Inside the FCC

James H. Quello

FCC commissioner, in a recent speech in Washington, before a joint meeting of the ABA Forum Committee on Communications Law and the FCC Bar Association

Technology explosion, deregulation provide many new challenges

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.

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, 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 six 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; 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.

Trustee concept

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 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 in-

412

advertent result was still greenmail.

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 CapCities-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 five 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.

Financial raiders

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 Association—all facilitated by new-found FCC procedural shortcuts.

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.

Some bottom-line opinions

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.

Cross ownership waivers: I believe the influential ANPA (American Newspaper Publishers Association) 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.*

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.