Dissenting Statement of
FCC Commissioner James H. Quello

In re: Policy Statement on Proxy Contests and Tender Offers

I regret that once again I must disagree with my colleagues on the two major questions presented here. First, I continue to believe that the agency has an obligation to recognize that a "substantial" change in de facto control may result from a corporate proxy contest and that in such cases Commission review according to the procedures of section 309(b) and section 309(d) of the Communications Act[1] is essential. Second, I reject the idea that employing a trustee arrangement in the hostile takeover context can substitute for full examination of the applicant's qualifications before a substantial change in ownership or control of a licensee can be approved.

This policy statement in effect adopts the principles previously applied in the three major cases in this area -- the disputes that involved Storer, Multimedia, and the Evening News Association.[2] Having reviewed my dissenting statements in these cases, I am satisfied that the analysis presented there applies equally to this decision and that a restatement of those arguments would serve no purpose. Accordingly, I shall raise only a few additional matters.

Completing this inquiry should result in one positive effect. The policy statement clarifies the powerful role of the trustee in controlling the target corporation during the long form review period. While the trustee will be expected to preserve the corporation's assets, the policy statement appears to recognize that the trustee/owner must have ultimate control of the licensee during this period or else the public is likely to suffer from a vaccuum of authority over licensee operations.[3] In my view, of course, recognition that both majority ownership

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[1] 47 U.S.C. §§ 309(b) & 309(d).

[2] Committee for Full Value of Storer Communications, Inc., 101 F.C.C.2d 434 (1985), aff'd sub nom. Storer Communications, Inc. v. FCC, 763 F.2d 436 (D.C. Cir. 1985); One Two Corporation, 58 Rad.Reg.2d (P&F) 924 (1985); L.P. Media, Inc., 58 Rad.Reg.2d (P&F) 1527 (1985).

[3] See Majority Opinion at ¶¶66-67. While the majority purports to limit the trustee's authority to a "caretaker" role, the Commission will be in no position to second guess almost any action (short of selling the properties) that a trustee may deem necessary or prudent to "preserve[] the status quo and maintain[] the general character of the corporation." Majority Opinion at ¶68.

and working control will rest in a trustee who is entirely new to the corporation should put to rest forever the argument previously presented (and still held in reserve by the majority[4]) that the transfer to the trustee is somehow not a "substantial" change in ownership or control.

Despite the improvement that results from this clarification of the Commission's policy, the policy itself remains misguided. It appears that only one commenter -- a law firm -- endorsed the trustee concept as a legitimate means of effectuating securities policy.[5] Neither the Securities and Exchange Commission nor any other entity charged with promoting the securities laws or the interests of shareholders has suggested that any extraordinary procedures are necessary to avoid conflict with these interests. Instead, almost all the commenters -- both from industry and from the "public interest" sector -- argue that the procedures adopted by the majority are inconsistent with sound communications policy, violate specific provisions of the Communications Act, and are unnecessary to further the legitimate interests of shareholders.[6] In sum, the record compiled in this inquiry runs directly contrary to the conclusions reached by the majority.

Similarly, experience with these procedures in practice does not support a conclusion that their use forwards shareholder interests. In each of the three cases noted above, corporate management was able to take steps to avoid letting the applicant's proposal reach the shareholders. Thus, the "corporate democracy" ideal envisioned by the majority has yet to occur in practice. Indeed, in one case, the major result of the Commission's action was a $24.5 million profit for one shareholder.[7] Thus, while these procedures have clearly benefitted private interests, their use has yet to demonstrate a benefit to the public interest.

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[4] See Majority Opinion at ¶45 n.147.

[5] See Appendix A, ¶¶13-14.

[6] See, e.g., Comments of Lee Enterprises, Inc., Gaylord Broadcasting Co., McGraw Hill, Inc., and Taft Broadcasting Co. (October 18, 1985); Reply Comments of Media Access Project and Telecommunications Research and Action Center (November 4, 1985).

[7] See Comments of CBS, Inc. at 6 n.6 (October 18, 1985).

Congress has determined that special obligations attach to the ownership of licensed communications properties. Thus, no inconsistency with the securities laws results from a recognition that compliance with these policies may affect shareholders' interests in these properties. Expeditious accomplishment of the Commission's oversight responsibilities is the appropriate response to legitimate concerns over shareholders' rights.[8] Since the majority has determined instead to subjugate communications policy to its own idea of sound securities policy, I am obliged to dissent.

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[8] Since the Commission has an obligation to minimize the adverse effects of its regulatory processes on corporate transactions, I supported the proposal made separately today that Congress should reduce the mandatory holding periods of section 309 from 30 days to 15 days. See FCC Public Notice, Legislative Proposal Package Submitted to Congress, Report No. GN-8 (January 30, 1986).