

**Dissenting Statement
of
FCC Commissioner James H. Quello**

In re: Application of L. P. Media, Inc. and G. William Miller,
Trustee, for Commission consent to a transfer of
control of the Evening News Association.

My dissent to the Commission's recent decision in One Two Corporation and Eugene McCarthy (McCarthy)¹ was based upon the legal and policy concerns that flow from the majority's attempt to avoid prescribed statutory procedures by means of a trustee arrangement. Since the trustee plan adopted in this case is exactly modeled on the McCarthy decision, identical concerns apply here. Therefore, I refer the reader to my dissent in McCarthy² for a full discussion of my views.

To summarize my concerns very briefly, the majority's approval of the transfer of a majority of the stock of the Evening News Association to a trustee is improper because this process fails to comply with the express requirements of section 309 of the Communications Act. 47 U.S.C. § 309. This section requires that any application for the transfer of rights under a station license that involves 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. See 47 U.S.C. §§ 309(b), 309(c)(2)(B), & 309(d)(1).

The proposed transfer to a trustee clearly would effect a "substantial" change since a majority of the shares must be transferred for the tender offer to succeed. Also, since the trust arrangement would abrogate majority shareholder control, there necessarily would be a substantial change in control. In addition, the possibility exists that a clearly substantial transfer of control to the trustee may occur without the required Commission consideration of his qualifications since the trustee is authorized to exercise control under certain circumstances.

Next, while the majority relies on section 309(f) of the Act, the Commission's authority to grant temporary authorizations for

1 58 Rad.Reg.2d (P&F) 924 (1985).

2 Id. at 937 (Quello, C., dissenting).

"temporary operations" under "extraordinary circumstances" to avoid "serious[] prejudice [to] the public interest"³ cannot be interpreted legitimately to permit permanent changes in ownership and control when ongoing "operations" are in no jeopardy and would, at best, be unaffected by the proposed transfer.

Finally, my dissent in McCarthy focused on the significant risk that the ability of the licensee corporation to operate in the public interest would be adversely affected by the majority's unclear division of ultimate authority between (1) incumbent directors (and managers) who will have lost majority shareholder support and (2) a trustee who has an affirmative responsibility to exercise control when necessary to preserve corporate assets. In such a situation, the locus of ultimate control is so muddled that its exercise when required may be impossible.

While the basic elements of McCarthy and the present case are identical, several matters raised by the majority opinion warrant brief discussion here. First, the majority's improper determination to avoid considering the difficulties that will arise under the trustee arrangement is further evidenced by the brevity of its discussion of the argument that some of the officers and directors who are expected to exercise control during the trustee's stewardship may leave the corporation after a successful hostile tender offer occurs. The majority's answer is to simply assert that "those who remain behind will continue to operate the stations and hire replacements for those who leave." Majority Opinion at ¶18. The majority's sole expressed concerns are to assure adequate limitations on trustee authority and to protect Commission neutrality. Id. In my view, this is an abrogation of the Commission's responsibility to ensure that this ownership change is consistent with the public interest. See 47 U.S.C. § 310(d).

While evolutionary changes in corporate officers are not generally of concern to this Commission, changes in directors and officers that directly accompany a complete transfer in majority ownership cannot be dismissed as of no consequence to this Commission's obligations under the Act. The majority relies heavily on the continuity of these directors and officers.⁴ More importantly, the majority has an obligation to focus on possible disruption at the licensee corporation so

³ 47 U.S.C. § 309(f).

⁴ See, e.g., McCarthy at 931 (¶27).

that any possible harm will be minimized. Instead, the majority continues to avoid facing any of the public interest questions raised by employing this novel trustee arrangement in a hostile takeover environment.

Second, in McCarthy the majority relied upon the upcoming shareholders' meeting to provide the "extraordinary circumstances" expressly required to implement section 309(f).⁵ In the present case, no such upcoming event necessitates action in advance of full Commission review under the statutory procedures of section 309. Since no harm has been demonstrated to occur from prompt compliance with the statutory procedures, use of section 309(f) is clearly inappropriate in this case.⁶

Finally, while the majority indicated that it expressly relies for statutory authority on sections 4(i) and 4(j) of the Act,⁷ section 4(i) only authorizes actions "not inconsistent with [the] Act" and the majority's action is directly inconsistent with sections 309(b) and 309(d). Also, the general procedural discretion granted the Commission by section 4(j) can provide no authority for the Commission to avoid the specific procedural directions contained in sections 309(b) and 309(d). Accordingly, the majority's use of the trustee procedure gains no support from these provisions.

For the reasons discussed above and in my dissent to the McCarthy decision, I dissent.

⁵ See McCarthy at 932.

⁶ In addition, the majority's further analysis of Commission authority under section 309(f) provides no additional support for the legality of this action. See Majority Opinion at ¶¶9-10. The majority's reliance on Gale Broadcasting Co., 15 Rad. Reg.2d (P&F) 337, reconsideration denied, 19 F.C.C.2d 623 (1969), as support for use of a special temporary authorization is misplaced because in that case continued operation of the station would not have been possible without grant of the authority. The Commission expressly found that its action was "the only course to permit continued service to the public during an expedited hearing." Gale Broadcasting, 19 F.C.C.2d at 624. Here, on the contrary, there is no threat to continued "operations" that might permit invocation of section 309(f).

⁷ 47 U.S.C. §§ 154(i) & 154(j).