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Dissenting Statement
of
FCC Commissioner James H. Quello

In re: Applications of One Two Corporation and Eugene McCarthy, Trustee, for Commission Consent to Acquire Control of Multimedia, Inc.

I do not support the majority's view that use of a trustee can permit avoidance of the procedural requirements of the Communications Act. In my view, expedited Commission consideration of a standard, long-form 315 application for transfer to the ultimate licensee is the only appropriate means by which the Commission can maximize its neutrality in this corporate dispute while avoiding the legal and policy pitfalls inherent in any half-way transfer measure.

The Commission's prime responsibility is to "execute and enforce the provisions of [the Communications] Act." 47 U.S.C. § 151. These provisions include the express directions of sections 310 and 309 that the Commission must approve in advance the transfer of any rights under a station license and that grant of any application for transfer involving "a substantial change in ownership or control" must be preceded by a 30-day holding period and by an opportunity for the filing of petitions to deny. 47 U.S.C. §§ 310(d), 309(b), 309(c)(2)(B), & 309(d)(1). In my view, it is inconsistent both with the clear directions of Congress and with the interests of the public for the Commission to permit the displacement of a qualified incumbent licensee prior to giving full consideration to the qualifications of its successor.[1]

That compliance with sections 309(b) and 309(d) procedures requires some delay is unavoidable, but the Commission can control the extent of that delay and should thus be able to reduce to a manageable level the uncertainties imposed both on the applicant and on corporate shareholders. In particular, the Commission could establish a date certain by which it would either approve the long-form application or designate it for evidentiary hearing. A timetable that appears reasonable for completing this analysis would be to guarantee FCC action within 90 days from the filing of the transfer application. In order to ensure that the Commission could meet such a deadline, it

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1 See Notice of Inquiry on Tender Offers and Proxy Contests Involving Publicly Traded Licensee Corporations, FCC 85-349 (adopted July 8, 1985) (Quello, C., concurring).

would probably be necessary to permit only formal pleadings, to restrict pleading length, and to bar amendments to the application during the course of its consideration. While this procedure would impose costs on the applicant, the target corporation, and the Commission, it would offer the immense practical and legal benefit of resolving the qualifications question before any irreversible transfer of control or ownership would occur.

In this case, the majority has described two theories under which it attempts to find authority to avoid the statutory procedures of sections 309(b) and 309(d) -- the section 309(c)(2)(B) exception for transfers that do not involve a substantial change in ownership or control and the special temporary authorization provisions of section 309(f).[2] Neither theory supports avoidance of Congress' determination that applications for transfers of ownership or control of licensed facilities shall be subjected to a 30-day holding period and an opportunity for the filing of petitions to deny.

Section 309(c)(2)(B). Under its first theory, the majority concludes that the transfer at issue may be considered a "non-substantial" one under section 309(c)(2)(B) because of the severe restrictions imposed on the ownership rights of the trustee. The majority reasons that while the trustee would acquire legal ownership of a majority of Multimedia's shares, control of the corporation "would remain behind as a residuum vested in the remaining shareholders and the incumbent Directors and officers." See Majority Opinion at para. 25.

Assuming for argument that the majority is correct in the conclusion that the restrictions on the trustee preclude his exercising control, the opinion still fails to show that the standard set out in section 309(c)(2)(B) has been met. The statutory test is that the transfer "not involve a substantial change in ownership or control." 47 U.S.C. § 309(c)(2)(B) (emphasis added). Under recent Commission precedent, this transfer to the trustee clearly would effect a "substantial change" in corporate ownership and control.

Obviously the transfer involves the transfer of substantial stock interests since a new entity would thereby acquire a majority of the corporation's stock. In addition, the changes in control accomplished by this transfer include the very

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2 See 47 U.S.C. §§ 309(c)(2)(B) and 309(f). While the majority relies expressly on the section 309(f) theory, its clear intent is that each theory supports the decision independently.

elements of control identified as crucial by the Commission in its recent decision in Committee for Full Value of Storer Communications, Inc. (Storer).[3] For example, as a direct result of the successful completion of the tender offer, a majority of shareholders would not "retain ultimate legal control" over the corporation and would lose the "right to vote out [the] existing board [of directors] by majority vote." See Storer, at 1659. Given the emphasis placed on corporate democracy and majority shareholder control in Storer, it is contradictory for the Commission to determine in the very next case that the voiding of identical majority shareholder rights can be dismissed as a "non-substantial change."[4] While such a transient definition of "control" may be convenient for the majority's avowed purpose of avoiding supposedly "non-neutral" statutory procedures, it also demonstrates a lack of any real effort to act within the scope of the statutory exception provided by section 309(c)(2)(B).

The majority also is incorrect in its conclusion that the conditions imposed on the trustee can assure that he will not exercise substantial control over Multimedia's operations. The majority has expressly approved the trustee's authority to "act independently . . . if management compels him to do so, by itself taking action inconsistent with preserving assets." Majority Opinion at para. 25. Given that some assets of a broadcasting business (e.g., contracts with on-air talent) are inextricably intertwined with station operations, it appears possible that the trustee might be required to exert some negative control over licensee operations when he perceives

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3 57 Rad. Reg.2d (P&F) 1651, 1659-1660 (1985), aff'd sub nom. Storer Communications, Inc. v. FCC, No. 85-1246 (D.C. Cir., May 14, 1985).

4 Cf. Metromedia, Inc., 98 F.C.C.2d 300, appeal docketed sub nom. California Association of the Physically Handicapped v. FCC, No. 84-1170 (D.C. Cir. May 4, 1984) In that case, the Commission approved a short-form transfer of more than a majority of the corporation's shares on the basis of a detailed showing that the person acquiring de jure control already exercised de facto control. While it was urged here that "working control" of Multimedia rests with its board, the majority made no such finding, and there appears to be no factual distinction that would warrant relying on the board's de facto control in this case when a similar theory was rejected by the majority in Storer, 57 Rad. Reg.2d (P&F) at 1659; see also id. at 1670 (Quello, C., dissenting in part).

it necessary to preserve asset value. While such actions could be essential to fulfillment of the trustee's express fiduciary obligations, his exercise of control over station operations without undergoing formal Commission consideration of his qualifications would violate the provisions of section 310(d).[5]

The majority also relies upon the temporary nature of the trustee's stewardship to support its "non-substantial" theory. Majority Opinion at para. 25. This distinction provides no basis for applying a less rigorous standard because (as discussed under the section 309(f) analysis below), the change in ownership resulting from this transaction is permanent, not temporary. Also, should a hearing be necessary on the underlying long-form application, it is possible that the trustee's stewardship would extend over the full length of a regular television license term or longer.

Section 309(f). The majority's second theory of its statutory authority relies on section 309(f) of the Act. 47 U.S.C. § 309(f). Implementation of this section requires the existence of "extraordinary circumstances requiring temporary operations in the public interest," plus a finding that "delay in the institution of such temporary operations would seriously prejudice the public interest." _Id_.

The majority's proposed use of this provision is a departure from all previous interpretations of that section's scope and is at variance with "any plausible reading of the statute's text."[6] Briefly, Congress gave the Commission authority to allow temporary technical operations when delay would "seriously prejudice the public interest." Such authority cannot support permitting the effectuation of a permanent transfer of majority ownership that, at best, would have no effect upon Multimedia's ongoing operations.

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5 That the trustee has even the slightest authority as majority shareholder totally invalidates the majority's attempted reliance on _Westinghouse Broadcasting Co._, 84 F.C.C.2d 938 (1981). _See_ Majority Opinion at para. 27. In _Westinghouse_ only a minority stock interest in Teleprompter was put into the voting trust, and the trust was "subject to the indirect control of Teleprompter's present Board of Directors _in all matters_ except for those directly related to the merger." 84 F.C.C.2d at 940 (emphasis added). The division of authority created here by the majority also raises serious policy questions that are discussed in the conclusion section of this statement.

6 _See_ _MCI Telecommunications Corp. v. FCC_, No. 85-1030, slip op. at 11-16 (D.C. Cir. July 9, 1985).

In the past, the Commission has employed the authority provided by section 309(f) as a means to protect against loss of broadcast or other radio operations and to permit initiation of new technical operations under extraordinary circumstances.[7] To the best of my knowledge, this authority has never been used in any context except to permit the provision of service when available facilities otherwise would lie fallow.[8] That Congress intended such a limited application of this authority is supported by the legislative history of the original section 309(f) which only permitted "emergency operations."[9] While the term "emergency" was subsequently deleted in a modification of language intended primarily to eliminate a 180-day limit on such authorizations, this change in no way suggests an intention to broaden the meaning of the term "operations" beyond its normal use.[10] Since no change is contemplated in Multimedia's ongoing "operations" as a result of the transfer to a trustee, it cannot be said that the change is in any sense "required" under section 309(f).

The other obvious variance between the statute's express terms and the majority's action is the fact that the authorization granted to the trustee to collect a majority of Multimedia's stock is in no sense "temporary." Unlike the temporary operation of a radio facility contemplated under section 309(f), the consequences of this "temporary" authority necessarily would continue beyond any summary termination of the authority,[11] and its effects are almost certainly irreversible.

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7 See, e.g., Entertainment Communications, Inc., 45 Rad. Reg.2d (P&F) 1685 (1979).

8 While the Commission in two cases has issued temporary authorizations for the transfer of control of non-broadcast licenses, in each case temporary authority was required to prevent cessation of otherwise unauthorized operations. Telesis Corp., 68 F.C.C.2d 696 (1978); State TV Cable, 22 Rad. Reg.2d (P&F) 683 (1971).

9 See H.R. Rep. No. 1800, 86th Cong., 2d Sess. 13, reprinted in [1960] U.S. Code Cong. & Ad. News 3516, 3521.

10 See H.R. Conf. Rep. No. 97-765, 97th Cong., 2d Sess. 37, reprinted in [1982] U.S. Code Cong. & Ad. News 2237, 2281.

11 Upon termination of the authorization, the majority would presumably order the trustee to sell his interest. See Majority Opinion, at para. 25, n. 7. It is possible, however, that the trustee would have the hearing rights accorded to a licensee in light of the extraordinary nature of this proceeding and the majority's conclusion that short-form transfer procedures could have been employed. See Majority Opinion at para. 44.

Once the tender offer has succeeded, it is highly unlikely, if not impossible, that subsequent sale of these shares by the trustee could reconstitute Multimedia as it existed prior to the change in ownership. The trustee's duty would be inconsistent with such a result because of his responsibility either to transfer the shares to the beneficiary or, if that transfer is disapproved, to sell the shares (or individual properties) to the highest bidder. Selling these shares as a block would convey control over Multimedia, and it may be expected that this would greatly increase their value. Thus, any dispersal of the shares back to the "public" would be inconsistent with the trustee's duty to obtain the best price possible.

Accordingly, a permanent transfer of ownership and control would eventually occur as an inevitable result of a successful tender offer. While it may perhaps be argued that the mere initiation of such a change is not "substantial," it unquestionably is not, as the majority claims, "temporary."[12]

Finally, in my view, the majority is casting too far afield from the Commission's authorizing legislation in its effort to find that use of section 309(f) is necessary here to avoid "serious prejudice to the public interest." As the Supreme Court has emphasized, "the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general welfare. Rather the words take meaning from the purposes of the regulatory legislation." NAACP v. FPC, 425 U.S. 662, 669 (1976). While federal agencies should "be alert to determine whether their policies might conflict with other federal policies and whether such conflict can be minimized," LaRose v. FCC, 494 F.2d 1145, 1146 n.2 (D.C. Cir. 1974), it is improper for an agency to attempt to circumvent clear instructions in its authorizing statute in order to serve its interpretation of federal policies that are far outside the scope of its expertise or authority.

Section 310(d). Even if the Commission had full statutory authority to act in this manner, the particular provisions of this trustee arrangement involve an unacceptable risk to accomplishment of the Commission's principal responsibility under section 310(d) -- ensuring that the transfer will serve the public interest. See 47 U.S.C. § 310(d). Lines of responsibility are so unclear under this trustee arrangement that Multimedia may well be incapable of operating its broadcast

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12 See Majority Opinion at para. 29. In a similar situation, the Commission has recognized the crucial importance of reversibility. In Pacific Power and Light Co., the Commission allowed the interim transfer of two large blocks of stock to a trustee but based the decision expressly on the fact that this transfer could be reversed if necessary. 42 F.C.C.2d 375, 378 (1973).

facilities in the public interest. The majority's approach would approve a division of authority between (1) directors who lacked the support of that majority of Multimedia's shareholders who will have tendered their shares to the trustee, and (2) a trustee who has been given directly conflicting responsibilities to stay completely out of corporate operations and yet to protect the value of the corporation's assets -- assets the value of which will be directly affected by corporate operating decisions. The opinion is silent as to whether the trustee should seek to resolve conflicts by means of a shareholders' meeting, an appeal to a local tribunal, a petition to the FCC, or some combination of these mechanisms.[13] It appears to me that in its attempt to find that no "substantial" transfer to the trustee would occur, the majority may have so muddled the concept of "control" that when the actual exercise of authority is required to run the licensee corporation, the locus of "ultimate control" will not be discernible. The majority has improperly declined to weigh this risk against the benefits it perceives from its course of action.

Conclusion. I believe that the majority is taking a significant and unwarranted risk with the public's interest in receiving high-quality service from a qualified licensee. In addition, I am convinced that the Commission lacks authority to pursue its interpretation of shareholders' interests in a manner that contradicts express statutory instructions. Sections 309 and 310(d) reflect Congress' assessment of appropriate communications policy. To the extent that Communications Act procedures conflict with shareholders' interests, it is only Congress that has the broad authority to harmonize the conflicting policies. I dissent.

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13 No doubt the majority hopes that such problems will be presented to local tribunals, but the essence of the disputes would be the terms of a trust designed solely to meet Commission objectives. Thus, it seems likely that a local court would refer disputes over the terms of this FCC dictated agreement back to this agency for interpretation.