

A NEW TRIAL FOR SOLOMON: COMPARATIVE HEARINGS AFTER *BECHTEL II*

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"The tendency of the law must always be to narrow the field of uncertainty."¹ Chief Justice Oliver Wendell Holmes' assessment has special applicability in the context of the comparative hearings held by the Federal Communications Commission ("FCC" or "Commission") to determine the licensee of broadcast stations. In this context, narrowing the "field of uncertainty" takes a considerable amount of time. For example, in some pending cases, the competition for a new radio station has spanned more than ten years, witnessing the death of one applicant, the divorce of another, and the reduction of the sixteen original applicants to three.² Clearly, Congress did not envision this backlog when it enacted the Communications Act of 1934.³ What was once a simple hearing convened to consider electrical interference,⁴ grew into a bureaucratic and legal quag-

mire where only the very strong, wealthy, or wise tend to prevail.

Until December 23, 1993,⁵ comparative hearings were the primary method for granting construction permits for new broadcast stations.⁶ In its early decisions, the Commission did not apply uniform criteria to each comparative hearing.⁷ However, after the adoption of the 1965 *Policy Statement* on comparative broadcast hearings⁸ in conjunction with the liberalization of other FCC policies,⁹ a practice developed where, in order to win the right to operate a station, applicants formed "unique" business associations to satisfy the Commission's standards.¹⁰

This trend, however, came to a dramatic end with the decision of *Bechtel v. FCC*.¹¹ With one decision, twenty-eight years of formal administrative and federal jurisprudence ended. A three judge panel for the

¹ O.W. HOLMES JR., *THE COMMON LAW* 127 (1881).

² Comments of J. McCarthy Miller to the *Second Further Notice of Proposed Rulemaking* in GC Dkt. No. 92-52 at 1-2 (July 20, 1994).

³ See 47 U.S.C. § 151 (1994). Section 1 of The Communications Act of 1934 ("the Act") states that the purpose of the FCC was "to make available . . . to all people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communications service . . . as for the purpose of securing a more efficient, exercise of this policy." *Id.* (emphasis added).

⁴ *Evangetine Brdcast. Co.*, 1 F.C.C. 253 (1934) (finding all basic qualifications satisfied and that no electrical interference would occur).

⁵ On December 23, 1993, the United States Court of Appeals for the District of Columbia Circuit released its opinion in *Bechtel v. FCC*, 10 F.3d 875 (1993), which effectively forbade the Commission to use "integration" credit in comparative hearings.

The term "integrated" reflects the amount of time that the owner plans to spend managing the station. For example, if an applicant pledges to spend 20 hours a week as News Director, then she would receive 50% integration credit, i.e., 50% of full-time (40 hrs/wk) participation. See *infra* text accompanying notes 86-111.

⁶ Any party who is interested in owning a radio or television station must first receive authorization to construct the station. 47 C.F.R. § 73.3533 (1994). After construction and testing of the station is completed, a construction permit holder files for a

license. 47 C.F.R. §§ 73.1620, 73.3536 (1994).

⁷ *WWDH, Inc.*, 22 F.C.C. 761 (1957) (focusing on cross-media ownership interest of an applicant in newspaper and radio, and balancing this interest against the need for competition in the Boston market).

⁸ *In re Comparative Broadcast Hearings, Policy Statement*, 1 F.C.C.2d 393 (1965) [hereinafter *Policy Statement*]. A policy statement is not subject to the Administrative Procedure Act ("APA"). 5 U.S.C. § 553 (1994). Instead, the APA exempts "general statements of policy." 5 U.S.C. § 553(b)(A) (1994); see also *infra* text accompanying note 91 (discussing policy statements).

⁹ See e.g., *infra* text accompanying notes 42-55.

¹⁰ In order to receive authorization, applicants would pledge to uphold unusual business and family arrangements, such as: best friends and co-owners of a station swear not to consult with each other; family members with valuable broadcast knowledge and experience agree not to assist the tyro[sic] station manager in the family; people with steady jobs and families in one city pledge to leave them and move permanently to another; and wealthy retirees promise to move to and work in small summer towns in Delaware with which they have no former connection. *Bechtel v. FCC*, 957 F.2d 873, 880 (D.C. Cir. 1992) [hereinafter *Bechtel I*].

¹¹ 10 F.3d 875 (D.C. Cir. 1993). Since this was the second time the Court of Appeals reviewed this matter, the case is commonly referred to as "*Bechtel II*."

D.C. Circuit found integration of ownership into management, the central standard of the *Policy Statement*, arbitrary and capricious.¹² As a result, comparative hearings for new broadcast stations, and licensees facing comparative renewals, are being held in abeyance pending the formulation of a new decisional basis for the distribution of broadcast licenses.¹³

This Comment focuses on the proposed criteria for comparative hearings suggested by the Commission, reviews the Comments and Reply Comments collected from interested parties, and notes the alterations mandated by the Telecommunications Act of 1996. Part I discusses the Pre-*Bechtel* developments that gave rise to the decision. Part II reviews the *Bechtel* case and the Comparative Hearing Rulemaking. Part III discusses the public's comments and proposes a new plan for comparative hearing proceedings. This Comment concludes that standards need to be formulated to satisfy the twin

goals of efficiency in application and the promotion of the public interest.

I. COMPARATIVE HEARINGS BEFORE *BECHTEL II*

A. Statutory Authority & Judicial Interpretation

The Communications Act of 1934 ("the Act")¹⁴ vested the FCC with the power to determine who would be authorized to construct radio stations on the basis of the "public interest, convenience, and necessity."¹⁵ In *Johnston Broadcast Co. v. FCC*,¹⁶ the U.S. Court of Appeals for the D.C. Circuit noted the difficulty in applying that exceedingly broad mandate when choosing between "mutually exclusive" applicants.¹⁷ The court granted the Commission "wide powers and discretion" in choosing between the competing applicants as long as certain standards were followed.¹⁸ Two of these standards, disallowing

¹² *Id.* at 887 (finding the application of integration credit to be arbitrary and capricious because it gave applicants an incentive to create "sham" proposals and made it difficult for the Commission to identify sound business practices).

¹³ FCC Freezes Comparative Proceedings, *Public Notice*, 9 FCC Rcd. 1055 (1994). This freeze had the effect of holding at least 15 new FM proceedings in abeyance: *In re* Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, (Alfred, NY) MM Dkt. 91-339; *In re* Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, (Minetto, NY) MM Dkt. 93-103; *In re* Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, (Athens, OH) MM Dkt. 93-165; *In re* Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, (Norlina, NC) MM Dkt. 93-184; *In re* Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, (Point Arena, CA) MM Dkt. 93-196; *In re* Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, (Isleboro and Winter Harbor, ME) MM Dkt. 93-203; *In re* Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, (Hermantown, MN) MM Dkt. 93-206; *In re* Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, (Bonanza, Keno, Lakeview, Malin and Merrill, OR) MM Dkt. 93-208; *In re* Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, (Balsam Lake, WI) MM Dkt. 93-213; *In re* Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, (Grand Gorge, NY) MM Dkt. 93-217; *In re* Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, (Houston, AK) MM Dkt. 93-220; *In re* Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, (Jeffersonville, NY) MM Dkt. 93-237; *In re* Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, (Templeton, CA) MM Dkt. 93-238; *In re* Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, (Quincy, WA) MM Dkt. 93-239; *In re* Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, (Taylorville, IL) MM Dkt. 93-256, *Order*, 9 FCC Rcd. 6844 (1994).

Furthermore, the freeze stalled at least 48 comparative hearings. Table of Settlement Cases, Office of Administrative Law Judges, Federal Communications Commission (Sept. 15, 1995)(on file with the COMMLAW CONSPECTUS). Also, at least 12 cases that were pending before the U.S. Court of Appeals for the D.C. Circuit were remanded to the FCC as a result of the freeze. *Caldwell Brdcast. Ltd. v. FCC*, No. 92-1343 (Feb. 3, 1994); *Lamprecht v. FCC*, No. 92-1586 (Feb. 9, 1994); *Charisma Brdcast. Corp. v. FCC*, No. 93-1188 (Feb. 15, 1994); *Bott v. FCC*, No. 93-1274 et al. (Feb. 17, 1994); *Mazo Radio Co. v. FCC*, No. 92-1659 et al. (Feb. 18, 1994); *Avalon Brdcast. v. FCC*, No. 92-1116 (Mar. 1, 1994); *Mitchell v. FCC*, No. 92-1349 (Mar. 8, 1994); *Biltmore Forest Brdcast. FM, Inc. v. FCC*, Nos. 92-1645, 93-1465, 93-1466, and 93-1470 (Mar. 15, 1994); *Skidelsky v. FCC*, No. 92-1460 (Mar. 18, 1994); *Benns v. FCC*, No. 93-1492 (Apr. 18, 1994); *NCB Enter., Inc. v. FCC*, No. 93-1438 (Apr. 18, 1994); *North Georgia Radio II, Inc. v. FCC*, No. 93-1690 (July 27, 1994).

Of these cases, approximately 80 settled during a 90 day waiver of the Settlement Cap period. Telephone Interview with Chief Administrative Law Judge Joseph Stirmer, in Washington, D.C. (Mar. 7, 1996). For a discussion of the waiver details see also FCC Waives Limitations on Payments to Dismissing Applicants in Universal Settlements of Cases Subject to Comparative Proceedings Freeze Policy, *Public Notice*, 10 FCC Rcd. 12182 (Sept. 15, 1995).

¹⁴ 47 U.S.C. § 151 *et. seq.* (1994).

¹⁵ 47 U.S.C. § 151 ("[I]f the Commission . . . shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.")

¹⁶ 175 F.2d 351 (D.C. Cir. 1949).

¹⁷ *Id.* at 356; *see also* 47 U.S.C. § 308(b) (1994) (requiring that every applicant satisfy the basic requirements of being financially, legally, technically qualified, and of good character).

¹⁸ *Johnston Brdcast. Co.*, 175 F.2d at 356. These standards are:

(1) [that] the bases or reasons for the final conclusion [are] clearly stated; (2) that [the] conclusion [is] a rational re-

the use of frivolous and/or wholly unsubstantial differences between parties as a decisional basis, and the requirement for a composite consideration of each applicant, directly relate to comparative determinations. Thus, requiring the Commission to look at each applicant's distinguishing characteristics, and evaluate all factors to "reach an over-all relative determination."¹⁹

The FCC is required to grant all competing applicants a hearing when it finds that the applications are "mutually exclusive."²⁰ Mutual exclusivity was defined in *Ashbacker Radio Corp. v. FCC*²¹ as a situation involving two or more proposed stations where "the simultaneous operation . . . would result in intolerable interference to both applicants."²² Where two or more applicants apply for authorization to utilize the same channel in a given community, or where an applicant files an application "against" an operating station's license renewal application,²³ these applications are "mutually exclusive." Further, the *Ashbacker* Court held that "where two *bona fide* applications are mutually exclusive, the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him."²⁴

Thus, following section 309 of the Act and interpretations of *Johnston* and *Ashbacker*, the FCC has

sult from the findings of ultimate facts, and those findings [are] sufficient in number and substance to support the conclusion; (3) the ultimate facts as found [must] appear as rational inferences from the findings of basic facts; (4) the findings of the basic facts [must] be supported by substantial evidence; (5) findings are made in respect to every difference, except those which are frivolous or wholly unsubstantial, between the applicants indicated by the evidence and advanced by one of the parties as effective; (6) the final conclusion [is based] upon a composite consideration of the findings as to the several differences, pro and con each applicant.

Id. at 357.

¹⁹ *Id.* The Court supported this decision by noting that "[t]he Commission cannot ignore a material difference between two applicants and make findings in respect to selected characteristics only. Neither can it base its conclusion upon a selection from among its findings of differences and ignore all other findings." *Id.*

Further, the decision is made more difficult when one applicant is relatively stronger in some respects and weaker in others. See *Pinellas Brdcast. Co. v. FCC*, 230 F.2d 204 (D.C. Cir. 1956).

²⁰ 47 U.S.C. § 309(e) (1994). Section 309(e) of the Act reads in part: "If . . . a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding . . . it shall formally designate the application for hearing on the ground or reasons then obtaining." *Id.*

²¹ 326 U.S. 327 (1945).

the unenviable task of comparing the relative strengths and weaknesses of competitors for a station license to determine which applicant would best serve the "public interest."

B. Development of Uniform Criteria in Comparative Hearings

Before the 1965 *Policy Statement* became effective, the public interest criteria applied in the comparative analysis were developed, on a case-by-case basis. In one of its earliest comparative decisions, the Commission announced a preference for an "integrated owner," citing the desirability of direct participation in the day-to-day operations of the station.²⁵ While this factor was apparently decisional in *Homer Rodeheaver*,²⁶ in *Pilgrim Broadcasting Co.*,²⁷ the FCC granted the application of a party with the least integration credit.²⁸ There, one applicant, an individual, planned to be 100% integrated, another applicant, Beacon Broadcasting Co., Inc, was to be 40% integrated, and the eventual winner, Pilgrim Broadcasting Co., an even lesser amount.²⁹ The Commission focused on Pilgrim's program proposals. Pilgrim satisfied the goal of diversity because of its participation in civic activities and because it had fewer existing broadcast interests.³⁰ The Commission made special

²⁵ *Id.* at 328; see also *FCC v. Pottsville Brdcast. Co.*, 309 U.S. 134 (1940).

²⁶ Citing the same goals as were given for the *Policy Statement*, the FCC adopted the *Policy Statement on Comparative Hearings Involving Regular Renewal Applications*, 22 F.C.C. 2d 424 (1970) [hereinafter *Renewal Statement*]. Note that the renewal process drastically changed with the passage of the Telecommunications Act of 1996. Pursuant to the Act, a renewal application filed after May 1, 1995, will not face competing applications, but rather will be judged solely on its own record. 142 CONG. REC. H1078, H1094 (daily ed. Jan. 31, 1996).

²⁷ *Ashbacker Radio Corp.*, 326 U.S. at 333.

²⁸ *In re Homer Rodeheaver*, 12 F.C.C. 301, para. 3 (1947). In the end, the FCC chose the applicant that currently resided in the community the license would serve, as compared to the applicant who planned to move into the city. However, the Commission clearly stated that its decision was based on the "entire record," rather than on just integration. *Id.*

²⁹ *Id.*

³⁰ 14 F.C.C. 1308 (1950).

³¹ *Id.* paras. 15, 17.

³² *Id.*

³³ *Id.* Note that when the applicant's application is assessed, only the station principle's attributes are taken into consideration. See *In re Corporate Ownership Reporting and Disclosure by Broadcast Licenses, Report and Order*, 97 F.C.C.2d 997 (1994). A principle is defined today as one who owns at least 10% of the voting interest in the applicant. *Id.*

note of the need to look at the complete application in order to make a rational prediction as to whether the applicant would carry out the policies of ownership. The FCC, therefore, gave little weight to integration credit in its overall consideration.³¹

One of the first actual "lists" of criteria to be used in comparative hearings appeared in a letter from the FCC Chairman, George C. McConaughy, to the Senate Interstate Commerce Committee Chairman, Warren G. Magnuson.³² In the letter, however, the Chairman noted that all of the criteria listed tended to be considerations.³³ In addition, he stated that when comparing applicants who have past broadcast experience, the use of criteria such as local residence and integration was less significant.³⁴

C. 1965 Policy Statement on Comparative Hearings - The Formulation of Set Criteria

In an effort to make comparative hearings more consistent and the basic policies more clear, the FCC adopted a *Policy Statement* regarding comparative hearings on July 28, 1965.³⁵ The Commission believed that this *Policy Statement* would give hearing examiners and the public a greater understanding of the determination of "public interest," and that this, in turn, would expedite the comparative hearing process.³⁶

To this end, the Commission listed six factors which would be used in comparing applicants: (1) diversification of control of the media of mass communications; (2) full-time participation in station operation by owners; (3) proposed program service; (4) past broadcast record; (5) efficient use of frequency; and (6) character.³⁷ The FCC noted that "it is inherently desirable that legal responsibility and day-to-day performance be closely associated" and that "there is a likelihood of greater sensitivity to the area's changing needs, and of programming designed to serve these needs, to the extent that the station's proprietors actively participate in the day-to-day operation of the station."³⁸

In quite prophetic separate statements, Commissioners Robert E. Lee and Rosel H. Hyde took issue with the *Policy Statement*. In his dissent, Commissioner Lee focused on the inherent problem with determining the winner of any comparative hearing process; the winner can sell the station to a lesser qualified party that would not have succeeded in a comparative hearing.³⁹ Commissioner Hyde recognized that, by announcing standards for applicants, each applicant would "mold" its application to the standards laid out in the *Policy Statement*, thereby resulting in a decision based on "trivial differences."⁴⁰ Five years later, despite these warnings, the Commission extended the application of these stan-

³¹ *Id.* para. 13. This consideration, whether the policies of the ownership would be followed, served as one of the major policy goals of the original focus on integration. See Homer Rodeheaver, 12 F.C.C. 301 (1947).

³² NETWORK BROADCASTING, H.R. REP. NO. 1297, 85th Cong., 2d Sess. at 62 n.44 (1958) (citing Letter of Aug. 30, 1956, to Chairman Warren G. Magnuson, Senate Interstate Commerce Comm., in Hearings on S. Res. 13 and 163, 84th Congress, 2d Sess. (1956)) [hereinafter NETWORK BROADCASTING REPORT]. The listed standards were as follows:

proposed programming and policies, local ownership, integration of ownership and management, participation in civic activities, record of past broadcast performance, broadcast experience, relative likelihood of effectuation of proposals as shown by the contacts made with local groups and similar efforts, carefulness of operational planning for television, staffing, diversification of the background of the persons controlling, diversification of control of the mediums of mass communications.

Id. at 61-62. The NETWORK BROADCASTING REPORT's purpose was to "determine whether the present operation of television and radio networks and their relationship with stations and other components of the industry tend to foster or impede the development of a nationwide competitive broadcast system." *Id.* at 1. In part, the NETWORK BROADCASTING REPORT was a follow up to the REPORT ON CHAIN BROADCASTING, Commission Order No. 37 (May 1941), which reviewed the interrelationship between networks and stations, and led to the development of

Commission rules regarding this matter. *Id.*

³³ *Id.*

³⁴ *Id.* The general belief that the comparative hearing should review the totality of the application, rather than just focus on one or two criteria in particular is also supported by the decision in *In re WWDH, Inc.*, 22 F.C.C. 761 (1957).

³⁵ *Policy Statement*, *supra* note 8.

³⁶ *Id.* at 393-94.

³⁷ *Id.* at 395-99. Character issues are also basic qualifying factors. *Supra* note 17. However, the Commission added character to its comparative standards, "since substantial demerits may be appropriate in some cases where disqualification is not warranted . . ." *Id.* at 399; see also 47 U.S.C. § 308(b) (1944).

³⁸ *Policy Statement*, *supra* note 8, at 395. Further, the Commission stated that "it is important that integration proposals be adhered to on a permanent basis." *Id.* at 395 n.6 (citing *Tidewater Teleradio, Inc.*, 45 F.C.C. 1070 (1962)); see also *infra* text accompanying notes 63-66.

³⁹ *Id.* at 405-06 (Commissioner Lee, dissenting).

⁴⁰ *Id.* at 400 (Commissioner Hyde, dissenting). Commissioner Hyde also noted that novice broadcast owners would be preferred over "the more prudent applicant who intends to secure competent, experienced and professional management to operate a station . . . until he acquires a reasonable degree of experience." *Id.* at 402; see also *infra* text accompanying note 83 (discussing the use of a "functional equivalent," where the owners hire personnel to operate the station).

dards to comparative renewal proceedings.⁴¹

Thus, the implementation of the *Policy Statement* gave the applicants a picture of what was expected of them, and gave the Commission an opportunity to make comparative proceedings more uniform and predictable. However, two subsequent decisions by the Commission changed the playing field by altering the basic assumptions upon which the *Policy Statement* rested.

D. Altering the Playing Field

1. Transfer of Control

Section 310(d) of the Act⁴² restricts the transfer of broadcast licenses and permits those transactions where the "public interest, convenience, and necessity will be served."⁴³ In 1962, the Commission codified the existing policy and required that a licensee seeking to sell its license, which had not held the station for more than three years, have its transfer/assignment⁴⁴ application designated for hearing.⁴⁵ As the basis for this decision, the Commission cited the increased frequency of short-term sales, and the resulting failure of the licensee to provide service as originally proposed.⁴⁶ However, twenty years later, the FCC determined that the imposition of the three-

year rule was counter to the public interest and that market forces would better determine the "higher valued use" of the station.⁴⁷ Accordingly, the FCC reduced the mandatory holding period from three years to one year,⁴⁸ citing the high cost of the comparative hearing process and the possibility for further delay of service.⁴⁹

2. Ownership Attribution

Another example of the de-regulatory spirit, which assisted the lifting of the three-year holding rule, occurred in 1984 when the FCC raised the Ownership Attribution guidelines for broadcast licensees.⁵⁰ Specifically, the basic ownership benchmark for attribution was raised to five percent or more, and the "passive" (non-voting) benchmark was raised to ten percent or more.⁵¹ Significantly, the FCC defined the nature of passive investors, those who own non-voting stock, as those who would not contact or communicate with the licensee regarding any issue relating to the operation of the station.⁵² This issue essentially codified the holding in *Anax Broadcasting Co.*,⁵³ where the Commission based part of the decision on the fact that, as passive investors, the limited partners would not have a role

⁴¹ *Renewal Statement*, *supra* note 23.

⁴² 47 U.S.C. § 310(d) (1994).

⁴³ *Id.* The Commission must make this decision without considering whether the public interest, convenience and necessity might be better served by authorizing the transfer to a party other than the proposed buyer. *In re* Amendment of Section 73.3597 of the Commission's Rules (Applications for Voluntary Assignments or Transfers of Control), *Report and Order*, 52 Rad. Reg. 2d (P & F) 1081, para. 28 (1982) [hereinafter *1982 Transfer Report and Order*]. Instead, the Commission is constrained to make the determination based on whether that applicant would serve the public interest. *Id.*

⁴⁴ An assignment involves the sale of the station's assets, while a transfer involves the sale of a controlling ownership interest in the licensee entity. *See* 47 C.F.R. §§ 73.3540, 73.3541 (1994).

⁴⁵ The issues for determination include whether the applicant:

fulfill[ed] his programming representations or adjust[ed] his programming to the needs of his area, that no unwarranted interruption or deterioration in programming service has occurred, or will occur, incompatible with broadcasting in the public interest, and that he has a valid reason for transferring the station after only a brief period of operation.

In re Amendment of Part 1 of the Commission's Rules Adding Section 1.365 Concerning Applications for Voluntary Assignments or Transfers of Control, *Report and Order*, 32 F.C.C. 689, para. 11 (1962) [hereinafter *1962 Transfer Report and Or-*

der]. The *1962 Transfer Report and Order* did offer an exception to the hearing requirement for those situations where "changed circumstances" occurred that were beyond the control of the licensee. *Id.* para. 10.

⁴⁶ *Id.* para. 4. The Commission also noted that the licensee/applicant always has the duty of complying with the proposals included in its application. *Id.*; *see also* *In re* KORD, Inc., 31 F.C.C. 85, para. 5 (1961) (relating to the importance of compliance with the programming proposals made in the license application).

⁴⁷ *1982 Transfer Report and Order*, *supra* note 43, paras. 2-3.

⁴⁸ *Id.* paras. 5-6. In fact, the Commission found that the public interest would be better served in situations where the incumbent station owner was unable, or unwilling to serve the public. In such situations, the FCC believed that a "station doctor" would be able to invigorate the station, and thus better serve the public interest. *Id.* para. 28.

⁴⁹ *Id.* paras. 34-35.

⁵⁰ *In re* Corporate Ownership Reporting and Disclosure by Broadcast Licensees, *Report and Order*, 97 F.C.C.2d 997 (1984) [hereinafter *Corporate Ownership Report and Order*].

⁵¹ *Id.* para. 1. The *Corporate Ownership Report and Order* also clarified the method for determining non-voting stock and limited partnership interests, as well as the provisions for officers and directors of the licensee. *Id.*

⁵² *Id.* para. 34.

⁵³ *In re* Anax Brdcast. Co., *Memorandum Opinion and Order*, 87 F.C.C.2d 483 (1981) [hereinafter *Anax Doctrine*].

in the management of the station.⁵⁴ Accordingly, a passive investor, who held 100% of the non-voting stock, which represented 100% of the capital invested, would not be attributed to the ownership of the station, so long as that investor did not influence or control the daily operations of the station, and filed with the Commission a "certification" to that fact.⁵⁵

3. *The Combination of the One-Year Rule and Non-Attribution of Passive Investors*

Each policy reviewed by itself seems harmless enough. In addition to the factors listed above, the fact that the passive investor does not have his or her interest attributed to the Commission's multiple ownership restrictions is a rational extension of the Commission's policy of diversity of ownership. Minority and female applicants are, therefore, able to access alternate sources of funding, while still retaining the full benefit of the integration qualitative enhancements. Further, by lifting the three-year holding period restriction, the Commission allowed stations that were not successful to be transferred to those that were better able to serve the public.

However, as a result of easing the restrictions, the FCC encouraged applicants to form, for the duration of the application process, "sham" business arrangements. These shams could, for example, consist of a minority person or female "general partner" who did not invest a large portion of the operating capital and had no previous broadcast experience. But, based on the comparative hearing criteria discussed

above, could present a strong comparative showing. This "passive" partner would be responsible for the infusion of most of the capital, but would not be considered a "party" to the application for comparative consideration. Once victorious, the "partnership" would need only operate the station for one year, until the license was sold to an entity not designated as the "best" applicant by the comparative hearing, at a price substantially higher than the amount originally invested. This type of sham operation gave rise to *Bechtel I* and *Bechtel II*.

II. *BECHTEL v. FCC*

A. Intra-Agency Decisions

Nine applicants originally sought authorization to operate a new FM station in Selbyville, Delaware. The end result was the Commission's forced abandonment of the comparative criteria it had used for at least thirty years. While the *Hearing Designation Order*,⁵⁶ the *Initial Decision*⁵⁷ of the Administrative Law Judge ("ALJ") and the *Decision*⁵⁸ of the Review Board were fairly run-of-the-mill, upon application to the Commission, it became apparent that using integration as a criterion in determining future licensees would be a continuing struggle.⁵⁹ On Application for Review, the Commission overturned the Review Board's decision to grant Galaxy's application, and instead reinstated the decision by the ALJ.⁶⁰ Just as it was handled at the first two levels, Bechtel's "frontal" attack on the use of integration

⁵⁴ *Id.* at 487.

⁵⁵ *Corporate Ownership Report and Order*, supra note 50, para. 34.

⁵⁶ In Re Applications for Construction Permit (Selbyville, DE), *Hearing Designation Order*, 2 FCC Rcd. 7051 (1987). The only issues for determination were whether one of the applicants was controlled by alien ownership, and, which applicant, if any, would serve the public interest. *Id.* para. 17.

⁵⁷ In Re Applications for Construction Permit (Selbyville, DE), *Initial Decision*, 4 FCC Rcd. 5687 (1989) (ruling by A.L.J. Joseph Chackin). Judge Chackin chose between the four remaining applicants. Galaxy Communications, Inc., Anchor Broadcasting Limited Partnership, Selbyville Broadcasting Co., Inc., and Susan M. Bechtel, and granted the application of Anchor Broadcasting Limited Partnership, finding that its minority involvement consideration outweighed Galaxy's limited expanded coverage, and recent local residence. *Id.* para. 47.

Interestingly, the issue of Bechtel's challenge to the use of integration credit was raised as a result of an evidentiary ruling. Bechtel sought to offer her "integration" proposal, which proposed to hire a full-time experienced manager, into the evidentiary record. However, the ALJ would not accept the proposal

as an exhibit relating to her integration proposal since she did not propose to be integrated. Interview with Harry F. Cole, Bechtel & Cole, Chartered, in Washington, D.C. (Mar. 7, 1996); see also *Initial Decision*, para. 45 (ALJ noting that Bechtel did not offer an integration proposal).

⁵⁸ In Re Applications for Construction Permit (Selbyville, DE), *Decision*, 5 FCC Rcd. 2432 (Rev. Bd. 1990). The Review Board considered Galaxy and Anchor as the "frontrunners," and ultimately decided that only Galaxy deserved 100% integration credit, and granted its application. *Id.* paras. 1, 38. Again, Bechtel raised the integration credit issue. *Id.* at n.3. In response, the Review Board found Bechtel's claim "irrelevant . . . since the Board has no authority to the [sic] afford the relief it seeks." *Id.*

⁵⁹ At each level, Ms. Bechtel, having local interests but no broadcast experience, tendered evidence which was rejected by the FCC under its integration requirement; that by hiring experienced professional management, better programming in the public interest would be achieved than if she were to manage the station herself. *Id.* para. 3; see also supra note 57.

⁶⁰ In Re Applications for Construction Permit (Selbyville, DE), *Memorandum Opinion and Order*, 6 FCC Rcd. 721 (1991).

credit was dismissed in a footnote.⁶¹ The Commission rejected the argument that integration credit was "discredited," and noted that a review of the policy would be appropriate in a rulemaking proceeding.⁶²

B. *Bechtel I*

The United States Court of Appeals for the District of Columbia disagreed with the Commission's determination. Noting that the Commission did not address Bechtel's substantive argument that the use of integration credit was flawed, the court held the Commission responsible for a "fuller explanation."⁶³ Specifically, the court questioned the Commission's failure to review the *Policy Statement* to determine whether the basis for its existence changed over time.⁶⁴ Focusing on the fact that the *Policy Statement* was not a regulation resulting from public notice and comment, the court held that the FCC had a "correlative duty" to periodically review its policies to determine their effectiveness in satisfying the Commission's proffered goals.⁶⁵ As such, the court ordered the FCC to determine whether the integration criteria "worked," and to then consider Bechtel's application.⁶⁶

⁶¹ *Id.* at n.4.

⁶² *Id.*

⁶³ *Bechtel I*, 957 F.2d 873, 880-81 (D.C. Cir. 1992).

⁶⁴ *Id.*

⁶⁵ *Id.* at 881 (citing *Pacific Gas & Elec. v. Federal Power Comm'n*, 506 F.2d 33 (D.C. Cir. 1974)). The Court held that: [w]hen the agency applies [a general] policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy.

Pacific Gas & Elec., 506 F.2d at 38-39.

⁶⁶ *Id.*

⁶⁷ *In re Reexamination of the Policy Statement on Comparative Broadcast Hearings, Notice of Proposed Rulemaking*, 7 FCC Rcd. 2664, para. 4 (1992) [hereinafter *Reexamination NPRM*].

⁶⁸ *Id.* para. 10 (citing the four main criteria: integration, proposed programs service, past broadcast record, and auxiliary power).

⁶⁹ *Id.* para. 11. Explaining the point system as:

(1) defining the weight of each preference in terms of an

C. Reexamination of the Policy Statement on Comparative Broadcast Hearings - *Notice of Proposed Rule Making*

Partially in response to the *Bechtel* decision, the FCC initiated a rule making proceeding to weigh the continuing relevancy of the comparative criteria.⁶⁷ The Commission raised two general issues for consideration, whether the Commission should: (1) "retain, eliminate, or modify" the four main comparative criteria,⁶⁸ and (2) modify the evaluation of criteria to a point system.⁶⁹ Specifically, the Commission sought comments on whether: (A) integration credit was still necessary in the competitive broadcast industry; (B) the proposed program service proposal was still a valuable indicator; (C) past broadcast experience adequately predict future conduct; and (D) the continuing consideration of auxiliary power was necessary.⁷⁰ Finally, the Commission requested comment regarding the advisability of using the former "enhancement" factors as stand-alone criteria, as well as whether it should adopt a point system to be used in conjunction with the comparative hearing.⁷¹

D. Remand Decisions in *Bechtel* and *Flagstaff*

In remanding *Bechtel* to the FCC, the Court of Appeals ordered the Commission to consider how integration credit was still in the public interest and to review Bechtel's challenges. The FCC was ordered to reconsider, Bechtel's application, if necessary, af-

absolute number of 'points,' rather than in terms of relative adjectival preferences and demerits; (2) precisely defining the circumstances under which points are awarded under each criterion; and (3) providing a 'tie-breaker' procedure for resolving cases in which no applicant receives a dispositive preference under the comparative criteria.

Id.

⁷⁰ *Id.*

⁷¹ *Id.* paras. 21-29 (focusing on diversification, minority and gender preferences, local residence, efficient use of the frequency, daytime preference, service continuity preference, and finder preference). The point system, as proposed, would allocate "points" reflecting: "the public interest significance of the criterion," and "the applicant's strength in relation to that criterion." *Id.* para. 33.

In a *Further Notice of Proposed Rule Making*, 8 FCC Rcd. 5475, para. 3 (1993), the Commission proposed that it adopt the Service Continuity preference. This preference gives applicants additional comparative "points" if they propose to own and operate their stations for three years. *Id.* The FCC requested comment on whether it should restrict applying this rule to just those applicants who gained their license through a comparative hearing, or to apply the rule across the board. *Id.* paras. 3, 6.

ter making modifications to the criteria used in the comparative hearing process.⁷²

The Commission's remand decision noted that it initiated a rule making proceeding to review the use of integration credit and that it had broad discretion to review policies.⁷³ Therefore, Bechtel "bore the burden of demonstrating that the changed circumstances [transfer/assignment and ownership policies] . . . clearly have removed the public interest basis for integration."⁷⁴ The Commission concluded that Bechtel failed to meet this burden.⁷⁵ According to the FCC, Bechtel did not provide a "basis" for determining that the effect of the *Anax Doctrine* and the lifting of the three-year rule dramatically restructured the advisability of applying integration credit.⁷⁶

The FCC's remand decision was criticized by the Court of Appeals in *Flagstaff Broadcast Foundation v. FCC*,⁷⁷ a subsequent case where the petitioner challenged the use of integration credit.⁷⁸ The Court of Appeals again remanded the case to the Commission, noting that the Commission failed to consider Bechtel's challenges in *Remand Order I*.⁷⁹ Instead, the court found that the Commission summarily dismissed these challenges after only a cursory review.⁸⁰ *Flagstaff* is significant, first, because it was a second challenge to the viability of integration credit, and second, because the court rebuked the Commission for failing to respond to the court's order in *Bechtel I*.

Responding to this criticism, the Commission modified its decision, recognizing that it failed to adequately address the court's concerns.⁸¹ Accordingly, the FCC offered three arguments in support of its earlier decision. First, the Commission cited the long history of comparative hearings and the "fact" that

an integrated owner would be able to respond more quickly to community needs. The Commission argued those with the most financial interest in the station control the daily functions of the station, and that integrated owners "have demonstrated an active interest in the operation of the station."⁸² Second, the Commission noted the problems associated with using "functional equivalents" in determining integration credit.⁸³ The FCC determined that the inherent lack of certainty regarding alternatives to an "objective structural factor such as integration" would negate the *Policy Statement's* goal of consistency.⁸⁴ Finally, the FCC found that it may still revise its integration policy subject to the on-going rulemaking. Until the completion of the rulemaking process, however, the FCC did not want to impose a new policy on those parties who have made significant investments in reliance on the former standards.⁸⁵ Accordingly, the Commission refused to grant Bechtel's reconsideration petition.

E. *Bechtel II* - Comparative Hearings In Crisis

Bechtel appealed the FCC's remand decision seeking to leave the initial result in the Selbyville case in place.⁸⁶ On the second appeal, the Court of Appeals struck down the continued use of integration credit. The court came to its decision following a review of the development of the policy, the three main arguments offered by the Commission to support the continued use of integration credit, and the proffered "advantages" of the application of the credit.⁸⁷

The court focused initially on the nature of a "Policy Statement" in administrative law to question the continuing adherence to the 1965 *Policy Statement*.⁸⁸ According to the Administrative Procedure

⁷² *Bechtel I*, 957 F.2d 873, 881 (D.C. Cir. 1992).

⁷³ In Re Applications for Construction Permit (Selbyville, DE), *Memorandum Opinion and Order*, 7 FCC Rcd. 4566, para. 13 (1992) [hereinafter *Remand Order I*].

⁷⁴ *Id.* (emphasis added).

⁷⁵ *Id.*

⁷⁶ *Id.* Further, the Commission cited its own tightened control over the integration proposal compliance, in which the licensee is required to report any variance with the proposal after one year. *Id.*; see also *Proposals to Reform the Commission's Comparative Hearing Process, Report and Order*, 6 FCC Rcd. 157, para. 34 (1990); *Anax Doctrine*, *supra* note 53.

⁷⁷ 979 F.2d 1566 (D.C. Cir. 1992).

⁷⁸ In both *Bechtel I* and *Flagstaff*, the applicants contended that the integration policy should not be applied to them. *Bechtel I*, 957 F.2d at 875; *Flagstaff Broadcast Foundation*, 976 F.2d at 1566.

⁷⁹ *Flagstaff Broadcast Foundation*, 976 F.2d at 1566.

⁸⁰ *Id.* at 1571 (citing *Remand Order I*, *supra* note 73).

⁸¹ In Re Applications for Construction Permit (Selbyville, DE), *Memorandum Opinion and Order*, 8 FCC Rcd. 1674, para. 12 (1993) [hereinafter *Remand Order II*].

⁸² *Id.* para. 15. The Commission cited Pilgrim Broadcast Co. to substantiate its belief that the integrated owner would have a more active interest. 14 F.C.C. 1308 (1950). In *Pilgrim*, however, the main focus was on the ties that each applicant had to the community, rather than their relative integration proposals. In *Remand Order II*, in a footnote, the FCC notes this distinction. *Remand Order II*, *supra* note 81, n.9.

⁸³ A "functional equivalent," in the case of *Bechtel*, would be a professional manager that would live in the community full-time. *Remand Order II*, *supra* note 81, para. 16.

⁸⁴ *Id.*

⁸⁵ *Id.* para. 18.

⁸⁶ *Bechtel II*, 10 F.3d 875, 878 (D.C. Cir. 1993).

⁸⁷ *Id.*

⁸⁸ *Id.*

Act ("APA"), a "Policy Statement" is not subject to the notice-and-comment requirements, which are an essential element of the "formal" rule making process.⁸⁹ The APA provides an exception to the requirements of notice and comment periods in those situations where the agency is offering a declarative statement or general policy statement which reflects the current practice of the agency.⁹⁰ However, the court noted that when an agency relies on that *Policy Statement* as the basis for a decision, the agency must meet its obligation to respond to challenges questioning the continued validity of the statement.⁹¹

The court then examined the Commission's three bases for supporting integration: incentives, interest, and information.⁹² First, the court discounted the notion that integrated owners have a financial incentive in responding to community needs, and are better owners.⁹³ The court observed that the applicant/owner need only hold on to the station for a year, and could then sell the station as it pleases, without regard to "integration" concerns.⁹⁴ Second, after reviewing supporting evidence proffered by the Commission, the court rejected the argument that integrated owners would necessarily be more actively interested in the operation of the station.⁹⁵ After reviewing the practices of the McDonalds restaurant chain,⁹⁶ and noting the fact that the Commission stated that it does not have any "particular expertise in finance or business management,"⁹⁷ the court con-

cluded that the Commission failed to support its hypothesis that an integrated owner would be more involved in the station's operation. The court concluded that the FCC did not offer a "shred of supporting evidence" in twenty-eight years that the use of integration credit satisfied the goal of diversity of ownership.⁹⁸ Third, the court questioned whether past broadcast record, proposed program service, or the efficiency of the proposed use of frequency was less important than the proposed integration plan.⁹⁹

The court also attacked the five claimed "advantages" of the integration criteria. The court discounted the focus on "financial interest" by pointing out that in a limited partnership, while the general partner is the only party credited during a comparative hearing, the limited partners could be financial backers.¹⁰⁰ The use of legal accountability as a basis for the application of integration credit was scrutinized and the court noted that any employee could be held liable for broadcasting indecent material, or, more generally, violating any rule of the Commission.¹⁰¹

Additionally, the court examined the fact that the Commission valued the "active interest" of an owner over the owner's broadcast experience.¹⁰² The court pointed out that there were other practices in which an owner could express an interest in the station other than working "day-to-day."¹⁰³ Such examples include managing the station from another office, or

⁸⁹ 5 U.S.C. § 553(b) (1994).

⁹⁰ 5 U.S.C. § 553(b)(3)(A).

⁹¹ *Bechtel II*, 10 F.3d at 878 (citing *American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111 (D.C. Cir. 1993)). The court's sentiment, regarding the need for periodic review of policy statements, is echoed in *Pacific Gas & Elec. Co. v. Federal Power Comm'n*, in which the court said that the agency "must be prepared to face challenges of the basic validity of the policy statement." 506 F.2d 33, 39 (D.C. Cir. 1974). In *FCC v. WNCN Listeners Guild*, the Supreme Court found that the Commission's reasonable explanation for the preference of diverse programming satisfied the question of validity of the policy statement on promoting diversity. 450 U.S. 583, 603 (1981).

⁹² *WNCN Listeners Guild*, 450 U.S. at 603. For a discussion of these three bases, see *supra* text accompanying notes 72-85.

⁹³ *Bechtel II*, 10 F.3d at 878.

⁹⁴ *Id.* at 879 (citing *Bechtel I*, 957 F.2d 873). The Court also recognized that the proposed transferee is not scrutinized as to its proposed integration policy. Rather, the Commission only reviews whether the proposed transferee will serve the public interest, convenience, and necessity. *Id.* (citing 47 U.S.C. § 310(b)).

⁹⁵ *Id.*

⁹⁶ *Id.* at 880-81 n.4. The Commission attempted to draw a connection between integration and McDonalds' requirement

that franchisees participate in the daily operation of their restaurant. The court rejected this argument, noting that the number of company-owned restaurants was high, and that McDonalds "micro-managed" each restaurant by setting procedures for every detail of the business. *Id.*

⁹⁷ *Victory Media, Inc.* 3 FCC Rcd. 2073, para. 19. "[The Commission] was reluctant to second guess an applicants business judgment - so long as it is, in fact, a good faith business decision." *Bechtel II*, 10 F.3d at 881.

⁹⁸ *Bechtel II*, 10 F.3d at 881.

⁹⁹ *Id.* at 881-82 (noting that integration credit is only viewed as secondary in unusual circumstances); see also *FBC, Inc.*, 95 F.C.C.2d 256, paras. 13, 14 (1983).

¹⁰⁰ *Bechtel II*, 10 F.3d at 883; see also *supra* text accompanying notes 50-55.

¹⁰¹ *Bechtel II*, 10 F.3d at 883 (citing 18 U.S.C. § 1464 (indecentcy) and 47 U.S.C. § 508 (willful violation of Commission's rules)).

¹⁰² *Bechtel II*, 10 F.3d at 884. The Court noted that the qualitative credit given for experience is minor, as compared to that given for integration. *Id.* at n.4 (citing *Northern Sun Corp.*, 100 F.C.C.2d 889 (Rev. Bd. 1985) and *New Continental Brdcast. Co.*, 96 F.C.C.2d 544 (Rev. Bd. 1983)). In each case, the applicant had substantially more broadcast experience, 23 and 31 years respectively, as compared to the eventual winner, who had none. *Id.*

¹⁰³ *Id.*

spending every morning at the station.¹⁰⁴ The court found the Commission's position that a "mom and pop" ownership-management structure was decisionally superior to the corporate style of ownership-management highly questionable.¹⁰⁵ Further, the court discounted the "vested interest" consideration, that being an owner/manager would have greater interest in community needs, finding that a licensee's awareness of community needs would more likely come from a familiarity with the community itself, rather than through operation of the station, welcoming visitors to the station, or reading correspondence sent to the station.¹⁰⁶

Finally, the court rejected the Commission's argument that the integration credit was a structural factor that is applied consistently and objectively.¹⁰⁷ In the court's words, "every step [of the integration analysis] towards the magic number is packed with subjective judgments, some generic, some ad hoc."¹⁰⁸ Accordingly, the court found the use of integration credit to be arbitrary and capricious.¹⁰⁹ As such, it determined that, even though the Commission was reviewing the matter in a rulemaking procedure, it would be arbitrary and capricious to continue to apply the policy.¹¹⁰ Instead, the court ordered the Commission to reassess the comparative merits of the competing applicants, including Bechtel, without regard to the question of integration.¹¹¹

F. *Second Further Notice of Proposed Rulemaking* - Damage Control

In light of this decision, the FCC issued the *Second Further Notice of Proposed Rulemaking* in the

Comparative Hearing Rulemaking,¹¹² seeking comment on how it should modify the rules to adhere to the provisions of *Bechtel II*. Specifically, the Commission asked four questions: (1) "what objective and rational criteria" can be used in comparing applicants, (2) what impact would this decision have on criteria that were once used as enhancements to integration,¹¹³ (3) what weight should be given to the criteria that were not affected by *Bechtel II*, and (4) what are the "procedural ramifications."¹¹⁴

III. THE FUTURE OF BROADCAST LICENSING

A. Review of Public Comment

In its Comparative Hearing Rulemaking docket, the Commission requested information relating to the methods used to assign licenses through comparative hearings. While the first two NPRMs¹¹⁵ are important, this Comment focuses on the questions posed by the *Second FNPRM*, as it was issued in a direct response to *Bechtel II*, and relates specifically to the question of the future structure of the assignment of licenses, without the use of integration credit.

Most comments submitted to the FCC supported the use of the enhancement criteria for the basis of the comparative process.¹¹⁶ For example, several commenters suggested that the FCC should focus on local residence, past broadcast ownership, and civic activity.¹¹⁷ In addition, most commenters indicated support for the continued use of minority and gender status as a preference.¹¹⁸ Finally, there was over-

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 885.

¹⁰⁷ *Id.* (citing *Remand Order II*, *supra* note 81, at 1676, para. 16.).

¹⁰⁸ *Id.* The Court cited *Omaha TV 15 Inc.*, 4 FCC Rcd. 730, para. 29 (1988), to note that the integration credit dropped off "sharply" when less than 40 hours of work are proposed. *Id.*

¹⁰⁹ *Id.* at 887.

¹¹⁰ *Id.*

¹¹¹ *Id.* The court refused to determine whether Galaxy Communications, Inc., who had its application for certiorari denied by the Supreme Court, would be allowed to participate in the remanded proceeding. *Id.*

¹¹² *In re Reexamination of the Policy Statement on Comparative Broadcast Hearings*, *Second Further Notice of Proposed Rulemaking*, 9 FCC Rcd. 2821 (1994) [hereinafter *Second FNPRM*]. Both the initial *NPRM*, the *Further Notice of Proposed Rulemaking*, and the *Second FNPRM* are still pending.

¹¹³ The enhancement credits were: local residence, civic participation, minority status, and broadcast experience. *Id.* para. 7.

¹¹⁴ *Id.* paras. 7, 8. Such ramifications include further hearings to gather evidence and amendment of applications. *Id.* para. 8.

¹¹⁵ *Supra* text accompanying notes 67-71 and 112-114.

¹¹⁶ The full list of enhancement factors includes: minority status, past local residence, female status, broadcast experience, daytime preference and civic activities. FCC Form 301 (July 1993 ed.).

¹¹⁷ *See, e.g.*, Comments filed by Trans-Columbia Communications to the *Second FNPRM* in GC Dkt. 92-52 (July 20, 1994); Comments of Stephen M. Cilurzo to the *Second FNPRM* in GC Dkt. 92-52 (July 22, 1994); Comments of Miller Communications to the *Second FNPRM* in GC Dkt. 92-52 (July 20, 1994); Comments of J. McCarthey Miller, *supra* note 2; Comments of Fredericksburg Channel 2 to the *Second FNPRM* in GC Dkt. 92-52 (July 22, 1994). On the other hand, Greg Smith attacked the use of local presence as a criterion, arguing that a Baltimorean surely cannot speak for all Baltimoreans. Comments of Greg Smith to the *Second FNPRM* in GC Dkt. 92-52 (July 21, 1994).

¹¹⁸ *See, e.g.*, Comments of Lowery Communications to the

whelming opposition to applying the new criteria retroactively.¹¹⁹

However, there was a mixed response with respect to the continued use of the current comparative hearing process. While some commenters suggested that the Commission drastically restructure the hearing process, the general sentiment of those filing comments centered on the alteration of the current comparative process through the use of different criteria.¹²⁰

B. Proposal

The following discussion is a proposal for a full-fledged review of the purpose of the comparative criteria. This section concludes with the presentation of a proposal which integrates the "point system" plan proposed by the Commission,¹²¹ coupled with the designation of three objective criteria to judge the applicants.

Second FNPRM in GC Dkt. 92-52 (July 22, 1994); Comments of Homewood to the *Second FNPRM* in GC Dkt. 92-52 (July 22, 1994); Comments of Miller Communications, *supra* note 117; Comments of Trans-Columbia Communications, *supra* note 117; Comments of Skyland Broadcasting Company to the *Second FNPRM* in GC Dkt. 92-52 (July 22, 1994). *But see* Comments of J. McCarthy Miller, *supra* note 2 (arguing that the FCC should get out of the business of social engineering); Comments of Highland Broadcasting Co., Inc. to the *Second FNPRM* in GC Dkt. 92-52 (July 22, 1994) (arguing that the preference should only be preserved if more stringent requirements of proof are offered, i.e. blood tests, birth certificates).

¹¹⁹ Most comments questioned the legality of this act, especially in light of *Bowen v. Georgetown University Hospital*, where the Court affirmed the District Court's application of *Retail, Wholesale and Department Store Union, AFL-CIO v. NLRB* five-part balancing test and its decision to strike down a retroactive applicant of Medicare regulations. 488 U.S. 204, 208 (1988); *Retail, Wholesale and Dep't Store Union, AFL-CIO v. NLRB*, 466 F.2d 38 (10th Cir. 1972). The test considers: (1) whether the case is one of first impression; (2) whether it is an abrupt departure from past jurisprudence rather than filling a gap in the law; (3) whether the parties relied on the previous rule; (4) the resulting burden that is imposed by the application of the new regulation; (5) and the statutory interest in affirming the new regulation balanced by the applicants reliance. *Retail, Wholesale and Dep't Store Union, AFL-CIO v. NLRB*, 466 F.2d. at 390.

A few commentators, namely Fredericksburg Channel 2, August Communications, and John Barger, noted that the new criteria may be applied in cases where the applicant excepted to the use of integration in his or her respective hearings. Comments of Fredericksburg Channel 2, *supra* note 117; Reply Comments of August Communications to the *Second FNPRM* in GC Dkt 92-52 (Aug. 22, 1994); Reply Comments of John W. Barger to the *Second FNPRM* in GC Dkt. 92-52 (Aug. 22, 1994).

1. Theoretical Framework

The licensing process must serve the "public interest, convenience, and necessity."¹²² This requirement was left purposely vague to meet the conflicting demands facing the FCC.¹²³ For example, while the public interest in broadcasting is best served by the comparative hearings, the public interest in the implementation of the Personal Communications Services ("PCS") is best served by auctions.¹²⁴ This difference can be attributed to the underlying purpose of each service. A common carrier acts as a mechanical relay service, providing the means of communication but not the actual content, whereas in broadcasting, the licensee provides content-based services. Therefore, in striving to serve the public interest, the FCC necessarily considers different factors.¹²⁵ From the onset of broadcast regulation, the goal has been to have the broadcaster provide "the best practicable service to the community reached by his broadcasts."¹²⁶ This goal is evidenced by the broadcast regulation of existing stations¹²⁷ and by the technical

¹²⁰ Parties such as Fredericksburg Channel 2, Irene Rodriguez Diaz de McComas, Highlands Broadcasting Company, and Miller Communications, among others, support the switch in criteria, either in substance, or in weight. Comments of Fredericksburg Channel 2, *supra* note 117; Comments of Irene Rodriguez Diaz de McComas to the *Second FNPRM* in GC Dkt. 92-52 (July 22, 1994); Comments of Highland Broadcasting Co., *supra* note 118; Comments of Miller Communications, *supra* note 117.

JEM Broadcasting Co., Inc., on the other hand, suggest a three step process consisting of: (1) basic qualification review, (2) a paper hearing on comparative criteria, and (3) a subsequent 30 day settlement period, followed by a hearing on the categorization of each applicant in the comparative criteria. Comments of JEM Broadcasting Co. to the *Second FNPRM* in GC Dkt. 92-52 (July 21, 1994).

¹²¹ *Reexamination NPRM*, *supra* note 67.

¹²² 47 U.S.C. § 309(a) (1994).

¹²³ *See National Brdcast. Co., Inc. v. FCC*, 319 U.S. 190 (1943); *WOKO, Inc. v. FCC*, 153 F.2d 623 (D.C. Cir. 1946); *rev'd*, 329 U.S. 223 (1946).

¹²⁴ 47 U.S.C. § 309(j)(3) (1994).

¹²⁵ *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940), *reh'g denied*, 309 U.S. 642 (1940).

¹²⁶ NATIONAL BROADCASTING REPORT, *supra* note 32, at 124 (citing *In re Great Lakes Broadcasting Co.*, F.R.C. Dkt. No. 4900, where the broadcaster was seen as the "mouthpiece" of the community).

In re Abraham Shapiro was the first time that the FCC looked at this issue. The Commission reviewed the proposed programming and focused on the fact that the applicant would broadcast local meetings of civic clubs, high school student programs, and church/fraternal organization meetings. 1 F.C.C. 240, 242 (1934).

¹²⁷ For example, the FCC requires each station to maintain a local public inspection file, and to notify the public when a

restrictions put upon a station.¹²⁸ Accordingly, the Commission should implement a system of broadcast licensing that focuses on the importance of an equitable and efficient determination process.¹²⁹ The best manner would be the application of an objective test that serves the twin goals of efficiency, and the highest predictive likelihood of public interest.

2. The Plan

CRITERIA¹³⁰

Local Residence - Residence gained prior to Petition for Amendment of the Table of Allocation, with substantial civic participation.

More than 10 Years 20 points

Between 2 & 10 Years 10 points

No Local Residence 0 points

Past Broadcast Experience - within 2 years of application

More than 5 Years 15 points

Between 1 & 5 Years 10 points

No Experience 0 points

Finders Preference 10 points

Tie Breaker

1st - No previous ownership

2nd - Daytimer Preference

3rd - Lottery

Conditions Applied

3 year holding period

new applicant files a construction permit application at the Commission, when the applicant/licensee files an application to modify the station, and when a licensee files a license renewal application. 47 C.F.R. §§ 73.3526, 73.3527, 73.3580 (1995).

¹²⁸ Such technical considerations include AM stations, FM stations, and TV stations. 47 C.F.R. §§ 73.44-190 (AM), 73.207-33 (FM), 73.610-614, 682-699 (TV) (1994).

¹²⁹ See Comments of JEM Broadcasting Co., Inc., *supra* note 120; Comments of Highland Broadcasting, *supra* note 118; Comments of Irene Rodriguez Diaz de McComas, *supra* note 120; Donald Grunewald, *Should the Comparative Hearing Process be Retained in T.V. Licensing?*, 13 AM. U. L. REV. 164 (1964).

¹³⁰ "The Plan" follows the basic structure suggested by Robert A. Anthony in *Towards Simplicity and Rationality in Comparative Broadcast Licensing Proceedings*, 24 STAN. L. REV. 1 (1971). Early after the *Policy Statement* was adopted, Anthony recognized the inherent problem with the comparative hearing process. In response, he proposed breaking down the hearing process to two or three criteria that were policy neutral, but would be weighted as to the relative importance of each interest. *Id.* at 62-64.

¹³¹ The Commission's goals may change in light of the implementation of the Telecommunications Act of 1996. For example, all national limitations on ownership of radio stations are lifted, while television requirements are only limited by the national audience reached. 142 CONG. REC. H1078, H1093 (daily

Take into consideration all passive owners and options in contracts

(a) Local Residence Criteria

Furthering the goals of efficiency and the promotion of the public interest,¹³¹ the criteria used to determine who should deliver programming should be based on an evaluation of who will best serve the community.¹³² The best way to ensure that the applicant chosen will fulfill this goal is to designate the most substantial credit for continued residency in the community and civic participation.¹³³ The Commission would ensure that those individuals owning the station would be those who are familiar with the community and its corresponding needs and interests by weighing this factor more heavily.¹³⁴

This criteria would be measured by the number of years that the applicant has lived in the community and by his or her involvement in civic organizations. Where the applicant lived in the community¹³⁵ for more than ten years, and has a long history of serving the community through organizational involvement, (e.g., an officer of the local Rotary Club), the applicant will receive more points than an applicant who resided in the community for a shorter period of time. Further, residence would be defined as those citizens who were present before the allocation table was modified.¹³⁶ This requirement will prevent situ-

ed. Jan. 31, 1996); see also *infra* note 138.

¹³² See Comments of JEM Broadcasting Co., Inc., *supra* note 120; Comments of Highlands Broadcasting, *supra* note 118; Comments of Irene Rodriguez Diaz de McComas, *supra* note 120.

¹³³ See Comments of Trans-Columbia, *supra* note 117; Comments of Miller Communications, *supra* note 117, but see Comments of Highland Broadcasting, *supra* note 118, and Comments of Greg Smith, *supra* note 117.

¹³⁴ Comments of Greg Smith, *supra* note 117. While Greg Smith complains that one Baltimorean can not speak for all Baltimoreans, this is not necessary. A broadcaster does not "speak" for its community, rather it serves the community. Thus, while it does not necessarily reflect every interest in the community, the licensee who has lived in the community for a number of years, will have better capability to serve that community than a person who has never set foot in that community.

¹³⁵ The "community" is defined as the Grade B contour. This definition is broad enough to encompass the outlying areas, while still ensuring community familiarity. See generally Comments of Irene Rodriguez Diaz de McComas, *supra* note 120.

¹³⁶ The Commission's rules require prospective applicants for FM and TV stations must petition the Commission to amend the Table of Allotments to add a new service to a community. 47 C.F.R. §§ 73.207, 73.610 (1994). Once this rulemaking proceeding is completed, then the actual application process takes place. 47 C.F.R. § 73.3533 (1994). In contrast, a prospective

ations in which an applicant moves into the city in order to gain this credit without having previous knowledge of the community. Also, because the requirement includes civic participation, the natural result favors an applicant who truly displays his or her commitment to the community. Finally, since the criteria rests upon discernable numbers, it serves the stated goals of efficiency and serving the public interest.

(b) *Past Broadcast Experience*

While knowledge of the community is important, so too is having the experience to build and operate a broadcast station. Too many applicants face unexpected and insurmountable difficulties after obtaining authorization to construct.¹³⁷ Therefore, those who have broadcast management experience, obtained within two years of the applications being filed, whether or not gained through ownership, will receive credit weighed less heavily than credit for local residence and community involvement. Since this experience will probably be gained outside the community, the relative value is lessened to ensure that a local broadcaster cannot gain a larger portion of the local media interests.¹³⁸ Thus, the application of this criteria helps to predict which applicant will have a

better chance to succeed, thus ensuring the benefit to the community, while also being easily calculable.

(c) *Finders Preference*

An applicant who files a Petition for Rulemaking to allocate the channel, or one who files an AM application first, should be given additional credit. This extra credit is appropriate due to the expense of locating an available channel and because these actions demonstrate the applicant's interest in serving the public. Often, an applicant shows keen interest in obtaining permission to operate a station, completes the requisite engineering studies, and files an application, only to find that its trailblazing efforts merit no comparative advantage.¹³⁹ Accordingly, the Commission should recognize these activities as those typical of a beneficial licensee. This type of licensee deserves the FCC's authorization to construct a station.

(d) *Tie-Breaker*

If this calculation results in a tie, first preference should be given to an applicant who has not previously owned a station. This preference would serve the Commission's interest, albeit slightly, in promoting the diversification of mass media services,¹⁴⁰

AM applicant is only required to file the application for a construction permit, with a showing that the proposed station will not cause undue interference. 47 C.F.R. § 73.37 (1994). This filing of the application is announced in a public notice, which welcomes additional applications. 47 C.F.R. §§ 73.207, 73.610, 73.637 (1994).

¹³⁷ See Comments of Greg Smith, *supra* note 117; Comments of Homewood, *supra* note 118; Comments of Stephen M. Cilurzo, *supra* note 117; Comments of Pears Broadcasting to the *Second FNPRM* in GC Dkt. 92-52 (July 22, 1994) discussing the inherent difficulty in building a station.

¹³⁸ This is especially true now that the Telecommunications Act of 1996 substantially lifts restrictions on ownership of radio and television stations in a community. Mass Media Action: FCC Revises National Multiple Radio Ownership Rule and Local Radio Ownership Rule in Accordance with the Telecommunications Act of 1996, *News, Rpt. No. MM 96-12* (released Mar. 8, 1996). The new ownership rules are as follows:

- A. Community with 45 stations:
 1. 8 may be owned, operated, or controlled
 2. maximum of 5 in one service.
- B. Community with 30-44 stations:
 1. 7 may be owned, operated, or controlled
 2. maximum of 4 in one service.
- C. Community with 15-29 stations:
 1. 6 may be owned, operated, or controlled
 2. maximum of 4 in one service.
- D. Community with 0-14 stations:
 1. 5 may be owned, operated, or controlled

-
- 2. maximum of 3 in one service
 - 3. provided no more than 50% of market
- Id.*

E. Exception created to give Commission discretion to waive requirement if they decide "that such ownership, operation, control, or interest will result in an increase in the number of radio broadcast stations in operation.

F. National Ownership Limitations

1. No limit on number of stations that an "entity may directly or indirectly own, operate, or control, or have a cognizable interest in."

2. Expand National Limit to 35 percent.

G. Local Ownership Limitations

1. Conduct a rulemaking proceeding to determine whether to retain, modify or eliminate the rules on local ownership of television.

H. The Commission shall extend its one-to-a-market waiver to the top 50 markets.

I. Television stations can affiliate with two or more networks unless:

- 1. Two of the entity's are designated as "networks" in § 73.3613(a)(1), or
- 2. One "network" and another entity that provides 4 or more hours per week to at least 75% of the homes.

142 CONG. REC. H1078, H1094 (daily ed. Jan. 31, 1996).

¹³⁹ See *NPRM, Reexamination NPRM*, *supra* notes 67 and 112; Comments of JEM Broadcasting Co., Inc., *supra* note 120.

¹⁴⁰ See *Policy Statement*, *supra* note 8.

while still recognizing other, more compelling policies. If none of the applicants previously owned a broadcast station, then additional credit would be given to the applicant who previously qualified under the AM Daytimer category.¹⁴¹ If this does not solve the dilemma, then the winner should be chosen by lottery, each applicant having one chance to win.¹⁴²

B. Further Considerations on Licensing

The Commission should require that the licensee hold the station for at least three years; thereby overturning the 1982 *Transfer Report and Order*.¹⁴³ By allowing for a small exception due to unforeseeable situations,¹⁴⁴ the Commission will reduce the trafficking of licenses, while ensuring that the station is run in accordance with its important public policy concerns.

Further, the Commission, in considering the applicability of the criteria, should look at the applicant as a whole. In the cases of limited partnerships, sole proprietorships, and close corporations,¹⁴⁵ each member of the party should have its relevant interest analyzed by the criteria. The results should then be averaged into a composite score. This practice will reduce the possibility of "sham" applicants even further, because there would be less incentive to have "token" partners whose sole existence was to benefit the applicant's comparative stature.¹⁴⁶ For public

corporations, the officers, directors, and ten percent or greater shareholder interests should be considered in accordance with the above procedure.

C. Minority and Gender Not Considered

Note that this proposal does not provide for consideration of the applicant's gender or minority status when giving credit. Currently, both preferences are given in order to increase diversity in programming. While some comments suggest the need for the inclusion of these credits,¹⁴⁷ three recent court decisions severely jeopardize the continuing use of these preferences.¹⁴⁸

1. Minority Status

In *Adarand Constructors, Inc. v. Peña*,¹⁴⁹ the Supreme Court held that all race-based classifications are subject to "strict scrutiny," where the investigation focuses on a "compelling government purpose" that is "narrowly tailored."¹⁵⁰ Inherent in a strict scrutiny examination is a detailed look at the connection between justification and classification.¹⁵¹ The *Adarand* decision overturned the 1990 decision in *Metro Broadcasting Inc. v. FCC*,¹⁵² where the Court applied the "intermediate scrutiny" test to two FCC policies that gave a preference to minority applicants.¹⁵³

¹⁴¹ The Daytimer preference served as an enhancement to integration under the *Policy Statement*. See *supra* note 116. Those AM station owners who were only authorized to operate during the daytime and who held their stations for more than three years, would be entitled to enhancement credit. See *FM Broadcast Assignments*, 101 F.C.C.2d. 638 (1985).

¹⁴² Support for the lottery is offered by the Commission in the *NPRM*, as authorized by Section 309(i) of the Act, 47 U.S.C. § 309(i) (1994), *supra* note 68, para. 36; see support of Miller Communications and Henry Geller. See Comments of Miller Communications, *supra* note 117 and Comments of Henry Geller to the *Second FNPRM* in GC Dkt. 92-52 (July 22, 1994).

¹⁴³ 1982 *Transfer Report and Order*, *supra* note 43. By overturning the 1982 *Transfer Order* and requiring a 3 year holding period, the Commission would be, by default, re-adopting the 1962 *Transfer Report and Order*, *supra* note 45. Further, the allowance of a small class of exceptions would be a de facto return to the 1962 *Transfer* rules. *Supra* note 45 and accompanying text.

¹⁴⁴ 1962 *Transfer Report and Order*, *supra* note 45.

¹⁴⁵ A close corporation is a corporation that has less than thirty members, the stock is not readily transferable, and the stock is not publicly traded. DEL. GEN. CORPORATION LAW

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¹⁴⁶ See Joint Comments of Richard M. Carrus and Joel Mart, Inc. to the *Second FNPRM* in GC Dkt. 92-52 (July 22, 1994) (calling for the abandonment of the *Anax Doctrine*).

¹⁴⁷ See Comments of Minority Media & Telecommunications Council to the *Second FNPRM* in GC Dkt. 92-52 (July 22, 1994); Supplemental Comments of the League of United Latin American Citizens to the *Second FNPRM* in GC Dkt. 92-52 (July 22, 1994).

¹⁴⁸ The three cases are: *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995); *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992); *Hopwood v. Texas*, Nos. 94-50569, 94-50664, 1996 WL 120235 (5th Cir. 1996).

¹⁴⁹ 115 S. Ct. 2097 (1995).

¹⁵⁰ *Id.* at 2113. A reviewing court's focus under strict scrutiny analysis concerns whether there is a race-neutral alternative method available that would give the same results. *Id.*; see also *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

¹⁵¹ *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980) (applying the strict scrutiny test to a congressional statute that allowed for a 10% set-aside for minority-owned businesses).

¹⁵² 497 U.S. 547 (1990).

¹⁵³ *Id.* The two programs were a "distress-sale" preference and a minority preference during comparative hearings.

2. Gender Preference

The same type of problem is posed with respect to the use of gender-based preferences in comparative hearings. In *Lamprecht v. FCC*,¹⁵⁴ the U.S. Court of Appeals for the D.C. Circuit struck down the use of the gender preference, finding that the FCC failed to provide evidence that the use of the preference was "substantially related to achieving diversity on the airwaves."¹⁵⁵ Accordingly, it appears that any further use of gender as a classification requiring additional credit fails to satisfy the "intermediate scrutiny test" set forth in the *Metro* decision.¹⁵⁶

3. Hopwood v. Texas

The most recent case discussing the giving of preferences to minority groups in order to increase diversity is *Hopwood v. Texas*.¹⁵⁷ The case revolved around the rating of minority applicants for admission to the Texas University Law School ("Texas").¹⁵⁸ Texas gave minority applicants a more thorough review, and used a lower standard for grading the applicants.¹⁵⁹

The court, using the strict scrutiny standard, held that "any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment."¹⁶⁰ Further, the court concluded that the classification of persons on the basis of race for the purpose of diversity frustrates, rather than facilitates, the goals of equal protection.¹⁶¹ Finally, the court determined that race can not, in and of itself, be taken into account in the decision-making process.¹⁶²

Thus, neither racial nor gender preferences will be used under the proposed plan. It is questionable whether, if the preferences are challenged, the court will find a significant connection between the justification of the preference and its application in the comparative hearing process. Although at least two

comments in the Comparative Hearing Rulemaking proceeding claimed that there was still great underrepresentation of minorities,¹⁶³ the FCC would have a difficult time justifying the use of a race-based preference without showing "pervasive, systematic, and obstinate discriminatory conduct."¹⁶⁴ As the courts have found, the goal of promoting diversity will not sustain strict scrutiny when it is used as the sole factor of consideration.

Also, since either the gender or minority status preference would be an independent criteria in selecting licensees, it would appear that this would run counter to the *Adarand*, *Lamprecht*, and *Hopwood* holdings. Additionally, the application of the two preferences would certainly spark considerable litigation. This onset of litigation would undermine efficient distribution of service, one of the central goals of the proposed plan.

IV. CONCLUSION

The plan as outlined above will serve the country by focusing the comparative hearing process on the goals of the Communications Act; serving the public interest, convenience, and necessity. First and foremost, the public interest is served by focusing on criteria that lead to better community service. The importance of the local residence requirement in conjunction with mandated civic participation, will ensure that the winning applicant is one who is truly interested in serving the community. Additionally, the public will be better served by the convenience of the proposed system. Drawn out litigation, which focuses on debating minimum points of importance, will no longer be prevalent. Instead, by the application of three simple criteria, in which there are usually only two choices, the predictability of the program will considerably reduce the delay in delivering service.¹⁶⁵

¹⁵⁴ 958 F.2d 382 (D.C. Cir. 1992).

¹⁵⁵ *Id.* at 398.

¹⁵⁶ *Metro Broadcasting*, 497 U.S. at 565 (finding that the program in question must "serve an important government objective within the power of Congress and [is] substantially related to the achievement of those objectives").

¹⁵⁷ Nos. 94-50569, 94-50664, 1996 WL 120235 (5th Cir. 1996).

¹⁵⁸ *Id.* at 1.

¹⁵⁹ *Id.* at 2-3.

¹⁶⁰ *Id.* at 10.

¹⁶¹ *Id.*

¹⁶² *Id.* at 13.

¹⁶³ See Joelmart Comments, *supra* note 147.

¹⁶⁴ *Adarand Constructors, Inc.*, 115 S. Ct. at 2117 (citing *U.S. v. Paradise*, where the Court reviewed past discriminatory practices of the Alabama Department of Public Safety and found that the measures used to rectify the situation passed a strict scrutiny examination. 480 U.S. 149 (1987)).

¹⁶⁵ This Comment is dedicated to the memory of George Nikitas, whose strength and humor continue to serve as a guiding light for those who were honored to know him.

