Back to Index

In re Application of D. H. OVERMYER (TRANSFEROR) AND U.S. COMMUNICATIONS CORP. (TRANSFEREE) For Voluntary Transfer of Control of D. H. Overmyer Communications Co., Inc., Permittee of Stations KEMO-TV, San Francisco, Calif.; WECO-TV, Pittsburgh, Pa.; WSCO-TV, Newport, Ky.; and WBMO-TV, Newport, Ky.; and WBMO-TV, Atlanta, Ga.; and for Voluntary Transfer of Control of D. H. Overmyer Broadcasting Co., Inc., Permittee of Station KJDO-TV, Rosenberg, Tex.; In re Application of PHILADELPHIA TELEVISION BROADCASTING CO. (ASSIGNOR) AND U.S. COMMUNICATIONS CORP. (ASSIGNEE) For Assignment of License of Station WPHL-TV, Philadelphia, Pa.

Files Nos. BPC-5376, BTC-5377, BTC-5378, BTC-5379, BTC-5380; File No. BALCT-327

FEDERAL COMMUNICATIONS COMMISSION

10 F.C.C.2d 822 (1967); 11 Rad. Reg. 2d (P & F) 967

RELEASE-NUMBER: FCC 67-1312

December 8, 1967 Adopted

BY THE COMMISSION: COMMISSIONERS BARTLEY, COX, AND JOHNSON DISSENTING AND ISSUING STATEMENTS; COMMISSIONER LOEVINGER CONCURRING AND ISSUING A STATEMENT.

[*822] 1. The Commission has before it the above-captioned transfer applications, under which D. H. Overmyer proposes to transfer control of the permittees of five UHF television stations to U.S. Communications Corp. The Commission also has before it the above-captioned assignment application, which proposes to assign the license for station WPHL-TV, Philadelphia, Pa., to U.S. Communications Corp. Since all the above-listed applications involves stations in the top 50 television markets, the applications come within the purview of the Interim Policy Concerning Acquisition of Television Stations (5 R.R. 2d i71), enunciated June 21, 1965.

2. The Commission is of the view that a grant of the applications would foster the development of UHF television stations. This would be consistent with the Commission's efforts to provide a

more competitive nationwide television service to the public. It is, therefore, believed the public interest would be served by a waiver of the Interim Policy.

[*823] Accordingly, It is ordered, That the applications for the transfer of control of D.H. Overmyer Communications Co., Inc., permittee of stations KEMO-TV, San Francisco, Calif.; WECO-TV, Pittsburgh, pA.; WSCO-TV, Newport, Ky.; and WBMO-TV, Atlanta, Ga., from D. H. Overmyer to U.S. Communications Corp., Are granted.

It is further ordered, That the application for transfer of control of D.H. Overmyer Broadcasting Co., Inc., permittee of station KJDO, Rosenberg, Tex., from D. H. Overmyer to U.S. Communications Corp., Is granted; and

It is further ordered, That the application for the assignment of the license of station WPHL-TV, Philadelphia, Pa., from Philadelphia Television Broadcasting Co. to U.S. Communications Corp., Is granted.

FEDERAL COMMUNICATIONS COMMISSION, BEN F. WAPLE, Secretary.

[*833] CONCURRING STATEMENT OF COMMISSIONER LEE LOEVINGER

I concur in the Commission order permitting the transfer of the Overmyer interests because it seems to me that this will increase competition and diversity of source in the field of television broadcasting.

The transaction now before the Commission involves applications for approval of the transfer of construction permits for five UHF television stations and the license of one UHF television station from a financially weak, and possibly insolvent, enterprise to a financially strong one. Two objections are urged against the proposal. First, it is argued that a Commission policy against permitting transfers that will result in a licensee holding more than three UHF licenses is violated, and, second, it is objected that the transferor here will profit from sale of the construction permits, which is also contrary to Commission policy. These arguments are not without some force, and the issues are not free from all doubt, but, on balance, I think that the public-interest objectives of competition and diversity will be better served by permitting the proposed transactions than by forbidding it.

Present FCC rules set absolute numerical limits on the number of licenses (or construction permits) that can be held by a single licensee, and the limit for UHF television licenses is seven. Because such a numerical limitation is a crude measure of concentration the effort has been made to devise a more refined and discriminating rule. The most recent such effort resulted in the adoption by the Commission of an Interim Policy subjecting to exceptional scrutiny any

transaction that would result in one licensee holding more than two VHF or three UHF television licenses in the top 50 markets. That policy expressly recognizes that present licensees holding more than such number may continue to do so, and no divestiture is proposed or has been contemplated by the Commission.

A significant number of licensees now hold more than the number of licenses specified under the Interim Policy. If that policy is now construed or applied so that whenever any licensees (or permittees) seek to transfer their holdings the Commission will require that the group be broken up, this will inevitably result in decreased competition and increased concentration. One thing quite certain is that of the present group licensees it will be the weak ones (like Overmyer) rather than the strong ones (like RCA, Westinghouse, and GE) which will from time to time find it necessary or advantageous to transfer their stations. Consequently, the weaker of the group licensees will eventually be broken up and only the few every largest and strongest will survive. Further, the policy will prevent any other large or strong enterprise from acquiring group holdings. The result of such a course will be to leave us finally which a very few large and strong corporations holding the maximum number of licenses now permitted under the rules, while all others will be limited to two or three licenses, and will be prevented by FCC rule from acquiring broadcasting facilities that permit them to compete with or challenge the few large protected group licensees. Thus, I believe that the position contended for by Commissioner Cox proceeds from an inadequate and unrealistic economic [*834] and market analysis and moves in the direction of promoting monopoly rather than competition.

The contention that the transferor here may, in fact, profit from this transaction has more weight than the argument concerning competition. However, accounting involving substantial sums in complex corporate organizations is not yet an exact science. The Commission staff has examined and analyzed the showing made by applicants and has concluded that the financial arrangements do not, in themselves, afford any profit to the transferor for his construction permits, or otherwise violate Commission policy. I do not see that there is anything to be gained by holding a hearing on this issue.
A hearing is warranted only where we can specify factual issues and the nature of evidence that may be relevant to resolve such issues. A hearing is not justified merely because we are confronted with a difficult decision which it would be pleasant to defer. Difficult decisions very seldom become easier with the passage of time or the amassing of argumentative material in a diffuse hearing.

A hearing is required as a preliminary to denial of an application, since each applicant has a statutory last chance to try and persuade the Commission to change its mind before entering a final order of denial. But I do not think that the transaction here is so inconsistent with the statutory scheme or Commission precedent and policy as to warrant denial. On the other hand, a hearing in such a case as this would be a profligate expenditure of manpower, money, and time. It would, at the very least, delay the institution of new, competitive, UHF television service in five major markets for a period of years, perhaps many years. It might forever preclude the

establishment of another vigorous, competitive UHF group of stations. In comparison, the potential disadvantages of approval are slight. Accordingly, I concur with the majority of the Commission in voting to grant the application.

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

In light of Commissioner Cox's dissenting statement, it is inconceivable to me that a majority of the Commission could vote to grant its consent to this transfer.

If this case should become precedent, I think the Congress may as well repeal section 310(b) of the Communications Act and recognize that it is public policy that, once a permit is granted, it can be bartered at the convenience of the private parties, without placing on the Commission any responsibility for making a determination that the transfer is in the public interest.

The policy against profiteering from permits is one which has been followed by this Commission prior to the incumbency of any present member. The Interim Policy, worked out after years of effort, had as one of its prime objectives the prohibition against sales of blocks of stations. Some of us in the majority believe that this would lead eventually to less concentration of the medium into fewer and fewer hands -- even in the cases which were grandfathered in.
If I sense a trend in policies of multiple owners correctly, it will not be long before the antitrust laws will come into play, which will result in the divestiture by some of the grandfathered groups.

If there is a majority of the Commission prepared to scrap the Interim Policy, it should be done forthrightly and not on a case-to-case basis.

DISSENTING STATEMENT OF COMMISSIONER KENNETH A. COX

The majority's action here further erodes our Interim Policy against concentration of control of television facilities in the top 50 markets, but even more serious are the blows it strikes at our long-established policy against allowing the holder of a construction permit to sell it for more than the out-of-pocket expenses reasonably incurred in acquiring the permit. As a consequence, I view this action as one of the most serious instances of the Commission's inability or unwillingness to discharge its regulatory functions that I know anything about. And to [*824] compound the problem, no one in the majority is willing to state for the record a rational justification for the result reached. Presumably, no one will appeal this disposition of the matter, since both parties before us seek this outcome, but I do not think this absolves an agency like this Commission of the duty to state clearly the grounds for important actions which it takes -- and I don't think anyone will dispute that this is an important and difficult case.

It is a truism that hard cases make bad law, and I think this represents a classic example. Overmyer was a very successful operator of a chain of warehouses. He developed a thriving and expanding business which generated substantial income. He became interested in UHF television, and decided to commit a substantial part of his profits to it. He acquired six construction permits in major markets, put one station on the air (in Toledo), and is here seeking approval of the sale of the remaining five permits (for San Francisco, Pittsburgh, Newport, Ky. (the Cincinnati market), Rosenberg, Tex. (the Houston market), and Atlanta).

I do not question Overmyer's sincerity in acquiring the permits, nor do I suggest that he sought them for the purpose of speculating in permits or licenses. I think he intended to build and operate the stations and expected them to be profitable -- as I am sure they will be in time. He also embarked on an ambitious network project, which he turned over to others when he encountered financial difficulties. n1 These problems were encountered in his basic warehouse business. I am satisfied that he is selling the permits because he is no longer able to implement them as planned, but also, I think, to raise funds to meet his commitments in the warehouse business. I hope he is successful in resolving his difficulties in the warehouse field, but do not believe the Commission has any obligation to stretch its rules or policies to accommodate him. I think the majority's action in doing just that is a serious disservice to the public interest which cannot be justified in terms of sympathy for an individual who has fallen into financial difficulties in a nonbroadcast field.

n1 The network ceased operation after a very short period.

I recognize that the Communications Act contemplates the alienability of construction permits, but it is clear that Congress has acquiesced -- with approval, I believe -- in our long-established policy limiting the price to be received for such a permit to the seller's reasonable out-of-pocket expenses in acquiring the permit. I think this is a wise and necessary policy which should be rigorously enforced in order to prevent speculation in permits.

There are very few business in which a man who plans on starting a new enterprise but is unable to open for business can recover all, or substantially all, of his expenditures in trying to establish his projected business. Normally, his authorization to engage in the business is of no value because anyone can get one just like it, and his other expenditures may not represent items of any real value to someone else interested in his proposed business field. But anyone who wants to go into broadcasting must have a permit or a license, and it is usually much simpler to acquire an outstanding authorization than it is to prepare and file an original application, run the risk of competing applications, [*825] and, if any are filed, face the delay, cost, and risk of failure involved in a comparative hearing. So one who obtains a permit but later encounters difficulties can usually dispose of it without suffering any out-of-pocket loss. I think that is all anyone is entitled to expect, and our policy has always been to prevent such a permit holder from realizing a profit in disposing of his authorization. I think the majority is breaching that policy here.

We have been quite strict in holding sellers of permits to their actual expenses, and have often required the elimination of improper or doubtful items. Here, however, the majority has allowed Overmyer to claim credit for more than twice the amount spent directly by or for the five permittees. The balance ($666,514) represents unreimbursed staff services furnished the permittees by other Overmyer companies, including legal, accounting, payroll, personnel, messenger, public relations, and other services. The method of calculating this sum, as outlined by our staff, seems very complicated and open to possible abuse. Certainly, it represents a novel approach which I think would have to be tested in a hearing before it could be accepted.

But even if we assume that Overmyer has actually reasonably spent $1,331,900 in acquiring the five permits here involved, I think this transaction still violates fundamental policy. If one accepts this figure, this would mean, under our normal practice, that Overmyer could sell all his permits outright for $1,331,900. Certainly, that would be a clean transaction raising a minimum of questions. But that sum apparently is not large enough to take care of his other financial problems. If he is to be able to use the permits to resolve his difficulties, he must arrange matters so thast he can produce a substantially larger amount in the immediate future. So he agreed to sell 80 percent of his interest in the permits for $1 million -- all of which paid, as a so-called downpayment, on March 28, 1967, before the applications were filed with the Commission.

AVC then agreed to lend Overmyer $3 million -- again, behalf of this amount was advanced on May 3, 1967, with the remaining half to be turned over to him on closing of the stock purchase agreement. This large loan is to be secured by the pledge of Overmyer's remaining 20 percent of the permits, by second mortgages on certain of his nonbroadcast properties in which he has an equity of over $6 million, and by the execution of guaranties of the debt by Overmyer and all his companies. Great emphasis is placed on these security arrangements, and they seem adequate -- though apparently Overmyer could not raise a comparable sum from anyone other than AVC. But if, in fact, Overmyer wished to retain a 20-percent interest in the broadcast properties for the indefinite future -- and if AVC were willing to settle for 80 percent of the permits and to make the loans as a separate transaction purely on the basis of the security offered -- then why the option which permits AVC to acquire the remaining 20 percent during a 1-year period 3 years after closing under the stock purchase agreement? The price under the option is to be determined by an odd formula which capitalizes gross receipts, rather than net profits as in most cases with which I am familiar, but shall not exceed $3 million -- which just happens to be the amount AVC has agreed to lend Overmyer.

[*826] It seems to me that the realities of the situation are as follows. I think Overmyer is willing to dispose of 100 percent of his construction permits, but not for $1,331.900 which our policies would allow him to realize -- if one accepts his claims as to out-of-pocket expenses. I think he is willing to sell out completely for $4 million. On the other hand, I think AVC would much rather acquired all of Overmyer's interest in the permits, and that it is willing to pay $4 million to achieve this result. After all, I know of no other way in which AVC can acquire five authorizations in the

top 25 markets for so little -- or, indeed, at all. Our interim policy on concentration of control in the top 50 markets would limit them to a maximum of three -- I shall refer further to this below. In any event, if the company were to seek entry into these five markets in any other way it would find that no channels remain unassigned in Pittsburgh, and that there are one or more applications pending for the last channel in each of the other four. If it went into hearing it would face substantial costs, probably a significant dlay, and the very real likelihood that it would not prevail in all four cases -- and the possibility that it might lose all of them. Our criteria for comparative cases do not favor nonlocal corporations with no past broadcast experience whose principals do not propose to be personally involved in management of a station applied for -- and, if AVC did get one permit, this factor would weigh against it in the remaining proceedings if its opponents there did not have other broadcast interests. So, if AVC could not do business with Overmyer, it would have to try to buy permits or operating stations from a number of other parties holding authorizations for these markets. I think no one would deny that this would be difficult to accomplish, and that, even if possible, the cost would be much greater.

So, for these reasons, as stated above, I think that AVC is willing to meet Overmyer's terms -- but they were no doubt told that the Commission would not approve sale of the permits for so high a figure. The result, I think, is the elaborate transaction now before us. If I am right in my appraisal, consider how things will work out. Overmyer will get $4 million to meet his immediate and urgent needs -- in fact, he has already received $2,500,000 of that sum. While this is cast partially in the form of a loan, I don't think Overmyer will ever repay the $3 million which he is purportedly borrowing -- and I donht think the parties ever contemplated that he would. Instead, having received $1 million outright for 80 percent of his interest in these permits, Overmyer is getting an additional $3 million for the remaining 20 percent -- a markup of 12 to 1 for this last fifth of his present holdings. I think this represents profiteering from the sale of permits in violation of our past policies and practices. I think this entire complex transaction has been carefully designed to achieve exactly this heretofore prohibited result.

It is argued first, of course, that AVC may never exercise the option. It is true that is a possibility, but I think it is so unlikely that it can be ignored. AVC is clearly going into television on large scale, presumably after careful study of the prospects for these facilities. While no one thinks that independent UHF operation in these multistation markets will be easy, I think that all careful students of broadcast developments [*827] anticipate that UHF stations in markets the size of these five will become modestly profitable in a reasonable period of time and that they will eventually be very profitable. Thus, I think both parties except the option to be exercised, and I am morally certain that it will be.

Next, it is argued that the option price may be less than $3 million, since that is stated as a ceiling. But, as pointed out above, the formula for calculating the price is an unusual one, based on gross receipts instead of income. If the five stations have combined gross revenues of just $3 million in the fourth year after closing under the stock purchase agreement, then the maximum price will be payable. I think the parties fully intend this result, and that Overmyer -- having

gotten the $3 million in advance -- will never be required to repay the purported loan in that amount.

It is also contended that Overmyer's 20 percent stock interest may be worth more than $3 million by the end of 4 years, and that the option is, therefore, disadvantageous to him. As indicated above, I think this is quite likely -- but, if so, the increase in value will be largely due to additional investment by AVC in the construction and operation of these stations, and Overmyer will have no equitable claim to more than the 12 to 1 markup he is to get under the agreement. In fact, for all practical purposes the parties have made a present contract for the complete sale of Overmyer's five construction permits for $4 million -- they have simply deferred part of the transaction for up to 4 years in an attempt to get arount our policy of limiting the price for permits to the holder's reasonable expenses in acquiring them. In other words, I think the parties bargained for the sale and purchase of these permits as if our policies didn't even exist; then, having agreed to the overall price, they sought to fit their transaction to the policies which we have been following for years. The result is to violate the spirit of our rules in a way which I find intolerable.

The final aspect of the transaction to which I object is that it violates our Interim Policy against concentration of control in the top 50 markets. Overmyer acquired or applied for these permits before we adopted our Interim Policy in June 1965 and, since we stated that we did not presently intend to require divestiture of holdings in excess of the indicated limit, he has grandfather rights to build and operate these five stations -- in addition to the one he already has on the air in Toledo. But, in saying that we would not require divestiture, we went on to state that, if a holder of more than the specified maximum number of stations decided to liquidate his holdings, the parties to whom he sold would have to meet our policy. Thus, while Overmyer can sell his permits, he cannot confer his grandfather status on the buyer. Under our policy, AVC is not entitled to control more than three television stations in the top 50 markets. However, the two transactions the majority is approving here -- the second one involves acquisition of control of WPHL-TV, a UHF station in Philadelphia -- will result in AVC's acquiring control of six stations in the top 25 markets (Philadelphia 4, San Francisco 7, Pittsburgh 9, Cincinnati 16, Atlanta 19, and Houston 25). This is a flagrant violation of our policy -- and of the public interest in a diversely controlled broadcast system.

[*828] And, again, the majority does not state the grounds for its action. Its order simply recites the conclusory formula that "the applicants have affirmatively and compellingly shown that a grant of the applications would be consistent with the Interim Policy." n2 This is the same meaningless justification the majority has used in approving transfers of two other UHF stations in major markets in violation of the Interim Policy -- one in Boston and one in Cleveland n3 -- while, in approving an earlier transfer in Boston, they issued no order at all. n4 It is true that in the Harvey and Superior cases individual members of the majority wrote brief concurring opinions. However, none of these really considered the purposes of our Interim Policy or marshaled any facts in the particular case which were claimed to justify different treatment than

that we had said we would give in such situations generally. Instead, they talk of need for strong financial support for new UHF operations (though we said when we proposed the rule that we need not rely on multiple owners for the development of UHF); of the desirability of treating UHF as "favorably" as VHF although I do not think it favors a service to allow it to fall into relatively few hands, and we were trying principally to avoid concentration in UHF); and of the fact that grant of the application would bring a new service at the earliest possible time (which is true in every case). But there has never been a real effort to meet the objections of the minority or to justify the particular relief being granted in concrete terms.

n2 See note at the end of this opinion.

n3 Harvey Radio Laboratories, Inc., 8 R.R. 2d 660, adopted Oct. 20, 1966; Superior Broadcasting Corp., 11 R.R. 2d 211, adopted Sept. 19, 1967.

n4 New Boston Television, Inc., 7 R.R. 2d 857, adopted July 27, 1966.

It has been common in the past for certain members of the Commission to say that they did not like the pattern of concentration which has developed, but that they could not reverse the trend established by earlier members of the agency. It was to correct this, and put everyone on notice and treat them all equally, that our Interim Policy was announced. This was late in the game, but held the promise of preventing our expanding UHF television service from following the pattern of closely held ownership which has developed in VHF. But the majority which is approving this transaction has so eroded the policy that we seem well on the way to an even higher degree of concentration in VHF -- and just as high a level in UHF as well. Certainly, they cannot claim that their predecessors are responsible for this development, or that they do not know what they are doing. If the public eventually finds itself saddled with an undesirably closely held television system, my colleagues of the present majority will be responsible. Of course, they believe this is in the public interest. If this is so, why do they not state the reasons for this conclusion, instead of simply parroting the requirement of the policy that one seeking a waiver must make "a compelling affirmative showing" n5 in order to avoid designation of his application for hearing? I think they have a duty fully to explicate the grounds for the result they reach.

n5 Interim Policy on Television Multiple Ownership, 5 R.R. 2d 271, adopted June 21, 1965.

(NOTE. -- Since the preparation of my dissent I have received a revised draft of the order in which the paragraph in question has been changed somewhat. Rather than rewrite the entire section of my dissent [*829] dealing with this aspect of the case, with consequent increased delay, I will simply attach this added comment.) The order now reads as follows:

> The Commission is of the view that a grant of the applications would foster the development of UHF television stations. This would be consistent with the Commission's efforts to provide a more competitive nationwide television service to the public. It is, therefore, believed the public interest would be served by a waiver of the Interim Policy.

This represents a slight change, but I'm not sure it's an improvement. The original draft at least said that the applicants had made an affirmative and compelling showing in support of their efforts to avoid the operation of our Interim Policy. While I don't think that is true here, at least it recognized the standard we set for these cases -- which certainly is a high one requiring something more than a routine conclusion that the public interest would be served by grant of the application in the face of our policy statement.

Look at what is offered in support of this watered-down conclusion. The majority now says (1) that this action will foster the development of UHF television stations, and (2) that this is consistent with our efforts to provide a more competitive nationwide television service. I certainly favor the expansion of our growing UHF television service, but I am not willing to disregard sound, long-established policies or to ignore pending rule proposals simply because someone offers to build a UHF station. The development of UHF stations would also be fostered if Overmyer were to sell his permits to two or more parties -- so that no one would acquire control of more stations than our interim policy contemplates -- at prices aggregating no more than his reasonable out-of-pocket expenses in acquiring the authorizations. In any event, I do not think the majority can make a finding, on the basis of what is now before us, that there is such an unusual and urgent need for additional television service in these five communities that we must disregard important policies in other areas in order to rush these stations to completion. UHF is important, but not all-important.

Similarly, I am in favor of a more competitive nationwide television service. I have done what I could to promote that goal ever since I had some part in the efforts of the Senate Commerce Committee in 1956-57 to galvanize the Commission into action in this direction. But I do not think that our chances of getting an improved competitive climate depend upon our allowing profiteering from the sale of permits or permitting our burgeoning UHF service to fall into the same patterns of concentrated ownership and control which characterize the older VHF service.

In other words, I think the revised explanation of this action has no relevance to the facts of the case or the country's very real long-range interest in a widely based competitive television service in which UHF stations must play a growing part.

Also, since my dissent was written, Commissioner Loevinger has added a separate concurring opinion. I do not wish to prolong matters unduly, but would add the following brief comments.

Initially, he says that this transaction involves transfer of five construction permits and one license "from a financially weak, and possibly [*830] insolvent, enterprise to a financially strong one." To the extent this puts Philadelphia Television Broadcasting Co., the assignor of the license of WPHL-TV, into the same category financially as Overmyer, I think the statement is clearly mistaken. While Philadelphia Television has lost a substantial amount of money, as is true of virtually every new television station, there is nothing in the record before us to suggest

that it is "financially weak, and possibly insolvent." I do not think any argument can be made that we must approve assignment of its license in order to insure that the people of Philadelphia will continue to get a worthwhile and competitively effective service from WPHL-TV.

Commissioner Loevinger concedes that my arguments "are not without some force," but says that, on balance, he thinks the public-interest objectives of competition and diversity will be better served by approving this transaction than by rejecting it. What are the countervailing considerations he advances to justify this conclusion?

First, he notes that a number of licensees now hold more than the number of licenses specified under our Interim Policy, but that we have not proposed divestiture of any of their interests. This overlooks, however, that the proposed rule includes a note reading as follows:

> "NOTE 5. -- Paragraph (a)(2) of this section will not be applied so as to require divestiture, by any licensee, of broadcast facilities owned prior to , 1965. That paragraph will not apply to applications for assignment of license or transfer of control filed in accordance with sections 1.540(b) or 1.541(b) of this chapter, or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy if the assignment or transfer to the heirs or legatees does not create interests proscribed by the paragraph. Paragraph (a)(2) will apply to all applications for new stations, and to all other applications for assignment or transfer. Commonly owned "stations or stations prohibited by paragraph (a)(2) may not be assigned or transferred to a single person, group, or entity except as provided in this note." n6 [Emphasis supplied.]
>
> n6 Television Multiple Ownership Rules, docket 16068, adopted June 21, 1965, 5 R.R. 2d 1609, at 1620.

Furthermore, our Interim Policy stated:

> Divestiture will not be required, but commonly owned stations in excess of the number set forth in the proposed rule which are proposed to be assigned or transferred to a single person, group, or entity will be designated for hearing. n7
>
> n7 Supra, note 4, at 272 (par. 6).

These provisions clearly contemplated that the transfer of concentrated holdings would give us a chance to reduce such concentration. Commissioner Loevinger voted in favor of both the Interim Policy and the proposed rule, so I am at a loss to understand his apparent surprise that the policy is "now construed" to require breaking up a group on transfer. Furthermore, I cannot agree with his conclusion that such a policy would "result in decreased competition and increased concentration." Certainly, it cannot result in increased concentration of ownership, since the clear effect would be to substitute two or more separate owners for the single individual or entity to whom the group had theretofore been licensed or authorized. It may be true that

smaller, more closely held multiple owners are more likely to withdraw from [*831] broadcasting -- and, therefore, dispose of their stations -- than entities like RCA, Westinghouse, and GE. But even such limited reduction of concentrated ownership would inject additional competitive interests into broadcasting. But I think the crux of his position here is contained in the three sentences following:

> Further, the policy will prevent any other large or strong enterprise from acquiring group holdings. The result of such a course will be to leave us finally with a very few large and strong corporations holding the maximum number of licenses now permitted under the rules, while all others will be limited to two or three licenses, and will be prevented by FCC rules from acquiring broadcasting facilities that permit them to compete with or challenge the few large protected group licenses. Thus, I believe that the position contended for by Commissioner Cox proceeds from an inadequate and unrealistic economic and market analysis and moves in the direction of promoting monopoly rather than competition.

Again, in view of his support of the policy and the rule proposal, I simply cannot understand his position. The whole purpose of these actions was to prevent other large or strong enterprises from acquiring group holdings comparable to the existing concentrations which gave rise to our concern in this area. n8 So I must confess that I am amazed at his apparent view that we should fight an already undesirable degree of concentration by allowing other major group owners to develop. We would not be protecting the grandfathered group owners -- we simply indicated we would tolerate them. Admittedly, it would be more logical -- and I think desirable -- to reduce existing concentration to our proposed lower level. If Commissioner Loevinger wishes to lead a move in that direction, I will be happy to support him. If he is saying that the present owners of five VHF stations in the top 50 markets are presently a monopoly -- whose interests he seems to think I would be promoting by preventing AVC from acquiring six UHF stations in the top 25 markets -- then we should be doing more than just trying to restrict further development of concentrated ownership. We should be moving to deal with the existing monopoly. I do not think that present group ownerships -- however undesirable -- constitute monopoly in any accepted sense. If Commissioner Loevinger [*832] feels that we now have a monopoly power in broadcasting which can only be countered by the creation of equally powerful group holdings, then I think he should set forth his grounds for this belief and suggest appropriate action to deal with the problem. Actually, the holders of multiple-station interests have always contended that they enjoy no competitive advantage vis-a-vis independently owned stations in the communities where they operate. While I am inclined to doubt their claims, if they do have such an edge over individual competitors this should be a reason for reducing concentration, rather than allowing it to grow. In any event, I think that, if AVC were allowed to acquire three of the six stations here involved, it would be able, with its resources, to compete effectively against the multiple owners in these markets. I think these comments are quite applicable here. I do not think it needs all six stations to become an effective competitor.

n8 It is an interesting historical fact that Commissioner Loevinger was one of the principal movers in

> the effort to tighten our multiple-ownership rules, as was natural in view of his background in the antitrust field. When I used to dissent from actions resulting in local concentration in small communities, he would say that I was worrying about inconsequential aspects of the concentration problem, and that we should act, instead, to prevent concentration on the national level through the ownership of facilities in the maximum permissible number of major markets. That is precisely what we are trying to do, but he seems to have lost his enthusiasm for the project. See, also, his dissent in connection with the assignment of WCBM and WCBM-FM to Metromedia, Inc., minute No. 463-A-63, meeting of November 27, 1963, where he said: "Of more significance, the licenses held by assignee cover large concentrations of population. Assignee's AM and FM licenses are in the same communities, namely, New York City, Philadelphia. Cleveland, Kansas City, and Los Angeles. The total population of these metropolitan areas is about 25 million people. An additional 2,600,000 people live within the areas covered by assignee's television licenses outside of New York, Los Angeles, and Kansas City, where assignee has television as well as AM and FM stations. The transfer involved here will add the sixth largest metropolitan area with over one and three-quarters of a million people to the population encompassed within assignee's broadcasting markets. It seems to me that these circumstances in themselves suggest the existence of an issue involving the most important and delicate function entrusted to this Commission. The most significant task of this Commission is to insure diversity and dispersion of control of the media of mass communications and to prevent any tendency or incipient development toward monopoly or concentration in this field. The proper performance of this task requires, at the minimum, a careful inquiry, full examination, and deliberate judgment concerning any transaction that will significantly increase the market scope of an enterprise that includes a substantial percentage of the population within the market of the licenses which it already holds. However, the Commission here permits such a transaction with causal, cavalier, and perfunctory formalicies."

Secondly, Commissioner Loevinger says the contention that the transferor may profit from this transaction has more weight than the argument concerning competition, but that "accounting involving substantial sums in complex corporate organizations is not yet an exact science." I think this may come as a shock to the accounting profession, but surely it is clear here that Overmyer has not put more than $1,331,900 into the acquisition of his permits -- in fact, he claims no more than that. I don't think it requires any precise accounting to see that, appraised realistically, this transaction is really equivalent to a sale of his interests -- though in two steps -- for $4 million, which nets him a substantial profit. I do not think the staff concluded that this transaction does not afford any profit to Overmyer, as Commissioner Loevinger says. They recognized that the loan arrangements had to be carefully examined and simply said that "they" are consistent with the public interest. This view seems to have rested largely on the fact that the loans are fully secured by collateral, that they bear interest at a premium rate, and that the principal is repayable at the end of 3 years. I have no quarrel with the loan agreements as to their validity or legal effectiveness as between the parties -- but I object strenuously to the result which is to be achieved through these business arrangements. I think we have to look underneath the surface to the real nature of what the parties are accomplishing. I don't think the staff ever reached that stage.

Finally, Commissioner Loevinger refers to the cost in manpower, money, and time that would be involved in a hearing on this matter, and the delay in institution of new service in these five markets that would result. In the first place, if Overmyer had been content to sell his permits to two different buyers for no more than he reasonably expended in obtaining them, he could have

obtained approval of the transfers, without hearing, some time ago. He, not the Commission, chose to follow a course which presents the problems I have discussed. Even now, he need not go to a hearing -- and I doubt if he would, though we cannot deny his applications without affording him that opportunity. He can still comply with our rules and policies and get rather routine approval for the disposition of his permits. If delay in instituting a service is to be advanced as an argument against resort to the hearing process when serious issues are presented, then we simply cannot discharge our obligations.

DISSENTING STATEMENT OF COMMISSIONER NICHOLAS JOHNSON

I strongly regret the majority's faithlessness to Commission policy and its cynical refusal to attempt even a token effort at defending its result with reasons. I join the articulate and thoughtful opinions of my colleagues, Commissioners Cox and Bartley. See also my opinions in Harvey Radio Laboratories, Inc., 6 F.C.C. 2d 898, 903 (1966) (dissenting statement); ABC-ITT Merger, 7 F.C.C. 2d 245, 278 (1966) (dissenting opinion); 7 F.C.C. 2d 336, 343 (1967) (concurring statement); 9 F.C.C. 2d 546, 581 (1967) (dissenting opinion of Commissioners Bartley, Cox, and Johnson); Paris-County Broadcasting, Inc., 6 F.C.C. 2d 894 (1967) (concurring statement); Farragut Television Corporation, 8 F.C.C. 2d 279, 285 (1967) (dissenting statement); Houston Consolidated Television Co., 8 F.C.C. 2d 205, 206 (1967) (dissenting statement); Flower City Television Corp., 9 F.C.C. 2d 249, 262 (1967) (dissenting opinion); Superior Broadcasting Corp., 10 F.C.C. 2d 100 (1967) (dissenting statement of Commissioner Kenneth A. Cox, in which Commissioners Bartley and Johnson join).

Back to Top Back to Index