COMPARATIVE BROADCAST HEARINGS: BECHTEL AND THE “INTEGRATION” CRITERION

Tanner Freeman

In 1965 the Federal Communication Commission ("Commission") released a Policy Statement on Comparative Broadcast Hearings that stated the Commission would grant substantial weight in comparative broadcast hearings to applicant-owners proposing to participate full time in the station's operation. This "integration" criterion was, the Commission stated, substantially related to the policy of providing the public with the "best practicable service." Nearly thirty years later, in Bechtel v. FCC, the Court of Appeals for the District of Columbia Circuit held that the Commission's "integration" policy as used in comparative broadcast hearings was "arbitrary and capricious," and that the Commission should conduct future proceedings free of the "integration" preference. The court noted that, despite its 28 years of experience with the policy, the Commission had accumulated no evidence to indicate that the "integration" policy achieves any of the benefits the Commission attributes to it.

The Bechtel decision raises a significant question regarding the Commission's minority preference policy in comparative broadcast hearings. Since TV 9, Inc. v. FCC in 1973, and WPLX, Inc. in 1979, the Commission has awarded potential minority owners credit for minority ownership and participation as a "qualitative enhancement" under the "integration" factor in comparative broadcast hearings. With the elimination of the "integration" factor, it is unclear if or how minority ownership and participation may receive merit in comparative broadcast hearings.

The 1965 Commission Policy Statement on Comparative Broadcast Hearings attempted to articulate factors to be weighed in comparative broadcast hearings, "to serve the purpose of clarity and consistency of decision, and the further purpose of eliminating from the hearing process time-consuming elements not substantially related to the public interest." The Commission set forth two primary objectives in choosing a broadcast license from among qualified applicants. First, to select a broadcaster that would provide "the best practicable service to the public," and second, to create diversification, "a maximum diffusion of control of the media of mass communications."

With clarity, consistency, diversification, and service in mind, the Commission articulated six specific factors to be considered and weighed in comparative broadcast hearings: 1) diversification of control of mass media communications; 2) "integration," the full-time participation in station operation by owners; 3) proposed program service; 4) past broadcast record; 5) efficient use of the frequency; and 6) character of the applicants.

The Commission made specific comments regarding the "integration" factor. The Commission considered "integration" to be a factor of substantial importance, because, it believed, day to day participation in station operation would lead to greater sensitivity to community programming needs and greater conformity with Commission regulations. Such participation, the Commission indicated, would lead to "the best practicable service" and greater "diversification," two major Commission policy considerations. The Commission also stated that attributes of participating owners such as local residence and broadcast experience, would be considered in the "integration" factor assuming full-time or almost full-time participation in station operation by those with ownership interests. The Commission would grant the greatest local residence credit to those applicants who resided in the principal community to be served, followed by residence outside the community, but within the proposed service area, and then, lastly, those applicants proposing future local residence. Any credit granted for local residence under the "integration" criterion would only be extended to those applicants who also proposed meaningful participation in station operation.

The 1965 Policy Statement made no specific reference to increasing minority broadcast ownership through a preference or merit in the comparative hearing process. Indeed, from 1968 to 1976, influenced by the civil disorders of the time and the Kerner Report findings, the Commission encouraged minority participation in broadcasting mainly through "command and control" regulations. Because of the neutralization of the citizen groups who were the greatest proponents of the command and control regulations and the lobbying of broadcasters, however, the
Encouraged by the National Black Media Coalition and the National Association of Black Owned Broadcasters, the Commission thus turned its focus from the "command and control" regulations to an emphasis on encouraging minority ownership of broadcast facilities.

The Commission's policy of encouraging minority ownership of broadcast facilities was first articulated in TV 9, Inc. v. FCC, where the D.C. Circuit Court held that when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded based on a "reasonable expectation of some public interest benefit." As a result, "integration" of minority groups was a relevant criterion upon which to judge applicants in a comparative broadcast hearing. In reaching its conclusions, the court rejected the Commission's reasoning that the Communications Act required the Commission to be "color blind," and that "black ownership cannot and should not be an independent comparative factor... rather, such ownership must be shown on the record to result in some public interest benefit."

The court thus reasoned that by increasing minority ownership of broadcast facilities, there would be greater diversity of programming and viewpoint, a primary Commission objective.

The merit for minority ownership policy continued to be implemented in a number of cases in the years following the TV 9 decision. Most significantly, in WPIX, Inc. the Commission announced a new policy regarding proposed minority ownership and the status of the "integration" factor in the comparative hearing process. The Commission announced that, "because minority ownership and participation is an affirmative factor enhancing the applicant's proposal and raising its level in the comparative evaluation, we have concluded that it can best be considered in this and future cases under the "integration" of ownership and management criterion." The Commission further noted that such credit would be considered "above and beyond" traditional "integration" credit in that minority ownership would be treated as a qualitative enhancement in addition to the quantitative credit awarded for an applicant's "integration" proposal.

The minority ownership policy also received support from Congress. When the Commission was reviewing its minority ownership policy in 1986, Congress passed the Continuing Resolution for Fiscal Year 1988 that contained an amendment preventing the Commission from using any appropriated funds "to repeal, to retroactively apply changes in, or to continue reexamination of" its policies in regard to minority ownership of broadcast licenses. Congress thus ordered the Commission to continue its minority preference policy and to discontinue any policy reexamination.

With Congress effectively stopping the Commission's review of the minority preference policy, the focus of the battle over the Commission's policy shifted back to the

D.C. Circuit Court and eventually to the Supreme Court. Due to conflicts in two D.C. Circuit Court decisions, Winter Park Communications v. FCC (upholding the Commission's minority preference policy in comparative broadcast hearings as constitutional), and Shurberg Broadcasting of Hartford, Inc. v. FCC (finding the Commission's "distress sale" to minorities policy unconstitutional), the Supreme Court agreed to hear a consolidated appeal of the two cases in Metro Broadcasting Inc. v. FCC.

In Metro Broadcasting, the Supreme Court held, by a five to four vote, that both the minority preference policy in comparative broadcast hearings challenged in Winter Park, and the minority "distress sale" policy challenged in Shurberg were constitutional and did not violate equal protection principles. Applying the Court's "intermediate scrutiny" standard articulated in Fullilove v. Klucznicz, the Court found that the Commission's minority preference policies were substantially related to the important government objective of increasing the diversity of viewpoints available to the public through broadcast programming, and gave great deference to the fact that the policies were specifically mandated by Congress.

The Court explained its deference to Congress in light of "Congress' institutional competence as the National Legislature." The Court noted Congressional powers granted in the Constitution under the Commerce Clause, the Spending Clause, and the Civil War amendments. The Court also explained its deference to Congress in this particular case because of Congress' superior fact finding ability, and the Commission's expertise in broadcasting. Furthermore, the Court referred to a number of hearings and findings conducted by Congress and the Commission that Justice Brennan called "a host of empirical evidence" to support the Court's decision.

Thus, despite the dissenting opinions' assertion that a "strict scrutiny" standard should be applied to the Commission's "amorphous" broadcast diversity interest, the Court in Metro Broadcasting found the Commission's "benign" race conscious minority preference policies in comparative broadcast hearings and "distress sales" constitutional. Relying on the powers granted to Congress through the Constitution, Congress' superior fact finding ability, and a "host" of legislative and empirical evidence, the Court upheld the constitutionality of the Commission policies that had been challenged by almost more than a decade prior to the Court's decision in Metro Broadcasting. The Metro Broadcasting decision, however, did not stop the attacks on the Commission's comparative broadcast hearing "integration" policy.

In 1989, before the Supreme Court released the Metro Broadcasting decision, the Commission began proceedings concerning mutually exclusive applications for the authority to construct and operate a new FM commercial radio station on Channel 250A at Selbyville, Delaware. After reviewing the four applications using the standard compara-
tive hearing criteria, the Administrative Law Judge awarded the station license to Anchor Broadcasting. Anchor Broadcasting was considered a superior applicant due to a 100% "integration" credit, no diversification demerit, a qualitative enhancement for Anchor's 100% minority involvement, proposed local residence, and an auxiliary power credit. Bechtel's application contained an engineering proposal that would comparatively cover a larger population than any of the other applicants proposed stations, but was overwhelmed by the integration credit awarded to Galaxy and Anchor.

On appeal, the Commission's Review Board adopted the ALJ's findings of fact, but reversed the ALJ's conclusion and awarded the Selbyville station construction permit to another applicant, Galaxy Communications. This was surprising because, although Galaxy was awarded the same "integration" and diversification credit as Anchor, Anchor had received more credit for qualitative enhancements. The Review Board, however, in reviewing the testimony of Mr. Stamps (the Anchor general partner) found fault in Anchor's proposed "integration" and managerial proposals. The Review Board concluded that he would not likely fulfill his promise to manage the station full time, and also doubted that he would not consult with his fellow limited partners in managerial decisions, thus contravening Commission policy on limited partnership agreements. With Anchor now receiving less "integration" credit than Galaxy, Galaxy was the clearly superior applicant because a "clear quantitative integration" advantage cannot be overcome by various qualitative attributes.

On appeal to the Review Board, Bechtel first filed its exception to the Commission's "integration" criterion through a frontal challenge to the Commission's 1965 Policy Statement's "integration" criterion. Although Bechtel's application sought no "integration" credit in contradistinction to the other applicants, she still contended her application would best serve the public interest by serving a larger population than any of the other proposed stations. Bechtel filed a lengthy supplement to her exceptions in an attempt to demonstrate that the Commission's "integration" criteria was inadequate in promoting long range ownership by the victorious applicants in the comparative hearing process. By eliminating the "integration" criterion, her application would then become the favored or strongest application because her station proposed to serve the largest population. The Review Board denied Bechtel's exceptions and pleadings in toto, striking the exception as unauthorized and not permitted under Commission rule 47 CFR 1.277. The Review Board also found it irrelevant because the Board had no power to vacate the Commission's "integration" policy.

On appeal to the full Commission, the ALJ's grant of the construction application to Anchor was reinstated. Disagreeing with the Review Board's interpretation of Mr. Stamp's testimony, the Commission found Anchor's "integration" proposal satisfactory, and was satisfied that Anchor's limited partners would be insulated from involvement in the management of the proposed station if Anchor were awarded the construction permit. In its conclusion the Commission stated, as had the ALJ, that, although Anchor and Galaxy Communications were both comparatively superior applicants, Anchor was awarded the license on its enhancement for minority ownership and proposed local residence.

The Commission denied Bechtel's request to file a brief pursuant to 47 C.F.R. 1.115(f), and rejected Bechtel's argument that the Commission's policy of awarding a preference for "integration" had been discredited and should not be applied in the proceeding. The Commission stated its belief in Anchor's fulfilling its "integration" commitment, and held that Bechtel had not made a sufficient showing to compel the Commission to disregard the "integration" criteria in the proceeding. Furthermore, the Commission stated that such a change in comparative criteria would be better considered in a rule making proceeding.

After the Commission's decision granting the license to Anchor, Galaxy and Bechtel appealed to the D.C. Circuit where Galaxy continued to challenge Anchor's "integration" proposal, and Bechtel continued the frontal challenge to the Commission's "integration" criteria, contending the Commission's continued use of the criteria was "arbitrary and capricious." Interestingly, the court rejected Galaxy's claim, but concluded that the Commission was obliged to answer Bechtel's challenge and remanded the case to the Commission to do so. The court was quite critical of the Commission's record on the "integration" criteria, noting that the Commission never had made clear why an owner/manager would be more sensitive to community needs than a professional manager. Further, the court stated that they were not aware of any instance in which the Commission had publicly examined the criteria's effectiveness.

The court also set forth the reasoning behind Bechtel's "arbitrary and capricious" challenge. The basis of Bechtel's argument against the continued use of the "integration" criteria centered on the Commission's recent passive ownership policy and broadcast facility transfer policy. In regard to the passive ownership policy, since 1981 the Commission had permitted applicants to gain full "integration" credit, even with passive ownership, so long as the passive owners were sufficiently insulated from station business and did not control the license. In reality, however, "sham" limited partnerships would be created with minority general partners having minority equity interests, minimal financial input and no prior relationship with non-minority limited partners, to take advantage of the qualitative enhancement under the "integration" criterion. Also, it was unlikely that the passive investors would be or remain passive, and the passive owners' potential participa-
tion in station affairs would not be monitored by the Commission.

Regarding the Commission's broadcast facility transfer policy, since 1982 the Commission has permitted licensees to sell stations without a hearing after operating the stations for only one year.74 Taking the two policies together, a victorious applicant who was largely financed by passive investors, promoting full "integration," could, after a year, sell the station without regard to the new purchaser's actual "integration."75 Such transactions, Bechtel stated, "cavorted" the original rationale behind the Commission's "integration" policy.76 Rather than dismiss Bechtel's challenge without elaboration the court instructed the Commission to demonstrate, explain, and justify why the "integration" criterion was still in the public interest, and to change the policy if the Commission's findings or wishes so dictated.77

In response to the D.C. Circuit Court's decision, the Commission launched a rule making proceeding, the Examination of the Policy Statement on Comparative Broadcast Hearings ("Examination")78 that sought comment on modification or elimination of various comparative broadcasting hearing criteria including the "integration" criterion. The Commission acknowledged that due to the dramatic changes that had occurred in the broadcast marketplace, technology, and regulatory policy in the twenty-seven years since the 1965 Policy Statement on Comparative Broadcast Hearings, it was time for a comprehensive review of policy.79

In the Examination, the Commission basically echoed the D.C. Circuit's comments on the "integration" criteria set forth in the Bechtel decision. Because of the current dissatisfaction over the "integration" criteria, the Commission asked for comments "as to whether the 'integration' criteria should be retained or modified and, if so, what rationale or empirical evidence supports such action."80

Recognizing that the elimination of the "integration" criteria as a comparative factor would probably effect the qualitative enhancement granted to minorities under the "integration" criteria, the Commission also sought comment on whether minority ownership should be treated as a separate factor in a revised system of comparative selection thus eliminating "integration" into station management as a requirement for receiving comparative credit.81 In stressing that the intent was not to eliminate credit for minority ownership, the Commission stated, "it is not our intention to change the proportional weight currently given...[minority ownership]...in the comparative evaluation, and any change made to the comparative criteria as a consequence of this notice will preserve those factors' current relative weighting.82 The Commission thus made clear its intent to preserve the enhancement granted to minorities in comparative broadcast hearings.

Despite the court's decision in Bechtel, the Commission's Examination notice, the Commission, on the remand of the Bechtel case83 ("First Remand Order"), rejected Bechtel's argument that "integration" should not be used as a comparative criteria84 in the case and affirmed the grant of the station construction permit to Anchor Broadcasting.85 On remand, Anchor argued that any new "integration" policy should not be applied to the present case, thus insuring the continuing award of the construction permit to themselves.86 On the other hand, Bechtel and Galaxy Communications, argued for holding the case in abeyance pending the outcome of Commission's Examination of comparative broadcast hearing policy so that any changes in "integration" policy could be applied to their case.87

On the first remand, however, the Commission was not persuaded by Bechtel's arguments regarding the effect of the Amex doctrine and transfer of stations rule on the effectiveness of the "integration" criteria in comparative broadcast hearings, and declined to hold pending cases in abeyance pending completion of the Examination notice.88 The Commission basically shifted the burden of proving the lack of effectiveness of the "integration" policy to Bechtel, when, in fact, the D.C. Circuit Court had stated that it was the Commission's responsibility to defend its current policies by showing the policies to be in the public's best interest. The Commission had failed to do this in the first remand order.

The D.C. Circuit Court made its dissatisfaction with the Bechtel first remand decision clear in another case involving an attack on the Commission's "integration" criterion. In Flagstaff Broadcasting Foundation v. FCC,89 the court stated that the Commission had failed to respond to appellant Flagstaff Broadcasting Foundation's ("Foundation") challenges to the "integration" criterion, and failed to provide any rational explanation for its continued adherence to the "integration" criterion.90 Because the Flagstaff decision involved a similar issue to Bechtel, the court also used the Flagstaff opinion to criticize the Commission's decision in the Bechtel first remand order. The court characterized the Commission's dismissal of Bechtel's claims in the first remand order as "summary...after a cursory review of the history of the integration criterion," and encouraged the Commission to respond to the recent attacks on the "integration" criterion with a reasoned and specific response rather than a general, cursory response.91

The Flagstaff case highlighted an interesting consequence of the Commission's policy of awarding merit for minority ownership under the "integration" criterion in comparative broadcast hearings. Foundation, the losing applicant in Flagstaff, was composed of "five principles, all of whom were low to middle income women of color, and [most] who had devoted their adult lives to community activism" in the Flagstaff area.92 Because the women proposed to act as directors rather than managers of the
station they received no “integration” credit.93 Because they received no “integration” credit, they received no enhancement for minority ownership under the “integration” criteria. The lack of “integration” credit turned out to be the determinative factor in Foundation’s loss to the competing applicant.94 The Flagstaff case thus was consistent with previous Commission opinions which suggested that a minority ownership enhancement in comparative broadcast hearings would be more efficient as a separate and independent criteria.95

Four months after the court released the Flagstaff opinion, the Commission modified its first remand order in the Bechtel case by issuing Anchor Broadcast Limited Partnership96 (“Second Remand Order”). In the second remand order the Commission acknowledged that “It is evident from the Flagstaff opinion that we did not appreciate the full extent of the court’s concerns about the “integration” policy.”97 The Commission then set out in the second remand decision to present a more comprehensive and reasoned response to Bechtel’s challenge to the “integration” criterion.

In the second remand order the Commission justified its continued adherence to the “integration” criterion by citing its longstanding conclusion that applicants proposing “integration” were more likely to be responsive to the needs of the community and to effectuate the communities suggestions and proposals.98 The Commission based this judgment on findings that: (1) “integrated” owners had demonstrated an active interest in the operation of the station; (2) “integrated” owners had been in a better position to be aware of community requests to the station and of the possibility that the station might not be in compliance with Commission rules; and (3) “integration” had put day to day control of station operations in the hands of those individuals with the most authority over, direct financial interest in, and legal accountability for the station.99

Furthermore, the Commission, in the second remand order, also concluded that reliance on an objective (based on quantitative point scale), structural factor such as “integration” provided a more reliable basis for judgment on which applicants would best serve the public interest.100 The Commission characterized the factors Bechtel proposed (intentions and efficacy of applicant’s proposed management) to replace the “integration” criterion as subjective, ad hoc factors, not as reliable as the objective “integration” factor.101 Finally, the Commission concluded that the possibility that it might eliminate or modify its “integration” criterion in the future did not prevent the Commission from applying the criterion in the current case and other currently pending cases where significant litigation expenses have already been expended based on current Commission policies.102

The litigation continued with Bechtel again appealing to the D.C. Circuit Court after the Commission released the second remand order.103 In the second appeal (Bechtel II), the court held that the Commission’s continued application of the “integration” preference was “arbitrary and capricious” and therefore unlawful.104 Apparently frustrated with the Commission, the court produced a lengthy opinion that addressed, in depth, the Commission’s arguments for continuing to enforce the “integration” criterion, and clearly stated a number of reasons for discontinuing its use. The court thus reversed the Commission’s decision in the second remand order and remanded the case to the Commission to conduct a proceeding in which it considers Bechtel’s application under standards free of the “integration” preference.105

In the Bechtel II decision, the court first summarized the Commission’s justifications for continuing to apply the “integration” criterion (the three arguments set forth above) as presented in the second remand order. After setting out the Commission’s reasoning for its continued adherence to the “integration” criterion, the court then outlined some common problems that “apply equally to all the three claimed substantive advantages.”106 The first problem outlined by the court was lack of permanence. By this the court referred to owners not necessarily continuing “integration” policy past the application victory and the Commission doing little to enforce a licensee’s claim to “integration.”107

Furthermore, the court noted, after one-year of ownership no reports on “integration” were required from the licensee and the licensee quickly could flip the station to an owner with no “integration” policy.108 The court stated that the Commission had never studied for how long the “integration” policy was practiced or stations were owned by those who won licenses in comparative hearing on “integration” policy merits.109 The court here clearly echoes the policy arguments made by Bechtel regarding the Anax doctrine and the one year limit of the transferability of stations.

The court’s next problem with the Commission’s argument for the continued use of the “integration” criterion involved a lack of supporting evidence. Apparently, over the Commission’s twenty-eight year experience with the policy, the agency had collected little or no evidence through any type of either short or long term research project to support the belief that the “integration” criterion achieves any of the benefits the Commission attributes to it.110 The court characterized the Commission’s reliance on its “predictive judgment” on the effectiveness of the “integration” criterion (as opposed to hard evidence) after nearly 30 years as “threadbare” and implausible.111 Finally, the court criticized what it considered to be the “extraordinary” weight given to the “integration” criterion by the Commission in comparative broadcast hearings. The weight the Commission gives to “integration” is so great, the Court explained, that it leads to the exclusion of other factors such as past broadcast record, proposed program service, and the efficient use of frequency.112 The court thus had difficulty
reconciling the substantial weight the Commission attributed to the “integration” criterion with the deficiencies the
court so clearly articulated regarding the “integration”
criterion.

After setting out its general critique of the Commission’s
“integration” policy, the court then went on to directly
address the Commission’s stated reasons for preferring an
“integrated” applicant in a comparative broadcast hearing.
The court first criticized the Commission’s belief that an
“integrated” owner will have greater financial and legal
accountability incentives than non-“integrated” owners. The
court also noted the results of the implementation of the Anax
doctrine, as well as the full “integration” credit available to
nonprofit corporations, (with the corporate directors being
treated as “owners” despite their lack of equity stake in the
venture), the court rejected the financial incentive aspect of
the Commission’s “integration” criterion as contrary to stated
Commission policy. The court also rejected the
Commission’s proposition that “integrated” owners would be
more legally responsible than non-integrated owners. Station
employees are legally responsible for their acts whether they
own the station or not, the court reasoned, thus
absentee owners have as strong incentives “to ensure that
their station complies with the relevant statutes and rules,”
as “integrated” managers do. Although station employees
would probably want to perform their job well, it is
possible the court was not being realistic on this point.
Those with the greatest financial investment in the station
would likely have the greatest incentive to run the
station in the most efficient, and hopefully, profitable way.

The court then criticized the Commission’s contention that
“integrated” owners have a greater interest in the
operation of their stations and have more “information”
about community broadcast needs than absentee owners.
The court was disappointed that the Commission would
give preference to an applicant with no broadcast
experience who intended to manage a station full-time over
an owner who, although possessing much skill and experience
in broadcasting, intended to run the station from a
distance. The court did not see why a distant owner
would not be just as effective, and mentioned that the
Commission did not follow-up on an applicants “integration”
proposal anyway. The court argued the same for the
supposed “information” advantage which the Commission
states “integrated” owners would have. The court did
not see why an absentee owner could not assign a competent
staff member to inform the distant owner to basically
the same effect. Again, the issue of monitoring station
activity under an “integrated” owner was at issue. Without
monitoring an applicants “integration” proposal after the
station was awarded, the Commission policy does seem
eviscerated, as Bechtel suggested.

Finally, the court examined the Commission’s argument
that, procedurally, the “integration” criterion is a
more objective and consistent way to measure an applicant’s
likely responsiveness to community needs than other possible
ways. The court disagreed, writing that, “Any
‘objectivity’ added by the ‘integration’ criterion is
unfortunately illusory,” and that “the Commission’s scores for
quantitative ‘integration’ merely lend the policy a veneer of
precision; every step towards the magic number is packed
with subjective judgments, some generic, some ad hoc.”
The court then concluded that Bechtel’s proposal for
weighting the “integration” criterion was, contrary to the
Commission’s determination, more objective than the current
“integration” procedure used by the Commission.

The court concluded the Bechtel II opinion by stating
that the Commission’s “integration” preference is “peculiarly
without foundation.” The court ultimately could not
reconcile the Commission’s placing such a strong
emphasis on the “integration” criterion in the comparative
broadcast hearing and then basically taking no interest in
“integration” after the station was operating or transferred.
The court, citing these objections, and combined with the
applicants’ incentive to thus “create a facade of
integration” (because the Commission does not follow
through by following up “integration” proposals) in
comparative broadcast hearings, found the Commission’s
“integration” policy “arbitrary and capricious.”

The Bechtel II decision does not specifically address the
question of minority preference in the comparative hearing
process, though it does note that it is a qualitative
enhancement that is largely “swamped” by the quantitative
portion of the “integration” credit. As the WPIX case made clear,
it is through the “integration” criterion in comparative
hearings that minority preference is awarded merit. The
question thus arises whether this signals the end of the
Commission’s merit for minority ownership in the
comparative hearing process, or if, instead, it will now simply
stand alone as a separate and independent factor. Based on
the Commission’s comments regarding the possible
creation of a new minority ownership criterion as articulated in
the Reexamination of the Policy Statement on Comparative
Broadcast Hearings, and the fact that the minority
preference was held constitutional by the Supreme Court in
Metro Broadcasting, it is likely the policy will continue
to exist in some form.

The Commission is currently questioning the economic
soundness of the one year ownership limitation policy, and
is reviewing the policy in the Reexamination of the Policy
Statement on Comparative Broadcast Hearings. With
the Commission potentially requiring licenses to hold
stations for three years, and creating a new, independent
criterion to award merit for minority ownership, the
Commission potentially could remedy the defects in its
comparative hearing process so comprehensively articulated by the
D.C. Circuit Court in Bechtel II. Clearly the Commission’s
policies are currently in flux as perhaps they should be. As a recent Communications Daily article indicated a "NTIA
survey showed that minority ownership of commercial
broadcast stations dropped to 2.7% in 1993 from 2.9% in 1991 and 1992. With the Commission's policy of increasing diversity of viewpoints through encouraging minority ownership of broadcast facilities apparently faltering, rather than advancing through current initiatives, it is perhaps time for the Commission to change its current policies.

11 F.C.C. 2d 393 (1965).

2Id. at 394.

3Id. at 394.

410 F.3d 875 (D.C. Cir. 1993).

5Id. at 887.

6Id. at 880.

7495 F.2d 929 (D.C. Cir. 1973).


9Id. at 411-2.

101 F.C.C.2d 393 (1965).

11Id. at 393.

12Id. at 394.

13Id.

14Id.

Furthermore, the Commission has also stated that "Within each criterion, the differences between the applicants are characterized by a system of preferences and demerits. These are described by various adjectives, such as "slight," "moderate," "substantial," and "strong." Once this comparison is completed within each criterion, all the preferences across all of the criteria are considered in terms of their number and magnitude, and the relative importance of each criterion." Reexamination of the Policy Statement on Comparative Broadcast Hearings, 7 F.C.C. Rcd. 2664, 2665 (1992).

151 F.C.C.2d 393, 394-99 (1965). The Commission also reserved the right to fully examine any other "relevant and substantial factors."

16Id. at 394.

17Id.

18Id.

19Id.

20Id.

21Id.

22O. Kerner, The Report of the National Advisory Commission on Civil Disorder, 383 (1968) stated, among other things that, "The media have not communicated to the majority of their audience--which is white--a sense of the degradation, misery, and hopelessness of living in the ghetto."

23Honig, The FCC and its Fluctuating Commitment to Minority Ownership of Broadcast Facilities, 27 Howard L. J. 859, 861-864 (1984). Examples of the "command and control" regulations included requiring stations to increase the hiring of minorities, having station managers meet with community leaders to ascertain community broadcast needs, and increasing programming diversity by the stations to address the community broadcast needs.

24Id. at 866-7.

25Id. at 869.

26495 F.2d 929 (D.C. Cir. 1973) (the Court held that afforded to participation of two members of a local minority group not represented in the ownership of mass communications media in the Orlando area was consistent with the policy objective of best practicable service to the community. The two minority participants were the principles of an applicant vying for a license to construct a new television station in Orlando, Florida).


28The court defined "merit" as "a 'plus-factor' weighed along with all other relevant factors in determining which applicant is to be awarded preference." It defined "preference" as "a decision by the Commission that the qualifications of a particular applicant in a comparative hearing are superior to those of another applicant with respect to one or more of the issues upon which the grant of a permit or license turns." 495 F.2d at 941 n.2 (D.C. Cir. 1973).


30Id. at 937.

31Id. at 936.

32Cherrill v. FCC, 513 F.2d 1056 (D.C. Cir. 1975) (Black owner of daytime-only radio station in Huntsville, Alabama denied waiver of technical requirements by FCC in request to convert to full time station); WPDX, Inc., 68 F.C.C.2d 381 (1978) (Involving the mutually exclusive applications of WPDX Inc. for renewal of its license to operate channel 11 in New York, and of Forum Communications, Inc. for authority to construct and operate a new television station on the same channel in the same city. Based on the record evidence, the full Commission found on a comparative basis that WPDX's application for renewal of its license should be granted); West
Michigan Broadcast Co. v. FCC, 75 F.2d 601 (D.C. Cir. 1984) (the court concurred with and encouraged the articulated Commission policy of promoting minority ownership to promote diversity, whenever ownership was integrated with management).


34 Id. at 411-2.

35 Id. at 412.

36 Id. at 411-2.


38 Id. at 1329-32.

39 Id. at 1329-32.

40 62 F.2d 347 (D.C. Cir. 1989) (where equal protection challenge was easily disposed of because Congress reinstated prior Commission policy that consideration of minority status is but one factor in a competitive multi-factor selection system).

41 876 F.2d 902 (D.C. Cir. 1989) (Shueberg Broadcasting Company of Hartford, Connecticut had been trying to replace Faith Center, Inc. as the licensee of Channel 18 in Hartford. Faith Center failed twice in attempts to sell its license under the Commission’s “distress sale” policy. Shueberg was then denied comparative consideration by the Commission in their attempt to build a television station mutually exclusive of Faith Center’s still pending renewal application. The Commission, in its decision, cited it “distress sale” policy as a decisive factor.)


43 Id. at 552.

44 448 U.S. 448 (1980).


47 Id. at 563.

48 Id. at 569.

49 Id. at 580.

50 Id. at 602. The dissenting Justices in Metro were O’Connor, Scalia, Rehnquist, and Kennedy.


52 Id. at 5692.

53 Id. at 5687-92. Anchor Broadcasting consisted of one General Partner, Herman F. Stamps, and three limited partners. Mr. Stamps, an Afro-American, was a retired dentist from Washington, D.C. who intended to manage the station without the assistance of the limited partners.

54 Bechel was Susan Bechel. She had no prior broadcast experience, did not intend to manage day to day operations of the station, and instead proposed to hire an experienced general manager to run the station under her general supervision. Her husband and attorney is Gene Bechel, an experienced communications attorney. She lives in Potomac, Maryland, and has vacationed in the proposed service area for 40 years. Her engineering proposal would serve a larger population than any of the three other applicants proposed stations. Id. at 5689.

55 Id. at 5691. The AJJ thought Bechel was entitled to only a slight preference for comparative coverage, because the population involved was small and already served by five or more stations.


57 Id. at 2432.

58 Id. at 2433-37.

59 Id. at 2439.

60 Id. at 2432.

61 Id.

62 Id.


64 Id. at 721.

65 Id. at 724.

66 Id. at 721.

67 Id.

68 Id.

69 97 F.2d 873 (D.C. Cir. 1992).

70 Id. at 879.

71 Id. at 875.

72 Id. at 880.

78See 47 C.F.R. 73.3597(a); Transfer of Broadcast Facilities, 52 Rad. Reg. 2d (P&F) 1081 (1982).

79Hechtel cited Bernstein/Rein Advertising, Inc. v. FCC, 830 F.2d 1188 (D.C. Cir. 1987) (Debra D. Carrigan, successful integration applicant, contracted within five months to sell the station for over $4 million to a group broadcaster) as an example of the Commission's "integration" criterion's lack of effectiveness, 957 F.2d 873, 880 (D.C. Cir. 1992).


81Id. at 881-2.


83Id. at 2664. Specifically, the Commission stated they were "looking comment on whether the criteria set forth in the 1965 Policy Statement provided a realistic basis for predicting whether one applicant will better serve community needs than other applicants, and whether the comparative hearing process had become tainted by manipulative applications, and subjective and trivial distinctions between applicants."

84Id. at 2665-6. Regarding the "integration" criterion, the Commission also sought comment on "whether credit should be granted for the use of professional management, and, if so, whether lesser weight should be given to it."

85Id. at 2667. The commission also sought comment on "whether, to prevent abuse of policy, minorities should have to have a minimum degree of equity for applicants to receive minority credit, and whether such a policy would be legally sustainable in light of Congress' express intent, Pub. L. No. 101-202, 104 Stat. 1329, 1329-31 (1988), recanted by Act of October 28, 1991, Pub. L. 102-140, that no alteration he made to the current minority preference system."


88Hechtel argued that the Amex doctrine, as set forth in Amex Broadcasting Inc., 87 F.C.C. 2d 483 (1981), "which disregards the interests of passive owners in the comparative analysis and the Commission's repeal of the three year restriction on the sale of broadcast stations, as set forth in Transfer of Broadcast Facilities, 52 Rad. Reg. 2d (P&F) 1081 (1982), are two Commission policies the have undermined the effectiveness of the 'integration' criteria in comparative broadcast hearings. As stated previously, Hechtel argues that the two policies, or lack thereof, allow applicants, actually controlled by investors who would not be integrated into management, to claim full integration credit and then quickly sell their stations to absentee owners. Id. at 4566.
107 id. at 879-80.

108 id.

109 id.

110 id. at 880.

111 id.

112 id. at 881.

113 id. at 882-4.

114 id. at 882-3.

115 id. at 883-4.

116 id. at 884-5.

117 id. at 884. The court cited New Continental Broadcasting Co., 96 F.C.C. 2d 544 (1983) as an example of an applicant losing even though its proposed "integrated" owner had 31 years of broadcast experience and the other applicant’s principles had no broadcast experience at all.

118 id. at 884.

119 id. at 884-5.

120 id. at 885-7.

121 id. at 885.

122 id. at 886.

123 id. at 887.

124 id.

125 id.

126 id. at 882.


130 F.C.C. R. 5475 (1993) (proposal to amend 47 C.F.R. 73.3597(a)(1) to require that successful applicants in comparative proceedings operate their station for three years before they would become eligible to transfer them).

131 Vol. 13, No. 210, Pg. 5, November 1, 1993.