

Hostile Tender Offers For Companies Holding Licenses Issued By the Federal Communications Commission

Introduction

Tender offers are a recognized facet of corporate existence, although the number of those offers is quite small. Those seeking to acquire a company by tender offer face a complex task. The offeror must typically provide information to, or seek approval of, federal entities, such as the Securities and Exchange Commission (SEC) and the Justice Department. State regulatory requirements may also be involved. Such offers may be "friendly" or "hostile"; that is, accepted or rejected by the board of the target corporation. When the offer is hostile, the target or its shareholders usually mount administrative or judicial challenges. The process will be complicated when the target corporation holds licenses issued by the Federal Communications Commission (FCC or The Commission), which must approve in advance the transfer of control of one of its licensees. The Commission adopted specific procedures in 1985 regarding hostile tender offers for its licensees in order to carry out its statutory obligations in harmony with other important federal policies. The procedures provided much-needed clarification, but a few issues remain unresolved. These include the Commission's statutory authority to use the procedures adopted. The Commission may soon be required to address these matters as a result of the recent increase in corporate mergers and acquisitions. This Article will describe the Commission's current policies regarding hostile tender offers and discuss the issues arising from them.⁽²⁾

I. Background

In a tender offer, the offeror asks the shareholders of the target corporation to sell, or "tender," their shares to the offeror at a stated price.⁽³⁾ To induce shareholders to tender their shares, the offered price is usually well above the market price before announcement of the offer. SEC regulations give the directors of the target corporation up to ten days to accept, reject, or take no position on the offer,⁽⁴⁾ consistent with their fiduciary duties. An agent for the offeror, called a depositary, collects the shares tendered. If less than the specified number of shares are received, the depositary will return them to shareholders. In contrast, if sufficient shares to gain control are tendered, the depositary will pay the tendering shareholders and transfer the stock to the offeror.⁽⁵⁾ The offer must be held open for at least twenty days,⁽⁶⁾ although the offeror may specify longer periods and may extend the period initially set. Shareholders have the right to withdraw tendered shares at any time the offer is open.⁽⁷⁾

Section 310(d) of the Communications Act of 1934⁽⁸⁾ (the Act or the Communications Act) comes into play if the target company holds Commission licenses. That section provides that the Commission must find that a grant of a transfer of control of a licensee is consistent with the public interest, as defined by Commission rules and policies. Further, the sale of more than 50 percent of a corporation's stock is a "substantial change in ownership or control" within the meaning of the Act,⁽⁹⁾ which sets in motion several procedural requirements. Specifically, the Act requires public notice⁽¹⁰⁾ that the transfer application has been accepted and imposes a thirty-day waiting period, during which interested parties may file petitions to deny the application.⁽¹¹⁾ If such a petition is filed, the applicant and petitioner are given time to file opposition and reply pleadings.⁽¹²⁾ Depending on the method of service of pleadings, completion of the pleading cycle might take fifty-one days, and even a few days longer if holidays fall within the pleading cycle.⁽¹³⁾ The Commission is required to hold a hearing if a petition raises a "substantial and material question of fact" as to why the grant of an authorization would not be consistent with the public interest.⁽¹⁴⁾ Any required hearings would take many months, but such hearings are rare.⁽¹⁵⁾ If a petition raises no substantial and material questions of fact, and the public interest would otherwise be served, the Commission will grant the application, accompanied by a decision explaining its action.⁽¹⁶⁾ The time needed for the preparation of a decision depends on factors such as the availability of Commission resources and the number and complexity of issues raised in the pleadings.

II. Overview of the Commission's Response to Hostile Tender Offers

The first published⁽¹⁷⁾ Commission case dealing with a hostile tender offer was its 1973 decision in *Continental Telephone Corp.*,⁽¹⁸⁾ where it applied standard procedures, considered the opposing pleadings, and granted the application. The subject then lay dormant until the 1985 ruling in *One Two Corporation*,⁽¹⁹⁾ where the Commission adopted special, expedited procedures for processing applications to transfer control of licensee corporations by means of a hostile tender offer. Those procedures were later refined and incorporated in a 1986 policy statement, *Tender Offers and Proxy Contests (Tender Offers)*.⁽²⁰⁾ The Commission adopted this policy statement after notice and comment and applied it in subsequent adjudicatory cases involving hostile tender offers,⁽²¹⁾ which are cited below.⁽²²⁾

The Commission rested its decision to adopt expedited procedures for processing hostile tender offers on two concepts. First, the courts have directed the Commission to consider policies set out in other federal laws in making its public interest judgments, if it can do so consistent with its own statute.⁽²³⁾ Second, the Commission determined that expedition of any required government review was an important policy underlying tender offer regulation. Tender offers can be beneficial by providing a means to remove inefficient management. On the other hand, the offeror might be a "raider" more interested in stripping the target of its assets than in the long-term viability of the company. Securities laws take the position that the benefits or detriments of any tender offer should be determined by shareholders armed with full information as to the offer, but that the government should be neutral as between the offeror and incumbent management. Unnecessary delay is not considered neutral because incumbent management would be afforded time to erect barriers to the offer. The Commission noted the fifty-one-day period required to complete the normal pleading cycle, and believed that it could not reasonably review those pleadings and draft, consider, vote on, and release a decision within the sixty-day period after which tendered shares could be withdrawn under SEC regulations then in effect.⁽²⁴⁾ The Commission concluded that resort to its normal procedures would lead to unnecessary delay, and that such delay would favor incumbent management, contrary to the policies underlying relevant securities regulation.⁽²⁵⁾

As a result of those conclusions, the Commission adopted a two-step procedure. In the first step, the Commission asks offerors to submit a request for a temporary authorization, issued under section 309(f) of the Act, for an independent trustee to take control of the licensee. That section enables the Commission to grant temporary authorizations in "extraordinary circumstances" when required by the public interest.⁽²⁶⁾ Section 309(f) has no provisions for a thirty-day waiting period or formal petitions to deny,⁽²⁷⁾ which permits faster action than is possible using normal procedures. The request for temporary authorization must contain such information to establish the qualifications of the trustee and a copy of the trust agreement, including provisions designed to assure the independence of the trustee. If its requirements are met, the Commission will grant a temporary authorization, which permits the trustee to collect the stock and to operate the company. At this point, the tender offer has been promptly completed. The trustee is intended to be temporary licensee and limits are placed on his or her actions; for example, the trustee is directed to maintain the status quo of the licensee's operations, as much as is possible, and is strictly insulated from the offeror. Thus, while the offeror may communicate in writing with the trustee with regard to the tender of shares and the payment for them, it cannot communicate in writing or otherwise, directly or indirectly, with regard to the operation or management of the licensed operations.⁽²⁸⁾

At the same time the offeror files its request for a temporary authorization, it must also file an application to transfer control of the licensee from the trustee to the offeror. That application is often referred to as a "long-form" application.⁽²⁹⁾ The second step of the process is consideration of that application and any associated pleadings. If the tender offer is successful and the trustee controls the licensee, the long-form application can be processed under normal procedures, including the thirty-day waiting period and potential petitions from interested parties. If the offeror is then found qualified, the application will be granted. In contrast, if the offeror is ultimately found unqualified, the trustee is obligated to find a buyer that can pass Commission muster, following normal application procedures.⁽³⁰⁾

III. The Use of Section 309(f) in Hostile Tender Offers

Most target corporations and several public interest groups have challenged the use of section 309(f) in the context of hostile tender offers.⁽³¹⁾ Although the Commission issued temporary authorizations in the cases cited above, no judicial review followed because the hostile tender offers were unsuccessful or withdrawn.⁽³²⁾ In one case, a majority of the shares were not tendered and in other cases a company considered "friendly" by the target subsequently made a higher bid. Several parties did appeal the policy statement in *Tender Offers*, but the court ruled that the matter was not ripe for review.⁽³³⁾ Accordingly, the propriety of the Commission's use of section 309(f) has not yet passed judicial review. Then Chief Judge Wald, however, dissented when *Tender Offers* was before the court. She believed that the matter was ripe for review and stated briefly that if she were to reach the merits of the case, she would hold that section 309(f) could not be used to issue temporary authorizations to a trustee in the context of hostile tender offers.⁽³⁴⁾

A. The Statute

The language of the statute is the starting point. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."⁽³⁵⁾ The Court assumes "that the ordinary meaning of [the statutory] language accurately expresses the legislative purpose."⁽³⁶⁾

The text of section 309(f) of the Act is set out below.⁽³⁷⁾ Those challenging the use of section 309(f) in the context of hostile tender offers focus on the use of the words "extraordinary" and "operation."⁽³⁸⁾ They assert that tender offers are not extraordinary. Nevertheless, "extraordinary" has numerous, sometimes inconsistent, meanings, from the broad to the narrow.⁽³⁹⁾ Critics would also restrict the word "operation" to mean transmitting a signal, while the Commission uses the word to denote operation under the control of a new party, the trustee. Here again, the dictionary definition provides numerous, sometimes conflicting meanings.⁽⁴⁰⁾ With regard to both words, each side of the controversy could cite at least one definition to support its position. Nor does the context in which the words are used provide clarification as to their meaning. Accordingly, resort to the language of the statute does not resolve the issue of congressional intent.

B. Legislative History

It is therefore appropriate to review the legislative history of the statute for guidance. The Act, as initially promulgated, had no provisions for the filing of petitions objecting to Commission actions.⁽⁴¹⁾ In 1952, Congress adopted a procedure in which parties in interest could file a protest within thirty days after the Commission granted a particular application.⁽⁴²⁾ The postgrant procedure proved problematic, and Congress amended the Act again in 1960 to impose higher pleading standards and to require the filing of petitions to deny before Commission action on applications.⁽⁴³⁾ At that time, Congress added section 309(f) of the Act to serve as a "safety valve to protect the public interest in those rare cases in which the Commission finds that the delay required [by the normal thirty-day petition-to-deny process] would seriously prejudice the public interest."⁽⁴⁴⁾ As then enacted, section 309(f) would apply only to "emergency operations," which could be authorized for ninety days and which could be renewed for one additional ninety-day period. The Commission subsequently adopted rules to govern requests for temporary authorizations for emergency operations.⁽⁴⁵⁾

Two Commission proceedings provide relevant background to subsequent legislation. In March, 1968, the Commission granted without opinion an application to assign the license of station WFMT from Gale Broadcasting Co. (Gale) to WGN Continental FM Co. (Continental), which then began operation of the station.⁽⁴⁶⁾ Several parties appealed the Commission's action, and the court subsequently remanded the case for further proceedings.⁽⁴⁷⁾ The Commission determined that a hearing would be required, but in the intervening months the sole stockholder of Gale had become incompetent due to illness and could not resume control of the licensee during the hearing. The Commission, obviously preferring to keep the station on the air, had two procedural paths open at that point. It could have required return of the license to Gale and contemporaneously granted an application transferring control of the licensee to a conservator or trustee, who would act on behalf of the incompetent controlling stockholder. Such assignments of license are routinely handled under a specific provision of the Act that permits expeditious handling of involuntary

assignments. That trustee or conservator would then operate the station until the resolution of the hearing. If, however, Continental could establish its qualifications in the hearing, yet a third assignment would have been required to transfer the license back to Continental. Rather than go through such a potentially multistage procedure, the Commission elected to follow a second path in its decision on remand. It authorized the buyer, Continental, to remain in control of the station during the hearing.⁽⁴⁹⁾

On remand, the Commission did not initially address the statutory basis for its decision to keep Continental operating the station, but alluded to sections 4(i)⁽⁵⁰⁾ and 309(f) of the Act.⁽⁵¹⁾ On reconsideration, the petitioners challenged the Commission's statutory authority for permitting Continental to operate the station during the hearing. The Commission responded that while section 309(f) was "not regarded as controlling,"⁽⁵²⁾ it believed that sections 4(i) and 4(j)⁽⁵³⁾ of the Act granted it authority "to permit action which fully and uniquely serves the public interest."⁽⁵⁴⁾ No party appealed the decisions on remand, so the Commission's assertion was never judicially reviewed.⁽⁵⁵⁾

The second proceeding was *Telesis Corp.*,⁽⁵⁶⁾ where the Commission granted temporary authority for control of the licensee of stations in the cable television relay service⁽⁵⁷⁾ to be transferred to a new entity. It found authority to permit such operations by a transferee under section 309(c)(2) (G) of the Act.⁽⁵⁸⁾ Unlike section 309(f), which is applicable to licensees in all the services authorized to use the radio spectrum, section 309(c) (2)(G) is limited to nonbroadcast stations, such as cable television relay service stations. In addition, temporary operations can be authorized under section 309(c)(2)(G) for no more than sixty days, without extensions. At the time the Commission issued its decision in *Telesis Corp.*, as noted above, section 309(f) permitted temporary authorizations for up to ninety days, with one ninety-day extension permitted.

The Commission subsequently sought several amendments to the Act, some of which it characterized at one point as "technical," including modifications to section 309(f). Congress accepted the Commission's recommendations and amended the statute in 1982.⁽⁵⁹⁾ Congress's specific amendments to section 309(f) were to change "emergency operations" to "temporary operations," to extend the periods for initial and renewed temporary authorizations from ninety to 180 days, and to permit more than one renewal of a temporary authorization.

The House version of the law was given the short title of "Communications Technical Amendments Act of 1982."⁽⁶⁰⁾ As adopted, however, Congress dropped the word "technical" from the title. The House Conference Report explained the change as follows: "While many of the provisions of the Conference Substitute are merely technical revisions of existing law, several provisions permit the FCC to have greater flexibility in . . . carrying out its duties."⁽⁶¹⁾ That report did have a section captioned "Technical Amendments," but the changes to section 309(f) were not included under that caption. The very brief sections of the reports accompanying the legislation that refer to section 309(f) do not address the specific issues raised here.⁽⁶²⁾

Several conclusions can be drawn from this history. Before 1982, the Commission had twice authorized proposed transferees to operate stations in *Gale* and in *Telesis*. There is no reason to define the word "operation" differently in subsections 309(f) and 309(c)(2)(B) of the Act. Relying on general sections 4(i) and (j), as the Commission did in *Gale*, is always a weak basis for authority when dealing with specific procedures, such as those governing petitions to deny. Seeking a statutory amendment to clarify its authority to install a temporary person or entity to operate a station could be described by the Commission as a "technical" amendment.⁽⁶³⁾ It is Congress's intent that governs, however, not how the Commission viewed the proposed amendments. Congress did recognize that its new law provided the agency with "greater flexibility in . . . carrying out its duties" and expanded the reach of the statute by substituting the word "extraordinary" for "emergency." The Conference Report did not include the amendment to section 309(f) in the subsection captioned "Technical Amendments." There is nothing in the legislative history to establish that Congress believed that the Commission erred in authorizing temporary operations in *Gale* or *Telesis*, or that Congress intended to overrule those decisions.⁽⁶⁴⁾ Thus, there is support for the Commission's position in the legislative history. On the other hand, the history does not specifically endorse the Commission's actions in *Gale* or *Telesis*, and is silent as to the use of section 309(f) in relation to tender offers. It can be argued, therefore, as the Court found in another case, that the statements in the legislative history "were obviously not made with this narrow issue in mind and they cannot be said

to demonstrate a Congressional desire . . . "(65)

C. *The Commission's Statutory Interpretation*

In reviewing another statute, the Court made the following statement regarding statutes that do not clearly establish congressional intent:

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. . . . Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. (66)

As noted, a reviewing court might not find the language of the statute to be dispositive or that the legislative history does not definitively establish Congress's intent. If so, there has been an implicit congressional delegation to the Commission to fill that gap. The question becomes, therefore, whether the Commission's interpretation of section 309(f) is reasonable.

The Commission carefully reviewed its authority under section 309(f) of the Act in *Tender Offers*. (67) It generally referred to the matters described in the preceding two subsections as to the amended statutory language and its legislative history. It noted that by deleting the word "emergency" and substituting "extraordinary," Congress could not have intended to limit the applicability of section 309(f) to circumstances that qualified as emergencies under the former statute. (68) Moreover, section 309 of the Act specifies procedures for dealing with various kinds of applications. There is no suggestion in that section generally, or in subsection 309(f) specifically, that excludes transfer applications from the "safety valve" provided by the latter.

The word "operations," the Commission observed, is not defined in the Act. (69) Further, there is nothing in the legislative history of the 1982 amendments to suggest that "operations" should be narrowly limited to mean transmitting a signal, rather than to permit a person to take over the operations of the licensee. It cited its two previous decisions in which it had permitted proposed transferees to "operate" stations before final approval of their transfer applications. (70)

The Commission determined that hostile tender offers were "extraordinary" for several reasons. It considered the conflicting regulatory schemes under the securities laws and the Communications Act to present extraordinary circumstances because the Commission's normal procedures, and the delay inherent in them, could be used to thwart tender offers for companies holding Commission licenses. (71) That in turn would deprive shareholders of those companies the ability to consider tender offers and serve to shield incumbent management from challenges. Such a shield, the Commission believed, would be inconsistent with its obligation to accommodate, to the extent possible, the policies embodied in the securities laws and a need to remain strictly neutral in the contest for licensee control. (72)

Congress provided a standard procedure for transfer of control; that is, the thirty-day wait/petition-to-deny process. Those procedures are used in all "ordinary" cases transferring control of a licensee. Section 309(f), however, provides an exception to permit operations in extraordinary circumstances. (73) The words "extraordinary" and "operations" have numerous conflicting definitions. (74) The Commission defined those words consistent with its broad public interest obligations under the Act and in light of the expanded scope and flexibility provided to it by the 1982 statutory amendments. There is no basis for concluding that the Commission's definitions are unreasonable. Accordingly, the conclusion should be reached that the Commission's use of section 309(f) in a limited class of transfer applications--hostile tender offers--is reasonable and within Congress's broad delegation of authority to the Commission to further the public interest.

IV. The Reasonableness of the Commission's Procedures Under the Statute

This part assumes that there is the necessary statutory authority under section 309(f) to authorize a new party to take over operations of a Commission licensee that is subjected to a hostile tender offer. The material that follows goes to

the reasonableness of the Commission's actions under the public interest standard.

A. Standard of Review

Parties seeking judicial review of Commission actions face a high hurdle. Under the Administrative Procedure Act, courts will review a Commission decision only to determine whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁽⁷⁵⁾ In the context of reviewing another Commission policy statement, the Supreme Court noted the "substantial judicial deference" accorded to the Commission's public interest determinations.⁽⁷⁶⁾ Thus, if the Commission's action is based on a "consideration of the relevant factors" and is not otherwise "a clear error of judgment," its determinations should be upheld.⁽⁷⁷⁾

B. The Commission's Position

The Commission took a rather narrow action. Most transfer applications, generally including friendly tender offers, will continue to be processed using normal procedures. In the area of hostile tender offers, normal procedures, including full participation by interested parties, are followed as to the qualifications of the offeror/buyer. The Commission's expedited procedures affect only the ability of interested parties to challenge formally the qualifications of the interim trustee and of the transferor; that is, the target licensee under the control of its existing shareholders. Informal objections to the qualifications of the trustee and the transferors can still be considered.

The Commission rested its two-step procedures on several grounds. The courts have often recognized a Commission obligation to consider other federal laws in making its own public interest determinations.⁽⁷⁸⁾ In its initial adjudicatory rulings and subsequently in *Tender Offers* the Commission gave careful consideration to both the Williams Act, concerning tender offers, and the Hart-Scott-Rodino Antitrust Improvements Act, regarding government review of acquisitions and mergers for compliance with the antitrust laws.⁽⁷⁹⁾ In the Williams Act, Congress determined that tender offers could be beneficial or detrimental, and that shareholders should be provided information by which to make an informed evaluation. The need for expedition was based on the conclusion that unnecessary delay caused by government review "might unduly favor the target firm's incumbent management, and permit them to frustrate many pro-competitive cash tenders."⁽⁸⁰⁾ . . . [T]he basic purpose of the Williams Act [is] to maintain a neutral policy towards cash tender offers by avoiding lengthy delays that might discourage their chances for success,"⁽⁸¹⁾ and the government should be neutral as between management and the offeror. In these circumstances, Commission action to minimize delay resulting from its own processes is reasonable.⁽⁸²⁾

Further, the Commission adopted procedures to protect the public. It does not, as it did in *Gale Broadcasting Co.*⁽⁸³⁾ and *Telesis Corp.*,⁽⁸⁴⁾ permit the proposed buyer to operate the stations while its qualifications are under review, and instead requires operation by a temporary, independent trustee. With respect to the trustee, the public is in no better or worse position than it would be when trustees are installed temporarily under section 309(c)(2)(B) of the Act⁽⁸⁵⁾ for involuntary transfers due to death, bankruptcy, or other legal disability. All interested parties have a full opportunity to file formal petitions against the offeror, and those petitions will be fully considered under normal procedures and disposed of in the same manner as any other case. Further, the trustee is strictly insulated from the offeror to avoid the possibility that the latter might take control of station operations prematurely.

The Commission also took steps to assure that the special procedures adopted would be of limited applicability. It stated that the use of its expedited procedures would not normally be available in the case of friendly tender offers.⁽⁸⁶⁾ As noted, in a hostile tender offer, incumbent management might use the time to erect barriers to an otherwise beneficial tender offer. Those concerns are not present in a friendly tender offer, because management of the target would not be expected to erect barriers or otherwise try to frustrate the offer. Although a temporary authorization might be issued to a trustee in a friendly tender offer in cases found "extraordinary" on other grounds, such an action cannot rest on the rationale set out in *Tender Offers*.⁽⁸⁷⁾

The proceeding in *MMM Holdings*⁽⁸⁸⁾ illustrates another Commission effort to limit applicability of its tender offer

policies. There, a hostile offeror requested a temporary authorization for its designated trustee. The parties later began negotiating, and asked the Commission to withhold processing of the request for a temporary authorization. The negotiations were not successful, and the offeror requested that processing resume. By that time, however, the statutory thirty-day waiting period had elapsed as to the regular applications and interested parties had filed a full set of pleadings. The staff amended the applications to reflect a transfer directly from the shareholders of the licensee to the offeror, issued its decision, found the offeror qualified, and dismissed the request for a temporary authorization for a trustee. In statutory terms, the case establishes that there is no need to rely on the extraordinary procedures permitted under section 309(f), when following normal procedures will yield the same result.

C. Challenges to the Commission's Position

There have been several challenges to the reasonableness of the Commission's choice of procedures. Some critics contended that the use of the two-step, tender offer procedures would be used by applicants to avoid normal procedures. The limitations imposed by the Commission have avoided that result. A review of the Commission's Annual Reports from 1985, when the Commission first began issuing temporary authorizations to trustees under section 309(f), until 1994, the last year for which figures are available, discloses grants of 27,544 assignment or transfer applications involving broadcast stations.⁽⁸⁹⁾ That figure includes both long- and short-form applications. Approximately 60 percent, or 16,526, of that total were long-form applications.⁽⁹⁰⁾ In the same period, as listed above in note 21, the Commission issued eight temporary authorizations under section 309(f), involving six licensees. Four of these held broadcast licenses for a total of forty-two stations. Thus, about 0.25 percent of the broadcast licenses that changed hands since 1985 have been subjected to hostile tender offers.⁽⁹¹⁾ These figures support the conclusion that hostile tender offer procedures have not been abused and in fact are numerically extraordinary events.

Critics have expressed the concern that the offeror and the trustee will not abide by their representations to the Commission regarding their insulated relationship, and, therefore, that the offeror will prematurely exercise *de facto* control of the stations. Yet the Commission's insulation standards are not new and are available in a variety of cases; for example, stations may be put in trust to avoid the application of the Commission's rule limiting the number of stations that can be under common control in a given area.⁽⁹²⁾ Critics point to no case in which such a trustee has acted inconsistently with the insulation criteria. The Commission's position is that it expects applicants and its regulatees to abide by their representations and that a petitioner's unsupported speculation that the parties have misrepresented their insulated relationship is not the basis for action.⁽⁹³⁾ Misrepresentations to the Commission may potentially result in the loss of a license,⁽⁹⁴⁾ a penalty that provides strong incentives to applicants to abide by their representations.

Critics have also asserted that the expenditure of substantial funds by the offeror in paying for the tendered shares, if the offer is successful, will prejudice the Commission so that it will reject any petitions questioning the offeror's qualifications. These critics rely heavily on *Community Broadcasting Co. v. FCC*.⁽⁹⁵⁾ In that case, the Commission had added a new television channel to its television table of channel allotments⁽⁹⁶⁾ and mutually exclusive applications for the channel were on file. The Commission was required in those circumstances to hold a comparative hearing among all minimally qualified applicants to determine which of them would best serve the public interest. The Commission granted interim operating authority to one of the competing applicants in order to provide service to the public during the hearing. An applicant other than the interim operator appealed. The concern was that the interim operator's expenditure of construction funds and the experience gained in operating the station during the hearing would weigh in the comparative consideration of the applicants. The court agreed with the appellant and remanded for further proceedings, stating: "Ordinary human experience tells us that these factors have a force which cannot always be set aside by the triers no matter how sincere their effort or intent."⁽⁹⁷⁾

Courts generally presume that administrative agencies act in an unbiased manner consistent with their statutory mandates. The *Community Broadcasting Co.* case is a narrow exception to that general rule, which seems to have the greatest force when an agency is making subtle choices among similar applicants for a valuable license. The Court of Appeals for the District of Columbia Circuit, which issued the *Community Broadcasting Co.* decision, has followed the general presumption in cases other than those comparing applicants for vacant broadcast channels. For example, in *Porter County Chapter v. NRC*,⁽⁹⁸⁾ the Nuclear Regulatory Commission had approved the construction of a nuclear

power plant. The appellants later raised objections to the project, and the agency responded that it would consider those objections upon completion of the plant, when it reviewed the utility company's request for operating authority. The appellants claimed that the expenditure of funds would prejudice fair consideration of its contentions. The court responded:

We do not ignore appellees' fear that the inertia generated by completion of a nuclear plant, with the massive investment it represents, will sway the licensing authority from faithfully carrying out its mandate to protect the public safety, if necessary by denying an operating license. While that contention may have practical force in some instances, a court may not transform a projected tendency to inertia into a presumption of infidelity to duty.⁽⁹⁹⁾

The speculation that an agency will act prejudicially is easy to make and hard to prove or disprove. Giving credence to such speculation could limit the substantial discretion granted to agencies in formulating their procedures.⁽¹⁰⁰⁾ Further, the circumstances before the Commission in considering the qualifications of a hostile offeror fall much closer to *Porter County* than to *Community Broadcasting Co.* First, the Act bars comparative consideration of an applicant other than the offeror,⁽¹⁰¹⁾ so there can be no difficult or close comparisons to make among applicants as there was in *Community Broadcasting Co.* Second, the court in *Community Broadcasting Co.* was concerned that the experience gained by the interim operator or the station might weigh in the comparative balance. In a hostile tender offer, during the interim period while a potential petition concerning the offeror is under review, the experience gained inures to the trustee, not the offeror. Finally, as in *Porter County*, there will be a substantial investment by the offeror to pay for the tendered shares. If the offeror is ultimately found unqualified to hold a license, however, the trustee is obligated to find a buyer that will pass Commission review, at the best price and terms available, and then give the proceeds to the offeror. Thus, the offeror is not at risk of losing its investment.⁽¹⁰²⁾ Moreover, when the Commission rules on a petition that raises questions as to the offeror's qualifications, it would not know whether a potential, subsequent sale by the trustee would result in a profit or loss to the offeror. It is therefore not apparent why the expenditure of funds by the offeror in these circumstances would weigh in the Commission's decision ruling on a petition. For these reasons, it is unlikely that a court would reject the Commission's procedures based on the speculation that it would not carry out its duties impartially.

As a matter of policy, the Commission will ordinarily entertain petitions directed at the seller of a licensed facility, as well as the buyer. If such a petition is filed and the seller is later found unqualified, the license would be lost and therefore could not be transferred.⁽¹⁰³⁾ In the case of a successful tender offer, however, the former shareholders are gone, and they cannot be compelled to repurchase their shares. The critics take the position that the derelictions of the licensee under its former owners cannot be raised against the licensee under the control of the trustee.⁽¹⁰⁴⁾ They assert that the loss of the ability of petitioners to question the qualifications of the licensee under its former owners is another reason for rejecting the hostile tender offer procedures.

This contention should be rejected. The policy of permitting petitions against the seller was created by the Commission, which can modify or even abolish that policy, provided it explains why it now believes that the public interest would be better served by doing so. A modification of its policy to accommodate the policies underlying securities laws and regulations seems well within the Commission's discretion.⁽¹⁰⁵⁾ Further, the critics' argument can be stated as follows: (1) when confronted with "extraordinary" circumstances, the Commission can follow its normal procedures under section 309(d) of the Act, or it can follow different procedures under section 309(f); (2) the Commission should not elect to use section 309(f), because to do so would deny petitioners of the procedures specified in section 309(d). This is a tautology, not a reason for failing to make use of the safety valve procedures permitted by section 309(f). Further, petitioners retain the right to object, albeit not as formal parties, to the qualifications of the licensee under the control of its shareholders before the tender offer. The Commission will consider petitions to revoke outstanding licenses, and has specified the same pleading standards as are applied to formal petitions to deny.⁽¹⁰⁶⁾ Such petitions can be filed as to any licensee, including those up for sale or subjected to a tender offer.⁽¹⁰⁷⁾

D. Effect of the SEC's Subsequent Rule Change

As noted in note 6, when the Commission adopted *Tender Offers* in 1986, SEC regulations permitted tendering

shareholders to change their minds and withdraw their shares during the first fifteen days of the offer and, if the shares had not then been purchased by the offeror, at any time after sixty days.⁽¹⁰⁸⁾ In *Tender Offers*, the Commission noted that the use of its normal procedures would not ordinarily permit action on a transfer application before the expiration of the sixty-day period.⁽¹⁰⁹⁾ After the Commission's action, the SEC changed its rules to permit withdrawal of tendered shares at any time the offer remains open.⁽¹¹⁰⁾

Agencies have very broad discretion when deciding whether to initiate a rulemaking proceeding to modify its rules. That discretion is limited, however, when a rule is based upon a specific premise that is no longer valid. For example, in *Geller v. FCC*,⁽¹¹¹⁾ the Commission first announced tentative rules regarding the regulation of cable television systems that would affect copyright holders, television broadcast stations and networks, and cable systems. The affected industries later reached a consensus that proposed different rules, which the Commission adopted on the ground that the industry-proposed changes would aid in the passage of much-needed copyright legislation relating to cable television systems. Congress did in fact later amend the copyright laws, which removed the Commission's foundation for adoption of the consensus rules. The court required the agency to review the relevant rules in those circumstances. That review, the court stated, is required when "abnormal circumstances make that course imperative."⁽¹¹²⁾

The court's standard would presumably apply to a policy statement adopted after notice and comment, such as *Tender Offers*. The question is whether the change in the SEC's regulation is an "abnormal circumstance" compelling the Commission to revisit its tender offer policies. One side of the argument is that the Commission's failure to act by the end of the sixty-day period does not trigger withdrawal rights for shareholders who have tendered their shares. The decision to withdraw shares now remains with the shareholders throughout the offer. On the other hand, the Commission can be viewed as resting its decision on the general congressional view, as expressed in the laws governing tender offers and review of proposed transactions for antitrust compliance,⁽¹¹³⁾ that unnecessary government delay in reviewing tender offers is not neutral and aids incumbent management. The relevant statute sets an outer, sixty-day limit within which Congress expected most tender offers to be completed, and the SEC's action does not affect Congress's expectation. The issue is unresolved, but the Commission can still refer to the general congressional policy of expedition. The SEC's changed rule should not constitute an "abnormal circumstance" requiring the Commission to revisit its policy.

V. Unresolved Issues Under the Policy Statement

A. Applicability of the Tender Offer Policy to Corporations Owning Cable Television Systems

In *One Two Corporation*,⁽¹¹⁴⁾ the case where the Commission established its two-step expedited procedure, the target licensee held licenses for both broadcast and cable television relay service stations. In *Tender Offers*, the Commission stated that the policies set out there would be applied to licensees in all services,⁽¹¹⁵⁾ and the staff subsequently applied the tender offer procedures to a company holding licenses only for cable relay stations.⁽¹¹⁶⁾ None of these decisions mentions or discusses the applicability of the Cable Communications Policy Act of 1984⁽¹¹⁷⁾ (Cable Act) to transfers involving cable systems. Among other things, that law sets out separate areas of jurisdiction for the Commission and for local cable franchising authorities. On matters that are relevant here, issuing and administering cable television franchises are matters generally left to local authorities, while the Commission issues licenses for and approves transfers of the cable relay stations.

The Cable Act states that "a cable operator may not provide cable service without a franchise . . . ,"⁽¹¹⁸⁾ and defines "cable operator"⁽¹¹⁹⁾ to include a trustee for an offeror in a hostile tender offer. Most franchising authorities require their prior approval before the transfer of control of a system operator. When dealing with a multiple system operator, numerous franchising authorities may be involved and obtaining any required advance approval could take several months. There is nothing in the Cable Act to suggest that transfers of franchises are subject to Commission regulation,⁽¹²⁰⁾ or that the Commission is free to impose a cable operator/trustee on local authorities, without their approval. If a trustee were to assume control of a cable system, he or she would be a cable operator providing cable

service in violation of the Cable Act. In circumstances where obtaining approvals from local authorities are likely to take several months, and where the trustee cannot legally take over operation, the need for expedited action, which underlies the Commission's use of section 309(f) of the Act, is no longer relevant.⁽¹²¹⁾ Accordingly, resort to normal procedures would be required.⁽¹²²⁾

The Cable Act, in light of the above, arguably provides a basis for delay not available to other targets of hostile tender offers. That is an unfortunate conclusion, from the perspective of the offeror, as it undermines the general congressional goal of avoiding unnecessary government delay. The laws regarding tender offers antedate the 1984 Cable Act, and it might be argued that the policies expressed in the earlier laws should not be overruled without some specific intention of Congress.⁽¹²³⁾ The rather precise language of the Cable Act, however, appears to overcome that contention.

B. Hostile Offers Turned Friendly: Which Procedures Apply?

The use of the two-step expedited procedures is generally limited to hostile tender offers. In *Rogers Communications, Inc.*,⁽¹²⁴⁾ the target and offeror were large, publicly-traded Canadian corporations. Their major assets were in Canada, but each owned, among other things, cable systems located in the United States. The tender offer was initially hostile. After the offeror filed the request for a temporary authorization and transfer application, but before Commission action, the parties reached an agreement. The target conditionally supported the issuance of a temporary authorization to the offeror's trustee. There are agreements between Canada and the United States regarding securities registrations, including those relating to tender offers.⁽¹²⁵⁾ Further, Canadian law permits the use of a trustee to hold tendered shares while the offeror's qualifications are reviewed by Canadian authorities.⁽¹²⁶⁾ In fact, the Canadian Radio-Television and Telecommunications Commission had approved a trustee before the staff issued its decision in *Rogers*. That decision followed the two-step expedited procedures, although the underlying rationale for those procedures is generally absent in the context of a friendly tender offer. Arguably, however, the complicating factors of Canadian ownership and laws would be enough to find the transaction to be "extraordinary" within the meaning of section 309(f). *Rogers* is, however, a staff decision, and the propriety of the use of those procedures will not be definitively answered until, and if, the issue is addressed by the full Commission.

The case nevertheless raises the question as to which procedures should apply when a hostile offer turns friendly. If the change is made before the Commission acts on the request for a temporary authorization,⁽¹²⁷⁾ and in the absence of complicating factors such as those in *Rogers*, the target need only withdraw any objections or petitions it may have filed. In most of the cases involving hostile tender offers, the only party objecting to the transaction is the target. To date, in fact, the only other parties who filed objections did not question the qualifications of any of the applicants, only the use of the two-step expedited procedures. In those circumstances, the Commission would be faced with an uncontested long-form application. The Commission could then amend that application to specify that the transferees are the target's shareholders, rather than the trustee. This is the procedure used in *MMM Holdings, Inc.*⁽¹²⁸⁾ A petition to deny was filed against the long-form application by a party other than the target would be treated in the normal course, as contemplated by *Tender Offers*.

VI. Other Approaches to Hostile Tender Offers

While the Commission appears to have acted within the discretion granted to it by statute, it might have exercised that discretion differently. Two different procedures are discussed here.

A. Purchase of Tendered Shares Without Voting Control Until After Commission Approval

In 1968, Hughes Tool Company (Hughes) tried to acquire control of American Broadcasting Companies (ABC) by hostile tender offer. In an unpublished ruling,⁽¹²⁹⁾ the Commission tentatively concluded that a hearing would be required regarding Hughes' qualifications. The letter also suggests that it would be permissible for Hughes to buy the tendered shares, but stated that Hughes was "specifically directed not to exercise any voting rights in the shares of ABC stock acquired or in any way to seek to influence the policies or operation of ABC. . . ." The Commission reserved the right to require divestiture of the acquired stock. Hughes, faced with a potentially lengthy hearing,

withdrew its tender offer.

The approach described by the Commission has two serious flaws. First, the Hughes case provides no statutory support for by-passing normal procedures and permitting the immediate purchase of the tendered stock without voting rights. Normal thirty-day/petition-to-deny procedures are required for transfer applications, except for applications that do not involve a "substantial change in ownership or control."⁽¹³⁰⁾ The language is in the disjunctive. Accordingly, even where Hughes had no right to vote its stock and lacked control, a change in ownership of more than half of the target's stock must be considered substantial. The Commission, therefore, should have specified that normal procedures would be applied to Hughes' purchase of more than half of ABC's stock.⁽¹³¹⁾

Second, Hughes would have had to pay substantial amounts for the stock, funds that would have been tied up for the duration of the hearing. At the same time, the company would have remained in the hands of management bent on defeating the offer. Management would have ample time, for example, to sell the assets that made the company attractive to the offeror, to incur debt and buy assets that are of no interest to the offeror, and to restructure debt so as to use assets as collateral that might otherwise be available for other purposes. Use of the purchase-without-control procedure would seem designed to insulate incumbent management from a hostile takeover.

B. Expedited Pleading Schedules

Several parties suggested that the Commission simply follow normal procedures, but adopt rules that would shorten the time for filing pleadings in response to petitions to deny. Support for this proposal is based on the following rationale. The thirty-day period for filing petitions is mandated by section 309(d) of the Act.⁽¹³²⁾ The periods for filing opposition and reply pleadings are established by rule, as described previously,⁽¹³³⁾ and can be amended by the Commission. For example, in this age of facsimile transmissions and overnight delivery services, permitting parties to serve opposing parties by mail and granting an additional three days to file responsive pleadings is certainly not required. By adopting such changes, it would be possible to reduce the current period for filing a full set of pleadings from the current fifty-one days to as few as forty days.⁽¹³⁴⁾ The decisions dealing with hostile tender offers have been lengthy, and often deal with factually complex issues. Yet a review of the cases discloses that the Commission has issued its decisions, on average, in less than thirteen days after the filing of reply pleadings, with no case taking more than seventeen days.⁽¹³⁵⁾ Accordingly, if the Commission were to shorten the time for filing pleadings and to devote the resources to processing the applications and related pleadings, it could act within the sixty-day period it believed essential when it adopted its current policies in *Tender Offers*. The tender offer could then proceed as scheduled in the typical case where the offeror is found qualified.

There are, however, two significant drawbacks to this proposal. First, it assumes that no hearing would be required. It is simply not realistic to assume that the Commission could evaluate the pleadings and conduct a full hearing within a sixty- or even 120-day period. The target would remain under the control of the hostile management during this period, which has serious drawbacks for the offeror. The most likely result, given the difficulty in keeping capital commitments in place and keeping shareholders from withdrawing their shares, would be withdrawal of the tender offer. In these circumstances the procedures would be inconsistent with the concept that government delay is not neutral in a contest between offeror and hostile management.

Second, the Commission noted a more significant problem that arises even in cases where no hearing is required. Despite significant deregulatory actions, the Commission must still consider a wide range of rules policies and statutes in making public interest judgments under the Act. There remain, for example, restrictions on alien ownership,⁽¹³⁶⁾ policies regarding violations of law by applicants,⁽¹³⁷⁾ and limits on media ownership.⁽¹³⁸⁾ The Commission's review of the qualifications of a trustee can be accomplished easily, because it is usually limited to one person, selected by the offeror specifically to avoid any questions as to Commission requirements.

In contrast, reviewing the qualifications of a large, corporate applicant is considerably more complex. The Commission's requirements apply to the corporate applicant and to those who hold "attributable" interests in the company; that is, officers, directors, and shareholders whose interests exceed specified bench marks. Some persons⁽¹³⁹⁾

may seek to insulate otherwise attributable interests so as to avoid attribution. In other cases, permanent or temporary waivers of particular requirements may be requested by a transferor. In almost all major acquisitions by corporations, the staff requests clarification or additional material, which can be voluminous and which requires substantial time to analyze. This process often involves statutory requirements, and the analysis should not be rushed. The Commission was justified in rejecting an expedited pleading schedule on the grounds that it "is critically important . . . to evaluate the potentially complex issues in a transfer application carefully," and that unreasonably short deadlines would "impede [its] ability to perform this task with the deliberation necessary to discharge [its] regulatory responsibilities."⁽¹⁴⁰⁾ In contrast, by using the two-step trustee procedures adopted for hostile tender offers, the Commission can analyze offeror's qualifications at a reasonable pace.

Conclusion

While one does not lightly disagree with such a distinguished jurist as Judge Wald, the author believes that the procedures set out in *Tender Offers* are consistent with section 309(f) of the Act and fall within the Commission's wide discretion. The procedures adopted are not entirely without their problems and there are issues that remain unresolved. Given the recent upswing in merger and acquisition activity, and Congress' recent action lessening restrictions on the ownership of media companies under the Commission's jurisdiction,⁽¹⁴¹⁾ the Commission may soon be called upon to address those issues. Overall, however, those procedures serve to carry out the Communications Act, while also accommodating the policies underlying securities regulation and subjecting licensees to the discipline imposed by potential tender offers.

1. * J.D., University of Wisconsin, 1967; member, State Bar of Wisconsin; formerly attorney, Federal Communications Commission. The author was the principal draftsman of the Commission's initial adjudicatory decisions dealing with hostile tender offers in 1985 and 1986. A brief overview of the Commission's treatment of tender offers appeared in 1991 as a part of a longer article on the general subject of sales of Commission authorizations. Stephen F. Sewell, *Assignments and Transfers of FCC Authorizations Under Section 310(d) of the Communications Act*, 43 Fed. Comm. L.J. 277, 37983 (1991) [hereinafter *Sales of FCC Authorizations*].

2. 1. An entity may also acquire control of a licensee by electing its own slate of directors to the target's board by means of a proxy contest. The Commission's procedures for processing proxy contests have passed judicial review, In Re Committee for Full Value of Storer Comm., Inc., *Memorandum Opinion and Order*, 101 F.C.C.2d 434, 57 Rad. Reg. 2d (P & F) 1651, *aff'd per curiam*, Storer Comm., Inc. v. FCC, 763 F.2d 436 (D.C. Cir. 1985), and that subject is outside the scope of this Article.

3. 2. The offeror often seeks all of the target's outstanding shares but may seek any amount down to a majority of the issued shares. While it is also possible to make a tender offer for less than a controlling interest in a licensee, the Commission's procedures, which are triggered only by a substantial change in ownership or control, would not generally be applicable in that case.

4. 3. 17 C.F.R. § 240.14e-2 (1996).

5. 4. The rights of the shareholders who do not tender their shares are defined by the terms of the tender offer and by state laws.

6. 5. 17 C.F.R. § 240.14e-1(a) (1996).

7. 6. 17 C.F.R. § 240.14d-7(a) (1996). In 1985, when the Commission adopted its current procedures for processing hostile tender offers, SEC regulations permitted tendering shareholders to withdraw their shares during the first 15 days of the offer and any time after 60 days. 17 C.F.R. § 240.14(d)-7(a)(1) (1985). The SEC later changed that rule to permit withdrawal rights at any time during the offer. Amendments of Tender Offer Rules; All-Holders and Best Price, 51 Fed. Reg. 25,873, 25,88081 (1986).

8. 7. 47 U.S.C. § 310(d) (1994). That statute provides in part:

No . . . station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such . . . license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

Id.

9. 8. 47 U.S.C. § 309(c)(2)(B) (1994).

10. 9. Applications are first reviewed by the Commission's staff for basic requirements such as payment of fees, completeness, and proper signatures. If an application passes this initial screening, the required public notice is prepared and issued. In the past, the Commission's staff has expedited the public notice process in cases involving hostile tender offers, and the required notices were issued three to five work days after filing the applications.

11. 10. 47 U.S.C. § 309(d) (1994). Procedures for participation in Commission application proceedings are summarized in *Sales of FCC Authorizations*, *supra* note *, at 29094.

12. 11. Applicants have ten days to oppose a petition, and petitioners are then afforded five days to respond. 47 C.F.R. § 1.45(a)-(b) (1995).

13. 12. If the petition and oppositions are served by mail, an additional three days is granted to the opposing party to file responsive pleadings. 47 C.F.R. § 1.4(h) (1995). Further, holidays are not counted in determining filing periods of seven days or less, and any pleadings due to be filed on a weekend or holiday should be filed on the next business day. 47 C.F.R. § 1.4(g)(j) (1995).

14. 13. 47 U.S.C. § 309(d)(e) (1994).

15. 14. Hearings are rare on transfer and assignment applications for a variety of reasons. Congress purposely established high pleading standards under the Act in order to avoid unnecessary, time-consuming hearings. For example, factual allegations, except where official notice may be taken, must be supported by an affidavit from a person with first-hand knowledge of the facts alleged: allegations supported by "information and belief" are not permitted. 47 U.S.C. § 309(d) (1994); S. Rep. No. 86-690, at 3 (1959) ("[The] allegation of ultimate, conclusionary facts or mere general allegations on information and belief, supported by general affidavits, . . . are not sufficient."). Further, the existence of the petition-to-deny process results in self-screening by buyers, which eliminates potential applicants that would have difficulty meeting Commission requirements. Finally, buyers tie up substantial capital to make purchases. They seek a licensed operation, not a protracted hearing with possible judicial review, during which that capital might not be available for other purposes. As a result, a typical buyer would withdraw its application rather than face a lengthy hearing.

16. 15. 47 U.S.C. § 309(d)(2) (1994).

17. 16. There is one earlier unpublished decision involving the attempt of Hughes Tool Co. to acquire control of American Broadcasting Cos., Inc., by tender offer. This case will be discussed below in Part VI.A.

18. 17. In *Re Continental Tel. Corp.*, *Memorandum Opinion and Order*, 41 F.C.C.2d 957, 28 Rad. Reg. 2d (P & F) 30 (1973). The target in that case was also the subject of a friendly tender offer. The companion case granting the applications of the friendly offeror is *In Re Pacific Power & Light Co.*, *Memorandum Opinion and Order*, 42 F.C.C.2d 375, 28 Rad. Reg. 2d (P & F) 106 (1973). These cases illustrate two basic points. The Commission's grant of a transfer application is permissive only and does not compel the parties to close the transaction. *United States v. Radio Corp. of Am.*, 358 U.S. 334, 351 (1959); *In Re WWOR-TV, Inc.*, *Memorandum Opinion and Order*, 6 FCC Rcd. 193, para. 26, 68 Rad. Reg. 2d (P & F) 1282 (1990), *reconsideration denied in Memorandum Opinion and Order*, 6 FCC Rcd. 6569, 69 Rad. Reg. 2d (P & F) 1617 (1991). Further, the Commission's grant of a transfer application does not signal its support or preference for a proposed transferee. Its action is solely a finding that the transferee meets Commission requirements, if the parties go forward with the sale. *In Re Continental Tel. Corp.*, *Memorandum Opinion and Order*, 41 F.C.C.2d 958, para. 5, 28 Rad. Reg. 2d (P & F) 30.

19. 18. In Re One Two Corp., *Memorandum Opinion and Order*, 58 Rad. Reg. 2d (P & F) 924 (1985).

20. 19. In Re Tender Offers & Proxy Contests, *Policy Statement*, 59 Rad. Reg. 2d (P & F) 1536 (1986) [hereinafter *Tender Offers Policy Statement*], *appeal dismissed sub nom.* Office of Comm. of the United Church of Christ v. FCC, 826 F.2d 101 (D.C. Cir. 1987). The expedited procedures are available to hostile offerors but are not required. In fact, Turner Broadcasting System followed standard procedures in its unsuccessful 1985 effort to buy CBS by tender offer. Turner withdrew its application before the Commission issued a decision, but the existence of the offer was mentioned in a decision responding to Turner's challenges to certain defensive measures taken by CBS. In Re Turner Brdcast. Sys., Inc., *Memorandum Opinion and Order*, 101 F.C.C.2d 843, 58 Rad. Reg. 2d (P & F) 1507 (1985).

21. 20. The Commission procedures on hostile tender offers are applicable to all corporate licensees, not just those licensees also subject to the SEC's jurisdiction. *Tender Offers Policy Statement*, 59 Rad. Reg. 2d (P & F) 1536, 1552 n.77; In Re L.P. Media, Inc., *Memorandum Opinion and Order*, 102 F.C.C.2d 1276, para. 12, 58 Rad. Reg. 2d (P & F) 1527 (1985). The procedures also apply to corporations whose Commission-regulated activities are a small part of the overall business. See In Re Macfadden Acquisition Corp., *Memorandum Opinion and Order*, 104 F.C.C.2d 545, para. 9, 60 Rad. Reg. 2d (P & F) 339 (1986) (Macfadden I) (applying the special procedures to a corporation whose regulated activities accounted for 16% of its revenues and 41% of its assets).

22. 21. In Re L.P. Media, Inc., *Memorandum Opinion and Order*, 102 F.C.C.2d 1276, 58 Rad. Reg. 2d (P & F) 1527; In Re Macfadden Acquisition Corp., *Memorandum Opinion and Order*, 104 F.C.C.2d 545, 60 Rad. Reg. 2d (P & F) 339 (Macfadden I); In Re Macfadden Acquisition Corp., *Memorandum Opinion and Order*, 60 Rad. Reg. 2d (P & F) 872 (Macfadden II), *reconsideration denied in Memorandum Opinion and Order*, 60 Rad. Reg. 2d (P & F) 1066 (1986); In Re JB Acquisition Corp., *Memorandum Opinion and Order*, 60 Rad. Reg. 2d (P & F) 1095, *reconsideration denied in Memorandum Opinion and Order*, 60 Rad. Reg. 2d (P & F) 1288 (1986) (JB Acquisition I); In Re JB Acquisition Corp., *Memorandum Opinion and Order*, 60 Rad. Reg. 2d (P & F) 1207 (1986) (JB Acquisition II); In Re CNCA Acquisition Corp., *Memorandum Opinion and Order*, 3 FCC Rcd. 6088, 64 Rad. Reg. 2d (P & F) 947 (1988); In Re QVC Network, Inc., *Memorandum Opinion and Order*, 8 FCC Rcd. 8485, 74 Rad. Reg. 2d (P & F) 320 (1993); In Re Viacom, Inc., *Memorandum Opinion and Order*, 8 FCC Rcd. 8439, 74 Rad. Reg. 2d (P & F) 292 (1993); In Re Rogers Comm., Inc., *Memorandum Opinion and Order*, 9 FCC Rcd. 7350, 75 Rad. Reg. 2d (P & F) 116 (1994) (D.A. Acting Chief, Cable Services Bureau). These cases all involved tender offers utilizing the expedited procedures set out in *One Two Corporation* and in *Tender Offers*. The *Macfadden* and *JB Acquisition* cases all involved the same target licensee, John Blair & Co. Similarly, the *QVC* and *Viacom* rulings were in response to two competing tender offers for Paramount Communications, Inc. In sum, the Commission has issued eight decisions involving six licensees under the procedures first adopted in 1985.

23. 22. See, e.g., Nat'l Brdcast. Co. v. United States, 319 U.S. 190, 223 (1943) (stating that the Commission "should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve"); Storer Comm., Inc. v. FCC, 763 F.2d 436, 443 (D.C. Cir. 1985) (per curiam) (stating that the "Commission has a duty to implement the Communications Act but also must attempt to do so in a manner as consistent as possible with corporate and federal security laws' protection of shareholders' rights"); LaRose v. FCC, 494 F.2d 1145, 1147 n.2 (D.C. Cir. 1974) (observing generally that "[a]dministrative agencies have been required to consider other federal policies, not unique to their particular area of administrative expertise, when fulfilling their mandate to assure that their regulatees operate in the public interest," and specifically remanding the case to the Commission for further consideration of the policies underlying the bankruptcy laws).

24. 23. 17 C.F.R. § 240.14(d)7(a)(1) (1985). See *supra* note 6.

25. 24. See generally *Tender Offers Policy Statement*, 59 Rad. Reg. 2d (P & F) 1536, paras. 23-33 (setting out in detail the Commission's rationale and supporting citations). Filing the transfer application well before filing the tender offer with the SEC does not resolve the problem of delay due to FCC procedures. Filing the transfer application would give notice to incumbent management of the licensee and so afford them time to initiate barriers to the offer. Further, the SEC would apparently consider the filing of the transfer application with the FCC to constitute the beginning of the tender offer. *Id.* at 1559 n.108.

26. 25. 47 U.S.C. § 309(f) (1994). The full text of this section is set out below in note 36.

27. 26. That does not mean that the target corporation is without a means to object to such subjects as the qualifications and insulation of the trustee, and compliance of the trust with the requirements of *Tender Offers Policy Statement*, 59 Rad. Reg. 2d (P & F) 1536, paras. 23

§§ 21.30(c), 73.3587, 78.22(c) (1995), and those objections have been fully considered in all cases using the expedited, two-step procedures. The staff usually calls for a meeting with counsel for the offeror and the target to set an expedited pleading schedule. That schedule typically permits the target to file an opposition pleading a day or two after the date on which the target corporation has rejected the offer. As noted above in note 3 and accompanying text, the SEC grants the target up to 10 days to accept, reject, or take no position on the offer. The staff practice avoids requiring the target to take a position on the offer before the SEC requires it to do so.

28. 27. *Tender Offers Policy Statement*, 59 Rad. Reg. 2d (P & F) 1536, paras. 63

were based on existing insulation standards used in other regulatory contexts. In *Re Corporate Ownership Reporting and Disclosure by Brdcast. Licensees, Report and Order*, 97 F.C.C.2d 997, para. 54, 55 Rad. Reg. 2d (P & F) 1465 (1984), *reconsidered in part in Memorandum Opinion and Order*, 58 Rad. Reg. 2d (P & F) 604 (1985), *further reconsidered in Memorandum Opinion and Order*, 1 FCC Rcd. 802, 61 Rad. Reg. 2d (P & F) 739 (1986).

29. 28. The issuance of a temporary authorization is available only when "an application subject to subsection [309](b) has been filed." 47 U.S.C. § 309(f) (1994). The long-form transfer application is subject to section 309(b), and the filing of such a transfer application is, therefore, a statutory prerequisite to issuance of the temporary authorization.

30. 29. After shareholders of the target receive payment for their tendered shares, they are free to use the proceeds as they wish. The trustee cannot compel them to repurchase their shares in the target, so the former ownership of the licensee cannot be reconstituted, if the offeror is found unqualified by the Commission.

31. 30. The various entities opposing the Commission's procedures will be referred to collectively as "critics." Most of the critics raised the same or similar arguments in their pleadings. Accordingly, no effort has been made here to identify specific arguments with specific parties.

32. 31. In *In Re Rogers Comm., Inc., Memorandum Opinion and Order*, 9 FCC Rcd. 7350, 75 Rad. Reg. 2d (P & F) 116 (1994) (D.A. Acting Chief, Cable Services Bureau), the transaction began as hostile, but became friendly after negotiations and a modified offer.

33. 32. *Office of Comm. of the United Church of Christ v. FCC*, 826 F.2d 101 (D.C. Cir. 1987).

34. 33. Because the court dismissed the appeal on the ripeness issue, Judge Wald did not find it necessary to provide an extensive analysis of the issue. Her full statement was:

Were the panel to reach the merits, I would hold that the FCC's new policy with respect to tender offers goes beyond its statutory power under § 309(f), the only statutory provision on which it relies as authority for the trustee mechanism. Based on my reading of the language and legislative history of this section, I believe Congress intended § 309(f) to be used only when the FCC needed to put or keep broadcast stations in operation temporarily so that they might inform citizens of impending disasters or "extraordinary" political events. I cannot conclude that Congress intended to allow the FCC to invoke its "safety-valve" authority of § 309(f) merely because it found the regular statutory "long-form" procedures were too cumbersome for broadcast license transfers resulting from a tender offer. Even if the FCC's new tender offer procedures might be extremely wise as a matter of policy, this court is bound by the plain language and clear intent of Congress.

Id. at 11314 n.6.

35. 34. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 84243 (1984).

36. 35. *Park `N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985).

37. 36. Section 309(f), 47 U.S.C. § 309(f) (1994) states:

When an application subject to subsection (b) of this section has been filed, the Commission, notwithstanding the requirements of such subsection, may, if the grant of such application is otherwise authorized by law and if it finds that there are extraordinary circumstances requiring temporary operations in the public interest and that delay in the institution of such temporary authorization would seriously prejudice the public interest, grant a temporary authorization, accompanied by a statement of the reasons therefor, to permit such temporary operations for a period not exceeding 180 days, and upon making like findings may extend such temporary operations for additional periods not to exceed 180 days. When any such grant of a temporary authorization is made, the Commission shall give expeditious treatment to any timely filed petition to deny such application and to any petition for rehearing of such grant filed under section 405.

The long-form application filed as the second step of the tender offer procedures is subject to "subsection (b)" of the Act.

38. 37. Some critics contend that the underlying long-form application is not "otherwise authorized by law" within the meaning of section 309(f). They provide no explanation, however, as to why a long-form application filed in the context of a friendly tender offer is "authorized by law," but that the same application filed in a hostile context is not. Both a friendly and a hostile offeror intend to acquire control of the target licensee when they file their applications. The fact that the Commission, not the hostile offeror, imposes a temporary agent for the offeror (the trustee) should not convert a long-form application from "authorized" to "unauthorized."

39. 38. Webster's Third New International Dictionary 807 (1981) provides more than 20 definitions for the word. Not all those definitions are applicable to the issue presented here, but a pertinent, broad definition is "more than ordinary." Narrower definitions include "of, relating to or having the nature of an occurrence . . . or risk of a kind other than what ordinary experience or prudence would foresee."

40. 39. The dictionary provides more than 20 definitions of "operation" and "operations." Relevant definitions include "an exercise of power or influence," "the whole process of planning for and operating a business . . .," "capacity for action or functioning," and "the operating of or putting or maintaining in action of something (as a machine or an industry)." *Id.* at 1581. The first two definitions are fully consistent with the Commission's use of the word, the third is consistent with the critics' position, while the last arguably supports both interpretations.

41. 40. Communications Act of 1934, ch. 652, 48 Stat. 1064, *reprinted in* A Legislative History of the Communications Act of 1934 921 (Max D. Paglin ed., 1989).

42. 41. Communications Act Amendments, 1952, Pub. L. No. 82-554, 66 Stat. 711, 715 (1952) (amended 1960).

43. 42. Communications Act Amendments, 1960, Pub. L. No. 86-752, 74 Stat. 889 (1960).

44. 43. S. Rep. No. 86-690, at 4 (1959). The House Report contains a similar, brief statement. H.R. Rep. No. 86-1800, at 13 (1960), *reprinted in* 1960 U.S.C.C.A.N. 3516, 3521. The pertinent section of the statute was then identified as section 309(d), but was later redesignated as section 309(f). For clarity, this Article will use section 309(f) throughout.

45. 44. Current rules are set out at 47 C.F.R. §§ 21.25 (common carrier), 73.1635 (broadcast), and 78.33 (cable television relay service stations) (1995). Prior to 1982, with the exception of the cases described in the following paragraph, those rules were used to permit a station to operate in a manner that differed from its license due to emergencies such as failed equipment or a fallen tower.

46. 45. Under Commission procedures, the parties to an assignment application may close the sale when the Commission's action is effective. The effective date is set by rules, 47 C.F.R. §§ 1.4(b), 1.102, 1.103 (1995), but is typically the date on which the Commission issues a notice announcing the grant of the application or releases the text of a decision ruling against any petitions that might have been filed. The "effective date," therefore, is not equivalent to "finality"; that is, when further administrative or judicial review is no longer possible. Parties that close the sale when the action is effective, but not final, assume the risk that the transaction might be set aside after further

administrative or judicial review. In *Re Improvement Leasing Co.*, *Memorandum Opinion and Order*, 73 F.C.C.2d 676, para. 19, 46 Rad. Reg. 2d (P & F) 175 (1979), *aff'd sub nom.* *Washington Ass'n for Television and Children v. FCC*, 665 F.2d 1264 (D.C. Cir. 1981).

47. 46. *Joseph v. FCC*, 404 F.2d 207 (D.C. Cir. 1968).

48. 47. 47 U.S.C. § 309(c)(2)(B) (1994). Implementing rules include 47 C.F.R. §§ 21.39(a) (common carrier stations), 73.3541 (broadcast stations), and 78.35 (cable television relay service stations) (1995).

49. 48. In *Re Gale Brdcst. Co.*, *Memorandum Opinion and Order*, 15 Rad. Reg. 2d (P & F) 337, para. 13 [hereinafter *Gale Brdcst. Co. Memorandum Opinion and Order*], *reconsideration denied in Memorandum Opinion and Order*, 19 F.C.C.2d 623, 17 Rad. Reg. 2d (P & F) 337 (1969) [hereinafter *Gale Brdcst. Co. Reconsideration*].

50. 49. 47 U.S.C. § 154(i) (1994). This statute broadly authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." *Id.*

51. 50. *Gale Brdcst. Co. Memorandum Opinion and Order*, 15 Rad. Reg. 2d (P & F) 337, 342 n.8.

52. 51. *Gale Brdcst. Co. Reconsideration*, 19 F.C.C.2d 623, para. 6, 17 Rad. Reg. 2d (P & F) 337.

53. 52. 47 U.S.C. § 154(i)-(j) (1994). Section 154(i) is quoted above in note 49. Section 154(j) provides in part that the "Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. § 154(j) (1994).

54. 53. *Gale Brdcst. Co. Reconsideration*, 19 F.C.C. 2d 663, para.9, 17 Rad Reg. 2d (P & F) 337.

55. 54. In a subsequent case, the Commission followed *Gale* and permitted the buyer to remain in control of the station after a remand. In *Re Arnold L. Chase*, *Decision*, 5 FCC Rcd. 1642, para. 30, 67 Rad. Reg. 2d (P & F) 815 (1990). There, the Commission did not discuss the statutory basis for its action, but no party raised the issue at any time during the proceeding.

56. 55. In *Re Telesis Corp.*, *Memorandum Opinion and Order*, 68 F.C.C.2d 696, 43 Rad. Reg. 2d (P&F) 612 (1978) [hereinafter *Telesis Corp. Memorandum Opinion and Order*].

57. 56. Cable television systems establish a "headend"; that is, a common location for receiving antennas for local television stations and for satellite-distributed stations and networks. Systems serving relatively small areas typically run cables directly from their headends to subscribers. Larger systems often establish hubs, and run cable from the hubs to subscribers. Cable television relay service stations are used to transmit signals by microwave from headends to hubs.

58. 57. 47 U.S.C. § 309(c)(2)(G) (1994).

59. 58. Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087, 1094.

60. 59. H.R. Rep. No. 97-751, at 1 (1982).

61. 60. H.R. Conf. Rep. No. 97-765, at 17 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2261.

62. 61. With reference to section 309(f), H.R. Rep. No. 97-751, at 30 (1982) states in its entirety:

This provision lengthens the duration of Special Temporary Authority (STA) from 90 to 180 days, and allows the Commission to renew an STA for additional terms of 180 days each. While the Committee recognizes that multiple STA renewals may be appropriate in extraordinary circumstances, it is emphasized that an applicant for STA renewal bears a heavy burden of showing, consistent with the test in Section 309(f), that a renewal should be granted.

The Conference Report expresses the same thoughts, but is even shorter. H.R. Conf. Rep. No. 97-765, at 37 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2261, 2281.

63. 62. The Commission contemporaneously represented to Congress that its proposed package of "technical" statutory amendments "would reduce or alter the Commission's regulatory requirements and responsibilities in certain areas . . . [and] clarify ambiguities in the Communications Act." *Tender Offers Policy Statement*, 59 Rad. Reg. 2d (P & F) 1536, 1576 n.176 (1986), *appeal dismissed sub nom.* Office of Comm. of United Church of Christ v. FCC, 826 F.2d 101 (D.C. Cir. 1987).

64. 63. Judge Wald's dissenting statement on her interpretation of section 309(f) is set out above in note 33. For the reasons stated in the text, the legislative history does not support her conclusion that the "plain language and clear intent of Congress," Office of Comm. of the United Church of Christ v. FCC, 826 F.2d 101, 113 (1987), preclude the use of section 309(f) to authorize a trustee to control a licensee during review of a hostile offeror's qualifications.

65. 64. *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America*, 325 U.S. 161, 169 (1945).

66. 65. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984); *Bethenergy Mines, Inc.*, 501 U.S. 680, 696 (1991) ("Judicial deference to an agency's interpretation of ambiguous provisions of the statutes it is authorized to implement reflects a sensitivity to the proper roles of the political and judicial branches.").

67. 66. *Tender Offers Policy Statement*, 59 Rad. Reg. 2d (P & F) 1536, para. 55.

68. 67. *Id.*

69. 68. In this regard, the Commission noted that even those who opposed the use of temporary authorizations in hostile tender offers did not agree as to what the word meant. *Id.* at 1572 n.157.

70. 69. *Gale Brdcast. Co. Memorandum Opinion and Order*, 15 Rad. Reg. 2d (P & F) 337, *reconsideration denied in Gale Brdcast. Reconsideration*, 19 F.C.C.2d 623, 17 Rad. Reg. 2d (P & F) 337 (1969), which relied on section 309(f), and *Telesis Corp. Memorandum Opinion and Order* 68 F.C.C.2d 696 43 Rad. Reg. 2d (P&F) 612 (1978), which relied on section 309(c)(2)(G), have been described above in Part III.B.

71. 70. The Commission specifically observed that, prior to the adoption of its special procedures, the acquisition of a broadcast license was a recognized defensive tactic against hostile tender offers because of the delay caused by administrative proceedings. *Tender Offers Policy Statement*, 59 Rad. Reg. 2d (P & F) 1536, 1561 n.114.

72. 71. *Id.* paras. 45-48.

73. 72. Section 309(f) is not unique in this regard. The Act contains other similar safety valves from specific statutory requirements where the Commission finds that the public interest would be served. 47 U.S.C. §§ 154(b)(2)(B)(i) (financial interests of employees), 211(b) (filing of certain contracts of common carriers), 317(d) (sponsor identification of broadcast matter), 352(d) (exemption of ships from certain radio communication requirements) (1994). Indeed, as noted, section 309 itself contains another such safety valve in subsection (c)(2)(G), relating to nonbroadcast radio stations. 47 U.S.C. § 309(c)(2)(G) (1994).

74. 73. These definitions are set out above in notes 38 and 39.

75. 74. 5 U.S.C. § 706(2)(A) (1994).

76. 75. *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981). *See also* *FCC v. Pottsville Brdcast. Co.*, 309 U.S. 134, 138 (1940) (stating that "subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked . . . were explicitly and by implication left to the Commission's own devising . . ."); *FCC v. Schreiber*, 381 U.S. 279, 290 (1965) (federal agencies have broad procedural discretion because

they "will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and tasks of the agency involved").

77. 76. GTE Service Corp. v. FCC, 782 F.2d 263, 269 (D.C. Cir. 1986).

78. 77. Cases supporting this proposition are cited above in note 22. It should be noted that the Commission adopted procedures to *accommodate* securities laws and the concerns expressed by Congress. Contrary to the assertion of some critics, the Commission is not claiming "authority to *execute* numerous other laws." *McLean Trucking Co. v. United States*, 321 U.S. 67, 79 (1944) (emphasis added).

79. 78. *Tender Offers Policy Statement*, 59 Rad. Reg. 2d (P & F) 1536, paras. 23-25 (1986), *appeal dismissed sub nom.* Office of Communication of United Church of Christ v. FCC, 826 F.2d 101 (D.C. Cir. 1987).

80. 79. Given enough time, the defensive measures available to incumbent managers seem limited only by their ingenuity. Defenses may be adopted to discourage takeovers generally, such as those described in *In Re Turner Brdcst. Sys., Inc., Memorandum Opinion and Order*, 101 F.C.C.2d 843, paras. 3
may be in response to a specific tender offer. The literature on the subject is substantial. The Current Law Index has a subject heading entitled "*Corporate Antitakeover Measures.*"

81. 80. H.R. Rep. No. 94

opinion) (stating that "providing the target company with additional time within which to take steps to combat the offer . . . furnish[es] incumbent management with a powerful tool . . . perhaps to the detriment of stockholders").

82. 81. In *Tender Offers Policy Statement*, 59 Rad. Reg. 2d (P & F) 1536, 1553 n.81 (1986), the Commission cited *Water Transport Association v. ICC*, 715 F.2d 581 (D.C. Cir. 1981), *cert. denied*, 465 U.S. 1006 (1984), where the court upheld an agency's use of an interim trust pending consideration of a sale of a regulated facility. The Civil Aeronautics Board has also adopted trust procedures to permit the closing of a tender offer. *Tender Offers Policy Statement*, 59 Rad. Reg. 2d (P & F) 1536, 1554 nn.82

expedited procedures when confronted with a hostile tender offer for a bank under its jurisdiction and a statute that required a 30-day waiting period and permitted public comment. The Bank of New York, 74 Fed. Res. Bull., No. 4, 257 (1988). Even assuming that identical statutory language is found in the various statutes, it appears that agencies would be within their discretion either to expedite consideration of hostile tender offers for companies within their jurisdiction, or to refuse to do so, given their expert knowledge of the industries they regulate and given the wide discretion afforded to agencies by statute and court precedent.

83. 82. *Gale Brdcst. Co. Memorandum Opinion and Order*, 15 Rad Reg. 2d (P & F) 337, *reconsideration denied in Gale Brdcst. Co. Reconsideration*, 19 F.C.C.2d 623, 17 Rad Reg. 2d (P & F) 337 (1969).

84. 83. *Telesis Corp. Memorandum Opinion and Order*, 68 F.C.C.2d 696, 43 Rad. Reg. 2d (P & F) 612 (1978).

85. 84. 47 U.S.C. § 309(c)(2)(B) (1994).

86. 85. In *Re J.B. Acquisition Corp., Memorandum Opinion and Order*, 60 Rad. Reg. 2d (P & F) 1095, para. 3, *reconsideration denied in Memorandum Opinion and Order*, 60 Rad. Reg. 2d (P & F) 1288 (1986) (JB Acquisition I).

87. 86. In fact, the Commission did issue a temporary authorization to a trustee in two friendly tender offers. In *Re J.B. Acquisition Corp., Memorandum Opinion and Order*, 60 Rad. Reg. 2d (P & F) 1207 (1986) (J.B. Acquisition II); In *Re Viacom, Inc., Memorandum Opinion and Order*, 8 FCC Rcd. 8439, 74 Rad. Reg. 2d (P & F) 292 (1993). In both proceedings, the Commission had issued a temporary authorization to a trustee on behalf of a hostile offeror. The targets then accepted tender offers from friendly parties. The Commission issued temporary authorizations in those limited circumstances on the ground that if it followed normal procedures as to a friendly offer, with the associated procedural delay, it would have decided the contest between the competing parties in favor of the hostile offer. That would have been contrary to the principle of government neutrality, another important policy underlying relevant securities laws. These circumstances appear to qualify as "extraordinary," within the meaning of section 309(f). The

staff ruling in *In Re Rogers Comm., Inc.*, 9 FCC Rcd. 7350, 75 Rad. Reg. 2d (P & F) 116 (1994) (D.A. Acting Chief, Cable Services Bureau), is described below in Part V.B. The staff described the tender offer as "conditionally" friendly, but was apparently considered "extraordinary" on other grounds.

88. 87. *In Re MMM Holdings, Inc., Memorandum Opinion and Order*, 4 FCC Rcd. 6838, 66 Rad. Reg. 2d (P & F) 1593 (D.A. Acting Chief, Mass Media Bureau and Deputy Chief, Common Carrier Bureau), *review denied in Memorandum Opinion and Order*, 4 FCC Rcd. 8243, 66 Rad. Reg. 2d (P & F) 1706 (1989).

89. 88. The Commission's Annual Reports do not list the number of assignment and transfer applications granted in the common carrier and cable television services. Review of the relevant cases discloses that *In Re CNCA Acquisition, Inc., Memorandum Opinion and Order*, 3 FCC Rcd. 6088, 6095 n.1, 64 Rad. Reg. 2d (P & F) 947 (1988), dealt primarily with common carrier radio stations, and that the staff ruling in *In Re Rogers Comm., Inc., Memorandum Opinion and Order*, 9 FCC Rcd. 7350, 75 Rad. Reg. 2d (P & F) 116 (D.A. Acting Chief, Cable Services Bureau), involved cable television systems. *In Re One Two Corp., Memorandum Opinion and Order*, 58 Rad. Reg. 2d (P & F) 924, para. 48 (1985), approved a trust arrangement for the licensee of 15 full-service broadcast stations and seven cable television relay service stations. Although figures are not available for the total number of assignment and transfer applications granted in the cable and common carrier services during the 1985-1994 period, the limited number of Commission decisions regarding hostile tender offers in those services supports the conclusion that temporary authorizations in those services are "extraordinary" events. There is no other evidence to support the critics' concern that the Commission's expedited tender offer procedures would become widely used in a variety of contexts to by-pass normal transfer procedures.

90. 89. The Commission's Annual Reports provide only a total of all long- and short-form applications. Short-form applications are used for involuntary transfers, such as from a licensee to a trustee in bankruptcy, or for an insubstantial change in ownership or control, such as transferring a license from a parent corporation to a wholly owned subsidiary. Such applications are not relevant here. Long-form applications are used where there is a substantial change in ownership or control, which includes any tender offer for more than 50 percent of the licensee's stock. The 60-percent estimate is based on conversations with knowledgeable members of the Commission's staff.

91. 90. The Commission's figures are slightly lower than the general level of hostile tender offer activity involving United States companies. In 1994, there were 109 tender offers launched for United States corporations, of which 19 were contested. *Answering the Call of the Swifter Market: Intensifying Competition and Bigger Deals Drove a Recovery in the Use of Tenders*, Mergers & Acquisitions Mag., May/June 1995, at 27. During the same year, there were 3993 mergers and acquisitions, as defined by the magazine. *Id.* at 48. Thus, hostile tender offers represented less than 0.5 percent of the total mergers and acquisitions during that year.

92. 91. 47 C.F.R. § 73.3555 (1995). The use of trusts in other contexts is described in *In re Corporate Ownership Reporting and Disclosure by Brdcst. Licensees (Attribution of Ownership Interests), Report and Order*, 97 F.C.C.2d 997, para. 53, 55 Rad. Reg. 2d (P & F) 1465 (1984), *reconsidered in part in Memorandum Opinion and Order*, 58 Rad. Reg. 2d (P & F) 604 (1985), *further reconsidered in Memorandum Opinion and Order*, 1 FCC Rcd. 802, 61 Rad. Reg. 2d (P & F) 739 (1986).

93. 92. *In Re News Int'l, PLC, Memorandum Opinion and Order*, 97 F.C.C.2d 349, para. 19, 55 Rad. Reg. 2d (P & F) 945 (1984).

94. 93. *See FCC v. WOKO, Inc.*, 329 U.S. 223 (1946) (upholding a Commission decision to deny license renewal to an applicant that had made several misrepresentations to the agency).

95. 94. *Community*, 274 F.2d 753 (D.C. Cir. 1960).

96. 95. 47 C.F.R. § 73.606 (1995).

97. 96. *Community*, 274 F.2d at 759. The court subsequently followed *Community Broadcasting Co.* in similar circumstances in *Consolidated Nine, Inc. v. FCC*, 403 F.2d 585 (D.C. Cir. 1968).

98. 97. *Porter County*, 606 F.2d 1363 (D.C. Cir. 1979).

99. 98. *Id.* at 1370.

100. 99. *See, e.g.*, *FCC v. Pottsville Brdcast. Co.*, 309 U.S. 134, 138 (1940) (stating that "questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked . . . were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest").

101. 100. Section 310(d) of the Act, 47 U.S.C. § 310(d) (1994), provides that when acting on a transfer application, "the Commission may not consider whether the public interest . . . might be served by the transfer . . . of the . . . license to a person other than the proposed transferee"

102. 101. The only risk taken by the offeror is that the market value of its investment may fluctuate while the station is under the trustee's control. That is a risk shared by all licensees, and that risk would apply to the offeror if it were in control of the station. Such a risk is not legally cognizable prejudice.

103. 102. For a more detailed description of this policy, see *Sales of FCC Authorizations*, *supra* note *, at 338-52.

104. 103. This issue has not been clearly decided. The Court of Appeals for the District of Columbia Circuit has strongly suggested the correctness of the critics' position in reference to a trustee in bankruptcy. *LaRose v. FCC*, 494 F.2d 1145, 1146-47 n.2 (D.C. Cir. 1974). The Commission subsequently rejected that court's position, but without reference to it, in the bankruptcy context. In *Re Davis Brdcast. Co.*, *Memorandum Opinion and Order*, 67 F.C.C.2d 872, para. 7, 40 Rad. Reg. 2d (P & F) 1449 (1977). Whether the courts would reach the same result in a context other than bankruptcy is not known. It should be noted, however, that the Commission normally recognizes that the locus of control of a corporate licensee is in its shareholders, *Storer Comm., Inc. v. FCC*, 763 F.2d 436 (D.C. Cir. 1985), which supports the position taken by the critics of the Commission's procedures.

105. 104. This is not the first time the Commission has denied petitioners the opportunity to challenge a seller's qualifications in a hearing. For example, if certain criteria are met, a bankrupt licensee may be permitted to sell its station, even where a petitioner has raised substantial and material questions of fact regarding the bankrupt seller's qualifications. In *Re Second Thursday Corp.*, *Memorandum Opinion and Order*, 22 F.C.C.2d 515, para. 5, 18 Rad. Reg. 2d (P & F) 914 (1970). Permitting such a sale, in contrast to taking away the license, increases the value of assets that can be distributed to innocent creditors. This policy is based in substantial part on the Commission's desire to accommodate the policies underlying the bankruptcy laws.

106. 105. Letter from Commission to Greater Portland Brdcast. Corp., 3 FCC Rcd. 1953, 1954, 64 Rad. Reg. 2d (P & F) 1264, 1266 (1988).

107. 106. To date, no party has raised any questions as to the qualifications of a licensee that was the target of a hostile tender offer.

108. 107. 17 C.F.R. § 240.14(d)-7(a)(1) (1985). Note that the statute upon which the rule is based, 15 U.S.C. § 78(d)(5) (1994), grants withdrawal rights during the first seven days of the offer and after 60 days have elapsed, if the offer is still open. The same statute, however, grants the SEC rulemaking authority to set different periods.

109. 108. *Tender Offers Policy Statement*, 59 Rad. Reg. 2d (P & F) 1536, para. 23-24. Specifically, the Commission stated:

[T]he 60-day maximum represents a judgment by Congress that if the offeror has not closed the transaction by that time it is not appropriate that he or she be able to continue to lock up tendered shares. In our view, this indicates a Congressional expectation that a tender offer would be conducted within this 60-day time period under ordinary circumstances. Thus, we believe that agency procedures which permit consummation of the tender offer prior to the expiration of the 60-day period would properly accommodate the goal of government neutrality.

Id. para. 24.

110. 109. 17 C.F.R. § 240.14(d)-7(a) (1996).

111. 110. *Geller*, 610 F.2d 973 (D.C. Cir. 1979) (per curiam).

112. 111. *Id.* at 979 (citation omitted).

113. 112. *Tender Offers Policy Statement*, 59 Rad. Reg. 2d (P & F) 1536, paras. 23-33.

114. 113. *In Re One Two Corp.*, *Memorandum Opinion and Order*, 58 Rad. Reg. 2d (P & F) 924 (1985).

115. 114. *Tender Offers Policy Statement*, 59 Rad. Reg. 2d (P & F) 1536, para. 45 & 1569 n.147 (1986).

116. 115. *In Re Rogers Comm., Inc.*, *Memorandum Opinion and Order*, 9 FCC Rcd. 7350, 75 Rad. Reg. 2d (P & F) 116 (1994) (D.A. Acting Chief, Cable Services Bureau).

117. 116. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended at 47 U.S.C. §§ 521-559 (1994)).

118. 117. 47 U.S.C. § 541(b)(1) (1994).

119. 118. 47 U.S.C. § 522(5)(B) (1994).

120. 119. The legislative history supports the conclusion that transfers are under local control. "[M]atters subject to state and local authority include, to the extent not addressed in the legislation, certain terms and conditions related to . . . the enforcement and administration of a franchise (e.g., . . . transfers of ownership)." H.R. Rep. No. 98-934, pt. 3, at 59, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4696.

121. 120. Federal laws and regulations generally preempt conflicting state requirements. In cable regulation, however, the allocation of federal and state responsibilities is set by federal law; that is, the Cable Act. The Commission cannot preempt state regulations in areas that are allocated to state authorities by federal law. 47 U.S.C. § 556 (1994).

122. 121. *In Re MMM Holdings, Inc.*, *Memorandum Opinion and Order*, 4 FCC Rcd. 6838, 66 Rad. Reg. 2d (P & F) 1593 (D.A. Acting Chief, Mass Media Bureau and Deputy Chief, Common Carrier Bureau), *review denied in Memorandum Opinion and Order*, 4 FCC Rcd. 8242, 66 Rad. Reg. 2d (P & F) 1706 (1989). The case is described and discussed above in Part IV.B. As noted there, the case suggests that expedited procedures should not be used where the offeror is in the same position if normal procedures are followed.

123. 122. *See, e.g.*, *Community Television of S. Cal. v. Gottfried*, 459 U.S. 498, 509-11 (1983) (expressing reluctance to interpret a statute so as to modify previously enacted legislation where there was no support for that result in the later statute or its legislative history).

124. 123. *In Re Rogers Comm., Inc.*, *Memorandum Opinion and Order*, 9 FCC Rcd. 7350, 75 Rad. Reg. 2d (P & F) 116 (1994) (D.A. Acting Chief, Cable Services Bureau).

125. 124. *Id.* at 7363 n.32, 75 Rad. Reg. 2d (P & F) 116, 123 n.32.

126. 125. *Id.* at 7362 n.29, 75 Rad. Reg. 2d (P & F) 116, 123 n.29.

127. 126. The opportunity for a target to change its mind from hostile to friendly is of limited duration. To date, the Commission has acted very promptly when dealing with hostile tender offers. (On average, the Commission has acted in less than 37 days between the filing of the request for a special authorization and the release of a decision granting or denying that request.) After the special authorization is issued and the trustee acquires a majority of the target's stock the trustee controls the company, and has the authority to block any action by the company's management that is inconsistent with the successful completion of the tender offer. The formality of changing the target's position from

hostile to friendly at that point would serve no purpose.

128. 127. In *Re MMM Holdings, Inc.*, *Memorandum Opinion and Order*, 4 FCC Rcd. 6838, 66 Rad. Reg. 2d (P & F) 1593 (D.A. Acting Chief, Mass Media Bureau and Deputy Chief, Common Carrier Bureau), *review denied in Memorandum Opinion and Order*, 4 FCC Rcd. 8243, 66 Rad. Reg. 2d (P & F) 1706 (1989).

129. 128. Commission letter to counsel for Hughes, FCC 68-697, (July 3, 1968) (on file with the Federal Communications Law Journal). Under 5 U.S.C. § 552(a)(2)(C)(i) (1994), a ruling that is not published and indexed has limited precedential value.

130. 129. 47 U.S.C. § 309(c)(2)(B) (1994).

131. 130. At that time, section 309(f) was still in terms of "emergencies," and temporary authorizations could be issued for a maximum of 180 days. A hearing, hotly contested by incumbent management, might well take more than 180 days, without consideration of appeals from the hearing officer to the Commission or the courts. The statute did not take on its current form until 1982. *See supra* notes 58-60 and accompanying text.

132. 131. 47 U.S.C. § 309(d)(1) (1994).

133. 132. *See supra* notes 11-12 and accompanying text.

134. 133. This period contemplates filing a courtesy copy of the application with those responsible for overseeing the acceptance of the application in Washington, in addition to the copies submitted to the filing point in Pittsburgh; and preparation of the required public notice manually, outside of the normal computer-generated notices. The 40-day period is based on the following: two days to prepare and issue the required public notice, 30 days for the required statutory waiting period, two days for the applicant to file an opposition, and three days for the petitioner to file its reply.

135. 134. These figures are based on the four cases that set out the filing dates of reply pleadings.

136. 135. 47 U.S.C. § 310(a)-(b) (1994).

137. 136. *In re Policy on Character Qualifications in Brdcast. Licensing, Report, Order and Policy Statement*, 102 F.C.C.2d 1179, 59 Rad. Reg. 2d (P & F) 801, *reconsidered in part in Memorandum Opinion and Order*, 1 FCC Rcd. 421, 61 Rad. Reg. 2d (P & F) 619 (1986), *as modified by Policy Statement and Order*, 5 FCC Rcd. 3252, 67 Rad. Reg. 2d (P & F) 1107 (1990), *reconsideration denied in Memorandum Opinion and Order*, 6 FCC Rcd. 3448, 69 Rad. Reg. 2d (P & F) 278 (1991). Large corporations are often subject to a variety of lawsuits concerning such matters as equal employment opportunity requirements and compliance with antitrust laws. Not all convictions are disqualifying, but must be evaluated under Commission standards.

138. 137. *See, e.g.*, 47 C.F.R. § 73.3555 (1995).

139. 138. For example, an officer of a transferor may also be a limited partner in a partnership that holds media interests that conflict with Commission requirements. The Commission may request and review the partnership agreement to insure that the officer's interest in the partnership is sufficiently insulated so as not to be considered attributable.

140. 139. *Tender Offers Policy Statement*, 59 Rad. Reg. 2d (P & F) 1536, para. 32 (1986).

141. 140. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified in scattered sections of 47 U.S.C.).