

F.C.C. 65-320

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C.

In Re Application of
AGNES J. REEVES GREER (ASSIGNOR)
AND
D. H. OVERMYER COMMUNICATIONS CO. (AS-
SIGNEE)
For Assignment of Construction Per-
mit of Station WAND-TV, Channel
53, Pittsburgh, Pa.

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: COMMISSIONER BARTLEY CONCURRING IN THE
RESULT; COMMISSIONER LEE ABSENT.

1. The Commission has before it for consideration (a) the above-captioned assignment of construction permit application tendered for filing on February 9, 1965; and (b) a petition by D. H. Overmyer Communications Company (Overmyer) for a waiver of Section 73.636 (a) (2) of the Rules (the multiple ownership rule which imposes a limit of seven television stations, no more than five of which can be VHF), to allow the acceptance for filing and the grant of the above-captioned application.¹

2. Pursuant to Rule 1.3 of the Rules,² the proposed assignee requests waiver of Section 73.636 (a) (2) of the Rules which imposes a limit of seven television stations to any one party. Station WAND-TV, channel 53, Pittsburgh, Pennsylvania, would be the eighth television station licensed to the assignee or a wholly-owned company, in the event that all the pending applications were granted.

3. D. H. Overmyer or a corporation controlled by Mr. Overmyer now has the following authorizations or applications pending:

Channel	City	File Number
79	Toledo, Ohio	¹ BPCT-3173
36	Atlanta, Ga.	BAPCT-351
74	Newport, Ky (Cincinnati)	² BAPCT-352
55	Stamford, Conn.	BPCT-3443
20	San Francisco, Calif.	BAPCT-354
29	Dallas, Tex.	BPCT-3463
17	Rosenberg, Tex. (Houston)	BPCT-3518

¹ Permit issued. Favorable initial decision issued January 19, 1965, and finalized March 10, 1965.

² Permit issued. Franted by Commission action on March 10, 1965.

¹By action taken March 17, 1965, the Commission set the permittee of Station WAND-TV for oral argument on its requested extension of time to construct application (BMPCT-4205).

² Section 1.3 of the Rules reads as follows:

"The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown."

4. The assignee advances the view that the seven station limit should be waived in this instance in order to foster the growth of UHF television in general and in Pittsburgh in particular without any concomitant undesirable concentration of control by Mr. Overmyer. Stressed by the assignee is the beneficial effect the waiver would have on educational television in Pittsburgh since an active commercial UHF station in that city would stimulate all-channel receiver sales and conversions. Assignee also points out the fact that UHF in general has had a poor financial history and that the future development of UHF needs the support of those, such as Mr. Overmyer, who are willing and able to risk the necessary capital for investment. The assignee maintains that the public interest would be benefited more through the advance of UHF than it would be harmed by waiving the multiple ownership rule to allow one person to control eight UHF stations. It is argued that eight UHF stations, widely scattered as the assignee's will be, would not constitute a concentration of control inimical to the public interest.

5. Petitioner must set forth reasons, sufficient if true, to justify a waiver of the rule in question. *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956). Special circumstances must be alleged to warrant a departure from the general standard. *Storer Broadcasting Co.*, 14 R.R. 742, 746 (1956). The main thrust of the reasons advanced for the waiver apply to UHF in general and are more appropriate as reasons to change the general rule, rather than applying to Pittsburgh in particular and a waiver specifically. This is certainly true of assignee's argument that the Commission should allow organizations such as his with adequate financing to acquire in excess of seven UHF stations in order to stimulate interest in and financing of UHF development and thereby prepare the base for a 4th UHF network. However, the method of instituting such a change in the rules is through proposed rule making, not through an *ad hoc* proceeding seeking a waiver of the multiple ownership rule for a particular city. Further, the arguments advanced by Overmyer in an attempt to justify the requested waiver to allow consideration of an application by him for an eighth UHF station situated in Pittsburgh are self-defeating. If there is a high set count of all-channel receivers in that city as is maintained, and if conditions are such that they give promise of early establishment of viable commercial UHF, a waiver of the rule would not seem appropriate, since these considerations increase the likelihood that another applicant would come forward to operate this channel without the need for waiving our multiple ownership rules.³ We have also noted the contention based upon assistance to educational television, which is now operating on both a UHF and a VHF channel in Pittsburgh. We do not believe that Overmyer's ownership of WAND-TV is the best or the only method of fostering educational UHF in Pittsburgh, and in any event this consideration is not such as to outweigh the policy embodied in our

³ See 14 R.R. 748, paragraph 11 as to providing service where the channel is inactive. However, in Pittsburgh there is certainly no dearth of television service and petitioner has not shown that only it can or will operate a commercial UHF in that city. Indeed, the present permittee states in Exhibit No. 1 to the application that "a reluctant determination was made to assign the permit to *one of the parties* which had earlier expressed a substantial interest in constructing and operating the station." (Emphasis added).

multiple ownership limitation. In short, Overmyer has not shown that the limit of seven television stations "works against the public interest" in Pittsburgh. Since adequate reasons to justify a waiver have not been given, the waiver will be denied.

6. The application for the assignment of the construction permit in question is therefore inconsistent with the other pending applications of Overmyer for UHF television stations since if they are all granted, Pittsburgh cannot be granted. As noted earlier, the application of Overmyer for Newport, Kentucky, has been granted and the application for Toledo, Ohio, received a favorable initial decision from the hearing examiner, which was finalized. The applications for Atlanta, Stamford, San Francisco, Dallas and Rosenberg are pending and have been accepted for filing. This totals seven potential UHF authorizations. The instant application for the assignment of the permit in Pittsburgh has been tendered for filing, but has not as yet been found acceptable for processing. Processing has commenced on the other applications of Overmyer.⁴ The Pittsburgh application is inconsistent with these earlier filed applications. Section 1.518 of the Rules⁵ prohibits the filing of a subsequent inconsistent or conflicting application while an earlier application is pending or undecided. *WSTV, Inc.*, 8 R.R. 854 (1953).

7. The above-captioned application for the assignment of construction permit of Station WAND-TV, Pittsburgh, Pennsylvania, is an inconsistent application within the meaning of Section 1.518 of the Rules. Accordingly, IT IS ORDERED, that the petition by D. H. Overmyer Communications Company for waiver of Section 73.636(a)(2) of the Rules IS DENIED; and that the above-captioned application be returned by the Secretary of the Commission as not acceptable for filing.

Adopted April 21, 1965.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary*.

⁴ The Rosenberg, Texas application (BPCT-3518) was tendered for filing only a few days before the Pittsburgh application. It was the seventh application of Overmyer and contained no request for waiver of the multiple ownership rule, whereas the Pittsburgh application was the eighth and did request the waiver. Apparently Overmyer had decided at that time which application he wished to pursue.

⁵ Section 1.518 reads as follows:
"Inconsistent or conflicting applications.

"While an application is pending and undecided, no subsequent inconsistent or conflicting application may be filed by the same applicant, his successor or assignee, or on behalf or for the benefit of the same applicant, his successor or assignee."