TAKEOVER OF BROADCAST LICENSEES

ABA Forum Committee on Communications Law
and
Federal Communications Bar Association
Joint Program

Luncheon Remarks
by
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Federal Communications Commission

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I should say I'm delighted that Dick Wiley, distinguished former FCC chairman and now a leading legal practitioner, invited me to present my layman viewpoints to this prestigious ABA-FCBA group.

Actually, my delight with the invitation was somewhat tempered by my anxiety about appearing before this impressive audience of legal experts. I asked my legal assistant and my staff for their ideas and input, but you should know that I personally wrote these remarks after collating the material. You see, I write most of the major speeches myself. I readily admit it...It saves my staff a lot of embarrassment.

Anyway, I told them I had several gems of composition that I had written, and rewritten, for recent speeches that I wanted to share with this audience. I suggested that the best of Carson, best of TV reruns, etc., was a well accepted programming device. So, I asked, how would the "best of Quello" play? The reaction was much too hesitant. It triggered a sad moment of introspection. . . I suspected they might believe that the very best of Quello would be 20 minutes of silence. I started thinking they may be right, but no conference audience, regardless of how appreciative of this zero-based approach to rhetoric, could sit quietly for that length of time. So, you are not seeing me at my silent best today. . . I'm going to talk. . . talk about takeovers, the principal subject of this conference. Then if I have time I would like to give brief bottom line opinions on a few other current issues like "must carry" and the renewed drive for repeal of Section 315 and First Amendment rights. Then if you are still awake, I'd like to explain my regulatory philosophy which necessarily reflects a more journalistic than legalistic approach.

I must say I'm impressed with your panels of lawyers representing all sides of the takeover controversy, but I'm never sure if an attorney's pleas represent conviction or client service. I do want the record to show that I am not paid for my views by any interested parties.

First, I want to thank Dick Wiley for the gracious introduction. Some of my introductions lately seem formulated for testing a speaker's tolerance for humor. They reflect the current "roast" mentality.

In one of my recent speeches titled "FCC -- From Crisis to Crisis," the Emcee, an old friend now jaded and bored by years of close association with me, introduced me saying, "The crisis situation has become so pervasive at the FCC, it has caused our speaker many a sleepless afternoon." Naturally, he wasn't from a regulated industry.

Another toastmaster with a light smirk introduced me by saying, "You don't need lengthy introductions for well-known speakers -- so, I give you Commissioner Jim Quello, the less said about him the better." He was from a regulated industry, but his license had just been renewed for seven years!

A former ABC broadcast executive and for 20 years an author (including "The $100 Million Lunch"), Sterling "Red" Quinlan, sent me a copy of his latest book titled "How You Too Can Become An Exemplary H.A.! He inscribed it "To Jim Quello who has always been one of us. Rejoice, we shall yet overcome!---Red." I wrote him that E.H.A.s (exemplary horses' a--es) is a well-established category in Washington and that an E.H.A. can feel perfectly at home here.

My sense of humor seemed destined to be tested even in my own office last month. I wore a silk tie with a beautiful hand painted panda design my wife brought me from China . A longtime associate remarked it was a very distinctive tie. "But," he said, "pandas are known to mate only once a year. Any significance in your wife giving it to you?"

You do find that a sense of humor is essential to sane survival in the government regulatory world. It helps you maintain equilibrium when important executives accompanied by their legal and P.R. entourage become indignant or outraged when you dare express a viewpoint contrary to their own position. In fairness to the legal profession, lawyers are not prime offenders. Lawyers more than anyone appreciate the value of two sides to every argument. In fact, with many I've known, and fortunately even with my own legal assistant, you just tell them which side of a controversial issue to develop and then stand aside and watch sheer legal and verbal artistry at work. Incidentally, I told my legal assistant when he first joined me that working directly for a commissioner would be a broadening experience in practical regulation. I smiled, "You will see how we apply social and political solutions to highly technical legal problems." Most FCC decisions are still strictly legal matters, but the most significant ones require consideration of all policy and social perspectives with an emphasis on policies expressed by Congress.

In fact, not only a sense of humor but a laid-back positive outlook with a well developed sense of self-unimportance is particularly helpful in the Commission's dialogues with Congress at oversight hearings. At oversight one side or the other critiques our traditional dismal performance, punctures our vanity and reminds us, "Remember, you are an arm of Congress. You are an independent government agency, independent of the executive branch not Congress."

I have mentioned before that it wouldn't surprise me if someday one of the inquisitional questions from Congress might be, "Is there anything known only to you and not to this committee that could possibly be used to discredit, embarrass or impeach you? Remember, you are under oath!" Nevertheless, let the record show that I find their criticism justified and their sardonic wit stimulating.

However, we don't always feel like Rodney Dangerfield. There are occasional moments that demonstrate the importance of having a Commission vote. (Cite experience in Italy during war and later in TAT-7 deliberations.)

Anyway, so much has happened since I spoke to the FCBA ten years ago. There have been two national elections, a mind-boggling telecommunications explosion, and two reappointments for me to the FCC with my current term expiring June 30, 1991. When Chairman Barry Goldwater asked me if I were willing to serve my full term, I said, "Yes sir, if God is willing, I'm willing."

Chuck Adams, then head of the 4A's, sent me the most terse congratulatory note -- "Congratulations! Hang in there until they name the building after you!" And Bob Lee, a distinguished former commissioner who broke all longevity records for regulatory agencies, and who is now president of the Broadcast Pioneers Library, displayed his characteristic mastery of understatement by informing me: "If you live long enough you might get one of our 'bleepin' awards." Bernie Koteen congratulated me personally saying -- "Congratulations again. You are proof that the meek don't inherit the earth." I told him, "If they did, how long would they keep it?"

During the past five years, we have been involved in a veritable explosion in technological developments, deregulation and unregulation which provides new challenges and responsibilities for the telecommunications industry and the FCC. There have been significant changes and far-reaching, often times controversial, developments in practically all fields of communications -- from FCC radio deregulation (which, except for the logging issue, was significantly upheld by the federal appellate court) and TV deregulation to implementing Computer II and enacting revised regulations for the newly structured telephone industry and initiating Computer III.

During the past four years many outmoded or unduly intrusive regulations and unnecessary paperwork requirements were eliminated, particularly in the broadcast area. The FCC also simplified license renewal procedures and technical requirements. In general, communications regulations were, and are, being replaced by marketplace competition.

Meanwhile, the FCC has introduced many additional communications facilities to the marketplace, thus providing expanded service to the public. The Commission promulgated new or expanded service in: LPTV (low power television), DBS (direct broadcast satellite), MMDS (multichannel multipoint distribution service), cellular radio, teletext, AM and TV stereo, cable, SMATV, STV and continued expansion in the number of FM, AM and UHF stations. The current FCC also authorized subcarrier service for radio and TV. In a very timely and significant action, the FCC also expanded the ways public broadcasters could raise additional funds, thus enhancing their self-sufficiency.

With a few exceptions, I have strongly supported the deregulatory thrust of Chairman Fowler. In the past few years, the FCC has done more than any FCC in history to get government off industries' backs. Most important, I think it has worked well for the American public, not only for the over-regulated industries. The overall result was massive elimination of unnecessary paperwork plus substantial savings of man hours and money for the government, the public, and the industry -- all in keeping with the mood and will of the American public. Importantly, deregulation accorded broadcasters freedom to provide programs for public acceptance rather than for government compliance. As Chairman Fowler has emphasized, and I agree, the public should determine the public interest.

Despite expressions of considerable misgivings in some quarters about marketplace competition replacing regulation, we still haven't unregulated either the FCC or the FCBA out of business. In fact, from what I see, the communications marketplace is brimming with legal activity and crisis-generating controversy. Also, sales and mergers are breaking all records. According to Paul Kagan Associates, a respected source, sales of radio and television stations during the first half of 1985 exceeded the total number of sales for all of 1984. In all, 463 radio stations and 114 TV stations were sold during the first 6 months of 1985 compared to 438 radio and 59 TV stations sold during all of 1984.

Consider the recent and current contentious issues -- the media mania mergers and hostile takeovers; the renewed drive to repeal the fairness doctrine and Section 315; the cable must-carry and copyright uproars; public broadcasting "U for V" swaps; the proposals for advertising on public broadcasting; the proposed ban on beer-wine advertising and possible counter commercials; multiple ownership rule changes and temporary

waivers; telephone industry restructuring and rate controversies; AT&T and OCC competition; Intelsat competition; spectrum allocation and sharing; numerous competitive applications and use of lotteries (in the case of cellular lotteries, over my strong dissent); and the usual complaints and petitions to deny. I think all this controversy demonstrates the continuing need for a strong communications bar.

Incidentally, some uncharitable souls even profess that law firms have incentives to generate crisis and regulatory contention. Surely, such base motivation is far beneath such an august profession -- one of the world's oldest or close to being the world's oldest, I am told. I was recently mailed a copy of part of a will that demonstrates the continuing problem of unfavorable private if not public perception of the legal profession. I even have to smile while I read this.

> No attorney or firm or group of attorneys, nor any bank shall for any reason whatsoever receive any money, property or valuables from my estate as I have already, while living, involuntarily contributed far more than my share to the benefit of this crooked bunch of miserable bastards who prey upon the misfortunes of others.

Incidentally, lawyers are multiplying and the future looks very litigious for the American public. I'll read this startling quote from the September 23 issue of U.S. News and World Report:

> Law schools are continuing to crank 'em out. By 1995, the nation will be knee-deep in 930,000 lawyers -- 225,000, or 38 percent, more than now.
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> That figures out to 1 attorney for every 279 Americans. It's 1 for every 354 persons today. California and New York have the most lawyers, more than 60,000 each. Washington, D.C., has 25,000-plus attorneys.
>
> Many of Washington's attorneys don't practice law, though. They're lobbyists influencing Congress in passing the laws keeping lawyers busy.

Now back to the controversial issues previously mentioned. Each subject could merit a full speech in itself, but the principal subject of this conference is takeovers, an appropriate and timely issue.

Your questions on this issue could well be: "Why the sudden explosive surge in the urge to merge in broadcast stock?"; "What part should the FCC play in the takeovers?"; and "What is the basis of your lone dissent on the trustee concept?"

Well, first I had difficulty in reconciling the trustee concept in unfriendly takeovers as a mark of neutrality. I could give it an A+ as a creative legal machination to attain a definite edge for a client engaged in a hostile takeover. But if our objective is to be neither sword nor shield in takeovers, why the legally required long form 315 or 314 in friendly takeovers while in a hostile takeover the process is initially expedited by the trustee concept and a filing of short form 316?

In my view, the public is not well served by authorizing the ouster of a qualified licensee prior to determining that the successor is fully qualified. In fact, irrespective of my personal view, this is the policy determination that has been made by Congress and expressed in Section 310(d) of the Communications Act -- approval of the transfer must precede its effectuation.

In my opinion, the STA authority Congress has granted the Commission under Section 309(f) of the Act does not support a trustee concept to facilitate hostile takeovers. For example, there were no "extraordinary circumstances in the Multimedia case requiring temporary operations in the public interest," and there was no reason to believe that "delay in the institution of such temporary operations would seriously prejudice the public interest." The facilities of Multimedia were currently operating, and Mr. Cooke, an honorable gentleman, represented that he did not intend to change those operations. No extraordinary circumstances required temporary operations by a trustee. If time was critical, the Commission could have better instituted an expedited 315 filing.

In fact, the Commission's decision resulted in what I had predicted -- greenmail. Now, in the Multimedia case, Mr. Cooke's objective certainly wasn't greenmail but the net inadvertent result was still greenmail. As soon as the FCC approved the trustee concept, Multimedia, according to Broadcasting magazine, paid Mr. Cooke $25,000,000!

We should remember that the laws and regulations which govern broadcasting have recognized that it is a form of commerce requiring extraordinary oversight by government. That it is not just another commercial enterprise is quite evident when you consider provisions of the Communications Act, particularly Sections 315 and 312(a)(7). Whether we like it or not, the law clearly recognizes broadcasting to be a special case which requires extraordinary government treatment -- treatment beyond that accorded to the printed press or any other business.

I am well aware of the free-market arguments that hostile takeovers provide an added spur to management to improve performance for the benefit of the ultimate owners, the shareholders. The rough-and-tumble of the marketplace, it is argued, merely assures that the assets of a business will be put

to their best use. This economic Darwinism defines "best use" as that which will produce the highest return to the owners of a business enterprise over the short term. This definition doesn't give due recognition to the requirement of meeting established public interest standards or the necessity for long range planning and stability to maximize program service to the public.

In fact, there has never been a successful hostile takeover of a broadcast company. Until recently, only a few were attempted. Last spring there was a sudden realization that it was possible, plus a perception that the FCC was facilitating takeovers. The financial specialists also appreciated that broadcast-cable properties were good cash flow vehicles and many seemed undervalued.

Frankly, I had no problem with the procedures used by Cap Cities-ABC, Turner-CBS, Murdoch-Metromedia, KKR-Storer, or Gannett-Evening News Association -- all filed the required long form with 30 days for public comment, 10 days for reply comment and 5 days for rebuttal. This statement does not imply a final vote for or against these applications; but these procedures give the FCC a full record for analysis and require FCC approval before transfer of control.

My general attitude questioning takeovers by professional financial raiders was initially expressed in my article in The Los Angeles Times (March 22, 1985). The key last two paragraphs read:

> The financial community should realize that broadcast properties should not be considered just another takeover game. Potential buyers have to meet the requirements of not only the Securities and Exchange Commission and the Justice Department but also the FCC, which is required to make a public interest finding before a transfer of control or ownership. The requirement for FCC approval is something that potential raiders should keep in mind.
>
> Our broadcasting system requires a degree of stability that is not enhanced by excessive financial manipulation and speculation.

My strongest objections were directed to the initial (now terminated) hostile takeovers of Storer, Multimedia and the Evening News Assocation -- all facilitated by new-found FCC procedural short-cuts.

In my opinion, the FCC attitude and action in the Storer case added further stimulus to the communications takeover mania that was underway. I dissented to the FCC decision that found that attempts by dissident stockholders to place eight new members on the Storer Board to cash in all assets did not

constitute a substantial change of control. The key word was substantial -- a substantial finding would have required filing a long form subject to public comment.

My statement made during an FCC meeting was rather widely quoted in the trade press. The excerpts from Broadcasting magazine summarized my general concerns:

> With this action, I'm afraid the FCC is promoting bust-up liquidations promoted by professional raiders and causing potential anarchy throughout the communications industry. Companies carefully developed over years by current management are now sentenced to publicly announced, summary dismemberment for a quick, short-range profit.
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> The takeover committee's plans were a prime example of a substantial transfer of control requiring the filing of an FCC Form 315 up front. The new proposed board proposed a drastic transformation from an operational business to a nonbusiness. It requires very substantial control to effect this complete reversal of current management directions and long-range planning.
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> With a substantial transfer of control, the FCC must make a public interest finding before transfer of control and allow the public a 30-day comment period. The Commission has a broader obligation in transfers than the Securities and Exchange Commission, which protects shareholders, or antitrust departments, which preserve competition. The FCC has the obligation to protect the public interest -- to assure quality service to broadcast viewers and listeners. Quality service requires stability of ownership, long-range planning and development.

These concerns continue to apply today. As we gain experience in this area, I think we'll see far more problems associated with the takeover process as permitted by the FCC. One additional concern that has been raised in the press recently is that revenues drained and debt incurred by takeover attempts reduce revenues available for new and better programs to serve the public. (Note the staff reductions and station sale at CBS.) There's an old saying that I think applies here -- "If it ain't broke, don't fix it." I think Congress set up a sensible way to deal with transfers of broadcast properties and until I see that it's broken, I won't join the FCC majority's fix-up efforts.

This doesn't allow much time for other contentious subjects. I'll just state a few bottom-line opinions.

Must-Carry: In my opinion, the FCC should have appealed the Court of Appeals decision invalidating the must carry rules and initiated a notice of proposed rulemaking on its own motion to remedy the inequities described in the court decision. The court practically invited the Commission to recraft the item. The controversial court decision granted cable disproportionate power. I don't believe any entity controlling a monopoly distribution pipeline should have the power to thwart any local TV station's access to the audience it was licensed and is required to serve. I believe licensee service to the public is expressly required by the Communications Act.

Repeal of 315 and Fairness Doctrine: The prestigious RTNDA (Radio Television News Directors Association) is the appropriate organization to spearhead this renewed campaign. Courts are the logical vehicles for Constitutional challenge because it is unlikely Congress will revise the statute.

Cross Ownership Waivers: I believe the influential ANPA (American Newspaper Publishers Assocation) is the appropriate organization to initiate and spearhead an NPRM (notice of proposed rulemaking) to determine if and when enforcement of these rules is counterproductive to their intent and actually results in reducing diversity of media and thought. In the meantime, waivers should be considered only when strong factual evidence is developed that divestiture would lessen the diversity of information and media available to the public. Parties seeking waivers would have to meet a strong burden of proof. However, cross ownership restrictions can be counterproductive -- for example, loss of TV stations led to the demise of the Washington Star, Boston Herald Traveler and the Philadelphia Bulletin.

Beer-wine ad ban and counter commercials: Unconstitutional, discriminatory and ineffective. Wise congressional action minimized FCC involvement.

Public broadcasting V for U swaps: An intriguing idea whose time has not come. Long-range implications are too negative and there is overwhelming opposition from a large majority of PBS and commercial TV operators.

FCC takeover inquiry: Reconsider and drop ill-considered short term trustee concept in take-overs. Craft expedited 315 proceedings. FCC must pass on public interest qualifications before transfer of control.

Telephone structure, rates: There are many complex issues that are highly contested by competing interests. Subscriber line charges are required for the consumer's own long-range benefit. FCC must preserve universal service and do all in its power to provide a level playing field to achieve maximum benefits to the consumer and reasonable opportunity for business growth. If phone company profits become excessive and outstrip the economy

or inflation, the FCC and state regulators may have to undergo a painful, controversial review of the allowable rates of return.

I would be remiss if I didn't leave you a brief message on practicalities in regulations. As a non-lawyer, I find great solace in this quote from that great President Franklin D. Roosevelt expressing his view of the role which should be played by an administrative agency in government. He said:

> A common sense resort to usual and practical sources of information takes the place of archaic and technical application of rules of evidence, and an informed and expert tribunal renders its decisions with an eye that looks forward to results rather than backwards to precedent and to the leading case. Substantial justice remains a higher aim for our civilization than technical legalism. (Emphasis added.)

I believe that all of us share the goal of "substantial justice" and I sincerely hope we can all pursue that goal together in a progressive spirit of reason and mutual cooperation.

Overall, it's a challenging, fascinating time to be at the Federal Communications Commission. Congress, the FCC, the communications legal profession, the industries and the public must work together to maintain our communications leadership so that Americans remain the best informed and best served people in the world.

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