasting System, Inc. v. FCC, 316 U.S. 407 (1942). In contrast, said the court, the FPC's order "is not so direct or immediate. Any abrogation of contractual commitments will occur only after individual curtailment plans have been filed and approved by the Commission. In those proceedings, all interested parties can appear, present their case, and, if aggrieved, obtain judicial review." 506 F.2d at 42 (footnote omitted).

The proposed Pioneer's Preference, like all of the criteria used in comparative broadcast cases, is analogous to the FPC's curtailment policies. Adoption of the Pioneer's Preference will not result in a final adjudication of any pending or prospective applicant's rights. Rather, the Pioneer's Preference would merely constitute a factor to be considered in comparing mutually

exclusive applications for the same broadcast facility. When the Pioneer's Preference is taken into account, each applicant in the particular proceeding will have a full opportunity to present evidence and argument concerning other factors and the ultimate disposition of the case. The Commission will remain free to consider all that evidence and all those arguments in making its decision -- which could, if the Commission chose, include a modification or reversal of policy. See Greater Boston Television Corporation v. FCC, 444 F.2d 841, 851-52 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971) (agency can use individual adjudication to change its course as long as it supplies "a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored"); New Castle County Airport Commission v. CAB, 371 F.2d 733, 734-35 (D.C. Cir. 1976), cert. denied sub nom., Board of Transportation of New Castle County v. CAB, 387 U.S. 930 (1967) ("[w]hen not controlled by a regulation even an established approach or precedent may be modified or overruled" in individual case); City of Chicago v. FPC, 385 F.2d 629, 637 (D.C. Cir. 1967), cert. denied, 390 U.S. 945 (1968) (agency can apply a newly-announced policy on depreciation to resolve a pending case).

There is nothing novel in the conclusion that the Pioneer's Preference would constitute a statement of policy which could be adopted without following the APA's public notice and comment procedures. The Commission's comparative criteria have never been embodied in a rule, have never been the subject of a

rulemaking proceeding, and have been modified over the years through the issuance of individual decisions or individual policy statements.

In 1956, for example, the court of appeals affirmed a Commission decision which departed from prior policy and accorded greater comparative weight to one applicant's past broadcast record and present program proposal than another applicant's integration of local ownership. Pinellas Broadcasting Co. v. FCC, 230 F.2d 204 (D.C. Cir.), cert. denied, 350 U.S. 1007 (1956). In upholding the Commission's new emphasis on past and proposed programming, the court stated as follows:

> . . . [T]he Commission's view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dictates changes. . .
>
> . . . No statutory provision has been violated [by the Commission's approach]. The bases for the Commission's selection are clearly set out and are understandable. They are reasoned and not capricious. They rest upon evidence put in the record. All parties had complete procedural opportunities. So far as the record shows, the Commission considered every suggested index of differences between the applicants. The function of the court in this case goes no further than to examine into these features of the matter.

230 F.2d at 206.

Nine years after Pinellas was decided, the Commission issued a comprehensive policy statement setting forth the criteria it would consider in comparing applicants for new broadcast stations. The statement was issued without any prior notice to

the public and without receiving any comments from the public. The sole purpose of the policy was to delineate the Commission's then-current views on comparative criteria. However, the Commission emphasized that modifications could be made in the future without prior notice to the public:

> [M]embership on the Commission is not static and the views of individual Commissioners on the importance of particular factors may change. For these and other reasons, the Commission is not bound to deal with all cases at all times as it has dealt in the past with some that seem comparable, Federal Communications Commission v. WOKO, Inc., 329 U.S. 223, 228, and changes of viewpoint, if reasonable, are recognized as both inescapable and proper. Pinellas Broadcasting Company v. Federal Communications Commission, 97 U.S. App. D.C. 236, 230 F.2d 204, cert. denied, 350 U.S. 1007.
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> [B]y this attempt to clarify our present policy and our views with respect to the various factors which are considered in comparative hearings, we do not intend to stultify the continuing process of reviewing our judgment on these matters. Where changes in policy are deemed appropriate they will be made, either in individual cases or in further general statements, with an explanation for the change. In this way, we hope to preserve the advantages of clear policy enunciation without sacrificing necessary flexibility and open-mindness.

Policy Statement, 1 FCC2d 393, 399 (1965) (footnote omitted).

As the Commission anticipated, modifications have been made to the comparative criteria in individual cases -- without any prior notice to the public. E.g. George E. Cameron, Jr. Communications, 71 FCC2d 460, 465 (1979) (subsequent history omitted) (1965 Policy Statement revised to preclude inquiry into

specialized programming formats except upon certain pre-designation showings); Waters Broadcasting Corp., 91 FCC2d 1260, 1263, 1266 (1982), aff'd sub nom., West Michigan Broadcasting Co. v. FCC, 735 F.2d 601 (D.C. Cir. 1984) (minority ownership entitled to equal weight with local residence, and residence in service area outside community of license entitled to substantial local residence credit). Indeed, the credit currently accorded to minority participation in management stemmed from a decision by the court of appeals in an individual case without any prior notice to the public or even the applicants involved -- an implicit acknowledgment by the court that the Commission's comparative criteria are policy statements not subject to the APA's rulemaking provisions. TV 9, Inc. v. FCC, 495 F.2d 929, 938 (D.C. Cir. 1973). See Stereo Broadcasters, Inc. v. FCC, 652 F.2d 1026, 1028 n.2 (D.C. Cir. 1981) (Commission's distress sale policy exempt from APA since Commission intended to apply the policy on a case-by-case basis).

On remand of TV 9, Inc., the Review Board decided to add female participation in management as another comparative criteria. In taking that action, the Review Board dismissed any notion that the parties to the proceeding -- let alone the public at large -- had any right to prior notice:

> [I]t should be clear that there is no unfairness in giving credit to an applicant for a deserved advantage whether or not the other parties knew at the outset of the proceeding that such credit could be obtained. Any party is entitled to urge such preferences flowing from its composition or proposals as it wishes. If its claim is

> sustained, credit is given. We may safely put that problem aside.

Mid-Florida Television Corporation, 69 FCC2d 607, 650-51 (Rev. Bd. 1978) (citations and subsequent history omitted).

Mid-Florida Television Corporation not only confirms the right of the Commission to change comparative criteria at will without prior public notice. That decision also makes it clear that pending applicants have no vested right to frustrate the Commission's desire to apply a change in policy to pending applications. Accord Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3026 (1990) ("[a]pplicants have no settled expectation that their applications will be granted without consideration of public interest factors"); FCC v. WJR, The Goodwill Station, 337 U.S. 265, 272 (1949) (station with a pending competing application in related rulemaking proceeding had "no vested right" to preclude Commission grant of a license to another applicant to use the same frequency).

As a practical matter, it would be adverse to the Commission's interest to conclude that the Pioneer's Preference can be adopted only pursuant to the APA's public notice and comment provisions. Such a conclusion would be tantamount to an admission that all the comparative criteria are rules and that no changes can be made except through rulemaking proceedings. That posture would emasculate the Commission's flexibility and also increase the Commission's expenditures (since the Commission would have to commit substantial resources to a rulemaking proceeding every time it wanted to change the criteria).

III. Notice Adequate Even If APA Applies

Even assuming arguendo that the APA is applicable, there has been adequate public notice to support the Commission's adoption of the Pioneer's Preference without further proceedings. Indeed, to require further proceedings would mean that the Commission could never adopt a proposal advanced in comments without first incorporating that proposal in a new NPRM.

At the outset, it should be emphasized that the APA itself does not require an agency to publish the text of any proposed rules in a public notice. Rather, it is sufficient if the agency provides "a description of the subjects and issues involved." 5 U.S.C. §553(b)(3). See American Medical Association v. United States, 887 F.2d 760, 767 (7th Cir. 1989) ("statutory language [of APA] makes clear that the notice need not identify every precise proposal which the agency may ultimately adopt"). Hence, an agency can adopt proposals first advanced in public comments.

There is perhaps no better illustration of the latter point than Owensboro on the Air, Inc. v. United States, 262 F.2d 702 (D.C. Cir. 1958). That case concerned an FCC rulemaking to change the table of allotments for television stations. In the NPRM, the Commission proposed to reserve Channel 7 in Evansville, Indiana for educational use. No mention was made of Channel 9 in nearby Hatfield, Indiana, which was then the subject of a comparative hearing with two mutually exclusive applicants. In response to comments, the Commission subsequently changed its

proposals and issued an order assigning Channel 7 to Louisville, Kentucky and reassigning Channel 9 from Hatfield to Evansville. On appeal, the court rejected the argument of the Hatfield applicants that the Commission's action violated the APA's public comment provisions. As the court explained, the APA

> "requires only that the prior notice include 'a description of the subjects and issues involved.' We think the procedure followed by the Commission amply fulfilled this requirement. . . . Surely every time the Commission decided to take account of some additional factor it was not required to start the proceedings all over again. If such were the rule the proceedings might never be terminated."

262 F.2d at 708, quoting Logansport Broadcasting Corp. v. United Stated, 210 F.2d 24, 28 (D.C. Cir. 1954). Accord Spartan Broadcasting Co. v. FCC, 619 F.2d 314, 321-22 (4th Cir. 1980) (APA "'does not require an agency to publish in advance every precise proposal which it may ultimately adopt'").

Courts have similarly sustained other agency orders adopting rules first proposed in comments. For example, in affirming the Occupational Safety and Health Review Commission's adoption of new flooring standards, the Fourth Circuit stated as follows:

> Although the APA requires that notice contain "either the terms or substance of the proposed rule or a description of the subjects and issues involved," the Act "does not require an agency to publish in advance every precise proposal which it may ultimately adopt as a rule." This is particularly true when proposals are adopted in response to comments from participants in the rulemaking proceeding. The "requirement of submission of a proposed rule for comment does not automatically generate a new opportunity for comment merely because the

> rule promulgated differs from the rule proposed, partly at least in response to submissions." A contrary rule would lead to the absurdity that an agency could learn from comments on its proposals only at the peril of starting a new procedural round of commentary. . . . To hold otherwise would penalize the agency from benefitting for comments received and further bureaucratize the process.

Daniel International Corp. v. Occupational Safety & Health Review Commission, 656 F.2d 925, 932 (4th Cir. 1981). Accord International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 632 (D.C. Cir. 1973) (agency could develop "its methodology on the basis of submissions made by the [participating] companies at the hearings").

There have been occasions when courts have rejected an agency's reliance on comments in situations where the agency reversed its position on a sensitive social issue. See National Black Media Coalition v. FCC, 791 F.2d 1016, 1022-23 (2d Cir. 1986); American Federation of Labor v. Donovan, 757 F.2d 330, 338-40 (D.C. Cir. 1985).[1] But most courts seem to agree that an agency can reverse its position in response to the public's

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[1] In National Black Media Coalition, supra, the Commission completely reversed itself and concluded it would not adopt the non-technical eligibility requirements -- including minority preferences -- which it had originally proposed to use in distributing licenses for new AM stations. In Donovan, supra, the Department of Labor decided to limit the applicability of the labor standards set forth in the Service Contract of 1965, 41 U.S.C. §§351-58, with respect to contracts partially performed outside the United States after conveying "the clear impression from the notices of proposed rulemaking" that those provisions "would be left untouched." 757 F.2d at 339. Thus, one case reflected a repeal of a policy of minority preferences in the distribution of certain broadcast licenses, and the other case reflected a limitation on protections for American workers.

comments. See Pennzoil Co. v. FERC, 645 F.2d 360, 372 (5th Cir. 1981), cert. denied, 454 U.S. 1142 (1982) (agency's reversal of position after receipt of comments "demonstrates not that the agency acted arbitrarily, but simply that the administrative process was working [since] modification of proposed rules in light of written and oral presentations is the heart of the rulemaking process"); Public Service Commission v. FCC, 906 F.2d 713, 717-18 (D.C. Cir. 1990) (Commission did not violate APA in reversing position and adopting a rule to use simpler accounting system for smaller and larger common carriers despite statement in NPRM that simpler accounting system would be applied only to smaller carriers); American Medical Association v. United States, supra, 887 F.2d at 767 (IRS's adoption of "an entirely different approach" to issue did not violate APA since NPRM had adequately identified the subjects and issues involved). The only question is whether the proposal adopted by the agency is a "logical outgrowth" of the rule proposed and whether the agency's notice "'fairly apprise[d] interested persons of the subjects and issues [of the rulemaking].'" National Black Media Coalition v. FCC, supra, 791 F.2d at 1022 (citations omitted).

Adoption of a Pioneer's Preference would satisfy the foregoing standard. The Commission's NPRM focused on ways to expedite its comparative hearing process for new applicants. Although much of the NPRM discussed procedural rules, other parts of the NPRM proposed modification of certain policies not embodied in rules. Moreover, the NPRM repeatedly invited the

public to propose other reforms that could help expedite the disposition of comparative hearing cases.

For example, the Commission stated that its "obvious objective should be to encourage even more cases to settle and to do so as early in the process as possible." The Commission then invited comment on certain specific strategies "as well as other strategies to encourage more and earlier settlements." 5 FCC Rcd at 4050. One of the Commission's proposals was to modify a policy -- not included in the rules -- which precludes a merged applicant from upgrading its comparative standing. The Commission proposed "to modify that policy to permit the merged applicant to enjoy the comparative advantages achieved by virtue of the merger." 5 FCC Rcd at 4051 (footnote omitted).

The Commission also proposed to reverse its decision in Ruarch Associates, 103 FCC2d 1178 (1986), which allows an applicant to abandon a pre-settlement divestiture commitment. The Commission agreed with the Review Board that Ruarch "facilitates integration gamesmanship and encourages abuse." The Commission added that it did not appear that a reversal "would have an adverse impact on the number of comparative cases terminated by settlement. . ." 5 FCC Rcd at 4052 (footnote omitted). In other words, the Commission proposed to correct a perceived inequity in the comparative process since it did not conflict with the Commission's overriding goal to expedite disposition of comparative cases.

The Commission similarly proposed to reverse its decision in Anax Broadcasting, Inc., 87 FCC2d 483 (1981). That decision had fostered a policy -- which, again, is not embodied in any rule -- to allow applicants to avoid the diminution of integration credit from the presence of non-voting stockholders or limited partners. Although it recognized that Anax "serves to increase the number of financially qualified applicants," the Commission expressed concern that the policy had "also spawned considerable litigation over the bona fides of such applications." For that reason, the Commission asked for comment "on alternatives by which the litigation spawned by the Anax doctrine could be avoided while still preserving some of the comparative benefits achieved by applicants using the active/passive ownership structure." 5 FCC Rcd at 4053.

In the NPRM's final paragraphs, the Commission stated that, "[t]o the extent that we can limit the time consumed in that [comparative hearing] process to the minimum, we will be serving the potential listening and viewing public." The Commission observed that its proposals were designed to serve that goal but added that it would "also entertain other proposals designed to achieve the same end." 5 FCC Rcd at 4055.

The NPRM thus broadly described the "subject" as the comparative hearing process for new stations and broadly described the "issue" as means to expedite that process. Interested parties were therefore put on notice not only as to the Commission's specific proposals but also as to the

Commission's intention to consider and perhaps adopt other proposals that might serve the Commission's goal to expedite comparative hearing cases.

Rochlis' proposal for a Pioneer's Preference is a direct response to the NPRM's open-ended invitation for "strategies to encourage more and earlier settlements," to help further the policies of female and minority participation fostered by Anax, and to expedite the Commission's hearing process.

First, by applying the Pioneer's Preference to pending cases (which have not yet been designated for hearing), the Commission would, in effect, encourage other competing applicants to settle or to dismiss their applications rather than face an applicant with a substantial edge. This process would be entirely voluntary and would allow a party to continue to pursue its application if it determined that the pioneer had substantial demerits or that other factors would enable the competing applicant to overcome the pioneer's substantial advantage.

Second, by creating that substantial advantage for a pioneer, the Commission will facilitate the award of licenses to minorities, women, and other newcomers. Currently, the most financially prohibitive part of the comparative process is not the financing to build the station after the construction permit is obtained; rather, the primary financial hurdle is the exorbitant cost of legal fees for the hearing process. By providing a substantial edge to the pioneer, the Commission will provide an opportunity for women, minorities, and other newcomers

to seek out new allocations in order to avoid those prohibitive hearing costs and the necessity for so-called passive investors whose participation could raise the troublesome -- and time-consuming -- Anax issues referenced in the NPRM.

And finally, the Pioneer's Preference will serve the Commission's overriding goal to expedite future cases. In most cases, few, if any, parties will file competing applications against a pioneer -- although, if they do, their right to a full hearing will be preserved. See Rochlis' Comments at 10-14.

The Pioneer's Preference is thus a "logical outgrowth" of the Commission's invitation for other proposals to help expedite the hearing process. It is of no consequence that the Pioneer's Preference was not expressly proposed by the Commission itself. All interested parties had notice of the Commission's intent to consider any and all proposals to expedite the hearing process, and copies of Rochlis' Comments were served on every party who had filed comments in the proceeding. No one filed an opposition.

Moreover, in contrast to the situations in National Black Media Coalition v. FCC, supra, and American Federation of Labor v. Donovan, supra, the Pioneer's Preference does not involve a situation in which the agency has completely reversed itself. Rather, adoption of the Pioneer's Preference will be the testament to the ultimate goal of a rulemaking procedure. As one court recently explained,

> That an agency changes its approach to the difficult problems it must address does

> not signify the failure of the administrative process. Instead, an agency's change of course, so long as generally consistent with the tenore of its original proposals, indicates that the agency treats the notice-and-comment process seriously, and is willing to modify its position where the public's reaction persuades the agency that its initial regulatory suggestions were flawed.

American Medical Association v. United States, supra, 887 F.2d at 767 (footnote omitted). This assessment was echoed by another court which sustained the FCC's decision to completely change its approach on accounting procedures for common carriers:

> "[A] final rule may properly differ from a proposed rule -- and indeed must so differ -- when the record evidence warrants the change. A contrary rule would lead to the absurdity that in rule-making under the APA the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary."

Public Service Commission v. FCC, supra, 906 F.2d at 717-18, quoting Edison Electric Institute v. OSHA, 849 F.2d 611, 621 (D.C. Cir. 1988).

Adoption of the Pioneer's Preference would be a recognition by the Commission that the proposal will expedite disposition of applications for new stations and also correct a long-standing inequity -- one of far more consequence to the public than the inequity of the Ruarch policy. See 6 FCC Rcd at 159-60 (Ruarch policy modified).

CERTIFICATE OF SERVICE

I hereby certify that I have, this 8th day of August, 1991 caused a copy of the Response to Comments to be mailed via first class mail, postage prepaid, to the following:

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