Statement of
FCC Commissioner James H. Quello
Concurring in Part and Dissenting in Part
April 22, 1985

In re: Application of the Committee for Full Value of Storer Communications, Inc. for Consent to Transfer of Control of Storer Communications, Inc. File No. BTCCT-850319KK-KQ

I concur in the finding that the Committee for Full Value of Storer Communications, Inc. (the Committee) is seeking to effectuate a transfer of control of Storer Communications, Inc. (Storer) and that this transfer is subject to the provisions of Section 310(d) of the Communications Act. I respectfully dissent to the majority view that this is not a "substantial" change of control that is subject to the full provisions of Sections 309(b) and 309(d) of the Act.

Congress has established specific requirements -- particularly a 30-day holding period and opportunity for the filing of petitions to deny -- that must be followed before a "substantial" change in control of a broadcast license may be completed. See 47 U.S.C. 310(d), 309(b), and 309(c). In addition, it is well settled that the "control" to be considered under this statutory scheme need "not be control in a formal sense, but may consist of actual control by virtue of the special circumstances present." Lorain Journal Co. v. F.C.C., 351 F.2d 824, 829 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966), quoting, Town and Country Radio, Inc., 15 Radio Reg. (P&F) 1035, 1057 (1960). Accordingly, the Commission is obligated to examine the particular facts of this case.

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The Transfer Issue

Briefly, a transfer of actual or de facto control would occur if Storer's shareholders adopt the Committee's proposal because:

(1) de facto control of Storer does not now rest with the institutional shareholders who hold a majority of stock, but rests instead with a management group that controls the corporation's proxy solicitation process; and

(2) a group of shareholders that is unassociated with the Storer management group (the Committee) seeks to effect a change in actual control by installing its own slate of directors and by establishing a drastically different corporate operating policy.

The record shows that Storer's shareholders do not exercise actual control over the corporation. As is generally the case in a large corporation, responsibility for "formulating business policy" at Storer rests formally with the corporation's board of directors. See Opposition to Application for Review, Exhibit A (Amended Code of Regulation of Storer Broadcasting Co., Article V, Section 7). In addition, the Commission generally looks to the directors, and the officers they appoint, as the persons properly in control of a corporation. See, e.g., RKO General, Inc. (WNAC-TV), 78 F.C.C.2d 1 ((1980), remanded on other grounds, RKO General, Inc. v. F.C.C., 670 F.2d 215 (D.C. Cir. 1981), cert. denied, 102 S.Ct. 1974 (1982).

More particularly, Storer has shown that de facto control of this corporation rests with its management by demonstrating (1) that the corporation's proxy solicitation efforts have achieved the election of management's slate of directors by a margin approaching unanimity over the last three years and (2) that all of management's proposals during this time received overwhelming shareholder approval. See Storer Reply to Opposition, at 3-4. There is no indication of any active shareholder involvement in corporate decisionmaking, and it is uncontested that institutional investors hold a majority of the corporation's stock.

The record thus strongly supports a conclusion that Storer is a classic widely-held corporation where actual control rests with those persons who control the board of directors through control of the corporation's proxy solicitation process.[1] Also, since Storer's bylaws grant operating control of the corporation to its board, it would be a clear demonstration of a change in de facto control for the existing management group to lose control over the board of directors.

Under these circumstances, the Commission cannot rely on a fiction that it is the shareholders who control the company. While the Commission might wish that Storer had identified more precisely the exact locus of control over the proxy machinery, the failure to identify the individuals in the management group

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[1] In analyzing where actual control resides, the representation made in 1976 by Storer's counsel (and vice president) that de facto control was relinquished to the general public does not preclude a finding to the contrary when such a finding is required after examination of the facts . See Stereo Broadcasters, Inc., 55 F.C.C.2d 819, 821 (1975).

provides no support for a conclusion that control thus somehow reverts by default back to the shareholders. Storer has made a clear showing that de facto control has not been exercised by the passive institutional shareholders.

For some purposes, such as taking the company private, it might be very important to establish precisely who exercises de facto control. Here, however, the existing management group's qualifications are not at issue, and the Commission's sole concern is whether a change in control would occur. Precise identification of the management group's members and their corporate roles is not necessary to the observation that this group will lose control if the Committee succeeds.

Committee principals seek to obtain de facto control over the corporation by offering a new slate of corporate directors that would include Committee principals themselves. The argument that the Committee's holdings are too small to permit its exercise of such control ignores the fact that the Committee's board members would assume control over the corporation's proxy machinery as well as take operating control of the company. It is also to be noted that the 5.3 percent of stock under the Committee's control is "in the same order of magnitude" as that of the present controlling management group. See Opposition to Application for Review, at 6.

Congress, of course, did not intend that the Commission impose Section 309 or 310 requirements at every routine change in persons exercising some control over a licensee, and the Commission has employed reasonable discretion concerning transfers of actual control. In accord with its obligation to examine the circumstances of each case, the Commission's regulatory approach may be viewed as comparable to having established a presumption against finding that a transfer of actual control has occurred. Evolutionary changes in a corporation's officers and directors are tracked through the filing of annual ownership reports, and this suffices to assure Commission oversight of the process. In this case, however, a complete and immediate change in actual control has been demonstrated, and this emphatically rebuts the presumption against finding that a transfer of control would occur.

The "Substantial" Transfer Issue

The majority decision correctly recognizes that a transfer of control would occur, but it is incorrect in concluding that the agency has discretion to classify this transfer as non-substantial under the Act. The majority's finding that the proposed transfer would not be substantial is based principally on the lack of change in shareholders'

ownership or voting rights.[2] Given that the express language of Section 309(c) applies to changes in either "ownership or control," the majority must justify its finding that Congress intended to require a change in "ownership" as well as "control" before a "substantial" change may be found. That burden has not been met, and the circumstances of this case dictate that the change would be substantial.

First, while "substantial" is not defined, the Commission's rules and decisions have generally applied the 309(c)(2)(B) exception to pro forma changes and other changes where no transfer of actual control would occur. See 47 C.F.R. 73.3540(f). Also, recent Commission decisions demonstrate a strong trend toward reduced interest in formal ownership and increased Commission concentration on actual control. See Metromedia, Inc., 98 F.C.C.2d 300, recon. denied, 56 Rad. Reg. 2d (P&F) 1198 (1984) (where a shift in a majority of stock ownership was held to be non-substantial because de facto control was unaffected); and Corporate Ownership Reporting and Disclosure by Broadcast Licensees (Attribution), 97 F.C.C.2d 997 (1984) (where the stock ownership level necessary to trigger Commission reporting requirements was raised dramatically).

This trend reflects reasonable Commission efforts to exclude issues that are unnecessary to its purposes, while focusing on the relevant question of control. Such a focus is particularly appropriate when examining a widely-held, publicly traded corporation such as Storer.

Storer's diverse shareholders will have no voice in corporate policy at the upcoming meeting except for exercising the option that may be given to them by the Committee. After they make that choice, control will again rest in the entity that controls the corporation's proxy solicitation process. The lack of change in ownership or voting rights does not reduce even slightly the impact of the proposed change on corporate operations, and thus it does not provide a basis for concluding that this change in control is not substantial.

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[2] The decision also urges that the corporation's legal entity and corporate obligations will remain unchanged, but this is likely to be the case in any transfer of corporate control.

Second, subsection 309(g) only authorizes the Commission to make reasonable classifications of applications in order to further the purposes of Section 309, and one of these express purposes is to provide a specific period of time during which persons interested in a "substantial" transfer of control may participate formally in the decision. See 47 U.S.C. 309(d). Here, all the elements warranting such public comment on the Committee's qualifications are present. There would be a complete change in persons exercising operational control, the Commission has never passed on the Committee principals' qualifications, and a drastic revision in corporate operating policy is proposed -- the complete dissolution of the company.

Since the principal effect of the "modified 316" procedures adopted by the majority would be elimination of the opportunity for formal public comment, it is particularly important to note that the lack of change in ownership does not support limiting public involvement. Thus, the classification adopted by the majority does not further the purposes of Section 309 as required by subsection 309(g).

Third, the majority's desire not to frustrate corporate law or shareholder rights does not provide any basis for avoiding the Section 309 procedures. No conflict with corporate law has been shown to flow from following the full statutory procedures, and the Commission cannot invoke a policy goal that is not even referenced in the Communications Act to support its departure from the express congressional directions contained in Sections 309(b) and 309(d).

Further, there is no record here to support a finding that compliance with the statutory procedures would impose a burden on the exercise of shareholders' voting rights. The appropriate means to reconcile the majority's policy goal of neutrality with the Communications Act procedures would be to grant highly expedited consideration to a long-form application. The Committee itself states that proxy fights customarily are announced up to eight weeks in advance of the shareholders' meeting (Opposition to Application for Review, at 25-26), and it would not be unreasonable to expect that the Commission could complete its review of a long-form application on a roughly equivalent timetable. Should the Committee nevertheless regard the statutory holding period as excessively burdensome, it has the option of following the procedure described by the Media Access Project -- seeking Commission approval after the shareholder meeting but before its directors would actually take their seats. See Media Access Project, Comments in Support of Application for Review.

Finally, there is an independent basis for concluding that the Committee's proposed transfer is "substantial" under the meaning of the Act. The one matter on which all the members of

the Commission agree is that a Notice of Inquiry is necessary to explore the important issues surrounding this type of transfer. This case presents novel questions, and the answers adopted by the Commission will have a significant impact on the entire broadcast industry.

While I do not dispute the Commission's ability to act in an adjudicatory context, it also should seek to encourage public participation on issues of broad impact. At a minimum that should include providing an opportunity for formal public participation here unless there is a compelling reason not to permit such participation. Here, the only reason not to permit comment appears to be the Commission's concern that delay might hinder the Committee's efforts at the May 7 shareholder meeting. Given that the Committee controlled when its application would be filed, it is particularly unreasonable to rely on the need for speedy resolution as a basis for precluding formal participation by interested persons.

Conclusion

I do not believe there is any sound basis for the Commission to depart from the procedures set out by Congress in Section 309, and I see strong reasons for permitting formal comment in this novel situation. Accordingly, I must dissent from the conclusion that the proposed transfer of control is not a "substantial" transfer under Section 309 of the Act.