

Application For Review
Review By Commission

Broadcast Bureau's application for review of Review Board decision resolving misrepresentation issue in favor of transferor of several UHF-TV construction permits denied. Bases for denial include remoteness in time of relevant events, absence of benefit accruing to transferor, and the transferor's precarious financial position. DO. 18950

FCC 80-391

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Applications for the transfer of Control of
D. H. Overmyer Communications, Co., Inc. and
D. H. Overmyer Broadcasting Company, Inc.
from D. H. Overmyer to U.S. Communications
Corporation

Docket No. 18950
File Nos. BTC-
5376,
5377, 5378, 5379,
and 5380.

MEMORANDUM OPINION AND ORDER

(Adopted: July 1, 1980); Released: July 17, 1980)

BY THE COMMISSION: COMMISSIONER JONES ABSENT.

1. Before the Commission for consideration is an application for review of the Review Board's decision in this proceeding, *D. H. Overmyer Communications, Inc.*, 54 FCC 2d 1045 (1975), filed by the Chief, Broadcast Bureau (herein Bureau) and responsive pleadings thereto.¹ Because of the unusual circumstances surrounding this case, we are unable to conclude that the public interest would be best served by granting the Bureau's application for review. Accordingly, we will deny its application for reasons set forth in this Memorandum Opinion and Order.

2. A detailed description of the facts and circumstances surrounding this case is contained in the Review Board decision and will not be repeated here. Interested persons are referred to that document. We do believe, however, that a brief summary of these facts and circumstances is helpful in understanding our reasons not to grant review.

¹ Additional pleadings include an opposition to application for review jointly filed by D. H. Overmyer, D. H. Overmyer Communications Company, Inc. and D. H. Overmyer Broadcasting Company, Inc. and a reply to opposition filed by the Bureau.

3. D. H. Overmyer held five construction permits for UHF television stations.² On December 8, 1967, the Commission approved transfer of these permits to U.S. Communications Corporation, *D. H. Overmyer*, 10 FCC 2d 822, 11 RR 2d 967. Pursuant to the terms of that sale, D. H. Overmyer was to receive the lesser of 80 percent of his out-of-pocket expenses in connection with the acquisition and development of the permits or one million dollars in exchange for 80 percent of his interests. In addition, he would receive a loan of \$3 million from the purchaser and would grant purchaser an option to buy his remaining 20 percent interests. Shortly thereafter, the Overmyer transfer became the subject of an investigation by the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce, which questioned the accuracy of Overmyer's representations to the Commission regarding his out-of-pocket expenses. That investigation culminated in a report critical of the Commission's handling of the Overmyer transfer.³ Subsequently, the Commission designated the Overmyer transfer applications for hearing nearly three years after they had been granted. *D. H. Overmyer Communications Co., Inc.*, 25 FCC 2d 442, 20 RR 2d 1 (1970), on the following two issues:

1. To determine, whether, in the application for transfer of control of D. H. Overmyer Communications Co., Inc., and D. H. Overmyer Broadcasting Co., Inc., the transferor, D. H. Overmyer misrepresented to the Commission the amount of out-of-pocket expenses incurred in obtaining and developing the construction permits held by the above companies.

2. To determine, whether, in light of the evidence adduced under the foregoing issue, the executory option held by the U.S. Communications Corporation or any assignee thereof, to purchase D. H. Overmyer's interests in the holders of the above-mentioned construction permits should be declared void; whether D. H. Overmyer should be required to transfer to U.S. Communications Corporation his interests in the holders of the construction permits and, if so, whether he should be permitted to receive any consideration for the transfer of his interests.

4. During the pendency of the proceeding, the executory option to purchase Overmyer's remaining twenty percent interests lapsed unexercised. Accordingly, issue two became moot and was never resolved. With respect to issue one, the misrepresentation issue, the Review Board concluded that the Bureau had failed to meet its burden of proof and ruled in favor of Overmyer. 54 FCC 2d 1045, at pp. 1056-60 (1975).⁴ The Board held that although Overmyer did not meet its

² The permits were for stations at San Francisco, California, Pittsburgh, Pennsylvania, Newport, Kentucky, Atlanta, Georgia, and Rosenberg, Texas.

³ See Report of the Special Committee on Investigations of the House Committee on Interstate and Foreign Commerce on *Acquisition and Transfer of Five Overmyer Television Construction Permits*, H.R. Rep. No. 91-256, 91st Cong., 1st Sess. (1969).

⁴ Initially, the Administrative Law Judge concluded that Overmyer had misrepresented the amount of out-of-pocket expenses incurred in obtaining and developing the construction permits. 54 FCC 2d 1079 (1973). Pursuant to remand from the Review Board (44 FCC 2d 834), the ALJ issued a Supplemental Initial Decision, wherein he

burden of making a *prima facie* showing substantially corroborating its alleged out-of-pocket expenses, it did meet its burden with respect to alleged wrongdoings by submitting testimony of its supervisory personnel denying any intentional misrepresentation. Having done so, the burden of proving misrepresentations by evidence of substantial disparities between Overmyer's claimed and actual out-of-pocket expenses was upon the Bureau, and the Bureau failed to carry the burden.^{4a}

5. In denying the Bureau's application for review, we are taking no position as to the correctness of the Review Board's findings and conclusions. Whether or not to grant an application for review is a matter solely within the discretion of the Commission. Congress amended the Communications Act in 1961 so as to enable the Commission to delegate authority to a Review Board to hear appeals of initial decisions in adjudicatory cases. In so doing, its intent was to:

. . . [p]rovide the Commission with greater flexibility in the handling of its business in order to (1) expedite the disposition of such business and (2) to permit the Commissioners to concentrate on major matters of planning and policy.⁵

In light of all the circumstances surrounding this case, we conclude that review shall not be granted here.

6. There is no longer any relief available with respect to the Overmyer transfers even if we were to determine that the terms of these transfers violated Commission policy. As noted earlier, the transferee's executory option to purchase Overmyer's remaining 20% interests expired. Further, none of the five stations are now held by Overmyer's transferee. In fact, one of the permits (Rosenberg, Texas) was surrendered and cancelled. A more significant reason for not granting review is that it is no longer necessary to reach any final determination with respect to D. H. Overmyer personally. At the time of designation, the D. H. Overmyer Telecasting company (wholly owned by Overmyer) was licensee of Station WDHO-TV, Toledo, Ohio. Renewal of that station's license has been deferred pending resolution of the misrepresentation issue in this proceeding. However, a petition for bankruptcy by the licensee corporation was filed and in 1976, the U.S. District Court for the Southern District of New York authorized the licensee to operate as a Debtor-in-Possession pursuant to Chapter XI of the Bankruptcy Act and to conduct its affairs subject to the court's control. Hence, Overmyer continues to operate WDHO-TV,

found that Thomas J. Byrnes, Overmyer's chief financial and administrative officer, made a "deliberate and conscious misrepresentation" to the Commission, but that the record failed to inculcate Overmyer personally in the misrepresentation, 56 FCC 2d 918 (1974).

^{4a} In most situations, the burden of proof in a misrepresentation issue is placed upon the applicant. However, in this case, because of its unique circumstances, the burden of introducing evidence was placed on Overmyer but the burden of proving the misrepresentation was placed upon the Bureau. 31 FCC 2d 208 (1971).

⁵ See Sen. Rep. No. 576, 87th Cong. 1st Sess. (1961), p. 5.

pursuant to court supervision for the benefit of creditors. Presently pending before the Commission is an application for Voluntary Transfer of Control of The Overmyer Co., Inc., Debtor-In-Possession, parent corporation of the licensee to Clark Television, Inc.⁶ Also, pending is a Form 316 (short form) application for Voluntary Transfer of Control of Licensee Corporation from The Overmyer Company to D. H. Overmyer.⁷ In light of the precarious financial status of WDHO-TV, we see no reason to further defer action on its license renewal and pending transfer applications because of alleged wrongdoing, *not* in connection with the operation of that station, which occurred twelve years ago, and which neither the Administrative Law Judge nor the Review Board were able to attribute directly to Mr. Overmyer personally.⁸

7. In sum, in view of the remoteness in time of the events that were the subject of this proceeding, and the precarious financial condition of Overmyer's one remaining broadcast interest, we conclude that the public interest would be served best by denying the Bureau's application for review of the Review Board decision and terminating this proceeding. In doing so, we emphasize that our denial of review is done as a matter of administrative discretion based upon all the relevant circumstances and equities surrounding this proceeding, and is in no manner intended as either agreement or disagreement with the merits of the Review Board decision.

8. Accordingly, IT IS ORDERED, That, the Application for Review filed by the Chief, Broadcast Bureau, IS DENIED.

9. IT IS FURTHER ORDERED, that this proceeding, IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary*.

⁶ BTCTV-790129LC, filed January 24, 1979.

⁷ BTCTV-79013LL, filed January 30, 1979.

⁸ See Review Board decision, 54 FCC 2d at 1047 where it is noted that the judge concluded that Overmyer's chief administrative officer deliberately and consciously misrepresented to the Commission the unavailability prior to September, 1966 of usable records to calculate out-of-pocket expenses, but that the hearing record did not inculpate Mr. Overmyer *personally*. Since the Board concluded that the Bureau failed to meet its burden of proof on the misrepresentation issue it was not necessary to decide whether any misrepresentation should be attributed to Overmyer personally.