Broadcast Licences: Fair Game for Corporate Raiders

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The conventional wisdom in the regulation of broadcasting has been that a transfer of control cannot lawfully occur without prior Federal Communications Commission (FCC) approval. To the party seeking control, this requirement has meant the filing of detailed applications and the potential for lengthy delays or public hearings. This approach worked reasonably well in the context of voluntary acquisitions and in a less volatile market. The Commission’s conventional transfer of control procedures appear less appropriate, however, in today's competitive business environment.

With the recent trend of hostile takeovers, the FCC has reason to examine its traditional approach to transfer of control applications. Experience has shown that the acquiror in a contested acquisition faces an untenable regulatory dilemma. The acquiror may submit to protracted FCC review proceedings and thereby risk defeat by incumbent licensee management. Alternatively, the acquiror may effect transfer of control consistent with federal securities and antitrust laws but in possible violation of FCC requirements. This situation lends itself to administrative inefficiency as well as to potential costly and time-consuming litigation. It also places the Commission in the position of inadvertently favoring the target station’s management.

FCC Chairman Mark S. Fowler summarized the dilemma as follows: "A hostile takeover situation has never been faced by the agency before. . . . What procedures would the Commission employ that would be permissible, and indeed legal, under the Communications Act and Section [310(d)]? We
have not answered that question yet. It would be a case of first impression."

Since then, on an ad hoc basis, the Commission has approved a short form application procedure permitting a hostile proxy contest to go forward rapidly, without complying with the public notice and petition-to-deny procedures specified in the Communications Act. The Commission has also granted special temporary authority and condoned a voting trust arrangement in recent cases involving hostile tender offers. Although the Commission’s policy of dealing with hostile takeovers is gradually evolving, it is far from clear. At this writing, the FCC has released a Notice of Inquiry proposing to better delineate its regulatory role in the context of current market forces.

It is the purpose of this article to show that FCC regulatory objectives may be achieved without prejudice to the normal forces of competition. Part I introduces the nature of the controversy and reviews the FCC’s traditional approach to changes in control of licensee broadcast stations. Part II discusses the neutral stance taken by other regulatory agencies in contested takeover struggles. The federal securities and antitrust requirements applicable to a hostile takeover of a publicly traded company and the defensive measures that a target company may employ are considered in Part III. Part IV delineates the FCC’s statutory and regulatory justifications for adopting a more flexible approach for reviewing changes in control of publicly held licensees. Finally, alternative theories for effecting a lawful transfer of control without contravening the Communications Act or FCC policy are set forth in Part V.

I. NATURE OF THE CONTROVERSY ADDRESSED

A. Transferring Control of a Broadcast Station

The transfer of control of a licensee broadcast station is governed by section 310(d) of the Communications Act. In essence, section 310(d) pro-

2. See, e.g., Committee for Full Value of Storer Communications, Inc., 100 F.C.C.2d 434, aff’d, Storer Communications, Inc. v. FCC, 763 F.2d 436 (D.C. Cir. 1985).
vides that no license nor control over any license may be transferred "unless
the Commission shall, after securing full information decide that said trans-
fer is in the public interest." Based upon a narrow reading of the statute,
then, acquisition of a licensee broadcast station cannot lawfully transpire
without prior approval from the FCC.

The legislative history of the Communications Act indicates that Congress
intended "control" to be broadly construed. In fact, drafters of the Act
specifically refrained from any attempt to define control fearing that this
would unduly limit the meaning of the term. Congressional committee re-
ports suggest only that wherever the statute refers to control, Congress' in-
tent was to include actual control as well as legally enforceable control.
The Communications Act does not include a definition of control. The
FCC's definition of control is therefore critical to a potential acquiror of a
licensee broadcast station. Decisions before the FCC indicate that there are
numerous ways to depict control. For purposes of section 310(d), control is
not limited to majority stock ownership. In fact, statutory control may be
evined by purchasing a small percentage of voting shares if that acquisition
is sufficient to exert actual working control over the licensee. Moreover,
control may be inferred from the power to influence day-to-day operations,
to dominate the licensee's financial affairs or to determine management
prerogatives.

The Commission recognized certain deficiencies in its transfer of control
procedures as early as 1948. In the AVCO case, the FCC noted that "im-
mediate steps should be taken to bring the procedure in transfer cases into
harmony with the theory of competition which underlies the Communi-
Thereafter, the Commission proposed several new procedures to govern future transfer of control cases. The new regulations were not to apply, however, where the proposed transfer entailed less than a controlling interest in a licensee station. Similarly, the FCC declined to apply these rules to cases where transfer of a license involved no substantial change in control of the broadcast station.

The Commission subsequently addressed the competing interests raised in transfer of control procedures by issuing a formal notice. The Commission recognized that “doubtful and borderline cases” may exist wherein it becomes unclear whether a proposed transaction effects a transfer of control within the meaning of section 310(d). Among these borderline cases, the FCC specifically noted those which effectively insulate de facto from de jure control. In a hostile takeover, for example, a proposed acquiror may employ any of several devices to forestall transfer of de facto control. By means of a voting trust, escrow arrangement, or other insulating device, control may be shifted to another entity not a party to the acquisition.

Despite the potential for ambiguity, the FCC cautioned that any doubt or uncertainty as to the legality of an acquisition should be resolved by informing the Commission in advance as to the details of a proposed transfer. The FCC’s notice further indicated that consummation of a transfer prior to Commission consent or knowledge of the transaction will not be condoned and may be grounds for disapproval of the transfer application. A careful reading of the Commission’s statement reveals some measure of flexibility in the typical application process. The Commission places great significance on prior approval or prior disclosure in transfer of control proceedings. The notice therefore suggests that, in the absence of prior consent, an acquiror could avoid disapproval of a proposed transfer by keeping the FCC fully apprised of its acquisition plans.

Following the release of its formal order, the FCC encountered repeated challenges to its prior approval requirement. In large measure, these chal-

13. *Id.* at 17. In the *AVCO* case, a retiring broadcaster attempted to choose his successor licensee by selling his station to the highest bidder. The FCC’s concern was that as a result of Crosley’s transfer to AVCO, the successor licensee had not been selected based on a competitive application.

14. *See infra* note 33 and accompanying text. For a detailed discussion of the FCC’s current procedures, see *infra* text accompanying notes 21-41.

15. 3 *RAD. REG.* at 29.


18. 4 *RAD. REG.* at 342.

19. Several of these challenges are discussed *infra* text accompanying notes 211-20.
lenges stemmed from circumstances where a proposed transfer involved an insubstantial change of control or where some insulating element of the transaction prevented the acquiror from exercising a controlling influence. To date, a great number of the section 310(d) cases before the Commission have pertained to voluntary transfers of control. Other cases have involved section 310(d) issues along with petitions for approval in the context of the Commission's cross-ownership or multiple ownership rules. By contrast, the FCC has heard very few cases involving hostile takeovers of a publicly held licensee, and until recently, none has suggested alternative means for securing FCC approval in that type of situation.

B. Requirement of Prior FCC Approval

1. Relevant Statutory Provisions

The FCC's approach to transfer of control applications is founded in part upon the Commission's statutory directive. The Federal Communications Act, section 310(d), provides that no license may be transferred "except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby." The statute requires that an application of this nature be treated as if the proposed transferee were applying under section 308(a) of the Act, which covers applications for licenses in the first instance as well as modifications or renewals of existing licenses. Section 309(b) delineates the element of timing in a grant of approval, by stating that "no such application . . . shall be granted by the Commission earlier than thirty days following issuance of public notice by the Commission of the acceptance for filing . . . ."

The Act provides for several exceptions to the typical application procedure in section 309(c). Among these are an assignment or transfer "which does not involve a substantial change in ownership or control," or "any special or temporary authorization to permit interim operation . . . to provide substantially the same service as would be authorized by such license

22. 47 U.S.C. § 310(d) (1982). As strictly construed, the prohibition applies to any "construction permit or station license, or any rights thereunder." Moreover, it restricts the transfer, assignment, or disposition thereof "in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person . . . ." Id.
25. Id. § 309(c).
Pursuant to section 309(f), the Commission may "grant a temporary authorization, accompanied by a statement of its reasons therefor, to permit such emergency operations for a period not exceeding 180 days." Thus, the Commission may permit exception to section 309(b) timing requirements if it finds that "the grant of a license application is otherwise authorized by law and that there are extraordinary circumstances requiring temporary operations in the public interest . . . ."

Thus, the Commission may permit exception to section 309(b) timing requirements if it finds that "the grant of a license application is otherwise authorized by law and . . . that there are extraordinary circumstances requiring temporary operations in the public interest . . . ."

Section 309(e) preserves FCC review "in the case of any application [which presents] . . . a substantial and material question of fact." In that event, the FCC may "formally designate the application for hearing on the grounds or reasons then obtaining . . . ." Pursuant to section 309(d)(1), "[a]ny party in interest may file with the Commission a petition to deny any application . . . at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing . . . ." Thus, section 309 provides for certain safeguards in the process of approving contested applications. Within the specified time period, that provision retains for the FCC and any opposing party in interest the option to dispute any material questions of fact. Pursuant to section 403, the Commission also has full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of this chapter.

The Commission may therefore undertake inquiry on its own motion at any

26. Id. §§ 309(c)(2)(B)-(C) (emphasis added).
27. Id. § 209(f). The Commission also has discretion to extend such temporary authorization for one additional period not to exceed 180 days.
28. Id.
29. Id. § 309(e). The provision also applies to any application for which the Commission is unable to ascertain that the public interest, convenience, or necessity will be served by a grant thereof.
30. Id.
31. Id. § 309(d)(1) (requiring that the Commission determine that the public interest, convenience, or necessity will be served). This section further provides that "[t]he petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) . . . ."
32. 47 U.S.C. § 403 (1982). This section further provides that "[t]he Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this chapter . . . ." Id.
point in the approval process, even in the case where expedited approval or temporary authorization has been granted.

2. Application Procedures

The Commission's Application Form 315 for consent to transfer of control poses specific obstacles for the acquirer in a hostile takeover situation. For example, the guidelines for section I require that the applicant submit the contract or agreement between the transferor and transferee.

The directions to section VI list various certification requirements to which the transferor, licensee, and transferee must each attest. The general instructions to the application also incorporate the public notice provision of the Commission's rules, including the requirement that publication be completed within thirty days of submitting the application. These factors suggest that the application form itself does not account for transfer of control in a hostile takeover context. The possibility of any cooperative undertaking between the transferor and the transferee is minimal at best.

Alternatively, the FCC may permit an applicant to submit a more abbreviated Form 316. For instance, that form of filing may be appropriate in proxy contests generally or in tender offer situations where the proposed transfer of a licensee station does not entail a substantial exercise of controlling influence. The short-form application requires fewer details as to the circumstances surrounding a proposed transaction. It also dispenses with the necessity for cooperative filing by the acquiror and target licensee. More importantly, in the event of a hostile takeover bid, an abbreviated Form 316 facilitates more expeditious review by the FCC.

Form 316 still provides the FCC with sufficient information to assure that a proposed transaction comports with the strictures of section 310(d). For example, item 9 directs the applicant to submit a narrative statement as to

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34. Id. at 98:315-2, 315-5, §§ I & VI.
35. 47 C.F.R. § 73.3564(c) (1985). Specifically, the applicant for consent to transfer control of a broadcast station license must give local notice in a newspaper of general circulation in the community in which the station is located. 47 C.F.R. § 73.3580(c) (1985). Local notice is also required to be broadcast over the station itself. Id.
37. The FCC specifically authorized the filing of Form 316 in a proxy contest for control of Storer Communications. Id. at 98:316-1.
38. Id.
the reasons for undertaking a transfer of control. Item 15 requires that the applicant state its interest in terms of the shares of licensee stock held and the percentage equivalent thereof. The consideration given for shares is accounted for in item 11. If the consideration is monetary, the applicant must specify the source of funds, the entity to which they are paid, and the terms of payment. Additionally, if circumstances warrant, the general instructions to Form 316 preserve for the Commission an option to require the refiling of more detailed information.39

The FCC has yet another option for reviewing a hostile bid for control of a broadcast licensee. When circumstances of the takeover justify a neutral regulatory posture, the Commission may grant an applicant special or temporary authorization to proceed with its acquisition plans. Pursuant to Code of Federal Regulations section 73.3542,40 an application for temporary authorization should be filed at least ten days before the proposed transaction date. The authorization period may not exceed 180 days and the Commission may cancel the temporary grant at any earlier time without further notice or right to a hearing.41

C. Problems With Hostile Takeovers

The FCC has espoused varying interpretations of its directive under section 310(d). Previously, the Commission varied its approach according to the novelty and complexity of a given transfer proposal. More recently, the Commission has responded to certain tensions between regulatory enforcement and competition. In the context of hostile takeovers, there are broad administrative and public policy reasons for the Commission to adopt a more uniform approach to the issues raised. The need for regulatory change is particularly compelling in the context of present-day transfer proposals involving fiercely contested bids for publicly held licensees.42

1. Market Forces and Competition
   a. The Storer case

Debate over the FCC's proper role in regulating hostile takeovers of publicly traded licensees intensified recently following news of a proxy contest for control of Storer Communications, Inc.43 Controversy as to the FCC's

39. Id.
40. 47 C.F.R. § 73.3542 (1985); 47 C.F.R. § 73.3540(b) (1985).
41. 47 C.F.R. § 73.3540(b) (1985).
43. FCC to Review Storer Decision, Wash. Post, Apr. 6, 1985, at D9, col. 4. Storer Communications, Inc., is a Miami-based broadcasting and cable television company.
involvement focused on the question of whether broadcast licensees should receive radically different treatment than other regulated companies that become targets of hostile takeover bids. The proxy fight for control of Storer ensued when, on March 19, 1985, an investor group owning five percent of the company's stock indicated that it wanted to solicit enough votes to elect its own slate of directors. Thereafter, the investor group planned to liquidate Storer. The licensee's shareholders would allegedly benefit from the transaction in that the broadcaster's assets far exceeded its stock market price.

Initially, the FCC declined to intervene in the proxy contest because it did not infer transfer of control from a change in the membership of Storer's board of directors. Subsequently, the Commission found that the proposed change in Storer's board of directors would constitute a transfer of control within the meaning of section 310(d). The FCC regarded the transfer as lawful, however, because the proposed change of control would not be substantial. In essence, the FCC believed ultimate voting control remained with the company's stockholders, most of whom would not change. The Commission also relied on its statutory discretion to fashion appropriate procedures for review under section 310(d). For these reasons, the FCC allowed the investor group seeking to solicit proxies to file a modified Form 316 application providing for review on an expedited basis.

b. Warner Communications

Yet another example of the problems posed by hostile takeovers was presented by the 1984 takeover struggle for control of Warner Communications, Inc. (Warner). Warner was the target of a hostile acquisition by Keith Rupert Murdoch, principal owner of the News Corporation and News International (collectively referred to as the Murdoch Group). In order to thwart the Murdoch Group's takeover attempt, Warner arranged for a friendly exchange of stock with Chris-Craft Industries, Inc. and its wholly owned subsidiary, BHC, Inc. Under the agreement, Warner received shares

44. Id. at D10, col. 4. In response to petitions from Storer and other broadcasters, the FCC agreed to formally consider its position and to issue a written release. See infra note 45 and accompanying text.
47. Short Form, supra note 36. The application would be modified to include a list of the proposed directors as well as information about their citizenship and media ownership.
of BHC preferred stock representing a twenty percent voting interest. Warner was also given the option of converting its preferred shares into 42.5% of BHC's common stock, leaving Chris-Craft with a 57.5% interest. In exchange, BHC received the same number of convertible preferred shares, representing a 15.6% voting interest in Warner. Other features of the agreement included provisions to avoid dilution of either BHC's or Warner's voting interest.

The issue of unlawful transfer of control between Warner and Chris-Craft arose in the context of an alleged violation of the Communications Act's prohibitions against cross-ownership. Based on the record before it, the FCC found that the agreement between Warner and Chris-Craft did not contravene section 320(d) because there was no evidence that Warner would actually exercise control over the personnel practices, finances, or programming of BHC's stations. According to the Commission, the transfer of shares did not grant Warner "the right to determine the manner or means of operating [BHC nor] . . . the policy that the licensee would pursue." Moreover, there was no indication that Warner would "dominate the management of [BHC's] corporate affairs."

Warner and Chris-Craft entered into the exchange agreement in an effort to defeat a hostile takeover of Warner by the Murdoch Group. In this respect, the transfer of stock ownership was used to obstruct a contested acquisition rather than to facilitate it. Nonetheless, the FCC's analysis of the transfer of control question highlights some of the factors for consideration in a competitive market context. The Commission distinguished between the passage of influence and the transfer of substantial control. Given the complexity of modern business transactions, the FCC acknowledged that there was no precise formula for determining when a transfer falls within the

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50. *Warner Communications, Inc.*, 581 F. Supp. at 1486. Thus, the agreement raised an issue as to exercise of actual (de facto) control rather than legal (de jure) control.

51. Warner and BHC retained the right of first refusal with regard to the shares each owned in the other. In order to ensure that Warner would have a minority representation on BHC's board of directors, BHC's charter and bylaws were amended to permit cumulative voting. The agreement also insured Warner's acquiescence in any corporate maneuvers of BHC by requiring at least two-thirds shareholder approval. This restriction extended to any plans by BHC to further amend its charter or bylaws, to engage in any merger or liquidation or to sell substantially all of its assets.


meaning of section 310(d). Basically, the Commission reasoned that the controlling influence passed must be sufficient to allow a minority shareholder either to determine the licensee's policies and operations or to dominate the licensee's corporate affairs.\(^{56}\)

The FCC also considered allegations that the merger agreement permitted Warner to exercise negative control over BHC. Negative control allegedly resulted from the specific restrictions imposed on BHC in order to avoid any dilution of voting interests in the shares of stock exchanged. The Commission decided that these restrictions were designed to protect a minority shareholder's investment; as such, they did not automatically constitute a transfer of control.\(^{57}\)

Finally, the Commission recognized the prospective nature of the exchange agreement between Warner and Chris-Craft. In the absence of evidence to the contrary, the FCC reasoned that it was appropriate to infer that the parties would honor the representations made in their agreement. The terms of the exchange indicated that despite Warner's substantial minority interest in BHC, Chris-Craft would retain majority voting power to elect the Board of Directors. Chris-Craft specifically stated its intention to exercise that controlling influence and Warner denied any plans to exercise it. The Commission therefore decided that the transfer of a minority interest to Warner did not violate section 310(d).\(^{58}\)

2. Conflicting Regulatory Requirements

In order to effectively compete in business, a licensee broadcast station may raise capital or finance its operations by issuing shares of stock. If the licensee's shares are publicly held, transfer of control in its stock ownership may subject the broadcaster to review by the Securities and Exchange Commission (SEC), the Department of Justice (DOJ), and the Federal Trade Commission (FTC).\(^{59}\) The conflicting demands of these agencies on a broadcast licensee may prove untenable in the case of a hostile takeover bid.\(^{60}\) In that situation, the acquiror is constrained by multiple disclosure

\(^{56}\) 97 F.C.C.2d at 356.

\(^{57}\) Id. at 354. See Cleveland Television Corp., 91 F.C.C.2d 1129, 1132-33 (Rev. Bd. 1982), aff'd, 732 F.2d 962 (D.C. Cir. 1984); see also L.B. Wilson, Inc. v. FCC, 397 F.2d 717 (D.C. Cir. 1968) (holding that a minority right to block the sale of substantial assets did not necessarily imply an exercise of de facto control).

\(^{58}\) 97 F.C.C.2d at 356. See Columbia Broadcasting Sys., 7 RAD. REG. (P & F) 298 (1951).

\(^{59}\) Specifically, the acquiror is bound by Williams Act filing requirements and by Hart-Scott-Rodino Act disclosures. See infra discussion at text accompanying notes 185-207.

\(^{60}\) A takeover is an attempt by a bidder to acquire control of a target company through purchase of some or all of its outstanding shares.
requirements and particularly critical timing limitations. Moreover, there is always a threat of third-party intervenors and a barrage of takeover defenses. Given the further requirements of prior FCC approval to undertake a transfer of control, the acquiror may be so constrained by conflicting regulatory demands that normal market forces have no chance to operate.

As the foregoing examples indicate, an acquiror's efforts to comply with FCC rules may be thwarted by circumstances beyond its control. The regulatory process should provide sufficient flexibility to account for contested applications. Alternatively, the Commission should grant expedited review of the information submitted to it until the requirements of the application process can be fully complied with. Otherwise, the applicant may be constrained to violate section 310(d) simply by virtue of the target's uncooperative posture. The result may be that, by default, the Commission winds up favoring the dissenting licensee.

In recent testimony before a congressional committee, Chairman Fowler described the potential for bias in enforcing the FCC's regulations:

[I]t is a complicated area, and the problem relates to acquiring stock in a publicly held company. If you make a tender offer, there is a point you will reach, perhaps quickly, depending on your offer, where you in effect have acquired sufficient stock to have effected a de facto transfer of control; that is, transfer of de facto control of the company.

Not legal control, that is, not more than fifty percent. With a publicly held company it would be thirteen percent, for example, which is sufficient to gain de facto control of the company. If there is not a mechanism in place which permits the stock to be gathered by someone and held legally when they hit that benchmark, then they have run afoul of [section 310(d)] of the Act.

II. NEUTRAL STANCE OF OTHER ADMINISTRATIVE AGENCIES

The transfer of control pursuant to hostile tender offer also occurs in other regulated businesses. The neutral stance taken by other administrative agencies underscores the competing interests of business and federal regulation. The viewpoint of other regulators is also instructive in that it entails a presumption that, below a specified percentage, transfer of control is not inherently unlawful. By contrast, the FCC has adopted the view that control is unlawful unless proven otherwise or unless countervailing circumstances exist. In deference to the marketplace and the normal forces of competition,

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61. See generally M. LIPTON & E. STEINBERGER, supra note 17, at chs. 3, 6.
62. Appropriations Committee Hearings, supra note 1, at 731-32 (statement of Chairman Fowler); see also Senate Commerce Committee Hearings, 99th Cong., 1st Sess. 32 (1985).
the Commission should adopt an approach to the transfer of control problem that is consonant with that of other federal regulators.

A. Civil Aeronautics Board

Section 408(a)(5) of the Federal Aviation Act provides, in relevant part, that:

it shall be unlawful [unless approved by order of the Civil Aeronautics Board] . . . for any air carrier or person controlling an air carrier, any other common carrier, or any person substantially engaged in the business of aeronautics to acquire control of any air carrier in any manner whatsoever . . . .

Control, as defined in section 408(f), arises upon the purchase or beneficial ownership of ten percent or more of voting securities. That control is considered lawful up to twenty-five percent stock ownership. Above the threshold, there exists a presumption of unlawfulness which may be rebutted by the acquirer. Section 408(b) states that the Civil Aeronautics Board (CAB) may by order exempt certain acquisitions to the extent and for such periods as may be in the public interest. Subsection (b) further provides that any party challenging a proposed transfer of control bears the burden of proving the transaction is unlawful. Thus, under section 408(b), an otherwise permissible transfer of control is presumed lawful unless evidence is presented to the contrary. The CAB may also find public policy reasons for exempting a particular transfer proposal from the approval requirement.

I. Trusts with Proportionate Voting of Shares

In several recent cases, the CAB has recognized that a strict requirement of prior regulatory approval could effectively impede a legitimate hostile takeover attempt. In 1978, the CAB allowed Texas International Airlines (TXI) and Pan American World Airways (Pan Am) to each acquire up to

64. Id. § 408(f), 83 Stat. 104 (amendment codified at 49 U.S.C. § 1378(f) (1982)). Thus, control arises with "ownership of such amount of [an airline's] outstanding voting securities as entitles the holder thereof to cast 10 per centum of the aggregate votes."
66. 49 U.S.C. § 1378(b) (1982). The provision states that "unless, after a hearing, the Board finds that the transaction will not be consistent with the public interest or that the conditions of this section [regarding specific antitrust standards] will not be fulfilled, it shall, by order, approve such transaction . . . ."
67. Id. The CAB reasoned that, if rigidly enforced, § 408 could effectively isolate incumbent management from the disciplining effects of a capital market to such a degree as would contravene the purposes of the Airline Deregulation Act. See also C.A.B. Order 78-6-208, at 7 (June 29, 1978).
twenty-five percent of the voting stock of National Airlines. Tiger International Airlines was likewise permitted to acquire up to twenty-five of the voting stock of Seaboard World Airlines. In each instance, the CAB sanctioned the use of trust agreements which mandated proportionate voting of shares. The CAB recognized that section 408 could be used to impede hostile acquisition attempts by insulating incumbent managers from the disciplinary effects of the capital market. The CAB approved the use of voting trusts in these cases so as not to encumber the takeover process while guarding against possible anticompetitive effects.

The CAB regarded the voting trust in each of these cases as an effective means of insulating beneficial ownership from control. The CAB reasoned that section 408 did not expressly prohibit control relationships. Instead, the requirement of prior approval was designed to ensure that the CAB review possible competitive and public interest effects of any significant transfer.

The CAB found the voting trust arrangement in each case sufficient to defeat the statutory presumption arising upon acquisition of twenty-five percent of voting securities. The CAB also reasoned that the contested nature of the acquisitions defeated any claims that incumbent management would be subject to improper influence. Were it to accept the target's claim of

70. C.A.B. Order 78-6-208, at 6. “[T]he transaction system should not be spared the disciplines, or denied the benefits, of the capital markets . . . unless some clearly demonstrated special circumstances is present.” Id.
71. In June 1978, TXI began purchasing National Airlines stock in open market transactions. Following disclosure of its 9.2% purchase to the SEC, as required by 15 U.S.C. § 78m (1982), TXI announced its plans to effect a hostile takeover of up to 25% of National Airlines' outstanding common stock. All shares were placed in a voting trust which mandated proportionate voting of shares. C.A.B. Order No. 78-10-100, at 1, 3 n.8. Soon thereafter, Pan Am proposed a friendly tender offer to National Airlines' stockholders. Pan Am then announced its intent to purchase up to 25% of National Airlines' outstanding stock. In order to effect the acquisition, Pan Am deposited all tendered shares into a voting trust. Id. at 3.
72. 49 U.S.C. § 1378(f) (1982). The CAB found that the restraints created by each of these voting trusts rebutted the presumption that ownership of even 25% of entrusted stock amounted to control. C.A.B. Order No. 78-10-100, at 4; C.A.B. Order No. 78-12-173, at 4-5.
unlawful transfer of control or right to a hearing, the CAB feared that section 408(f) could be transformed into a virtual ban on hostile acquisitions.

The CAB permitted all three takeover plans to proceed, concluding that the public interest is best served by allowing marketplace forces to operate without needless regulatory interference.\(^7\)

2. **Rebuttable Presumption of Control**

In 1981, Texas International launched a hostile takeover seeking 48.5% of the voting stock of Continental Air Lines.\(^{74}\) The CAB again permitted the transaction, prior to a grant of approval under section 408(f). As in the previous cases, the acquired securities were placed in a voting trust structured to require proportionate voting of shares. The latter trust arrangement was unique, however, in that it permitted the trustee to vote all shares held against Continental's approval of a proposed merger with Western Airlines. TXI's proposal also clearly exceeded the twenty-five percent limit for presuming a lawful transfer of control. Despite the unique features of the transaction, the CAB was persuaded that the provisions of TXI's voting trust adequately rebutted the presumption of control and guarded against potential anticompetitive effects during the pendency of agency review.\(^{75}\)

In essence, TXI argued that its particular takeover proposal was necessary to assure competitive equality, given the merger agreement between Continental and Western Airlines. TXI claimed that circumstances surrounding its proposal justified the CAB's departure from strict enforcement of section 408(f). TXI further maintained that denial of its petition would allow incumbent management to dictate Continental's future by denying shareholders the opportunity to choose between the offers of TXI and Western Airlines.\(^{76}\) Finally, TXI contended that it had no alternative way to compete with Western Airlines' management.\(^{77}\)

In order to allow the market to function freely, the CAB granted expe-

\(^{73}\) TXI/Pan American-National Acquisition, 79 C.A.B. at 794-96.


\(^{75}\) Id. at 1096-97.

\(^{76}\) On this basis, the CAB distinguished this case from its prior ruling in the proposed acquisition of Wein Air Alaska by Alaska Airlines. Id. at 1097. In that voting trust arrangement Alaska Airlines reserved for its wholly owned subsidiary the power to veto a merger by Wein Air with another entity. C.A.B. Order No. 79-12-158, at 6 (Dec. 21, 1979). The CAB noted that Alaska Airlines was effectively positioning its own subsidiary in an attempt to frustrate the alternative merger proposal and to prevent Air Alaska's competitor from obtaining new management or capital. Id. at 7-8.

\(^{77}\) 88 C.A.B. at 1090. TXI noted that even a simple proxy fight would have failed without a concrete counter-offer. Moreover, the advance announcement of TXI's tender offer, delayed until after CAB approval, would have violated SEC rule 14d-2(b) which requires an offer to commence within five days of announcement. See 17 C.F.R. § 240.14d-2(b) (1985).
dited approval of TXI’s takeover proposal. The CAB held that the statutory presumption of unlawful control was rebutted by the checks against improper influence provided in the voting trust arrangement. The CAB considered it unlikely that the reservation of a single voting right would prove anticompetitive or adverse to the public interest. Moreover, it found that other proportionate voting restrictions in the proposal served as effective checks on the exercise of improper influence. The CAB recognized that regulatory approval would permit Continental’s shareholders to tender their shares for a cash premium if they chose to do so. The CAB concluded that to disallow TXI’s transfer proposal would insulate the air carrier industry from the disciplines of the marketplace. Disapproval would also needlessly restrict the ability of Continental’s shareholders to decide what was in their own and the corporation’s best interest.78

B. Federal Banking Agencies

A transfer of control in banking may be governed by either of two statutes, depending upon the identity of the purchaser and the proportion of shares acquired. The Change in Bank Control Act (Control Act)79 applies to persons and proscribes the acquisition of control of any bank, insured by the Federal Deposit Insurance Corporation, through the purchase of voting stock “unless the appropriate Federal banking agency has been given sixty days’ prior written notice.”80 For purposes of the statute, “control” is defined as “the power . . . to direct the management or policies of any insured bank or to vote 25 per centum or more of any class of voting securities.”81 Acquisition of a smaller percentage of stock may also result in control and thereby trigger the filing requirements of the Control Act.82 The federal banking agencies have promulgated regulations interpreting the Control Act, which provide for a rebuttable presumption of control where ten percent or more of a bank’s voting securities are acquired and the bank has a class of voting securities registered under section 12 of the 1934 Act.83 In

78. All powers and duties of the CAB under the transfer of control provisions of the Federal Aviation Act of 1958 were transferred, effective Jan. 1, 1985, to the Department of Justice by Pub. L. No. 95-504, § 1601(b)(1)(C), 92 Stat. 1745 (1978). It remains to be seen whether the Department of Justice will adopt the same policy with respect to voting trusts.
80. Id. In addition to the prior notice requirement, the Control Act requires that the acquiror furnish specific details to the proposed transfer of control. See id. § 1817(j)(6).
81. Id. § 1817(j)(8)(B).
82. Control may result from the power to vote 10% of shares, if the securities are publicly registered or if after the acquisition, there is no other stockholder able to vote more than 10% of shares. See 12 C.F.R. § 303.15(a)(1)-(2) (1985).
83. See, e.g., 12 C.F.R. §§ 303.15(a), 5.50(1)(i)-(ii) (1985). This presumption was extended to the case of a hostile takeover attempt of a publicly traded company in Riggs Nat’l
addition, the Control Act regulations allow for a “letter of nondisapproval” from the Comptroller of the Currency. The letter is significant in that by regulation it provides a means whereby a proposed takeover could be consummated in advance of the sixty-day waiting period specified in the Control Act. The regulation thus provides a measure of flexibility as to the limitation placed upon transfers of control in banking.

As an alternative to a direct purchase of voting shares, the Federal Reserve Board has permitted certain escrow arrangements to effect the transfer of ownership in stock. In a recently issued regulation, the Board noted that the use of such an arrangement pending Board approval would not violate the Bank Holding Control Act (BHCA)

so long as [1] title to such shares remains with the seller during the pendency of the application; [2] there are no other indications that the applicant controls the shares held in escrow; and [3] in the event of Board denial of the application, the escrow agreement provides that the shares would be returned to the seller.

Thus the federal bank agencies have attempted to infuse some flexibility into

Bank v. Allbritton, 516 F. Supp. 164 (D.D.C. 1981). After considering the various bank regulatory issues, the district court eventually granted Riggs' request to enjoin the hostile takeover. Id. at 182. Before entering the injunction, however, the court observed that Allbritton could have rebutted the statutory presumption of control but for his failure to comply with filing and notice requirements. Id. at 178-80. Allbritton was already a 15% shareholder of Riggs when he proposed to acquire 5% of shares from a colleague along with an additional 15% of shares outstanding. As a result of the combined purchase, Allbritton would surpass the 25% threshold of control in the Change of Control Act. Id. at 179-80. Allbritton complied with filing requirements for the initial 5% purchase but failed to submit proper notice for the later 15% bid. Id.

84. 12 C.F.R. § 225.43(c)(ii) (1985). One of the elements of Allbritton's rebuttal to the alleged statutory violations related to a “letter of nondisapproval” from the Comptroller of the Currency. Allbritton, 516 F. Supp. at 176. The letter was issued just one month after Allbritton's notice filing. Id. In relevant part, the letter stated that the Comptroller did not intend to oppose the proposed changes in control. Id.


86. The bidder in a hostile takeover situation, by seeking a letter of nondisapproval, could effectively acquire control of a bank before expiration of the Hart-Scott-Rodino and Williams Act waiting periods. See supra note 84 and accompanying text.

87. Bank Holding Company Act (BHCA), § 3(a)(1) (codified at 12 U.S.C. § 1842(a)(1) (1982)). The Bank Holding Company Act pertains to transfers of control by corporate acquirors rather than individuals. The statute entails even greater restrictions than the Control Act in order to prevent bank holding companies from engaging in unlawful, nonbanking activities. The relevant provision of the BHCA proscribes any action which causes a company to become a bank holding company without prior [Federal Reserve] Board approval. A bank holding company is defined as any company which has control over any bank. "Control" for purpose of the statute indicates that "the company directly or indirectly . . . has power to vote 25 per centum or more of any class of voting securities of the bank." 12 U.S.C. § 1841(a)(1), (a)(2)(A) (1982).

the regulation of banking, an area in which the statute sets forth strict limitations on any transfer of control.  

C. Interstate Commerce Commission

In the transportation industry Congress has mandated that:

[t]he following transactions . . . may be carried out only with the approval of the [Interstate Commerce] Commission: . . . acquisition of control of a carrier by any number of carriers; acquisition of control of at least [two] carriers by a person that is not a carrier; [or] acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers.

Despite this general prohibition, the Interstate Commerce Commission (ICC) has reviewed several proposals for transferring control prior to administrative approval. In recent years, particularly, the agency has assumed a neutral regulatory posture in order to preserve the transportation industry's viability in the marketplace. Among the proposals deemed most acceptable by the ICC are those which provided for voting trusts. As a basis for finding a trust lawful, the ICC has required that: (1) the trustee be entirely independent of the trust; (2) the trustee exercise its voting power in such a way as not to cause any dependence or intercorporate relationship between the beneficiary and the carrier trusted; and (3) the trust must be irrevocable for a stated period of time.

I. Trustee Independence Required

Under these criteria, the ICC found lawfully established voting trusts improper when the trustee has failed to remain independent. Unless the trust
is entirely independent, the ICC has regarded the trustee as an extension of the acquiring carrier. For example, in the case of *Eastern Freight Ways, Inc.*, the ICC approved a voting trust devised as part of a hostile takeover plan. In 1975, Eastern initiated a hostile tender offer for control of another transport carrier. The bid was designed to oust ineffectual management who also held controlling stock in the company. As support for its transfer proposal, Eastern argued that incompetent management should not be insulated from removal due to the strictures of section 5.

The voting trust arrangement proposed by Eastern was generally irrevocable for a period of ten years. The trust could be cancelled, however, following the sale of stock or the receipt of transfer of control approval by the ICC. The trustee was accorded full and independent voting powers in exchange for the duty to exercise that vote so as to further competent management. The trustee was also required not to dispose of the target's assets, alter its capital structure, or permit it to merge with another corporate entity. The trustee violated this last restriction over a year after the trust's initiation. For this reason, the ICC found a loss of trustee independence sufficient to disapprove Eastern's transfer proposal.

2. Competitive Equity and Public Benefits

Upon rehearing of Eastern's petition, however, the ICC sanctioned the acquiror's combined tender offer and voting trust arrangement. The ICC recognized that given the hostile nature of the acquisition, Eastern was compelled to abide by SEC laws which were ipso facto incompatible with the requirements of section 5. Strict enforcement of section 5 would therefore mean that tender offer procedures for ousting ineffectual management were unavailable to regulated transport carriers.

which the voting trusts were properly established but failed to remain independent. Once the stock was placed in trust, the existing directors of each company were removed from office. The trustee therefore remained the only viable management prospect. The trustee was no longer independent but rather had become a party to the transaction. The ICC acknowledged that "nothing was stated in those cases indicating that voting trusts if independent could not be utilized." *Eastern Freight Ways, Inc.*, 122 M.C.C. 143, 146 (1975). *Accord B.F. Goodrich Co. v. Northwest Indust.*, 303 F. Supp. 53 (D. Del. 1969), aff'd, 424 F.2d 1349, cert. denied, 400 U.S. 822 (1971).


95. 122 M.C.C. 267 (1975).

96. See 15 U.S.C. § 78n(d)-(f) (1982), which requires that payment be made for tendered stock within 60 days of the tender offer.

97. The ICC concluded that: "This should be reason enough for the Commission to allow large publicly held carriers to be bought out through the use of properly established independent voting trusts. . . . In this way, ineffectual management can be removed, and adequate transportation can be assured to the public." 122 M.C.C. at 153.
Eastern's petition for rehearing was also based on third party claims that (1) the prior ICC ruling did not adequately protect the interest of creditors, minority shareholders, and employees of the other carrier, and (2) there was an urgent public need for the interline service terminated as a result of the ICC's order. Eastern argued that incumbent management was incapable of keeping the target company financially viable. Eastern also submitted evidence of great public demand for its continued transport service. The ICC acknowledged that the public should not be deprived of the benefits of transport service and thereafter approved Eastern's takeover proposal. The ICC formally authorized the placement of shares in a voting trust with an independent trustee and further indicated that the trust could effectively safeguard against violations of the Act even though the acquisition of shares occurred without prior regulatory approval.

Perhaps there is a lesson to be learned from the experience of other regulators. Arguably, given proper safeguards, a hostile transfer of control may lawfully transpire in advance of final FCC review and approval.

Admittedly, it defies reason to contend that a hostile takeover, in the words of section 310(d) "does not involve a substantial change in ownership or control." In fact, the FCC has recently indicated that the transfer of legal control through a purchase of majority stock ownership is substantial in terms of its prior approval requirement. The Commission has likewise identified as substantial negative control majority stock ownership that grants the holder an absolute right to block a proposed transaction.

In this context, perhaps the message from other agencies is that the Commission still has statutory authority to grant interim or emergency approval. This is particularly true whenever a transaction is structured so as to place the target licensee's stock into a fully separated voting trust. The Commission may allow takeover plans to move forward because, in effect, the acquiror lacks the wherewithal to influence or control station operations during the pendency of the transaction.

The experience of other regulators further suggests that while prior FCC approval is warranted by a transfer of de jure control, the degree of scrutiny is decreased in any situation where target management retains control over station operations and policy. In other words, a short-form application procedure followed by expedited FCC review would seem appropriate to this situation. In any event, the Commission must adopt a solution to the hostile

98. 122 M.C.C. at 274.
99. Id. at 267, 274. The ICC reaffirmed its neutral regulatory posture in an August 1977 proposed rulemaking. In its rulemaking, the ICC extended the reasoning of the cases discussed above.
takeover dilemma: one which permits market forces to operate, yet preserves the FCC's statutory right ultimately to approve or disapprove a given transaction.

III. PROBLEMS RAISED BY HOSTILE TAKEOVERS OF PUBLICLY TRADED COMPANIES

An acquiror seeking to obtain control of a publicly traded broadcast licensee is subject to the requirements of the federal securities laws and the antitrust laws. The principal federal securities provisions regulating takeovers are contained in the Securities Exchange Act of 1934 (1934 Act)100 and particularly in the 1968 Williams Act Amendments to the 1934 Act (Williams Act).101

Significant stock purchases and other acquisitions of voting securities or assets are subject to the preacquisition notification and reporting requirements of the Clayton Act102 as amended by the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Hart-Scott-Rodino Act).103 In addition to these statutory and regulatory impediments to a hostile takeover, the target has numerous defensive measures which it can implement to defeat a cash tender or exchange offer or the accumulation of a large block of the target's shares.104 The Williams Act, the Hart-Scott-Rodino Act, and the takeover defenses are discussed below.

A. Williams Act and Other Federal Securities Requirements

In promulgating the Williams Act, Congress expressly recognized that the principle of full and fair disclosure was fundamental if the Act was to be effective in regulating the accumulation of large blocks of a company's stock either through formal, published tender offers or through other methods.105 The legislative history surrounding the Williams Act indicates that Congress was particularly sensitive to situations involving potential changes in man-

agement and control. As a result, Congress required persons seeking to accumulate significant amounts of a company's voting securities to make full disclosure of material and relevant information.

The Williams Act added sections 13(d), 14(d), and 14(e) to the 1934 Act. These sections comprise the primary federal securities provisions governing hostile takeovers of publicly traded companies.

I. Increments of Control

Section 13(d)(1) pertains to any person who acquires more than five percent of a class of registered equity securities. That person must file a schedule 13D statement with the Securities and Exchange Commission and provide a copy to the issuer and the exchange on which the securities are traded. The schedule 13D statement must disclose, among other things, the identity and background of the purchaser, the number of shares owned by the purchaser, the source of funds used to purchase the shares, the purpose of the acquisition of stock, and the purchaser's plans and intentions with respect to the issuer. According to section 13(d)(2) and SEC rule 13d-2, the schedule 13D statement must be amended promptly whenever any material change affects the facts set forth therein.

In calculating the percentage of securities acquired, the purchaser must include all securities beneficially owned. A person is a beneficial owner of shares of stock if he, directly or indirectly, has the power to vote or direct the voting of such shares, or the right to receive or direct the receipt of the dividends or the proceeds from the sale of such shares. Also included in the percentage of shares owned are all securities that the person has the right to acquire through the exercise of an option, warrant, or right exercisable within sixty days, or through conversion of securities convertible within sixty days.

Moreover, section 13(d)(3) operates to prevent a group of persons seeking

107. 15 U.S.C. §§ 78m(d), 78n(d), 78n(e) (1982).
110. In general, §§ 13(d) and 14(d) of the Williams Act are applicable only where the securities being acquired or subject to the tender offer are registered pursuant to § 12 of the 1934 Act (15 U.S.C. § 78l). 15 U.S.C. §§ 78m(d)(1), 78n(d) (1982).
115. Id. § 240.13d-3(a).
116. Id. § 240.13d-3(d)(1).
to evade the provisions of the statute from pooling their voting or other interests in the securities of any issuer. That section provides that "[t]wo or more persons [acting] as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer . . . shall be deemed a 'person' for the purposes of [section 13(d)]."  

2. **Tender Offer**

Section 14(d) of the 1934 Act regulates tender offers. This section not only imposes mandatory disclosure requirements but also establishes substantive procedures for the conduct of tender offers. The term "tender offer" has not been precisely defined. Nevertheless, a tender offer is generally understood to refer to "a publicly made invitation addressed to all shareholders of a corporation to tender their shares for sale at a specified price." The courts have identified eight relevant factors in determining whether an acquiror has commenced a tender offer: (1) active, widespread solicitation of public shareholders; (2) solicitation for a substantial number of shares; (3) offer of a premium over market price; (4) firm as opposed to negotiable terms; (5) offer contingent on minimum number of shares; (6) offer open for a limited period of time; (7) shareholders pressured to sell their shares; and (8) publicity.

Section 14(d) of the 1934 Act requires any person or group making a tender offer which would result in the ownership of more than five percent of a class of equity securities registered under the 1934 Act to disclose concurrently specific information deemed of relevance to shareholders. Specifically, rule 14d-1 requires the filing of a schedule 14D-1 statement, which provides for detailed disclosures essentially similar to those called for by a schedule 13D statement. The schedule 14D-1 statement must disclose, inter alia, the identity and background of the offeror, the source and amount of funds.

which will be used to pay for tendered securities, any plans or proposals with respect to the issuer, the number of shares the offeror presently owns, and the details of any arrangements with other parties concerning shares to be acquired.  

As a further mandate of section 14(d), the bidder is required to hand deliver a copy of the schedule 14D-1 to the target’s principal executive office as well as to any other bidder for the same class of the target’s securities. The bidder must also give telephonic notice of the tender offer and mail the schedule 14D-1 to each national securities exchange upon which the particular class of securities is listed for trading. Furthermore, all of the relevant facts contained in schedule 14D-1 must be disseminated to holders of the securities subject to the tender offer.

Section 14(d) imposes additional substantive obligations on any person making a tender offer. Stockholders who tender their shares may withdraw them during the first seven days of a tender offer or, if the offeror has not purchased or returned their shares, at any time after sixty days from the commencement of the offer. Moreover, all shares tendered must be purchased for the same price. If an offering price is increased, those who have already tendered their shares receive the benefit of the increase. Finally, once a tender offer is commenced, rule 10b-13 forbids the offeror from purchasing any of the target’s securities, directly or indirectly, in the open market or otherwise outside of its tender offer.

Section 14(e) proscribes material misstatements, misleading omissions, and fraudulent, deceptive, or manipulative conduct in connection with any tender or exchange offer. In order to avoid coercive and potentially fraudulent tender offer practices, rule 14e-1(a) establishes a minimum tender offer period of twenty business days from the date the offer is first disseminated to security holders.

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124. 15 U.S.C. § 78n(d)(1) (1982); 17 C.F.R. § 240.14d-3(a)(3) (1985). If the securities being acquired are authorized for quotation on NASDAQ, the bidder must give telephone notice of the tender offer and mail the schedule 14D-1 to the National Association of Securities Dealers.
126. Id. § 78n(d)(5). The seven-day withdrawal period contained in the Williams Act has been extended to 15 business days by the SEC. 17 C.F.R. § 240.14d-7(a)(1) (1985).
127. 15 U.S.C. § 78n(d)(7) (1982). The Williams Act also provides that when the number of shares tendered exceeds the number of shares sought in the offer, those shares tendered during the first 10 days of the offer must be purchased on a pro rata basis. Id. § 78n(d)(6).
128. 17 C.F.R. § 240.10b-13(a) (1985).
3. Proxy Contest

Changes in control of a publicly held company may occur in ways other than upon the acquisition of voting securities. Specifically, a transfer in control may result from a change in the company's board of directors due to a proxy contest.

In a typical proxy contest, the shareholder group attempting to oust existing management solicits proxies from the company's shareholders. An insurgent group with even a small percentage of stock may obtain proxies from a large block of shareholders and thereby attain a position of control. By the next annual or special shareholders meeting, the group may have sufficient influence to vote in new directors favorable to the group's objectives. Alternatively, a shareholder group seeking to gain control of a publicly traded company may solicit proxies to vote in favor of a proposed merger or acquisition transaction.

Persons seeking to solicit proxies in favor of a change in directors or a proposed merger or acquisition transaction must comply with the requirements of section 14(a) of the 1934 Act and the regulations promulgated thereunder by the SEC. Section 14(a) provides that all proxy materials be filed with and declared effective by the SEC prior to dissemination to the company's shareholders.

The conventional proxy contest for control of a company's board of directors "has largely been replaced by the tender offer as the quicker, neater, and cleaner method of contested corporate takeover." This is because proxy contests typically last several months and are fraught with litigation and public allegations of mismanagement and fraud. Nonetheless, there are instances where the proxy contest has been employed as an effective means of transferring control.

In Teleprompter Cable Systems, for example, Teleprompter's largest shareholder, Jack Kent Cooke, initiated a solicitation of proxies following a conviction of the company's president for bribery and other unlawful activities in connection with obtaining a cable franchise. Notwithstanding compliance with the requirements of the federal securities laws, the FCC found that a potential violation of section 310(d) occurred when Teleprompter's shareholders elected the new board of directors without ob-

133. M. LIPTON & E. STEINBERGER, supra note 17, at § 1.04[7].
134. Id.
136. Id. at 1028-29.
taining the Commission's approval.\textsuperscript{137} The FCC realized that immediate shareholder action was necessary to avert damage to the company's reputation and competitive position. The FCC also recognized the exigencies of a proxy fight and the constraints imposed by the federal securities laws in connection with a proxy solicitation. Significantly, the Commission approved the prior transfer of control in \emph{Teleprompter} based upon the unusual circumstances of the case and the fact that Mr. Cooke kept the FCC fully informed of his efforts to effect the change in directors.\textsuperscript{138}

\section*{4. Free Market Policy}

There is little question that by imposing the requirements of the federal securities laws, and, in particular, the Williams Act, Congress intended to protect the target's shareholders.\textsuperscript{139} Nevertheless, a major aspect of the effort to protect the target's shareholders was to avoid favoring either management or the takeover bidder. Congress expressly recognized "that takeover bids should not be discouraged because they serve a useful purpose in providing a check on entrenched but inefficient management."\textsuperscript{140} As Senator Williams explained, "[w]e have taken extreme care to avoid tipping the scales in favor of management or in favor of the persons making the takeover bids."\textsuperscript{141}

In a hostile takeover situation, time is of the essence.\textsuperscript{142} Extended delays serve only to deter takeover attempts or make such attempts more difficult.\textsuperscript{143} Delay eliminates the element of surprise, and, more importantly, delay affords incumbent management the opportunity to resort to a variety of defensive maneuvers to thwart the attempted takeover.\textsuperscript{144} In addition, the specter of lengthy delays may discourage potential acquirors from initiating offers and thereby serve to insulate inefficient management from legitimate

\begin{itemize}
  \item \textsuperscript{137} \textit{Id.}
  \item \textsuperscript{138} \textit{Id.} at 1031.
  \item \textsuperscript{139} Piper v. Chris-Craft Indus., 430 U.S. at 35; Rondeau v. Mosinee Paper Corp., 422 U.S. at 58.
  \item \textsuperscript{140} S. REP. NO. 550, 90th Cong., 1st Sess. 3 (1967).
  \item \textsuperscript{141} 113 CONG. REC. 24,664 (1967) (statement of Sen. Williams).
  \item \textsuperscript{142} Delay has been characterized as "the most potent weapon in a tender offer fight." Edgar v. MITE Corp., 457 U.S. at 637 n.12 (quoting Langevoort, \textit{State Tender-Offer Legislation: Interests, Effects, and Political Competency}, 62 CORNELL L. REV. 213, 238 (1977)); see also Wachtell, \textit{Special Tender Offer Litigation Tactics}, 32 BUS. LAW 1433, 1437-42 (1977).
  \item \textsuperscript{143} Great Western United Corp. v. Kidwell, 577 F.2d 1256, 1277-78 (5th Cir. 1978), rev'd on other grounds sub nom. Leroy v. Great Western United Corp., 443 U.S. 173 (1979).
  \item \textsuperscript{144} Edgar v. MITE Corp., 457 U.S. at 637-38. \textit{See M. LIPTON \\& E. STEINBERGER, supra} note 17, at § 6.05[5][a].
\end{itemize}
takeover bids, all to the detriment of the target's shareholders.\textsuperscript{145}

In sum, shareholders are protected under the Williams Act through a free market approach. The function of the Williams Act is to get relevant information to the shareholders of the target company and then to allow the shareholders to decide for themselves. Once the required disclosures have been made, the takeover bidder is free to acquire the tendered shares within the time frame provided by the statute.

B. Hart-Scott-Rodino Act

The Hart-Scott-Rodino Act became effective in September 1978 and added section 7A to the Clayton Act.\textsuperscript{146} The Act is enforced by the Federal Trade Commission and the Department of Justice. The Hart-Scott-Rodino Act prevents substantial mergers, tender offers, stock purchases, and other acquisitions of voting securities or assets from being consummated until both the FTC and the DOJ have had an opportunity to review the proposed transactions for compliance with federal antitrust laws.

1. Pertinent "Size" Test

The Act applies to acquisitions that meet both the size-of-person and the size-of-acquisition tests. Under the size-of-person test, the acquisition must involve one entity with total assets of at least $100 million and another entity with total assets of at least $10 million.\textsuperscript{147} Under the size-of-the-acquisition test, the acquisition must result in the acquiror holding at least fifteen percent of the voting securities or assets of the acquired entity, or an aggregate total amount of voting securities and assets of the acquired entity in excess of $15 million.\textsuperscript{148}

2. Prenotification, Waiting Periods, and Early Termination

The importance of the Hart-Scott-Rodino Act for hostile takeovers is to forestall the consummation of reportable acquisitions until prior notification is filed with the FTC and DOJ and a waiting period has either expired or is prematurely terminated by the agencies.

The initial waiting period for contested acquisitions may be either fifteen calendar days in the case of a cash tender offer, or thirty calendar days in the case of any acquisition effected through open market purchases or negotiated

\textsuperscript{145} Edgar v. MITE Corp., 457 U.S. at 635; Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558, 568 (6th Cir. 1982); Kennecott Corp. v. Smith, 637 F.2d 181, 190 (3d Cir. 1980).


\textsuperscript{147} Id. § 18a(a)(2).

\textsuperscript{148} Id. § 18a(a)(3). The statutory size-of-acquisition test has been modified by regulations to provide certain exceptions.
purchases from existing shareholders.\textsuperscript{149} Both waiting periods are triggered by the acquired person’s notice filing.\textsuperscript{150} Both the FTC and the DOJ have the power to request additional information from either party to the acquisition within the initial waiting period.\textsuperscript{151} Generally, the request for additional information extends the waiting period ten calendar days following compliance with the information request in the case of cash tender offers and twenty calendar days in any other case.\textsuperscript{152}

An important caveat in the context of hostile takeovers is that the FTC and DOJ may prematurely terminate a waiting period sua sponte or on written request.\textsuperscript{153} Such termination is effective at the time the requesting party receives a telephone notice from the reviewing agencies.

3. \textit{Effect on Stock Acquisitions}

The Hart-Scott-Rodino Act does not change the criteria for substantive antitrust analysis; rather, its impact relates to the timing of acquisitions. Stock acquisitions are still analyzed to determine whether there is a violation of section 7 of the Clayton Act\textsuperscript{154} or of sections 1 or 2 of the Sherman Act.\textsuperscript{155} The Hart-Scott-Rodino Act and the regulations promulgated thereunder affect only the date of consummation of acquisitions subject to its provisions. The Act and regulations do not impose restrictions on the minimum notice or duration period for tender offers nor do they change the time periods applicable to the making of a tender offer under the Williams Act and the SEC tender offer rules.

In enacting the Hart-Scott-Rodino Act, Congress again recognized the deleterious consequences of delay in situations involving an unfriendly transfer of control.\textsuperscript{156} The Act was drafted to minimize these consequences and thereby reaffirm the neutral policy toward takeovers embodied in the Williams Act. Thus, the Hart-Scott-Rodino Act permits an acquiror to proceed with its acquisition of the target company’s securities or assets following the expiration or early termination of the statutory waiting period.

\begin{itemize}
\item \textsuperscript{149} Id. § 18a(b)(1)(A)-(B).
\item \textsuperscript{150} Id. § 18a(b)(1)(A).
\item \textsuperscript{151} Id. § 18a(e)(1).
\item \textsuperscript{152} Id. § 18a(e)(2).
\item \textsuperscript{153} Id. § 18a(b)(2).
\item \textsuperscript{154} Id. § 18.
\item \textsuperscript{155} Id. §§ 1-2.
\end{itemize}
C. Takeover Defenses

Any company that becomes the target of a hostile takeover may have numerous defenses available to thwart an acquiror. Among these are (1) the commencement of litigation; (2) the arranging of a defensive merger; (3) the sale of a target's valuable assets (crown jewels) to a third party; and (4) the securing of an alternative friendly buyer (white knight). 157

1. Commencement of Litigation

Upon learning of an unsolicited tender offer or other bid for control of the target, the target company may undertake litigation. The purpose of the litigation is to thwart or delay the consummation of the takeover. The target usually asserts every conceivable challenge to the proposed acquisition. The litigation itself generally focuses on alleged inadequacies or misleading disclosures in the acquiror's schedule 13D or schedule 14D-1 filings and violations of the antitrust laws.

In Chromalloy American Corp. v. Sun Chemical Corp., 158 the United States Court of Appeals for the Eighth Circuit expressly recognized the tactical significance of certain takeover litigation. The target alleged that the acquiror's schedule 13D failed to make proper disclosures with respect to the acquiror's intent to control the target. The court found that the acquiror had violated section 13(d) of the Williams Act by inadequately disclosing in its schedule 13D filing the intent to control the target. The court therefore enjoined further purchases of the target's stock until the acquiror filed an amended schedule 13D. 159 While the target failed to defeat the takeover, the target did cause significant delays in the ultimate consummation of the takeover. 160

Litigation has been employed by licensees to defend against hostile takeover attempts. The American Express contested tender offer for McGraw-Hill, Inc., is illustrative. In January 1979, American Express announced its tender offer to acquire all of the issued and outstanding shares of McGraw-Hill. 161 McGraw Hill promptly filed suit in state and federal court seeking to block American Express' offer. McGraw-Hill alleged that the combination would violate antitrust and federal securities laws. 162 American Ex-

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157. See generally M. LIPTON & E. STEINBERGER, supra note 17, at ch. 6; Edgar v. MITE Corp., 457 U.S. at 638 n.13.
158. Id. at 249.
159. Id. at 243, 248-49.
160. Id. at 249.
162. Id.
press subsequently withdrew its offer in the face of McGraw-Hill's strong opposition to the proposed acquisition.\footnote{163}

More recently, in *Warner Communications, Inc. v. Murdoch*,\footnote{164} Warner Communications was the target of an attempted takeover by The News Corporation, Ltd., its wholly owned subsidiary, News International, and the principal owner of News Corporation and News International, Keith Rupert Murdoch. After acquiring 6.7% of Warner's outstanding common stock in the open market, News Corporation and News International filed a schedule 13D statement. News Corporation and News International made additional open market purchases of Warner common stock and filed an amendment to their 13D statement disclosing the additional purchases.\footnote{165}

Among the defensive tactics employed by Warner's management to thwart the Murdoch Group's acquisition of control of Warner was the institution of a lawsuit against the Murdoch Group. The complaint charged that the 13D Statements filed by News Corporation and News International were false and misleading in various respects and that the Murdoch Group's acquisition of Warner stock would create regulatory and contractual problems for Warner.\footnote{166} Ultimately, the Murdoch Group's attempt to take over Warner was unsuccessful.\footnote{167}

### 2. Defensive Merger

Another defense that is used by a target to block hostile changes in control is the arrangement of a friendly defensive merger.\footnote{168} The merger is usually with a company that creates antitrust or regulatory barriers for suspected or potential acquirors.\footnote{169} Some analysts believe that the recently announced merger of Capital Cities Broadcasting, Inc., and American Broadcasting Companies, Inc. (ABC), was arranged to prevent ABC from being the target of a hostile takeover.\footnote{170} As a result of the merger, it would be very difficult for any other broadcast licensee to obtain control of either ABC or Capital Cities because the acquisition might result in significant divestitures.

\footnote{163. Id.}
\footnote{164. 581 F. Supp. 1482 (D. Del. 1984).}
\footnote{165. Id. at 1485.}
\footnote{166. Id. at 1487.}
\footnote{168. See M. Lipton & E. Steinberger, * supra* note 17, at § 6.02[6].}
\footnote{169. Id.}
\footnote{170. Vise, *Turner Indicates that He's Still Interested in Acquiring a Network*, Wash. Post, Mar. 21, 1985, at B1, col. 2.}
3. Sale of Valuable Assets

Where the target has a crown jewel, the sale of that asset is yet another defense that a target could use to defeat a hostile takeover.\(^\text{171}\) In *Whittaker Corp. v. Edgar*,\(^\text{172}\) the court denied the acquiror's motion for a preliminary injunction against the target's sale of its medical division to American Home Products. Similarly, in *Marshall Field & Co. v. Icahn*,\(^\text{173}\) the court refused to invalidate an agreement giving BATUS (a white knight) a one-year right of first refusal on certain of Marshall Field's assets. An even more extreme response to a threatened takeover is a target company's effort to undertake a disaggregation transaction, which could involve sale of a division or partial liquidation.\(^\text{174}\)

When the target is a broadcast station, the station's management could contract or grant an option to sell valuable operating assets. The longer the delay in effecting the transfer of control, the greater the opportunity for the target licensee to arrange for the sale of its crown jewel. To the potential acquiror, there is a significant deterrent effect in the possibility of lengthy delays or sale of the target licensee's valuable assets during this interim period.

4. Securing an Alternative Purchaser

Another defensive strategy for the target of a hostile takeover attempt is to find an alternative buyer for the target's stock. To ensure that this white knight becomes the successful bidder, targets may employ various "lock up" devices. For example, the target may sell the white knight common stock or preferred stock with special voting rights. Alternately, the target could sell or grant the white knight an option to purchase either common or preferred stock.

This strategy was employed successfully by Warner Communications in defeating the hostile takeover attempt mounted by the Murdoch Group.\(^\text{175}\) Soon after the Murdoch Group announced its acquisition of a significant percentage of Warner stock, Warner entered into a binding agreement with Chris-Craft and its subsidiary BHC providing for an exchange of stock.\(^\text{176}\) Pursuant to this agreement, Warner agreed to issue BHC shares of preferred voting stock representing approximately nineteen percent of the total voting power of all outstanding securities. The agreement also entailed provisions

\(^{171}\) M. LIPTON & E. STEINBERGER, supra note 17, at § 6.05[5][d][ii].

\(^{172}\) 535 F. Supp. 933 (N.D. Ill. 1982).

\(^{173}\) 437 F. Supp. 413 (S.D.N.Y. 1982).

\(^{174}\) M. LIPTON & E. STEINBERGER, supra note 17, at § 6.05[5][e].


\(^{176}\) Id. at 1485.
designed to present the dilution of voting power. Additionally, the stock had a “put” provision whereby BHC could require Warner to repurchase the stock if any shareholder unaffiliated with Chris-Craft acquired 33.3% or more of the Warner common stock then outstanding. The repurchase price would equal the highest price paid by the 33.3% shareholder for any shares purchased within the preceding six-month period. The net effect of the exchange agreement was to secure Chris-Craft as a white knight alternative and to make any takeover of Warner by the Murdoch Group more costly and difficult.

In summary, the target company in a hostile takeover situation can employ any one of a combination of defensive measures. The most important element in a hostile takeover is time. There can be little question that delay favors incumbent management. As discussed above, the Williams Act and the Hart-Scott-Rodino Act impose various disclosure, filing, and waiting requirements that must be complied with by a hostile acquiror. Nevertheless, these legislative efforts reflect a policy of strict neutrality toward contested acquisitions. Congress carefully drafted these statutes to protect a target’s shareholders while at the same time permitting the free operation of market forces.

Congress, the courts, and leading commentators have all recognized the salutory purposes served by changes in corporate control. Because delay is a weapon employed by entrenched management to defeat takeovers, the scheme of federal regulations governing struggles for corporate control provides for minimal delays in the transfer of control. When a hostile takeover involves a publicly traded licensee, the Commission should likewise adopt a policy of impartiality between acquirors and incumbent management. Otherwise, imposing significant delays on an acquiror’s exercise of control over a licensee target tips the balance in favor of existing management. In Chairman Fowler’s words:

[t]here is a significant public interest here, at least from my standpoint. We need to ensure that our processes are used neither to discourage nor encourage, neither to impede nor artificially expedite such a process before the Commission; that is, we ought to be the impartial umpire, administering [section 310(d)] of the Communications Act in as fair and impartial a manner as we can.179

As discussed below, the FCC should construe its regulatory authority con-

177. Id. at 1486.
178. Id.
179. See Appropriations Committee Hearings, supra note 1, at 732 (statement of Mark S. Fowler, Chairman, FCC).
sistent with the purpose and policy of the Communications Act to maintain this delicate balance.

IV. Basis for FCC Review of Hostile Takeovers

A. Support from Legislative History

1. Radio Act of 1927

The transfer-of-control limitations in the Communications Act actually derive from legislation in 1927. It was the Radio Act of that year that established the Federal Radio Commission on an experimental, temporary basis. During the debates preliminary to passage of the Radio Act, Congress recognized that due to the limitations of the broadcast spectrum, there should be some limitation upon the number of stations licensed. "Notions of scarcity, frequency interference, and the unique pervasiveness of mass media were used to justify relatively intrusive regulation . . . ." Congress also contended that licenses should be issued only to those stations whose operations would render a benefit to the public or would contribute to the development of radio generally.

Members of both House and Senate committees, espousing greater regulation of radio, noted that there was no restraint in the existing law upon the right of a licensee to transfer its license. At the time, several congressmen were concerned about trafficking in radio licenses and stations for prices far in excess of reasonable value. Thus, in relevant part, section 12 of the Radio Act provides:

The station license required hereby, the frequencies or wave length or lengths authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner, either voluntarily or involuntarily, disposed of to any person, firm, company, or corporation without the consent in writing of the licensing authority.

Legislative proposals for other sections of the Radio Act addressed 1927 concerns as to the impact upon the economy of unfair competition. One

180. Congress' 1927 legislation was in turn patterned on the Interstate Commerce Act.
181. Radio Act of 1927, ch. 169, 44 Stat. 1162 (1927). The Radio Act granted the FRC full powers as a regulatory agency for one year. The Commission was then to become a part-time tribunal with only appellate powers. The FRC's full-time status was perpetuated by statute and enabling legislation over the next few years.
182. S. REP. No. 772, 69th Cong., 1st Sess. 3 (1926).
The potential perceived threat of monopoly power created fears that radio broadcasters would provide inferior service and that listeners would be deprived of important information services. Because radio broadcasting was advertiser supported, some congressmen believed that, absent extensive regulation, listeners would have no direct influence on the content of any broadcast.  

The legislative history of the Radio Act, therefore, suggests that Congress was not so much concerned with the existence of control in a broadcast licensee as it was with the unlawful exercise of controlling influence to the detriment of the public interest.

2. Communications Act of 1934

In drafting the Communications Act of 1934, Congress patterned its new transfer-of-control provision upon the language of prior section 12. Pursuant to section 310(d), the FCC's authority was extended to cover applications for transfer of stock control in a licensee corporation. The Commission's authority was also broadened to require full information from the transferring parties before passing upon an application. Congress refrained from defining “control” suspecting that this would limit the meaning of the term in an unworkable manner. As a result, the concept of control has been open to varying interpretations by the FCC and those entities subject to its regulatory oversight. Broadly construed, the term may include every form of control, whether actual or legal, direct or indirect, negative or affirmative.

By amendment in 1952, Congress recommended certain procedural changes to section 310(d). The imprecise nature of existing language was
thought responsible for the Commission's previously disparate treatment of transfer-of-control applications. The suggested revisions were intended to clarify the FCC's standard for approving or disallowing transfer-of-control applications.\textsuperscript{192} As set forth in section 310(d) and related provisions, that standard is one of public interest, convenience, and necessity. The Commission is also accorded great discretion in determining how that standard may be satisfied.

**B. Public Interest Standard and FCC Discretion**

The guiding principle enunciated by Congress is that the FCC must act as the "public interest, convenience, or necessity requires." Section 303 reiterates this standard of public interest, convenience, and necessity found throughout Chapter III. Because the Communications Act nowhere defines "public interest," this standard grants the FCC broad discretion in the exercise of its duties. Section 303 also empowers the Commission to make such rules as necessary to discharge its authority. However, the public interest rubric does not confer unlimited power upon the FCC. Rather, the principle is to be construed by its context, by the nature of radio transmission and reception, and by the scope and quality of services rendered."\textsuperscript{193} Moreover, the FCC is not constrained by the doctrine of stare decisis.\textsuperscript{194} As with other administrative agencies, the Commission may depart from a prior trend of rulings if it provides a cogent explanation for its departure.\textsuperscript{195}

Given the nascent status of broadcasting when the Communications Act was drafted, there was no sufficient regulatory expertise upon which to base detailed standards for limiting the FCC's discretion.\textsuperscript{196} Pursuant to its enabling legislation, the Commission was given a comprehensive mandate to "encourage the larger and more effective use of radio in the public interest."\textsuperscript{197} Congress specifically refrained from any attempt to itemize the FCC's powers, however, fearing that this would frustrate the purposes for which the Communications Act was promulgated. "That would have stereotyped the powers of the Commission to specific details in regulating a field

\textsuperscript{192} See S. REP. No. 44, 82d Cong., 1st Sess. (1951). The amendment also extended § 310(d) to cover applications for transfer of construction permits.


\textsuperscript{194} ARCO case, 3 RAD. REG. (P & F) at 17.

\textsuperscript{195} WOKO, Inc. v. FCC, 153 F.2d 623 (D.C. Cir. 1946).


\textsuperscript{197} Section 303(g) permits the Commission to "encourage the larger and more effective use of radio in the public interest" and § 303(r) allows the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter."
of enterprise the dominant characteristic of which is the rapid pace of its unfolding." Moreover, the FCC's discretion is not absolute. Rather its directive by statute is "to provide to the people a fair, efficient, and equitable distribution of radio service." Thus, the Commission is free to exercise its expert judgment in hostile takeover situations but it cannot act arbitrarily or capriciously.

V. ALTERNATIVE THEORIES CONSISTENT WITH FCC POLICY

A. Separating De Facto from De Jure Control

1. Voting Trust Arrangements

Prior to Jack Kent Cooke's recent unsuccessful billion dollar bid for Multimedia, Inc., the FCC's only precedent involving voting trust arrangements occurred in the context of a voluntary transfer of control. Whether the trust provides sufficient insulation to assure that the trustee may exercise full voting rights free from the influence of the beneficial owner is the foremost concern of the FCC. In Westinghouse Broadcasting, Inc. v. Teleprompter Corp., for example, Westinghouse Broadcasting proposed to place its one-third acquisition of Teleprompter Corporation's shares into a voting trust. The trust was subject to the indirect control of Teleprompter's board of directors in all matters except those directly relating to the merger. Westinghouse also agreed that it would refrain from effecting any changes to Teleprompter's management pending the Commission's approval of the transfer. The trust was to terminate with FCC approval, following Teleprompter's merger with another company or upon Westinghouse's withdrawal of all stock deposited in trust.

The FCC regarded the voting trust arrangement as sufficient to insure that

198. FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940) (referring to § 303(g) of the Act); Heitmeyer v. FCC, 95 F.2d 91 (D.C. Cir. 1937). Both cases involved transfer of a construction permit.
202. Moreover, a great number of the cases decided by the Commission arise in the context of the FCC's multiple ownership or cross-ownership rules as opposed to its rules regarding transfer of control. Notice of Inquiry and Proposed Rulemaking, 68 F.C.C.2d 1302 (Aug. 16, 1978).
204. 84 F.C.C.2d at 946-47. Similarly, in Bonneville Int'l Corp., 68 F.C.C.2d 933 (1977), the Commission approved a voting trust as a means of insulating stock ownership which would otherwise violate its multiple ownership and cross-ownership rules. The Commission granted a waiver of both proscriptions in part because the shares held in trust were labelled investment letter stock and constituted only a minority interest.
Broadcast Licensees

control over Teleprompter would remain unchanged during the pendency of Westinghouse's transfer application. The Commission's view was not altered by the fact that one incident of control, namely the trustee power to vote Westinghouse's stock in favor of the proposed merger, did in fact occur upon completion of the stock purchase. The FCC reasoned that this element of change was insufficient alone to require invocation of section 310 transfer-of-control procedures. "This is particularly the case here where the change proposed has otherwise been fully disclosed to the Commission in advance, [and] involves neither clear positive nor negative control with respect to . . . the merger."205

In the deluge of recent hostile takeover proposals, the FCC has had occasion to reassess its approach to section 310(d) regulation. In One-Two Corporation,206 Jack Kent Cooke proposed to make a hostile tender offer for controlling interest in Multimedia, Inc., the licensee of numerous radio and television stations. Cooke acknowledged that his planned acquisition would require a long-form application, with the attendant waiting periods and opportunity for filing petitions to deny. Cooke urged, however, that requiring completion of this drawn-out procedure before his tender offer could move forward would, in effect, afford management an unfair advantage in the contest.

Cooke suggested instead a two-step proposal. The first step involved FCC short-form approval of a voting trust under which the trustee could collect any stock tendered in response to Cooke's offer. In step two, Cooke submitted a long-form transfer application averring that if the trustee collected sufficient shares to acquire a controlling interest, Cooke would remain detached from the operation or management of Multimedia until completion of the FCC's review process.207

For the first time in a hostile takeover context, the FCC approved Cooke's proposed voting trust arrangement. As a basis for its decision, the Commission observed that the trustee had "highly restricted incidences of ownership or control." The Commission also declined to regard movement of stock to the trustee as a "substantial" transfer of control,208 and even so, the Com-

205. 84 F.C.C.2d at 951 (emphasis added). Thus, Westinghouse's acquisition of minority shareholder interests in Teleprompter did not amount to transfer of de jure or de facto control for purposes of § 310(d). See In re Wolverine Cablevision, Inc., 69 F.C.C.2d 1487, 1493 app. (1978). The FCC approved transfer of control again in the context of its cross-ownership rules in part because by terms of the trust agreement, the trustee retained sole voting rights in the acquired stock and had authority to sell that stock without approval of the licensee.


207. Id. at 925-26.

mission was willing to authorize the transfer on an interim basis.\textsuperscript{209} In the
Commission's view there could be no risk of prejudice if it eventually denied
Cooke's long-form application, because the funds expended could still be
recouped through a sale of stock by the trustee to another approved
buyer.\textsuperscript{210}

The FCC has also approved other methods of separating de facto from de
jure transfer of control. Among these are the use of irrevocable proxies,
unexercised stock options, and the placement of purchased securities in es-
crow. In the event of a hostile takeover, any one of these alternatives could
be used to effect lawful transfer of control. Following are examples of take-
over alternatives, with the caveat that existing case law is typically illustra-
tive of voluntary rather than contested acquisitions.

2. Irrevocable Proxies

As early as 1944, the FCC issued approval under section 310(d) for a
transfer of control involving an irrevocable proxy agreement. In the case of
\textit{Falknor and Schepp},\textsuperscript{211} the parties admitted to undertaking transfer without
prior Commission approval. Specifically, their transfer agreement provided
for transfer of forty-nine percent of the licensee broadcast station's outstand-
ing stock. An option agreement was also negotiated under which the trans-
feree received the option to purchase Falknor's remaining one percent of
stock. Finally, an irrevocable proxy given by Falknor to the transferee's at-
torney authorized the latter to vote the one percent share. In allowing the
transfer to proceed, the FCC noted that the parties made every effort to
inform the Commission of their negotiations.\textsuperscript{212}

The FCC considered the transfer proposal of Falknor and Schepp in 1944,
several years before issuing its Procedures on Transfer and Assignment of
Licenses.\textsuperscript{213} The case presents an early example of the Commission's will-
ingness to sanction a transfer of control in the absence of prior section
310(d) approval. The proposed transaction was one in which ultimate legal
ownership in the licensee was evenly shared and in which policy for the
broadcast station could be established only by mutual agreement. Thus, fol-
lowing a narrow interpretation of section 310(d), the transfer of even one

\textsuperscript{209} Id. § 309(f).
\textsuperscript{210} 58 RAD. REG. 2d (P & F) at 925-26. One week after the Commission's decision,
Cooke abandoned his tender offer for a $25 million profit. \textit{See Cooke Out of the Race for
Multimedia at $25 Million Profit}, BROADCASTING, July 22, 1985, at 34.
\textsuperscript{211} \textit{In re Application of Falknor and Schepp}, 10 F.C.C. 401 (1944).
\textsuperscript{212} Id. at 405. \textit{But see In re Albert J. Feyl (Press-Union)}, 15 F.C.C. 823 (1951) (parties
claimed an inability to comply with the FCC's request for stock investment).
\textsuperscript{213} Procedures on Transfer and Assignments of Licenses, 4 RAD. REG. (P & F) 342
(1948).
ownership interest provided reason enough to subject the transaction to prior FCC review.

The Commission adopted a more flexible interpretation of the statute, however, and found Falknor and Schepp's transfer arrangement to be lawful. The Commission noted that throughout the course of their negotiations, both parties kept the FCC fully informed. Falknor and Schepp had also requested the Commission’s advice as to the legality of their conduct. Finally, the FCC observed that the combined irrevocable proxy and stock option arrangement served as effective means of separating de facto from de jure control. In the absence of a compelling reason to deny the transfer, the Commission decided that the public interest, convenience, and necessity would be served by granting approval.214

The Commission reverted to a narrow interpretation of section 310(d), however, in In re Albert J. Feyl (Press-Union).215 This case is noteworthy in that it raises an important distinction as to the FCC's basis for adopting a rigid as opposed to a flexible interpretation of the statute. In the Commission's view, the acquiror of Press-Union Publishing unfairly attempted to manipulate the FCC and other agency requirements to its own business advantage. The acquiror, Bethlehems' Globe Publishing, also demonstrated total disregard for the Commission's authority and request to be kept fully informed of the transaction's progress.

The proposed acquisition entailed issuance of an irrevocable proxy to each of Press-Union's stockholders following the transfer of shares to Bethlehems. On the surface, at least, Bethlehems' proposal appeared to provide a means for separating legal control from the exercise of controlling influence. However, the Commission was unpersuaded; it noted that the giver of the irrevocable proxy in this instance could easily avoid whatever legal restrictions the proxy placed upon it. For example, Bethlehems preserved at all times the right to vote the licensee's stock as to fundamental business decisions. The FCC also observed that the sale of stock was effected primarily for tax purposes and for matters of personal business expediency.216

One distinction raised by Press-Union appears to be that in the latter case the irrevocable proxy employed failed to sufficiently isolate de facto from de jure control. The FCC noted that another critical factor was Bethlehems' right to and power over the stock and the incidents of control flowing from its exercise.217 The Commission decided that the potential for abuse in this

214. 10 F.C.C. at 405-06.
216. Id. at 827.
217. Press-Union, 15 F.C.C. at 827. See Procedure on Transfer and Assignment of Licenses, 4 RAD. REG. (P & F) 342 (1948). The Commission recognized that borderline cases
instance mandated section 310(d) prior approval. Thus, in the absence of public interest reasons to conclude otherwise, the FCC found that Bethlehem's control of Press-Union was unlawful.

3. Unexercised Stock Options and Purchased Securities in Escrow

As another means of separating de facto from de jure control, the FCC has permitted the use of unexercised stock options. The Commission's rationale for approving such arrangements is that the party purchasing the option has no present interest in the shares. Absent any present interest, the party cannot invoke either actual or legal control prior to exercising the option. In *Atlantic Coast Broadcasting Corp.*, the FCC approved a transfer of control application which provided for purchase of a minority interest in voting shares along with an option to acquire the remainder of stock outstanding. The FCC reasoned that the unexercised option alone did not indicate relinquishment of control for purposes of section 310(d). Similarly, in the case of *M&M Broadcasting Co.*, the Commission sanctioned an agreement granting a third party an option to purchase one-half of the licensee's stock. According to the FCC, control remained unchanged "so long as the option holders [could] not exercise control over the day-to-day operations of the station, dominate the licensees' affairs or intervene as to management prerogatives."

A variation on a stock option is an arrangement whereby the transfer-of-control applicant purchases voting securities for cash, but then deposits the shares in an escrow account. The ultimate acquisition of securities is held pending section 310(d) transfer-of-control approval. The Commission approved a transaction of this nature in the case of *WWSW, Inc.* The Commission reasoned that the escrow arrangement did not effect any personal transfer of title or voting rights in the purchased shares. The escrow arrangement, therefore, insulated the incidents of control sufficient to comply with section 310(d).

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218. 22 RAD. REG. (P & F) 1045 (1962). The Commission reasoned that an unexercised option alone does not represent relinquishment of control. *Id.* at 1050-51.
220. *Id.* at 73.
221. 14 RAD. REG. (P & F) 587 (1956). The Commission sanctioned the escrow arrangement even though certain provisions thereof vested in the applicant's shareholders negative control over certain affairs of the licensee without prior regulatory approval.
B. Special Temporary Authorization

If the grant of an application for transfer of control is otherwise permitted by law, the FCC may issue a temporary authorization. As the basis for issuing such a grant, the Commission must indicate extraordinary circumstances to justify temporary operations. It must also find that delay in the commencement of operations would jeopardize the public interest.222

The FCC recognized extraordinary circumstances in the analogous common carrier situation of Pacific Power and Light Co.223 In that case, the Commission granted the acquiror interim authorization to proceed with its planned acquisition of Telephone Utilities, Inc. (TU). The proposal entailed transfer of fifty-one percent stock ownership in TU and the placement of those shares in a voting trust. The acquisition was opposed by Continental Telephone Corporation by virtue of its simultaneous tender offer for forty percent of TU's common and preferred shares. Continental's plan involved the exchange of large quantities of stock between the parties as well as the exercise of a voting trust arrangement.

The FCC conceded that under ordinary circumstances it would delay consideration of Pacific's application until after formal section 310(d) review. Given the competitive nature of the takeover struggle, however, the Commission noted that delay would be tantamount to defeating Pacific's acquisition plans. The FCC recognized that its regulatory procedures should not be used to obstruct the plans of an otherwise qualified acquiror in a legitimate struggle for corporate control. "To preserve Pacific's position vis a vis Continental and to prevent the use of our own procedures and processes to determine the substantive results of the contest, we believe the situation demands some form of extraordinary action."224 As a basis for granting Pacific special temporary authorization, the Commission noted that section 310(d) specifically empowers it to authorize the transfer of rights under a license. In terms of contested takeover struggles, the FCC interpreted "rights" to indicate something less than complete control; a grant of temporary authority that would allow the takeover process to proceed without undue regulatory restraints. Thus, Pacific received interim approval to exchange the stock in question and to exercise its voting trust.225 The Commission concluded:

224. Id. at 378.
225. Id. The FCC specifically conditioned its grant of interim authority so as to forbid
“Our sole purpose in taking this action is to maintain parity between the competitive efforts of these contending parties in an unusual situation for which there are no exact precedents.”

Some of the issues inherent in the Commission's grant of special temporary authorization gained notoriety in Ashbacker Radio Corp. v. FCC. In that case, the Supreme Court examined the comparative hearing requirement under section 309(e) in the context of two mutually exclusive applications for transfer of control. Because comparative hearings may evolve into protracted and detailed affairs, the FCC has identified certain public policy reasons for special authorization to new or existing broadcast services. In American Broadcasting Co. v. FCC, for example, the Commission recognized an overriding public interest sufficient to justify a conditional grant of operations pending outcome of formal hearings. The circuit court agreed that “[t]o require a full dress hearing for the issuance of a temporary . . . license would be in effect to negate the power of the Commission to deal with a large variety of exigent situations.” Thereafter the Commission adopted a policy of granting temporary authorization, even in cases involving no section 309(e) comparative hearing requirement.

C. Rebuttable Presumption of Control

On occasion, the FCC has addressed the transfer-of-control issue as a presumption which may be defeated by evidence to the contrary. The FCC identified several reasons for allowing the presumption of control to be rebuttable.”

226. Id.
227. Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945). This case involved the grant of regular as opposed to temporary operations.
228. Id. The Supreme Court held that the FCC could not grant one application for operations pending the holding of a comparative hearing on the other because the result would be to render the subsequent hearing a nullity.
229. New South Media Corp. v. FCC, 685 F.2d 708 (D.C. Cir. 1982).
230. 191 F.2d 492 (D.C. Cir. 1951).
231. Id. In overturning the special service grant, the court did not question the FCC's action in issuing the original authorization. Rather, it objected to the perpetuation of the granted for a decade thereafter.
232. See Peoples Broadcasting Co. v. United States, 209 F.2d 286 (1953). The standards for granting special temporary authority were reviewed in Community Broadcasting Co. v. FCC, 274 F.2d 753 (D.C. Cir. 1960). The district court distinguished the FCC's § 73.3542 and § 73.3594 noting that the former rule does not require the Commission undergo a thorough factfinding procedure.
233. Id. Compare Western Gateway Broadcasting Corp., 16 F.C.C. 274, 288-89 (1951), with Jefferson Radio Co., 35 F.C.C. 331 (1963). The FCC noted a rebuttable presumption that there was no exact formula for ascertaining when control had transferred. 16 F.C.C. at 288-89.
butted in *Charles W. Jobbins*.\(^{234}\) In that case, the acquiror, Hughes Tool Corporation (HTC) submitted a hostile bid for control of forty-three percent of American Broadcasting Company's outstanding voting shares. The proposed tender offer expressly stated that it was not conditioned upon prior FCC consent. Thus, by launching the takeover attempt, HTC risked violating section 310(d).

The FCC granted its consent to HTC's tender offer of ABC's shares because circumstances surrounding the takeover proposal rebutted the presumption of unlawful transfer of control. The Commission identified the following factors as evidence that the presumption was defeated: (1) the acquiror specifically recognized the FCC's jurisdiction over the matter; (2) it attempted to cooperate with the Commission; (3) it indicated that it would refrain from voting the stock during the pendency of any hearing to determine the legality of the transaction; and (4) the tender offer stated that HTC undertook any risks of divestiture if FCC approval was not obtained.\(^{235}\) On this basis the Commission reasoned the HTC's hostile takeover attempt did not contravene section 310(d).\(^{236}\)

In *Coaxial Communications, Inc. v. FCC*,\(^{237}\) the record showed that the acquiror, CNA Financial Corporation, inadvertently failed to file a timely request for consent to transfer of control.\(^{238}\) Failure to comply with section 310(d) requirements occurred by virtue of CNA's conversion rights whereby it increased its holdings in Coaxial Communications to fifty-one percent. The facts surrounding the acquisition indicated that CNA's failure to file under section 310(d) was truly inadvertent. There was also evidence that CNA made a good faith effort to bring the matter to the FCC's attention. Consequently, the FCC allowed CNA to rebut the presumption of unlawful transfer of control.

**VI. Conclusion**

Oliver Wendell Holmes once wrote: "It cannot be helped, it is as it should
be, that the law is behind the times.\textsuperscript{239} Aside from the benefits of stability this statement connotes, it also suggests the never ending need for law reform.

The Commission is presented with the challenge of adopting a more flexible approach to transfer-of-control applications involving hostile takeovers of licensee broadcast stations. Given the broad discretion conferred upon it by statute, the FCC should endeavor to promote the development of broadcasting by recognizing the business context in which modern station licensees operate. In adopting a neutral regulatory stance, the Commission does not lessen its administrative role; nor does it diminish the FCC's policy of broadcast regulation. The experience of other agencies has shown that there are several alternatives for structuring an acquisition so as to comply with regulatory procedures. There are obviously broad public policy reasons for treating transfer of control applicants in a manner which comports with that of other administrative agencies. The Commission should therefore strive to foster a system of regulation that works within rather than against the forces of market competition.

Chairman Fowler identified the challenge before his colleagues at the Commission as follows:

If our procedures would in and of themselves discourage someone from even beginning to make an attempt to take over a publicly held corporation because of bad management, or where they think they can do a better job, and they make their case to the shareholder, I personally don't think we should be a part of a process that is designed to artificially discourage that. We should not erect unnecessary regulatory hoops that an entity might have to jump through in order to effect a grant of the application.\textsuperscript{240}

Hostile quests for control of broadcast licensees are rarely fought on ideological bases. Rather, the regulatory hurdles drafted into the Communications Act are deftly manipulated by opposing parties in struggles for corporate control. The Commission is beginning to acknowledge the detrimental implications this has for its regulatory processes. In the wake of \textit{Storer and Multimedia}, particularly, the FCC is attempting to interpret the language of section 310(d) in terms of the business world. But this is only part of any solution to the problems posed by hostile takeovers. The Commission's challenge ahead must be to devise procedures which protect the public's right to comment and the FCC's statutory review of the proposed acquisition, while preventing the Commission's procedures from becoming a

\textsuperscript{239} O.W. Holmes, \textit{Law and the Courts}, in \textit{Collected Legal Papers} 294 (1920).

\textsuperscript{240} See Appropriations Committee Hearings, supra note 1, at 732 (statement of Mark S. Fowler, Chairman, FCC).
mechanism for thwarting an otherwise legitimate struggle for corporate control.

Those sympathetic to the target company undoubtedly argue that allowing an acquiror to proceed with its tender offer or proxy contest necessarily prejudges the merits of any transaction. The Commission must reject this argument, however, as it still may grant temporary authorization or a waiver of its rules. The FCC must also recognize that voting trusts may effectively insulate shareholders from an acquiror's exercise of control. In any event, the Commission must be cognizant of the value of allowing the marketplace to determine the success or failure of a proposed acquisition and the equity of permitting an acquiror to close on its tender offer or proxy contest within a commercially reasonable period of time.