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

GC Docket No. 92-52

In the Matter of

Reexamination of the Policy RM-7739
Statement on Comparative RM-7740
Broadcast Hearings RM-7741

FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: July 19, 1993; Released: August 12, 1993

Comment Date: September 13, 1993

Reply Date: September 28, 1993

By the Commission:

I. INTRODUCTION

1. In this notice, we propose to amend 47 C.F.R. § 73.3597(a)(1) to require that successful applicants in comparative proceedings operate their stations for three years before they would become eligible to transfer them. This action would supersede the current requirement that such stations be held for one year.

II. BACKGROUND

2. We initiated this proceeding to reform the criteria used to select among mutually exclusive applicants for new broadcast facilities. *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd 2664 (1992). We noted that these criteria had not been comprehensively examined for 27 years and that changes in the broadcast marketplace, in broadcast technology, and in the Commission's regulatory policies for broadcasting now warranted reexamination of the criteria. *Id.* at 2664 ¶ 2.

3. Among the proposals that we put forth for comment was adoption of a novel comparative criterion called the "service continuity preference." 7 FCC Rcd at 2668 ¶ 28.¹ Under the service continuity preference, applicants proposing to own and operate their stations for at least three years would receive specific comparative credit. That proposal was made in response, *inter alia*, to concerns about the impact on the comparative process of changes in the Commission's policies regarding the transfer of broadcast stations.

4. For many years, under the "three-year" or "anti-trafficking" rule, the Commission prohibited -- with narrow exceptions -- the transfer or assignment of a broad-

cast station that had not been operated by its licensee or permittee for at least three years. See 47 C.F.R. § 73.3597(a) (1982). See also *Procedures on Transfer and Assignment Applications*, 32 FCC 689 (1962). In 1982, the Commission found that the three-year rule no longer served the public interest, and repealed it. *Transfer of Broadcast Facilities*, 52 RR 2d 1081 (1982), *recon. granted in part*, 99 FCC 2d 971 (1985).² Nonetheless, the Commission concluded, for reasons apart from those underpinning the former three-year rule, that in some circumstances restrictions on the transferability of stations were appropriate to protect the integrity of the Commission's processes. *Id.* at 1089-90 ¶ ¶ 34-35. Thus, the Commission imposed a one-year holding requirement on stations awarded in comparative proceedings, generally precluding their immediate resale. *Id.*; 47 C.F.R. § 73.3597(a)(1) (1992).

5. In the NPRM, we proposed that awarding comparative credit to applicants that voluntarily undertake to hold their stations for three-years would offer a benefit to the public in addition to that provided by the one-year holding requirement of 47 C.F.R. § 73.3597(a)(1). 7 FCC Rcd at 2672 n.12. We suggested that such credit would extend the public interest benefits of choosing licensees in the comparative process, would discourage potential abuse of the comparative process, and would prevent disruption of service. *Id.* at 2668 ¶ 28.

6. Although we proposed that the service continuity preference would supplement rather than supersede the holding requirement of 47 C.F.R. § 73.3597(a)(1), we invited commenters to address whether the rationale of the service continuity preference would warrant our applying it to all new licensees selected through the comparative hearing process. 7 FCC Rcd at 2672 n.12. See also *Separate Statement of Commissioner Ervin S. Duggan*, 7 FCC Rcd at 2672.

III. DISCUSSION

7. Our review of the comments, as well as our own concerns, now lead us to the view that the proposed preference is not an adequate means of fully promoting the public interest benefits of service continuity. Rather, it appears that a mandatory three-year service continuity requirement should apply to all successful applicants in comparative proceedings. We now review the factors that lead us to this conclusion.

A. COMMENTS

8. The commenters uniformly supported our proposal to foster service continuity. They asserted that making provision for service continuity will discourage speculators, lead to more realistic proposals, and encourage investment in quality programming and commitment to the community. See *Comments of Capital Cities/ABC, Inc.* at 13-15; *The National Association of Broadcasters* at 11-12.

9. Moreover, several of the commenters favor the alternative of amending the one-year rule to apply a longer restriction to all successful applicants in comparative proceedings -- not merely to those who claim a service con-

¹ In the NPRM, we stated that: "In view of the scope of the changes proposed in this notice, we may decide, in later action in this proceeding, to sever one or more of the issues raised herein for separate resolution." 7 FCC Rcd at 2671 n.6.

² Subsequently, the Commission rejected petitions seeking to initiate a rulemaking to reinstate the anti-trafficking rule. See *Office of Communication of the United Church of Christ v. FCC*, 911 F.2d 813 (D.C. Cir. 1990).

tinuity preference.³ These commenters argue that a mandatory service continuity requirement would more effectively protect the integrity of the comparative process because it would apply uniformly. According to these commenters, the effectiveness of a voluntary preference would either be "hit or miss" or, alternatively, would merely represent the backhanded imposition of a mandatory requirement, since virtually all applicants would seek a preference. See Comments of American Women in Radio and Television, Inc. at 5; Arnold Broadcasting Company at 8-9; Black Citizens for a Fair Media *et al.* at 2-5; Contemporary Communications at 3-4; The National Association for the Advancement of Colored People and the League of United Latin American Citizens at 22-23; Women in Communications, Inc. *et al.* at 4 n.2; The National Association of Black Owned Broadcasters, Inc. Reply at 3-4; Michael J. Wilhelm Reply at 2, 6-7.⁴

10. The record before us indicates that the public interest would be better served by a longer mandatory holding period for comparative authorizations. We find that the public interest benefits of granting authorizations to those applicants with superior comparative attributes would be enhanced if the public were assured of service from those favored applicants for a longer period of time. Moreover, we find that a longer mandatory holding period would serve to safeguard the comparative process from applicants with ill-considered or insincere proposals. Such applicants would face the added burden of effectuating their proposals under potential Commission scrutiny for more than just one year. Applicants with no serious interest in effectuating their proposals and intending to sell after one year to make a quick profit would lose that opportunity. These factors amply support adoption of a longer mandatory holding period. Consequently, we propose to amend 47 C.F.R. § 73.3597(a)(1) to increase the holding period from one to three years for all successful applicants in comparative proceedings. Thus, whereas, in *Transfer of Broadcast Facilities*, 52 RR 2d at 1090 ¶ 16, we concluded that the public interest benefits of the comparative process would be enhanced by a "brief" one-year holding period, the commenters have persuaded us that these public interest benefits would be further enhanced by a longer, three-year period.⁵

B. SUBSIDIARY MATTERS

11. Although the comments already filed provide significant discussion of this matter, we believe we would be assisted by further comments on a number of related questions.

12. *Time period.* In adopting the original anti-trafficking rule, the Commission noted that Congress had limited broadcast license terms to a maximum of three years. *Procedures on Transfer and Assignment Applications*, 32 FCC at 690-91. In 1981, however, Congress extended the statutory license terms to five years for television and seven years for radio. See [1981] U.S. CODE CONG. & ADMIN. NEWS 396, 1257. Thus, we ask whether three years remains the relevant period for purposes of service continuity. In this regard, it is our initial view that the Commission's long experience with the former three-year rule provides sufficient indication of its efficacy and benefits to conclude that a three-year provision is an appropriate restriction despite the change in the license terms.

13. *Settlements.* Currently, the holding requirement of 47 C.F.R. § 73.3597(a)(1) applies only to facilities awarded pursuant to a decision on the merits in comparative proceedings and not to grants made pursuant to settlements in those proceedings. See *Pan Pacific Television, Inc.*, 3 FCC Rcd 6629, 6631 ¶ ¶ 13-14 (1988). Recently, the Commission modified its policies to require applicants to adhere to proposals regarding the divestiture of outside media interests, the integration of ownership and management, and active/passive ownership structure made in comparative proceedings despite settlements unless expressly relieved of that obligation by the presiding judge. *Proposals to Reform the Commission's Comparative Hearing Process*, 6 FCC Rcd 157, 159-60 ¶ ¶ 18-22, 162 ¶ 34 (1990), *recon. granted in part*, 6 FCC Rcd 3403 (1991). See 47 C.F.R. § 73.1620(g). In view of this change in policy, we ask whether the service continuity requirement of 47 C.F.R. § 73.3597(a)(1) should also apply to authorizations granted pursuant to settlements.

14. *Reporting Requirement.* In connection with the policy change noted in the previous paragraph, the Commission's rules now require successful applicants in comparative proceedings to report any deviations from their divestiture, integration, and passive/active ownership proposals in their application for a license to cover their construction permit and on the first anniversary of the commencement of program tests. 47 C.F.R. § 73.1620(g). We seek comment as to whether a modification of the service continuity requirement would warrant a change in the number and timing of the reports to be made under that rule.

15. *Applicability.* In the NPRM, we proposed to apply changes to the comparative criteria made in this rulemaking proceeding only to applicants not yet designated for hearing as of the effective date of the pertinent action. 7 FCC Rcd at 2669 ¶ 41. In so doing, we sought to avoid prejudice resulting from the detrimental reliance on

³ The views expressed by the commenters are similar to concerns raised by the Court of Appeals as to whether the one-year holding requirement of 47 C.F.R. § 73.3597 is sufficient to protect the integrity of the comparative process. See *Bechuel v. FCC*, 957 F.2d 873, 880 (D.C. Cir. 1992), where the court remanded an adjudicatory proceeding for consideration of an argument that requiring only a one-year holding period appeared to "eviscerate" the basis for awarding credit for the integration of ownership and management.

⁴ Although the comments provide ample support for a finding that a longer holding period would serve the public interest, we note, in passing, that none of the commenters submitted empirical data with their comments. Accordingly, we wish to give the commenters an additional opportunity to submit relevant empirical data in response to this further notice. In particular,

data on the turnover rate of stations acquired in the comparative hearing process (especially within one year of operation or shortly thereafter) may be of interest.

⁵ This proposal does not affect aspects of 47 C.F.R. § 73.3597(a)(1) that pertain to the treatment of transfers or assignments pursuant to the Commission's Minority Ownership Policy. In addition, our analysis raises the related but distinct question of whether there is reason to reinstitute some form of anti-trafficking rule applicable to all facilities. Because this question goes beyond the scope of this proceeding -- and beyond the rationale for amending 47 C.F.R. § 73.3597(a)(1) -- we will not consider it in this proceeding. So as not to ignore this matter, however, we request comment as to whether a new proceeding should be opened to explore this issue.

the current comparative factors by applicants whose proposals might be rendered inferior by changes in policy. We also sought to avoid the expensive and time-consuming need to relitigate cases already decided. See *Anchor*, 7 FCC Rcd at 4568 ¶ 22.

16. These considerations do not appear relevant to the proposal made here, since this proposal does not involve the comparative evaluation of the applicants. Moreover, the immediate application of a longer service continuity requirement would maximize its effectiveness. Accordingly, we propose to apply the new service continuity requirement to all existing and future authorizations. We seek comment on this proposal.

C. QUESTIONS FOR COMMENT

17. In view of the foregoing, we seek comment on the following questions:

- (a) Whether the one-year holding period specified in 47 C.F.R. § 73.3597(a)(1) should be increased to three years (or more) for successful applicants in comparative proceedings.
- (b) Whether the holding requirement of 47 C.F.R. § 73.3597(a)(1) should apply to authorizations granted pursuant to settlements in comparative proceedings.
- (c) Whether and how the reporting requirements of 47 C.F.R. § 73.1620(g) should be amended in light of any modification in the required holding period.
- (d) Whether an increase in the holding period should be applicable to all existing and future authorizations obtained through the comparative process.
- (e) Whether the Commission should initiate a proceeding to inquire whether service continuity requirements should be imposed with respect to facilities acquired other than through the comparative hearing process.

IV. PROCEDURAL MATTERS

A. EX PARTE RULES -- NON-RESTRICTED PROCEEDING

18. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission rules.

B. REGULATORY FLEXIBILITY ACT

19. An Initial Regulatory Flexibility Analysis is set forth in 7 FCC Rcd at 2671.

C. AUTHORITY

20. Authority for this rulemaking action is contained in 47 U.S.C. §§ 154(i), 154(j), 303(r), 309(g), 309(i), 403.

V. ORDERING CLAUSES

21. ACCORDINGLY, IT IS ORDERED, That NOTICE IS HEREBY GIVEN of the proposed regulatory changes described above, and that COMMENT IS SOUGHT on these proposals.

22. IT IS FURTHER ORDERED, That pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's Rules, comments SHALL BE FILED on or before **September 13, 1993** and reply comments SHALL BE FILED on or before **September 28, 1993**. To file formally in this proceeding, commenters must file an original and four copies of all comments, reply comments, and supporting comments. If commenters want each Commissioner to receive a personal copy of their comments, they must file an original plus nine copies. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. In addition, commenters should file a copy of any such pleadings with the Office of General Counsel, Room 610, 1919 M Street, N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, N.W., Washington, D.C. 20554.

23. For further information, contact David S. Senzel, (202) 632-7220, Office of General Counsel.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
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Acting Secretary

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