RECEIVED

APR 3 - 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C.

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses	)	MM Docket No. 97-234
	)	
Reexamination of the Policy Statement on Comparative Broadcast Hearings	)	GC Docket No. 95-52
	)	
Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases	)	GEN Docket No. 90-264

DOCKET FILE COPY ORIGINAL

RESPONSE TO REPLY COMMENTS OF SIMON T

TRINITY BROADCASTING OF FLORIDA, INC.

TRINITY CHRISTIAN CENTER OF SANTA ANA, INC. d/b/a TRINITY BROADCASTING NETWORK

TRINITY BROADCASTING OF NEW YORK, INC.

Howard A. Topel
Stuart F. Feldstein
R. Bruce Beckner
Fleischman and Walsh, L.L.P.
1400 Sixteenth Street, N.W.--Suite 600
Washington, D.C. 20036

Their Counsel

Colby M. May
1000 Thomas Jefferson Street, N.W.
Suite 609
Washington, D.C. 20007-3835

Their Co-Counsel

READING BROADCASTING, INC.

TWO IF BY SEA BROADCASTING CORPORATION

Howard A. Topel
Fleischman and Walsh, L.L.P.
1400 Sixteenth Street, N.W.
Suite 600
Washington, D.C. 20036

Their Counsel

TABLE OF CONTENTS

Page

SUMMARY ii

I. The Commission's Utilization Of A Two-Step Procedure To Determine Whether To Grant Broadcast License Renewal Applications Filed Prior To May 1, 1995, Is Legally And Judicially Sustainable. 3

II. The Award of a Renewal Expectancy Should Satisfy Step One of the Renewal Procedure. 11

III. The Comparative Criteria Suggested by Simon T are Either Arbitrary and Capricious Under the *Bechtel II* Standard or are Meaningless in the Renewal Context. 14

CONCLUSION 19

SUMMARY

Simon T is a competing applicant against the renewal application of the one of the Joint Renewal Commenters. Simon T's Reply Comments in this rulemaking were not limited to responding to the comments filed by the Joint Renewal Commenters or any other commenter. Instead, Simon T offered for the first time a proposal to adopt specific criteria to resolve comparative renewal cases for all applications filed prior to May 1, 1995 which are still pending before the Commission. The Joint Renewal Commenters have requested the Commission to accept this surreply in order to have the opportunity to reply to the position advanced by Simon T.

The Commission has proposed to utilize a two-step procedure to determine whether to grant the eight remaining comparative license renewal applications filed prior to May 1, 1995. Under step one of the two-step procedure, the Commission proposes to grant the renewal application without a comparative hearing if it can be determined in a threshold hearing that the renewal applicant deserves a renewal expectancy for substantial performance during the license term. Simon T argues that the two-step license renewal procedure proposed by the Commission is inconsistent with Section 309 of the Communications Act and with the Supreme Court's decision in *Ashbacker Radio Corp. v. FCC*. However, subsequent court decisions, as well as the Commission's broad discretion to promulgate rules in the public interest, support the Commission's decision to utilize a two-step process to resolve pending license renewal applications. The proposed rule is consistent with recent D.C. Circuit precedent, which permits administrative agencies to set threshold eligibility standards for comparative hearings. In view of the fact that Congress has already adopted a two-step renewal procedure for applications filed after May 1, 1985 that provides less protection to competing applicants than the proposed procedure, and the fact that only eight applications are pending, it would

be a waste of the Commission's resources to establish comparative criteria for such a small number of cases.

If the Commission adopts the proposed two-step renewal procedure, the Joint Renewal Commenters urge the Commission to use the standard it has developed in the renewal expectancy context as the benchmark for satisfying step one of the renewal process. Simon T would subsume the renewal expectancy in a comparative hearing and have it only be potentially decisional if the expectancy was "strong", *i.e.*, denoting "superior" service. This suggestion is incompatible with the aim of a two-step process which is to avoid having a step two comparative hearing if the renewal applicant exceeds a certain threshold standard. The Joint Renewal Commenters suggest the use of the existing renewal expectancy standard because the law is highly developed and the Commission would not have to invent some other step one standard to use in the eight remaining cases. Moreover, the renewal expectancy standard contrasts favorably with the renewal standard newly codified in Section 309(k) of the Act. That standard is simply a "pass/fail" renewal test. By contrast, the renewal expectancy standard requires the applicant not just to pass, but to have rendered substantial service during its license term.

In response to the Commission's invitation, Simon T suggests eight possible comparative criteria. All of the criteria suggested by Simon T are either arbitrary and capricious under the standard set forth in the *Bechtel II* case or are not meaningful in the context of a comparative renewal. Three of the suggested criteria form the core of the "qualitative" factors under the integration criterion discredited in the *Bechtel II* case. The fourth criterion suggested by Simon T, diversification of control of mass communications media facilities, would also fail the *Bechtel II* test since the Commission has no empirical evidence that a "diversity of views" is enhanced when it

awards a diversity of ownership preference. Three of the remaining four comparative criteria advanced by Simon T are minor factors which have rarely, if ever, been of decisional significance, *i.e.*, past broadcast record, most efficient use of the frequency and auxiliary power facilities. The final criterion suggested by Simon T is renewal expectancy. If the Commission adopts its proposed two-step renewal process, renewal expectancy should be the test for satisfying step one. Thus, renewal expectancy could not be a comparative criterion in a proceeding which reached step two.

The Joint Renewal Commenters suggest that, since there are only eight renewal proceedings pending involving pre-May 1, 1995 applications, the Commission should not attempt to adopt a uniform set of comparative criteria. If any of these proceedings advances to step two of the renewal process, the Joint Renewal Commenters suggest that the criteria be determined on an *ad hoc* basis pursuant to suggestions made by the competing applicants.

Before the
Federal Communications Commission
Washington, D.C.

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses	)	MM Docket No. 97-234
	)	
Reexamination of the Policy Statement on Comparative Broadcast Hearings	)	GC Docket No. 95-52
	)	
Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases	)	GEN Docket No. 90-264

RESPONSE TO REPLY COMMENTS OF SIMON T

Trinity Broadcasting of Florida, Inc.; Trinity Christian Center of Santa Ana, Inc. d/b/a Trinity Broadcasting Network; Trinity Broadcasting of New York, Inc.; Reading Broadcasting, Inc.; and Two If By Sea Broadcasting Corporation (collectively, " the Joint Renewal Commenters") hereby file a surreply in response to the reply comments filed by Simon T in the above-captioned proceeding.

Simon T is a competing applicant against the renewal application of one of the Joint Renewal Commenters, Trinity Christian Center of Santa Ana, Inc., the licensee of KTBN-TV, Santa Ana, California. Simon T's reply comments were not limited to responding to the comments filed by the Joint Renewal Commenters or any other commenter. Rather, Simon T offered for the first time a proposal to adopt specific criteria to resolve comparative renewal cases for all renewal applications filed prior to May 1, 1995, which are still pending before the Commission. The Joint Renewal

Commenters have contemporaneously filed a Motion for Leave to File Surreply in response to the reply comments filed by Simon T. The gist of the Joint Renewal Commenters' motion is that because Simon T did not file his comments during the initial comment period, but rather styled them as reply comments, other commenters should have the opportunity to reply to Simon T's position.

As the Commission has stated, the underlying catalyst for this rulemaking proceeding was the D.C. Circuit's holding in *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993) ("*Bechtel II*").[1] The *Bechtel II* court held that "[d]espite its twenty-eight years of experience with the [integration and enhancement factors] policies, the Commission has accumulated no evidence to indicate that it achieves even one of the benefits that the Commission attributes to it."[2] Therefore, "[b]ecause integration and the related qualitative enhancement factors have been crucial factors in recent comparative cases, the Commission, since 1994, has stayed all ongoing comparative cases pending resolution of the issues raised by *Bechtel II*."[3] The Commission therefore requested comment on the comparative process in light of this case and the amendments to Section 309 of the Communications Act. Because new Section 309(k) did not eliminate the comparative process for renewal applications filed before May 1, 1995, comment was sought on the standard to be used now to decide the few outstanding comparative renewal cases remaining before the Commission. In particular, the Commission proposed to lift the comparative freeze and to adjudicate the remaining comparative renewal cases using a two-step procedure.[4] Under this approach, the Commission stated that it would

---

[1]*Notice of Proposed Rulemaking ("NPRM")* at ¶¶ 4 and 102.

[2]10 F.3d at 880.

[3]*NPRM* at ¶ 5. *See also, Public Notice: FCC Freezes Comparative Hearings*, 9 FCC Rcd 1055 (1994), *modified*, 9 FCC Rcd 6689 (1994), *further modified*, 10 FCC Rcd 12182 (1995).

[4]*NPRM* at ¶ 102.

"grant the renewal application without a comparative hearing if [it] determined in a threshold hearing that the renewal applicant deserved a renewal expectancy for "substantial" performance during the license term."[5] As for any proceedings which reached the second step, the Commission asked for suggestions on specific comparative criteria to be used in such cases.[6]

In his reply comments Simon T vigorously contests the Commission's authority to adopt a two-step hearing process for resolving comparative renewal proceedings involving applications accepted prior to May 1, 1995. Simon T then goes on to suggest a set of comparative criteria allegedly modified to satisfy *Bechtel II*. The Joint Renewal Commenters disagree with Simon T as to the Commission's authority to adopt the proposed two-step procedure. Moreover, many of the comparative criteria suggested by Simon T are fatally deficient for the very reasons articulated by the *Bechtel II* court. The remaining criteria are minor factors which would constitute an inadequate basis to decide between competing applications.

I. The Commission's Utilization Of A Two-Step Procedure To Determine Whether To Grant Broadcast License Renewal Applications Filed Prior To May 1, 1995, Is Legally And Judicially Sustainable.

The Telecommunications Act of 1996 eliminated comparative broadcast license renewal proceedings for all renewal applications filed after May 1, 1995.[7] Currently there are only eight pending license renewal applications that were filed before May 1, 1995. In the *NPRM*, the Commission proposed that it would "adopt for these cases the two-step renewal procedure [it]

---

[5] *Ibid.*

[6] *NPRM* at ¶ 103.

[7] 47 U.S.C. § 309(k) & note.

developed for comparative cellular renewal proceedings."[8] The Commission explained that under the two-step procedure it "would grant the renewal application without a comparative hearing if [it] determined in a threshold hearing that the renewal applicant deserved a renewal expectancy for 'substantial' performance during the license term."[9] The Commission's establishment of such a procedure for the few remaining license renewal applications is within the Commission's rulemaking authority and consistent with legal precedent.

Some years ago, the Commission proposed, through the issuance of a policy statement, use of a two-step broadcast license renewal procedure similar to that now suggested by the Commission in the *NPRM*. In *Citizens Communications Center v. FCC*, the D.C. Circuit held that the two-step procedure was inconsistent with Section 309 of the Communications Act and with *Ashbacker Radio Corp. v. FCC*, 66 S.Ct. 148 (1945).[10] However, subsequent decisions, as well as the Commission's broad discretion to promulgate rules in the public interest, indicate that *Citizens* does not preclude the Commission from using the two-step process proposed in this rulemaking to resolve pending license renewal applications.

The Commission, "as public convenience, interest, or necessity requires, shall . . . [m]ake such regulations not inconsistent with law as it may deem necessary . . . to carry out the provisions of [the Communications Act of 1934]."[11] The Supreme Court has stressed that the Commission has broad

---

[8]*NPRM*, ¶ 102.

[9]*Id.*

[10]*Citizens Communications Center*, 447 F.2d 1202 (D.C. Cir. 1971).

[11]47 U.S.C. § 303(f).

power to regulate in the public interest.[12] Furthermore, federal agencies, such as the Commission, also have "broad freedom to select their procedures."[13]

The requirement for a hearing does not "withdraw[] from the power of the Commission the rule-making authority necessary for the conduct of its business."[14] Moreover, the Commission can limit "statutory hearing rights by establishing threshold eligibility standards designed to serve the public interest."[15] Thus, the Commission can create exceptions to the right to a hearing when a license application is inconsistent with rules promulgated to advance the public interest.[16] The Commission's proposed rule suggesting a two-step license renewal process is such a permissible exception.

Several cases decided after *Citizens* indicate that the D.C. Circuit has embraced a more expansive view of the Commission's authority to adopt hearing eligibility standards based on the public interest. The D.C. Circuit has repeatedly sustained the rules of administrative agencies that

---

[12]*FCC v. Nat'l Citizens Committee for Broadcasting*, 98 S.Ct. 2096, 2111 (1978); *FCC v. Pottsville Broadcasting Co.*, 60 S.Ct. 437, 439 (1940) (the interpretation of the public interest standard of the Communications Act of 1934 is "a supple instrument for the exercise of discretion by the [Commission]").

[13]*Altamont Gas Transmission Co. v. FERC*, 965 F.2d 1098, 1100 (D.C. Cir. 1992) (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Counsel, Inc.*, 98 S.Ct. 1197 (1978)).

[14]*United States v. Storer Broadcasting Co.*, 76 S.Ct. 763, 770 (1956).

[15]*Proposing an Allocation for New Services*, 8 FCC Rcd 1659, ¶ 6 (1993) (citing *Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos.*, 111 S.Ct. 615, 625-26 (1991)).

[16]*See Storer Broadcasting Corp.*, 76 S.Ct. at 770; *see also FPC v. Texaco Inc.*, 84 S.Ct. 1105, 1109 (1964) (a statutory requirement for a hearing "does not preclude the Commission from particularizing statutory standards through the rule-making process").

established threshold standards to gain access to a hearing required by statute.[17] In *Hispanic Information & Telecomm. Network, Inc. v. FCC*, the D.C. Circuit upheld the FCC's determination, "after notice and comment, that the public interest will best be served if local applicants are granted an absolute priority for a specified period of time."[18] The court explained that the Commission's rulemaking authority would be eviscerated if the Commission had to reexamine the application of its policies each time it considered the same set of facts.[19] Therefore, the Commission could determine by a rulemaking that the two-step process, which gives an absolute priority to incumbents with a renewal expectancy, would serve the public interest in resolving the eight pending license renewal applications.

The D.C. Circuit has also upheld an agency rule that denied a statutorily required comparative hearing to applicants competing for a mutually exclusive certificate. In interpreting the *Ashbacke*r principle, which requires the Commission to grant a full comparative hearing to each applicant that has filed for a mutually exclusive license, the D.C. Circuit noted that the principle "requir[es] only that an agency 'use the same set of procedures to process the applications of all similarly situated persons who come before it seeking the same license.'"[20] In *Public Utils. Comm'n of California*, the court upheld a rule that established separate procedures for the applicants for mutually exclusive construction certificates. If an applicant was able to meet certain threshold requirements, a certificate

---

[17]*See, e.g., Altamont Gas Transmission Co.*, 965 F.2d at 1100 (agency has the power to "impose a variety of reasonable threshold requirements" that must be met prior to a comparative hearing).

[18]865 F.2d 1289, 1294 (D.C. Cir. 1989).

[19]*Id.*

[20]*Public Utils. Comm'n of California v. FERC*, 900 F.2d 269, 278 (D.C. Cir. 1990) (emphasis in original).

would be awarded without a comparative hearing. Therefore, applicants that met the threshold requirement received a dispositive preference over those who did not.[21] The two-step procedure proposed by the Commission provides the same procedure to all similarly situated persons. Under the Commission's proposed rule, incumbent licensees that are able to meet a threshold requirement of obtaining a renewal expectancy will receive absolute priority over competing applicants, thereby avoiding a comparative hearing. Therefore, the Commission's proposed rule is consistent with the D.C. Circuit's rationale in *Public Utils. Comm'n of California.*

The Commission's proposed departure from an expected comparative hearing process after the filing of license applications is also supported by the D.C. Circuit's decision in *Maxcell Telecomm Plus, Inc.*[22] In that case the court upheld the Commission's adoption of a lottery process, in lieu of a comparative hearing procedure, for the selection of permittees in public cellular radio telecommunications services for domestic markets beyond the largest 30 markets. At the time applications were filed the Commission's rules provided for the selection of the winner via the comparative hearing process. The Commission subsequently changed the selection process. The court explained that retroactive application of the lottery procedure to pending applications was permissible in part because it relieved competing applicants of the costs associated with a comparative hearing. In addition, the court noted that "[s]ince all persons seeking [a particular] market's license became equally subject to the lottery procedure, the Commission fully satisfied the *Ashbacker* rule."[23] Similarly, under the Commission's proposed two-step process, all broadcast license applicants that

---

[21] *Id.* at 273, 277-78.

[22] *Maxcell Telecomm Plus, Inc. v. FCC*, 815 F.2d 1551, 1555 (D.C. Cir. 1987), *aff'g in part and rev'g in part, Cellular Lottery Order*, 59 R.R. 2d 407 (1985) (prior history omitted).

[23] *Id.*

challenge the renewal of an existing license will have access to the same procedure -- an opportunity to participate in a hearing to determine the renewal expectancy of an incumbent licensee.[24]

Finally, the Commission's proposed two-step process is a justified modification of the comparative hearing process, because the two-step process advances the public interest. First, the two-step process will serve the public interest in continuing to receive quality broadcast service from a provider with a proven record. An incumbent licensee will not receive a renewal expectancy unless it has shown that its past record is "sound, favorable, and substantially above a level of mediocre service which might just warrant renewal."[25]

Secondly, the two-step process is not a substantive departure from the Commission's past practice. The difference is that the proposed new procedures will more efficiently use the Commission's and the parties' resources. The Commission's past practice demonstrates that, once an incumbent licensee earns a renewal expectancy, the result of a comparative hearing is virtually pre-ordained. The Joint Renewal Commenters know of no case in which an incumbent broadcast licensee *with* a renewal expectancy was denied a renewal after a comparative hearing.[26] The Commission's adoption of a two-step procedure to resolve the pending license renewal applications simply puts into effect the Commission's actual practice. In light of the fact that the Commission has already adopted the two-step procedure for applications filed after May 1, 1995, and the fact that only eight

---

[24]*NPRM*, ¶ 102.

[25]*Cowles Broadcasting, Inc.*, 86 FCC 2d 993, 1006 (1981), *aff'd sub nom.*, *Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983).

[26]*Cf. United Broadcasting Co.*, 94 FCC 2d 938 (Rev. Bd. 1983) (incumbent without a renewal expectancy was denied a renewal).

applications are pending, it would be a waste of the Commission's resources to establish comparative criteria for only a few cases.

Thirdly, the Commission's proposed two-step process provides greater rights to applicants competing for licenses than the two-step procedure that is now in effect pursuant to the Act.[27] Under the Commission's proposed two-step process, which would apply solely to the eight pending license renewal cases, competing applicants will be entitled to participate in a hearing which will establish whether the incumbent licensee has a renewal expectancy.[28] In contrast, under the Act's two-step process, which applies to all license renewal applications filed after May 1, 1995, no competing applications are even permitted unless and until the Commission has determined that the incumbent licensee has not met the renewal criteria.[29] Competing applicants have no role in this determination. Furthermore, under the Commission's proposed rule, incumbent licensees would have to meet a higher standard than that established by the Act to avoid a comparative hearing. The Commission's proposed rule allows an incumbent licensee to bypass a comparative hearing only if the licensee is entitled to a renewal expectancy, *i.e.*, it has performed "substantially above a level of mediocre service."[30] To avoid a comparative hearing under the Act, an incumbent licensee does not have to possess a record that is "substantially" greater than average. Rather, the incumbent is granted a renewal as long as it has served the public interest, has committed no serious violations of the Act

---

[27]47 U.S.C. § 309(k).

[28]*NPRM*, ¶ 102.

[29]47 U.S.C. § 309(k)(1).

[30]*Cowles Broadcasting, Inc.*, 86 FCC 2d at 1006.

or Commission regulations, and has not engaged in a pattern of abuse by committing a series of non-serious violations of the Act or Commission regulations.[31]

Simon T's argument that Congress' choice of a May 1, 1995, cut-off date for its new two-step procedure somehow precludes the Commission from considering the instant proposal is unavailing. Congress chose May 1, 1995 as the start date for its new procedure. By so doing it did not alter the law for pre-May 1, 1995, situations. If the Commission could lawfully have adopted its proposal prior to the 1996 amendments to Section 309, nothing in the 1996 amendments changes that state of affairs today.

In light of the fact that Congress has already adopted a two-step procedure that provides less protection to competing applicants than the proposed procedure, and the fact that only eight applications are pending, it would be a waste of the Commission's resources to establish comparative criteria for only a few cases.

In summary, the Commission has authority to promulgate a rule that gives incumbent broadcast licensees a dispositive preference over other applicants. Such a rule is consistent with D.C. Circuit precedent, which permits administrative agencies to set threshold eligibility standards for comparative hearings. Moreover, a Commission rule that bifurcates the license renewal process will serve the public interest in receiving high quality service and in ensuring efficient use of the Commission's resources.

---

[31] 47 U.S.C. § 309(k)(1)(A)-(C).

II. The Award of a Renewal Expectancy Should Satisfy Step One of the Renewal Procedure.

Pursuant to Commission broadcast law prior to the addition of Section 309(k) of the Act in 1996, an incumbent licensee could be challenged at renewal time by the filing of a petition to deny its renewal application or by the filing of an application for a mutually exclusive facility. If a competing application was filed, the Commission designated the existing licensee and its challenger for a comparative hearing. In comparing incumbent and challenger applications, the Commission utilized a set of traditional comparative criteria. However, one advantage available only to the incumbent licensee was a comparative preference for meritorious past performance, *i.e.*, a "renewal expectancy". [32] If the Commission adopts a two-step renewal procedure for renewal applications filed before May 1, 1995, the Joint Renewal Commenters urge the Commission to also adopt its proposal to use the standards it developed in the renewal expectancy context as the benchmark for satisfying step one of the renewal process.

Simon T, as part of its suggested comparative criteria, acknowledges the applicability of the renewal expectancy concept but attempts to downplay its significance. Simon T would subsume the renewal expectancy in a comparative hearing and have it only be potentially decisional if the expectancy was "strong," *i.e.*, denoting "superior" service. This, however, would defeat the aim of a two-step process, namely, not having a step two comparative hearing at all if the renewal applicant exceeds a certain threshold standard. The use of as objective a standard as possible should be the Commission's goal. Parsing the relative strength of a renewal expectancy would not attain this goal. Moreover, as the following paragraphs demonstrate, even the weakest renewal expectancy standard

---

[32] *Cowles Broadcasting, Inc., supra.*

is a higher standard than the basic renewal standard found in Section 309(k) of the Act for post-May 1, 1995 renewal applications.

Starting as early as 1951 the Commission wrestled with ways to give weight to the desirability of continuing existing good service in a comparative renewal context.[33] This concept eventually evolved into what became known as the "renewal expectancy." The rationale for this comparative criterion was best articulated by the Commission in *Cowles Broadcasting*, as follows:

> The justification for a renewal expectancy is threefold. (1) There is no guarantee that a challenger's paper proposals will, in fact, match the incumbent's proven performance. Thus, not only might replacing an incumbent be entirely gratuitous, but it might even deprive the community of an acceptable service and replace it with an inferior one. (2) Licensees should be encouraged through the likelihood of renewal to make investments to ensure quality service. Comparative renewal proceedings cannot function as a "competitive spur" to licensees if their dedication to the community is not rewarded. (3) Comparing incumbents and challengers as if they were both new applicants could lead to a haphazard restructuring of the broadcast industry especially considering the large number of group owners. We cannot readily conclude that such a restructuring could serve the public interest. (Footnote omitted.)[34]

The award of a renewal expectancy to an incumbent licensee was not automatic, however. A renewal applicant whose application would be granted in the absence of a competing application might well not be entitled to a renewal expectancy preference in a comparative setting. As the Commission said in *Cowles Broadcasting*:

> In our view, the strength of the expectancy depends on the merit of the past record. Where, as in this case, the incumbent rendered substantial but not superior service, the 'expectancy' takes the form of a comparative preference weighed against [the] other factors . . . . An incumbent performing in a superior manner would receive an even

---

[33] *Hearst Radio, Inc.*, 15 FCC 1149 (1951).

[34] 86 FCC2d at 993.

stronger preference. An incumbent rendering minimal service would receive no preference. (Emphasis added.)[35]

The Commission has identified the following factors as being those relevant to determinations regarding a licensee's renewal expectancy: (1) the amount of non-entertainment programming, especially news and public affairs, it presented and at what times of day; (2) whether that programming appeared "reasonably directed to local needs and interests;" (3) the amount of locally produced programming presented; and (4) the station's reputation in the community.[36]

With regard to an incumbent licensee's character, the Commission may, of course, disqualify a renewal applicant for lack of the "character qualifications" necessary to remain a licensee based on allegations raised by a competing applicant or a petition to deny. However, non-disqualifying conduct has been held to be relevant only in assessing an incumbent licensee's renewal expectancy since the Commission ceased considering character issues as a comparative factor in renewal proceedings several years ago.[37] The Commission weighed the strength of an incumbent's record on the factors outlined above against any negative record on compliance with Commission rules and policies in order to arrive at an ultimate decision on the strength (or existence) of any renewal expectancy to be awarded to a renewal applicant.[38] Adverse findings with regard to character matters which were not disqualifying were relevant only to the issue of an incumbent licensee's renewal

---

[35]86 FCC2d at 1012.

[36]*Video Forty-Four*, 65 RR 2d 1512 (1989), *remanded, Monroe Communications Corp. v. FCC*, 900 F.2d 351 (D.C. Cir. 1990).

[37]*Character Qualifications in Broadcast Licensing,* 59 RR 2d 801, 836 (1986), *recon. denied,* 61 RR 2d 619 (1986).

[38]See, *e.g., Valley Broadcasting Co.,* 4 FCC Rcd 2611 (Rev. Bd. 1989), *review denied,* 5 FCC Rcd 499 (1990), *aff'd sub nom. William H. Hernstadt v. FCC,* 919 F.2d 182 (D.C. Cir. 1990).

expectancy.[39] Thus, a station with a meritorious programming record could mitigate findings of misconduct and still be able to obtain a renewal expectancy.[40] Contrary to Simon T's contention, this was even more true where the findings with regard to conduct related to matters having nothing to do with the station whose renewal application was being considered.[41]

Thus, as described in Argument I, *supra*, the renewal expectancy standard contrasts favorably with the renewal standard codified in Section 309(k). That standard is simply a "pass/fail" basic renewal test. The renewal expectancy standard requires the applicant not just to "pass", but to make high grades.

The point which the Joint Renewal Commenters would like to stress is that the law on renewal expectancy is highly developed. The Commission need not invent some other step one standard. If a renewal applicant is entitled to a renewal expectancy, whatever the strength that expectancy might have been in the comparative context, that should be sufficient to satisfy step one of the renewal process. The Joint Renewal Commenters therefore urge the Commission to utilize the case law which has evolved surrounding the award of a renewal expectancy as the standard for satisfying step one of the renewal process for renewal applications filed prior to May 1, 1995.

III. The Comparative Criteria Suggested by Simon T are Either Arbitrary and Capricious Under the *Bechtel II* Standard or are Meaningless in the Renewal Context.

In *Bechtel II* the court held that continued application of the powerful integration preference factor was "arbitrary and capricious" and therefore unlawful. This holding essentially did away with

---

[39]See, *Seattle Public Schools*, 4 FCC Rcd 625 (Rev. Bd. 1989).

[40]See, *Central Florida, supra; Valley Broadcasting Co., supra.*

[41]*United Broadcasting Co., Inc.*, 57 RR 2d 887, 897 (1985) (renewal expectancy only slightly diminished for misconduct at other stations).

the heart of the Commission's comparative process. The court carefully considered each of the rationales put forth to justify reliance on the integration preference and found them wanting. Much of the reasoning used by the court applies equally to many of the criteria suggested by Simon T in his reply comments.

In the first place, three of the suggested criteria are the core of the "qualitative" factors under the discredited integration criterion, *i.e.*, owner's residence in the proposed service area, owner's participation in civic affairs, and owner's broadcast experience.[42] Identifying these factors as separate criteria does not magically remedy their deficiencies under the *Bechtel II* test. For example, each of these factors suffer from one of the *Bechtel II* court's prime criticisms, lack of permanence. Any benefits allegedly derived from these factors would last only if the Commission insisted on the owner maintaining his local residence, or continuing with his civic activities, or remaining involved in the day-to-day operation of the station.. This is not what the Commission does nor is it what the Commission proposes to do. In addition, there is a marked lack of evidence as to these factors' efficacy. The Joint Renewal Commenters would venture to say that the Commission has no more evidence that these factors achieve the benefits ascribed to them than they did in the case of the Commission's integration policy. Thus, these factors rest on as unstable a foundation as the factors found to be arbitrary and capricious in *Bechtel II*.

Likewise, Simon T's proposal to award comparative advantage based on a diversification of control of mass communications media facilities is unsustainable. It has historically been assumed that diversity of ownership *per se* without reference to actual programming and programming content

---

[42] 10 F.3d at 882.

advanced the diversity of viewpoints under First Amendment principles.[43] However, the mere incantation of "diversity of viewpoints" is not sufficient justification for awarding a comparative preference in a renewal case. This is especially so since the Commission does not consider the content of a station's programming and thus does not know if a "diversity of views" is in fact enhanced when it awards the diversity of ownership preference.[44] As the *Bechtel II* court held, when no factual basis is offered to uphold a policy it must be struck as "arbitrary and capricious."[45]

Adopting retroactive integration enhancement or ownership diversity standards which serve virtually the same purpose as the pre-*Bechtel II* standards would not be rational, but would remain "arbitrary and capricious," both facially and as applied. Most notable among the *Bechtel II* court's rejections of the various rationales put forth by the Commission, and offered anew by Simon T supporting integration-type criteria, was its rejection of the FCC's objectivity rationale, *i.e.*, that the structure of the integration standards led to greater objectivity in deciding among competing applications. This would have to be the basis for any new criteria, that they were the best objective standards to be applied to resolve who the best licensee would be. However, the *Bechtel II* court found that such "objectivity" was "illusory," merely lending a "veneer of precision."[46] If the court rejected this argument, based upon the Commission's twenty-eight years of experience with the old integration and enhancement factors policy, it is highly unlikely that the same court would then find

---

[43]*See*, *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564-65 (1990), *reversed, Adarand Constructors, Inc. V. Pena*, 515 U.S. 200, 225 (1995).

[44]*See*, *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990); *FCC v. WNCN Listeners Guild*, 450 U.S. 584 (1981).

[45]10 F.3d at 887.

[46]10 F.3d at 885.

this argument persuasive with a newly developed policy for evaluating ownership. Again, the problem here is that the Commission would be attempting to implement the same objective weighing process under a new guise.

Three of the remaining four comparative criteria advanced by Simon T have historically been minor factors which have rarely, if ever, been of decisional significance. Thus, an applicant's past broadcast record, as distinct from the incumbent's renewal expectancy, is not normally a factor in renewal proceedings.[47] The most efficient use of the frequency is almost never a factor in a comparative television application context.[48] As for auxiliary power facilities, in the post-New York blackout world this factor has never been decisive in a comparative case.[49]

The final criterion of the eight criteria suggested by Simon T is renewal expectancy. However, if the Commission adopts the proposed two-step renewal process, the Joint Renewal Commenters have urged the Commission to make the grant of a renewal expectancy the test for satisfying step one of the process. If the Commission concurs with this position, renewal expectancy could not be a comparative criterion in a proceeding which reached step two.

---

[47]*Notice of Proposed Rulemaking in GC Docket No. 92-52*, 7 FCC Rcd 2664 (1992) ("We emphasize that we are dealing with the issue of past broadcast record in new applicant proceedings. The renewal expectancy analysis in comparative renewal proceedings rests on policy considerations that have no counterpart in new applicant proceedings").

[48]*Id.* at 2667. ("Under this criterion, we have awarded preferences to applicants proposing greater coverage than their opponents, especially coverage to areas receiving no or only one existing service.") This narrow scope of reference is inapplicable to any of the seven remaining television comparative renewal cases.

[49]*Id.* at 2666. ("The Commission adopted the auxiliary power preference in response to the November 1965 northeastern power failure . . . . Upon reflection, we question the suitability of the comparative process for addressing this concern.")

The issue in this proceeding comes down to whether any new comparative criteria would survive the court's scrutiny and/or be decisionally meaningful. The D.C. Circuit has already rejected the integration and enhancement factors in *Bechtel II* The Commission's various justifications for its determinations as to ownership have been deemed "implausible." Since the Commission does not consider the content of programming, there is little else that the Commission could do in the way of rulemaking, as demonstrated by examination of Simon T's reply comments, which could serve to evaluate the relative merits of licensees and challengers which was not previously addressed and struck down in *Bechtel II*, or which are not simply weak factors.

The Joint Renewal Commenters are not arguing that there are no meaningful comparative criteria which could be supported with extrinsic evidence. However, in view of the fact that there are only eight renewal proceedings pending involving pre-May 1, 1995 applications, it does not seem worth the effort to attempt to adopt a uniform set of comparative criteria for such a small number of proceedings. Instead, the Joint Renewal Commenters suggest that, if one of these proceedings advances to step two of the renewal process, the criteria be determined on an *ad hoc* basis pursuant to suggestions made by the competing applicants. In this way, the comparative criteria in each case can be tailored to the particular facts of that proceeding. Thus, for example, the past broadcast records of the applicants may well be a relevant factor in one proceeding and not a factor at all in another proceeding. This method of setting forth comparative criteria has the benefit of relevance and ensures that only those criteria will be utilized which are susceptible to the development of a proper evidentiary record.

CONCLUSION

The Joint Renewal Commenters urge the Commission to reject the arguments advanced by Simon T and to adopt the proposed two-step procedure for the resolution for the eight remaining pre-May 1, 1995 comparative renewal proceedings.

Respectfully submitted,

TRINITY BROADCASTING OF FLORIDA, INC.

TRINITY CHRISTIAN CENTER OF SANTA ANA, INC.
d/b/a TRINITY BROADCASTING NETWORK

TRINITY BROADCASTING OF NEW YORK, INC.

By: Howard A. Topel

Howard A. Topel
Stuart F. Feldstein
R. Bruce Beckner

Fleischman and Walsh, L.L.P.
1400 Sixteenth Street, N.W.--Suite 600
Washington, D.C. 20036
202/939-7900

Their Counsel

By: Colby M. May / HAT

Colby M. May

Law Offices of Colby M. May
1000 Thomas Jefferson Street, N.W., Suite 609
Washington, D.C. 20007-3835
202/298-6348

Their Co-Counsel

READING BROADCASTING, INC.

TWO IF BY SEA BROADCASTING CORPORATION

By: Howard A. Topel
Howard A. Topel

Fleischman and Walsh, L.L.P.
1400 Sixteenth Street, N.W.--Suite 600
Washington, D.C. 20036
202/939-7900

Their Counsel

Dated: April 3, 1998

c74645