

bly will greatly exceed the supply.<sup>8</sup> Yet common sense, not to mention the First Amendment, counsel against the Commission's trying to decide what America should see and hear over the airwaves. Further, the ability to pick persons and firms who will be "successful" at delivering any kind of services is a rare one, however success might be defined; that is why it commands generous rewards in the market. The Commission has often implicitly recognized the difficulty, noting the advantages of allowing stations to shift by voluntary transactions into what are presumptively more capable hands (and if not, to shift again). See *supra* at 8. Moreover, any effort to infer some sort of recipe for success by studying existing owners would be inadequate: if success could be captured in a formula, the skill of identifying future successes would not be so scarce and well rewarded. Any sort of recipe that could be discerned would necessarily abstract criteria from a complex web of facts; applicants would immediately start to adopt the specified ingredients solely to satisfy the Commission, and would feign them, so that their earlier predictive value would decline. Changing exterior circumstances would also undermine the recipe. And any effort to rely on intuitive judgments about applicants, assuming Commissioners had sound intuition, would provide rich opportunities for graft and corruption in a public agency dispensing valuable resources. All these difficulties flow from the statutory scheme itself.

All that said, the integration preference is peculiarly without foundation. While the Commission makes it a central

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<sup>8</sup> The Commission has expressed dismay at the notion that people might enjoy lavish pecuniary returns by selling a station without operating it for very long. Indeed, it has described the one-year holding period of 47 CFR § 73.3597 as a rule that "prohibits licensees from profiting on the sale of . . . a license for a station that has been on the air less than a year." *Rebecca Radio of Marco*, 4 F.C.C. Rec. 830, 832 ¶ 20 (1989). It is unclear why these windfalls are more distressing when highlighted by prompt sale than in their ordinary occurrence—every time the Commission issues a license.

focus of *allocation*, the Commission takes no interest whatever in the matter when it comes to *transfers* or even in the continuing conduct of the original licensee. The Commission appears to have *no* evidence that the preferred structure even survives among the winners, much less that it does so among especially outstanding broadcasters. Because of applicants' incentive to create a facade of integration, and the difficulty of identifying sound business practices, even the preference's touted objectivity proves an illusion. Though we owe substantial deference to the Commission's expertise, we are forbidden to suspend our disbelief totally. We find the integration policy arbitrary and capricious.

#### IV. Remedy

At times, the Commission has suggested that the pendency of a rulemaking designed to reconsider the integration criterion permits the Commission to continue applying the criterion in the meantime. See, e.g., *Second Remand Order*, 8 F.C.C. Rec. at 1676 ¶ 16; *First Remand Order*, 7 F.C.C. Rec. at 4567 ¶ 12. If a policy is arbitrary and capricious, however, the mere fact that the Commission is reconsidering that policy does not authorize the Commission to continue making arbitrary and capricious decisions. As Bechtel was denied a license on the basis of an arbitrary and capricious policy, she is entitled to a proceeding in which the Commission considers her application (and any other application properly before it) under standards free of that policy.

As for the scope of the proceedings on remand, Bechtel asks us to direct the Commission to compare her application with that of Anchor Broadcasting, the applicant to which the Commission awarded the Selbyville permit initially. Galaxy wants to be included too. While Bechtel and Anchor obviously should be involved in the upcoming comparative process, we do not decide whether Galaxy (or any other parties) should also be considered. The only Selbyville applicant who has consistently challenged the integration policy is Bechtel. Which applicants the Commission should consider on remand

(other than Bechtel) is not properly before us, but is a question for the Commission to decide in the first instance.

The Commission's decision is reversed and the matter is remanded for further proceedings consistent with this opinion.

*So ordered.*

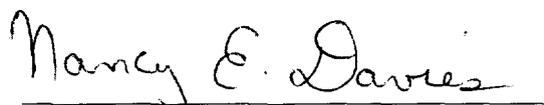
CERTIFICATE OF SERVICE

The undersigned, an employee of Haley, Bader & Potts, hereby certifies that the foregoing Joint Motion for Partial Continuance was mailed this date by First Class U.S. Mail, postage prepaid, or was hand-delivered\*, to the following:

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January 4, 1994