

**Separate Statment of
Commissioner James H. Quello
Approving in Part, Dissenting in Part**

February 8, 1996

**In re Applications of Capital Cities/ABC, Inc. and The Walt
Disney Company**

This morning, the President signed into law the Telecommunications Act of 1996, which has been hailed as the most important piece of communications legislation since the Communications Act of 1934. This law promises to deregulate, open barriers to entry, and enhance competition in all areas of communications, thereby bringing to consumers the best range of exciting new communications services at the lowest possible prices. By signing this Bill into law, the President has come through on his statement in the State of the Union address that, "The era of big government is over."

In stark contrast, this afternoon the Commission adopts a decision that, while generally positive in that it approves the marriage of two vital, creative companies, includes a throwback to the days of ill-advised, excessive regulation. That throwback is the denial of a request for a permanent waiver of the newspaper broadcast cross-ownership rule in Fort Worth, Texas and Detroit, Michigan. It is to this aspect of the decision today that I dissent. And it is to this aspect of the decision that I must ask my colleagues who vote to break up this combination: why, when both the Administration and Congress state that the era of big government is over, is the majority voting for a big government regulatory disruption in the conduct of two existing businesses in vigorously competitive markets?

While my colleagues in the majority may tell you that we should reexamine the rule and its waiver policies only after we develop a detailed record in a rulemaking, we clearly have the record, and the authority, to waive the rule in the case before us, **today**. To use the supposed need for a lengthy notice and comment rulemaking as an excuse for not acting is a sorry substitute for making the right decision at the right time. That decision would be to grant a permanent waiver of the newspaper radio cross-ownership rule in Fort Worth and Detroit.

Legal Authority

The history of the newspaper broadcast cross-ownership rule at the FCC and in Congress supports grant of permanent waivers in the case before us. First, this rule is more than twenty years old and was adopted at a time when newspapers were stronger and

fewer radio stations were licensed. Second, when the rule was adopted, the facilities at issue were already jointly owned by ABC. Upon adoption, the Commission reviewed all newspaper/broadcast combinations and ordered divestiture in a number of markets. However, the Commission waived the rule to allow the continued joint operations of the facilities at issue in Detroit and Fort Worth. Second Report and Order, 50 FCC 2d 1046, 1080-84 (1976). This, in my view, speaks volumes.

Finally, as to the stringent language in the Second Report and Order adopting the waiver policy that "once a sale is to take place, the rule would require a split in an existing [grandfathered] combination," 50 FCC 2d at 1076, I would urge that any twenty-year old decision be read with an eye toward current market conditions and current regulatory policies. The Second Report and Order specifically provided for waiver where the purpose of the rule would be disserved by divestiture. 50 FCC 2d at 1085. Moreover, the Commission has previously stated that in using waivers to fine-tune its regulatory approach it need not limit its analysis to the balance struck when the rule was originally adopted or to the factors previously considered in waiver cases. Citadel Communications, Ltd., 8 FCC Rcd. 855, 858 (1993) (quoting Pegasus Broadcasting, Inc., 7 FCC Rcd. 8625, 8627 (1992), recon. pending). Clearly, then both the law and common sense point to grant of a permanent waiver in this case.

Not only does the Commission have authority to grant the waivers at issue, but Congress has given us a green light to modify our stringent waiver policy with respect to newspaper radio cross-ownership. As the majority notes, since 1988, because of restraints on our appropriations that prohibited us from modifying in any way the newspaper broadcast cross-ownership rule and related policies, we have been prohibited from even considering changes in this somewhat outdated rule. See Department of Justice and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-317, 108 Stat. 1724, 1737-38 (1994); H.R. Conf. Rep. No. 708, 103d Cong., 2d Sess. 40 (1994). However, in 1993, and in appropriations since, Congress specifically granted the Commission authority to "amend policies with respect to waivers of the portion of section 73.3555(d) that concerns cross-ownership of a daily newspaper and and AM or FM radio broadcast station." Id. This language remains in effect today. Why the Commission would want to forego, in a case with facts as compelling as these, Congress' engraved invitation to waive the radio newspaper cross-ownership rule, defies logic.

Facts Compelling a Permanent Waiver in Detroit and Fort Worth

In addition to the law, a number of factors considered in duopoly and one-to-a-market waiver cases are relevant here and support grant of a permanent waiver. First, the markets at issue, Detroit as the ninth largest market and Dallas/Fort Worth

as the eighth largest, are among the most diverse in the country. Detroit boasts 53 broadcast voices, including 46 radio voices, and eight daily newspapers. Dallas/Fort Worth has 69 broadcast voices, 54 radio voices, and 19 daily newspapers.

Second, as to the facilities involved, Disney would own an AM and FM radio station in each market (including a clear channel AM station in Detroit). In addition, Disney in Detroit would own the Oakland Press (with a Monday circulation of 79,803, and Tuesday through Saturday circulation of 70,797), which is the third largest newspaper in the market behind the Detroit Free Press (with a daily circulation of 537,353) and the Detroit News (with a daily circulation of 351,366). The Audit Bureau Report, March 31, 1995. In Fort Worth, the Fort Worth Star-Telegram is the number two newspaper in the market behind the Dallas Morning News, with just over one-half the circulation. Third, Disney assures the Commission that the radio stations and newspaper in each market have operated, and would continue to operate with, a separate editorial voice.

Fourth, the economic concentration in each market indicates that the combinations at issue, if continued on a permanent basis, would not negatively affect competition. When considering both local advertising and national advertising in the local market, the HHI in Dallas Fort-Worth would go from a moderately concentrated 1646 without the combination to a moderately concentrated 1724 with the proposed combination. In Detroit, the HHI increases from 1036 to 1060 under the proposed combination, just barely above the "unconcentrated" threshold of 1000.

As to the share of local advertising revenue that the combined radio stations and newspaper would receive in each market (looking only at television, radio, cable and newspaper), in Fort Worth Disney would glean 18.5% of the total local advertising revenues. While this would appear to give Disney the second largest share of the advertising revenue in the market, this still puts them significantly behind Belo's Dallas Morning News with 35.3% of the local advertising revenues. In Detroit, the proposed combination would give Disney a total market share of 7.8%, which would place them fifth in the market, with the Detroit Free Press and Detroit News boasting a 23% and 17.1% share, respectively for a combined 40.1% under the Joint Operating Agreement between the two.

Finally, under the public interest analysis, the detrimental effects of allowing the combination weighed against the benefits, Disney once again comes out ahead under any reasoned approach. Under the first prong, there are no apparent detrimental effects in granting a permanent waiver, given that there would be no decrease in diversity by allowing the continuation of a combination that has been in place for more than 20 years. See, e.g. Field Communications Corp., 65 FCC 2d 959 (1977).

Similarly, there would be no decrease in competition by allowing the combination to continue. One could, I suppose, argue that the fact that we will be giving someone else a chance to own either the newspaper or the radio stations is a good enough reason to break up the current combinations regardless of the absence of any negative effect from their continuation. But if that is the majority's rationale, then the majority must also think that ownership diversity per se is a valid regulatory goal regardless of how well they serve the public and even absent any reason to rationally expect that it would meaningfully advance viewpoint diversity. This Commission has not, indeed cannot, go that far, and I will not move in that direction today.

In terms of the public interest benefits, Disney would be able to continue some of the economic and administrative efficiencies of joint operation that Cap Cities/ABC has realized over the years, including the sharing of legal, human resources, accounting, technical and public affairs resources. As a result of these economic efficiencies, Disney would be able to continue to air significant amounts of news, public affairs and local programming, and PSAs on its radio stations; and to continue providing free advertising space and sponsorship of public service endeavors such as election specials, community forums, scholarships, internship programs and management exchanges.

Removing for the moment my bureaucrat's hat and speaking from the heart, I feel compelled to address an issue that is not part of any waiver criteria, HHI analysis, or legal nuance. And that is the very significant effect that the majority decision today will have on the lives of the people who work at the newspapers and radio stations threatened with divestiture. Much like the dissolution of a marriage, these people will be thrown under a cloud of uncertainty, their jobs and their future at risk. Moreover, should Disney decide to sell one or more of the newspapers as a result of the majority decision, in particular the relatively small, suburban Oakland Press, the future of a small newspaper and its journalists could be threatened at a time of dwindling circulations and journalism jobs. This result is unfortunate, particularly coming from an Agency that supposedly cares about jobs, deregulation, and competition.

In conclusion, this is an unfortunate and ill-advised decision in a case that presented more than adequate facts to justify a waiver. I therefore dissent to the denial of the request for a permanent waiver of the broadcast newspaper cross-ownership rule in Detroit and Fort Worth.