

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 CO., INC. FROM D. H. OVERMYER TO U.S. COM- MUNICATIONS CORP.	}	Docket No. 18950 Files Nos. BTC-5376, 5377, 5378, 5379 and 5380
--	---	--

APPEARANCES

Benito Gagvine, Herbert M. Schulkind and James K. Edmundson, on behalf of Overmyer; William S. Green, Joy L. Scharff and Leon J. Schachter, on behalf of U.S. Communications Corporation; and Richard M. Riehl, Thomas B. Fitzpatrick, Michael T. Fitch, A. Thomas Carroccio and William D. Silva, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted August 5, 1975; Released August 21, 1975)

BY THE REVIEW BOARD: BOARD MEMBERS EMERSON AND BERKEMEYER CONCURRING WITH SEPARATE STATEMENTS; BOARD MEMBER KESSLER DISSENTING WITH STATEMENT AND BOARD MEMBER EMERSON RESPONDING TO DISSENTING STATEMENT.

1. The above-captioned applications for the transfer of control of five D. H. Overmyer (Overmyer)¹ UHF television construction permits to U.S. Communications Corporation² were granted without hearing on December 8, 1967, by Commission Order, 10 FCC 2d 822, 11 RR 2d 967 (1967). Thereafter, the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce, which had conducted hearings on the Overmyer transfer,³ issued a report⁴ questioning, *inter alia*, the accuracy of the representations made to the Commission regarding the out-of-pocket expenses allegedly incurred by Overmyer in obtaining the construction permits

¹ Hereinafter the term "D. H. Overmyer" will be used to refer to Overmyer personally and the term "Overmyer" will be used to refer to the corporate permittees.

² The original stock purchase agreement, negotiated March 28, 1967, was between Overmyer and the AVC Corporation (AVC). All rights under the agreement were assigned by AVC to its wholly-owned subsidiary, U.S. Communications Corporation, on June 6, 1967, shortly before the filing of the transfer applications on June 30, 1967.

³ Hearings Before the Special Committee on Investigations of the House Committee on Interstate and Foreign Commerce, 90th Cong., 1st and 2nd Sess., serial 90-50 and 90-51, pts. 1 and 2 (1967-68). The hearings were held from December 15, 1967, through August 1, 1968.

⁴ 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). The report was issued on May 19, 1969. See also Appendix A, *D. H. Overmyer Communications Co., Inc.*, 20 RR 2d 1 (1970).

and developing the proposed stations.⁵ Subsequently, by Memorandum Opinion and Order, 25 FCC 2d 442, 20 RR 2d 1, released September 4, 1970, the Commission designated this matter for hearing. In so doing, the Commission did not set aside the applications for transfer of control; rather, its inquiry sought to determine: (a) whether Overmyer's out-of-pocket expenses were as claimed;⁶ and (b) whether D. H. Overmyer's actual expenses were sufficient to support his retention of a twenty percent interest in the station.⁷ The issues were designated as follows:

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 construction permits and, if so, whether he should be permitted to receive any consideration for the transfer of his interests.

On August 24, 1971, the Commission released a Memorandum Opinion and Order, 31 FCC 2d 203, 22 RR 2d 837 (1971), clarifying Overmyer's burden of proceeding: "the burden requires[d] . . . [it] to make a *prima facie* showing substantially corroborating . . . [its] alleged out-of-pocket expenses as were previously represented to the Commission." 31 FCC 2d at 204, 22 RR 2d at 839. In addition, the Commission shifted the burden of proof in this proceeding from Overmyer to the Broadcast Bureau.⁸

2. In an Initial Decision, FCC 73D-23, 27 RR 2d 685, released May 4, 1973, Administrative Law Judge Herbert Sharfman concluded that Overmyer had misrepresented to the Commission the amount of its

⁵ At the time of the transfer, Commission policy allowed no more than out-of-pocket expenses to transferors of construction permits; that policy is now codified in Section 1.597 of the Commission's Rules. Section 1.597(e)(2) provides in pertinent part: The Commission will not consent to the . . . transfer of control of the construction permit for an unbuild station if the agreements or understandings between the parties provide for, or permit, payment to the seller of a sum in excess of the aggregate amount clearly shown to have been legitimately and prudently expended . . . by the seller solely for preparing, filing, and advocating the grant of the construction permit for the station, and for other steps reasonably necessary toward placing the station in operation.

⁶ In a subsequent Memorandum Opinion and Order, 27 FCC 2d 982, 21 RR 2d 391 (1971), released in this proceeding, the Commission stated that it had concluded when designating the issues that it "had the affirmative duty to re-examine the Overmyer transfer of control agreement to be sure that the Commission's prior approval was not procured by fraudulent misrepresentations." 27 FCC 2d at 984, 21 RR 2d at 393.

⁷ Pursuant to the transfer agreement, D. H. Overmyer sold eighty percent of his interests in the five permits to AVC Corporation for one million dollars, i.e., approximately seventy-five percent of the figure that Overmyer represented to the Commission as its out-of-pocket expenses. At the time the hearing was designated, AVC's assignee, U.S. Communications Corporation, in return for agreeing to loan Overmyer three million dollars, held an executory option to purchase Overmyer's remaining twenty percent interest in the stations for an amount not to exceed three million dollars.

⁸ The Commission acted in response to a petition filed September 28, 1970, by Overmyer, with the Review Board, requesting that Issue 2 be deleted and that the burden of proof be shifted to the Broadcast Bureau; the Board denied the request to delete issues and certified to the Commission the request to shift the burden of proof. 27 FCC 2d 505, 21 RR 2d 17 (1971).

out-of-pocket expenses incurred in obtaining and developing the construction permits. The Presiding Officer emphasized, however, that his conclusion was predicated upon Overmyer's failure to demonstrate a reasonable correlation between represented and actual expenses and not from any "culpably false statement or intent to mislead the Commission." Additionally, he concluded under Issue 2 that no affirmative relief was possible.⁹ On December 28, 1973 (44 FCC 2d 834, 29 RR 2d 169), the Review Board remanded the proceeding to the Administrative Law Judge for additional findings and conclusions under the misrepresentation issue, stating that the Judge had erred in his resolution of the issue since it properly encompasses an inquiry into whether Overmyer intentionally misrepresented its expenses in securing approval of the transfer.¹⁰ Judge Sharfman's Supplemental Initial Decision, FCC 74D-29, was released on May 17, 1974.¹¹ Once again the Judge concluded that Overmyer had failed to prove its claimed out-of-pocket expenses incurred in acquiring and developing the permits (*i.e.*, "misrepresentation" in terms of the Initial Decision). Thus, he concluded that the need for an allocation formula to calculate unreimbursed services and facilities rendered to the five television companies involved herein was not established. However, pursuant to the Review Board directive that he focus on whether the "misrepresentation" was intentional or fraudulent,¹² he concluded that Thomas J. Byrnes, Overmyer's chief administrative and financial officer, deliberately and consciously misrepresented to the Commission that usable records to calculate Overmyer's out-of-pocket expenses were not available before September 1966.¹³ Despite this intermediate conclusion with respect to Byrnes, the Presiding Officer concluded, after determining that the hearing record failed to inculcate D. H. Overmyer personally, that under the terms of the remand D. H. Overmyer did not intentionally or fraudulently misrepresent to the Commission his expenses in securing approval of the transfer. Judge Sharfman's conclusion under Issue 2 remained unaffected.¹⁴

3. This proceeding is now before the Review Board on exceptions filed by the Broadcast Bureau and Overmyer. In essence, the Bureau challenges the Presiding Judge's resolution of the misrepresentation issue, arguing that the Judge committed fundamental error in not according decisional significance to Overmyer's failure to meet its burden of proceeding and in not recognizing that the Bureau's burden of proof was concomitantly reduced. The Bureau contends that Judge Sharfman's action in failing to attribute decisional significance to

⁹ It should be noted in this connection that the option, which ran from January 15, 1971, to April 19, 1972, had lapsed by this time.

¹⁰ The Board noted in that document that the application for renewal of Overmyer's Toledo television station WDHQ-TV is on deferred status pending the outcome of this proceeding and that Overmyer's qualifications to remain a licensee cannot be determined until the instant misrepresentation issue is completely resolved. The Board's action was in response to a petition for special relief or in the alternative, for remand, filed October 11, 1973, by Overmyer.

¹¹ The parties agreed at the January 16, 1974, conference that they would not offer additional testimony and that the resolution of the issue would be based on the existing transcript, to which they could direct additional written submissions.

¹² In this latter connection, the Judge indicated that fraud must be clear, precise, and indubitable.

¹³ The intermediate conclusion was based upon the rapidity with which Byrnes shifted his ground (from "inflation" to "inaccuracy") as an explanation for his reluctance to rely on the book entries, *i.e.*, the 6000 series accounts. See paragraph 9, *infra*.

¹⁴ The Judge noted that "Overmyer has stated that he stands ready to transfer to ATC or its designee whatever remaining interests he may still have in any of the permits without any additional consideration." Note 19 of the Supplemental Initial Decision, *supra*.

Overmyer's failure to substantially corroborate its out-of-pocket expenses resulted in imposing an unrealistic and unfair burden, *i.e.*, that it must establish malicious intent on the part of Overmyer clearly, precisely, and indubitably.¹⁵ Arguing that this misrepresentation issue is no different than other misrepresentation issues specified in the past, the Bureau alleges that the Administrative Law Judge imposed too stringent a standard of proof in resolving the issue. Finally, the Bureau excepts to the fact that the Judge merely set out the contentions of the parties, rather than drawing definite findings of fact.¹⁶ Overmyer, in full agreement with the ultimate conclusion under the misrepresentation issue, excepts to the Judge's intermediate conclusions concerning: (a) the failure by it to establish a need for using the allocation formula; and (b) the "misrepresentation" by Byrnes. Neither the Broadcast Bureau nor Overmyer objects to the Judge's conclusion under Issue 2.

4. The Board has reviewed the Initial Decision in light of the exceptions and briefs, the arguments of the parties,¹⁷ and our examination of the record. Based upon this review, we are of the opinion that the Bureau failed to sustain its burden of proof, *i.e.*, that it failed to establish by a preponderance of the evidence that Overmyer fraudulently misrepresented its claimed out-of-pocket expenses for the permits to the Commission. Accordingly, we agree with the Administrative Law Judge's ultimate conclusion that, based upon the record here before us, an adverse determination cannot be made under the designated misrepresentation issue. Since, however, the Presiding Judge failed to draw adequate findings of fact, we are, perforce, required to make such findings. To the extent that the Judge's findings of fact and conclusions of law are not inconsistent with the substituted or supplemental findings and conclusions of law herein or the rulings on exceptions contained in the attached Appendix, they are adopted.

5. *Factual Background.* According to Overmyer, because of the financial difficulties of D. H. Overmyer's principal contractor, the lack of available general credit, and the need for funds for other entities in his corporate complex, D. H. Overmyer agreed on March 28, 1967, to sell eighty percent of his interests in five UHF television construction permits¹⁸ to AVC Corporation for a total consideration of the lesser of eighty percent of his out-of-pocket expenses attributed to the acquisition of the authorizations and development of the stations or one million dollars. In addition, in return for a loan of three million dollars, he granted AVC an option to purchase the remaining twenty

¹⁵ The Bureau attempted to sustain its burden of proof at the hearing by demonstrating that records of staff expenses prior to September 1966 were, in fact, available to calculate Overmyer's out-of-pocket expenses, contrary to Byrnes' representation in the transfer applications, and that such calculations based on these records reflected that specific departmental allocations of staff expenses were materially overstated. The Bureau took the position that misrepresentation could be inferred if the findings established a substantial disparity between what was claimed and what should have been claimed in out-of-pocket expenses.

¹⁶ The Presiding Officer characterized the Bureau's proposed findings as "contentions" and simply inserted them, along with Overmyer's responses, in the Initial Decision. See paragraphs 13-17, *infra*.

¹⁷ Oral argument was held before a panel of the Review Board on June 17, 1975.
¹⁸ D. H. Overmyer owned one hundred percent of the stock in the following television permittees: D. H. Overmyer Broadcasting Co., Inc., permittee of KJDO-TV, Rosenberg, Texas; D. H. Overmyer Communications Co., Inc., permittee of WECO-TV (now WPGH-TV), Pittsburgh, Pennsylvania; WSCO-TV (now WXIX-TV), Newport, Kentucky; and WBMO-TV (now WATL-TV), Atlanta, Georgia. In addition, Overmyer held eighty percent of the stock of the permittee of KEMO-TV, San Francisco, California, and an irrevocable option to purchase the remaining twenty percent.

percent interest in the stations.¹⁹ At the time of the agreement, the Overmyer companies consisted of three operating groups—warehousing, communications, and leasing—and a management staff organization that provided the operating groups with services.²⁰

6. In preparation for filing the transfer applications, D. H. Overmyer personally approved the use of an allocation formula, devised by his chief administrative and financial officer, Thomas J. Byrnes, which would permit the recovery of unreimbursed management staff expenses incurred by the Overmyer companies from July 1964 through March 1967—the period of time in which Overmyer was involved in the television projects—for services rendered to the five communications companies.²¹ Simply described, in designing the formula, Overmyer calculated the staff communications expenses of four months from September to December 1966 (\$129,281.00) as a base period figure and then had its supervisory personnel estimate the levels of communication activities of the staff departments for other periods (same level for other 8 months of 1966, 75% of 1966 level for 1965, 10% of 1966 level for 1964, and 75% of 1966 level for the first three months of 1967) and then multiplied these levels by the figure found for communications expenses for the base period.²² The expenses of each of the relevant years as calculated were as follows:

¹⁹ As noted, *supra*, the option, which ran from January 15, 1971, to April 14, 1972, was never exercised. The status of the applications at the time of the Initial Decision was as follows:

KFMO-TV—San Francisco—silent from 3/31/71; transferred for assumption of liabilities plus \$3,500 for furniture.

WPGH-TV—Pittsburgh—silent since 8/16/71; in the hands of a receiver.

WXIX-TV—Newport, Kentucky—transferred to Metromedia for assumption of liabilities and funds expended after August 1, 1971.

WATL-TV—Atlanta—silent since 3/31/71; transfer of construction permit pending—consideration \$28,500 for out-of-pocket expenses and \$1000 for equipment.

KJDO-TV—Rosenberg, Texas—Permit surrendered and cancelled.

By Memorandum Opinion and Order, 36 FCC 2d 653, 25 RR 2d 127 (1972), the Commission granted its consent to the transfer of control of the license of WXIX from U.S. Communications Corp. to Metromedia, Inc. Judge Sharfman noted that his Initial Decision was not intended to affect the finality of the transfer to Metromedia.

²⁰ The warehouse operation consists of sixty regional and branch offices throughout the country. The leasing company rented equipment to various customers, including affiliated Overmyer companies. The communications group included an operating UHF station in Toledo, Ohio (WDHO-TV); an applicant for a UHF station in Dallas; and the five UHF station companies involved in this proceeding. Overmyer also had an interest in a network organization that was intended to originate programs for national distribution.

²¹ Staff expenses included the costs of the following departments:

President's Office, Controller's Department, Purchasing & Office Services, Human Relations Department,

Treasurer's Office, Personnel Department, Data Processing Department,

Legal Department, Corp. Relations Department,

Advertising and Public Relations Department, Taxes and Insurance Department, Acquisition Department,

Finance and Development Department, Auditing Department.

²² The following discussion shows in greater detail how Overmyer calculated its expenses. In arriving at an estimated allocation of staff expenses for communications, supervisory personnel of the various staff departments estimated the amount of time their employees spent on communications activities during the four-month base period and allocated to communications expenses that portion of the employee's salaries that reflected the communications activities. A comparison of the portions of salaries allocated to communications with the total department salaries, including the salaries of employees who were not engaged in communications, was made and the percentage found was multiplied by the total department expenses (salary expenses only represented sixty percent of staff expenses) to arrive at an amount of staff expenses that could be allocated to communications for the base period. The amount allocated to communications for the base period represented 11.1% of the overall departmental expenses. Having calculated the staff expenses for communications for the base period, the supervisory personnel next estimated the levels of communications activities of the staff departments for other periods and multiplied the percentages of those levels by the figure found for communications expenses for the base period; thus, estimated out-of-pocket expenses for communications were found for the 1964-1967 period. From this figure, Overmyer deducted 20% to cover the expenses for the Toledo station, the Dallas application, and the Overmyer network. Finally, an amount was added that represented the leasing company expenses chargeable to the five station companies. Also see paragraphs 43 and 44 of the Initial Decision, *supra*.

1966—\$387,843 (129,281 × 3)
 1965—\$290,882 (75% of \$387,843)
 1964—\$ 38,784 (10% of \$387,843)
 1967—\$ 72,721 (75% of \$387,843 + 4)

Overmyer deducted 20% from the aggregate sum in order to cover the expenses of his communications interests which were not involved in the transfer applications, and, finally, added the leasing company expenses chargeable to the five station companies in order to reach his ultimate figure. Based on these calculations, Overmyer, through Byrnes' affidavit, subsequently represented in the transfer applications to the Commission that its out-of-pocket expenses were in excess of \$1,300,000, including \$666,514 of unreimbursed staff expenses calculated under the allocation formula.²³

7. *The Byrnes Statement.* Byrnes' affidavit, which was submitted in connection with the transfer application, represented, *inter alia*, that "[t]he cost of 'staff' services was never separated out when they [staff services] were rendered by the Warehouse and other companies prior to September 1966." "Such costs," he declared, "especially the non-personnel costs of the various functions were buried within the total expenses of the Company involved." "Since September 1, 1966," Byrnes continued, "the management staff functions have been housed in a separate corporation, The Overmyer Company, Inc." (TOC) enabling "the non-personnel as well as the personnel costs of the separate 'staff' departments involved to be pinpointed and determined with substantial accuracy." Thus, Byrnes explained, when it became necessary in the early part of 1967 to consider the preparation of applications to transfer the five stations, he had available four months of records—September to December 1966—from which an allocation formula could be devised to recover Overmyer's unreimbursed staff expenses.²⁴

8. *Overmyer's Presentation.* At the Commission hearing, Overmyer's affirmative case consisted of written testimony of key company executives, including D. H. Overmyer and Byrnes,²⁵ as well as a copy of the original material associated with the transfer application. The latter material, which set forth the specific percentages of total department expenses allocated to the Overmyer Communications Company (OCC) during the four-month base period, detailed the nature of the staff functions carried out on behalf of OCC by the Treasurer's Office and by the Legal, Advertising & Public Relations, and Finance & Development Departments. In the written testimony, each executive essentially repeated his earlier representations, reaffirmed his belief in the accuracy of the original submissions, and disclaimed any intent

²³ The uncontroverted facts relating to Overmyer's claimed direct expenses are adequately detailed in paragraphs 35-36 of the Initial Decision, *supra*, and, consequently, need not be repeated here.

²⁴ Also attached to the transfer applications were the affidavits of key supervisory personnel in which each averred that the allocation of expenses as applied to his department was either reasonable or understated. The General Counsel of the Overmyer Companies stated in his affidavit that it was his opinion that the formula resulted in a substantial understatement of Legal Department costs for communications for the non-base period of more than fifty percent. The Treasurer also indicated that the amount claimed for his department's communications activities was conservative and the actual expenditures exceeded it by a significant amount.

²⁵ Three of the exhibits have letters attached to show that Overmyer endeavored to check with its employees to see if the estimates of time spent on communications were correct.

to deceive the Commission. Specifically, it was D. H. Overmyer's belief that he and his various companies had expended in excess of two million dollars in connection with the acquisition and development of the five permits that were proposed to be transferred; he stated that he accepted one million dollars for eighty percent of the stock in the companies because he thought he could not get a better price. D. H. Overmyer reviewed the applications prior to their being placed on file with the Commission, and it was his belief that the material in the applications was accurate, that the estimates therein were made in good faith, and that there was no intent on his part or on the part of his personnel to misrepresent any fact to the Federal Communications Commission. He also stated that he had not attempted to influence or instruct any persons as to a total figure of expenses to be reached; rather, he had issued instructions that the applications be as accurate as possible. Byrnes indicated in his statement that it was his opinion that the estimates were as accurate as could be ascertained; he said he knew of no procedure other than the allocation formula that could have been utilized to secure the information required for the transfer applications within the applicable time limitations. Byrnes added that no precise records had been kept on Overmyer personnel performing functions for other Overmyer companies and that no particular pay records had been kept for specific service functions performed by Overmyer personnel for various other Overmyer companies.

9. *The Bureau's Case—Pre-September 1966 Records of Staff Expenses.* Disputing Byrnes' statement that the cost of staff services was not separated out prior to September 1966 and questioning the need of the base period for the allocation formula,²⁶ the Broadcast Bureau introduced into evidence a chart of accounts reflecting that Overmyer had, in fact, recorded its staff expenses²⁷ in a single series of accounts—the 6000 series—since 1964. Byrnes had answered under cross-examination with respect to the 6000 series that one type of expenses (home office) included both staff salaries and the salaries of executives of the Warehouse Company, who were line or operating people, whereas line people were not included in the records for TOC since TOC was comprised of the administrative employees who reported to Byrnes.²⁸ On further cross-examination when asked whether Bureau Exhibit 4²⁹ refreshed his recollection that pure staff expenses were being carried in the 6000 series of accounts prior to the transfer of TOC, Byrnes replied, "I think it shows an attempt to. But we were not satisfied that they were accurate." Byrnes subsequently testified that he had a "gut reaction" that things were in a mess; he indicated it had been his contention that "we" were not going to get the operating companies on a proper basis as long as "we" were unsure whether improper expenses

²⁶ Byrnes' explanation of why he used the four-month period of TOC records for the formula was that he had four months of TOC records available and, thus, it was unnecessary to concern himself with having to use figures from the past of which he could not attest to their accuracy.

²⁷ Although the 6000 series lists an amount for each of the departments' total staff expenses, it does not segregate the communications expenses from the total amount of expenses.

²⁸ It was on the basis of this statement that the Judge found that Byrnes did not use the 6000 series of accounts because the expenses were "inflated". See note 13, *supra*.

²⁹ The exhibit contains a reproduction of accounting worksheets for the 6000 series of accounts.

were being charged to them. Testifying that the bulk of the money responsible for the problems had come from staff home office groups, he said that the solution had been to isolate the problems corporately with the creation of TOC. Byrnes was also asked whether the 6000 series was correct or accurate; he answered that on a number of occasions, operating people had challenged an amount somewhere in the statements under the 6000 series and "all too often the analysis showed incorrect postings to those accounts." Finally, Byrnes testified that it was his opinion that the only safe place from which he could count on getting figures that were defensible was the TOC group; he added ". . . subsequent events, such as the audit and the number of entries in the various companies, have justified my position, as far as I am concerned."³⁰

10. *Erroneous Department Allocations.* With respect to the specific departmental allocations of staff expenses calculated under the formula, the Bureau introduced a number of exhibits into evidence to demonstrate alleged discrepancies between Overmyer's claimed and actual expenses. The material included, *inter alia*, copies of records of Overmyer's total staff expenses for fiscal years 1964-65, 1965-66, and the first three months of 1967;³¹ a document breaking down the allocations of the department expenses from 1964 through 1967, which was prepared by the Congressional Subcommittee;³² two documents that reflect transfers of various staff people near the end of 1966;³³ and two statements, one by Robert Adams and one by Robert L. Bryan, which commented on the various staff services allegedly rendered on behalf of OCC.

11. In rebuttal, Byrnes testified that the 1967 first-quarter staff expense records were not available at the time the transfer applications

³⁰ Byrnes testified that an audit of the Overmyer books showed that there were in excess of 5000 adjusting journal entries to the books of the Warehouse Company, little or none to the books of TOC, and none of the closing transaction of the five construction permits. Bureau counsel requested that Overmyer provide the Bureau with a resume of the kind of adjusting entries and particularly the year-end adjusting entries that the auditors required to be corrected; the Presiding Officer, however, denied the request on the grounds that the probative value of the audit had not been established, that it would be difficult and time-consuming for Overmyer to secure this information, and that it was appropriate to close the record at this time.

³¹ These records reflect the following information:

Fiscal year September 1964 through August 1965	\$1,912,702
Fiscal year September 1965 through August 1966	2,314,492
Base period September to December 1966	1,160,160
January to March 1967	748,455

Overmyer used the calendar year in estimating its communications expenses; Overmyer's records, however, employ the fiscal year running from September through August.

³² The Subcommittee document breaks down the yearly cost of each staff department for the years 1964-67 by calculating the same percentage of 1966 costs for each department as Overmyer used in calculating the levels of communications activity. Thus, for example, Overmyer claimed: (a) that \$15,062 of the advertising and public relations department's expenses was allocated to communications during the base period, (b) that the level of communications activity during the remainder of 1966 was the same as the base period, and (c) that the levels of communications activity for 1964 was 10% of that of 1966. Therefore, to find the amount to be allocated to advertising for 1964, using the Subcommittee's approach, one would multiply \$15,062 by 3 (base period was four months) to find the 1966 total of \$45,186 and then multiply that figure by 10%, the level of activity in 1964. The amount would be \$4,519. Overmyer's approach, on the other hand, was simply to take the total amount of expenses allocated for communications for the base period—\$129,281—and multiply that figure by 3 to find the total 1966 amount allocated for communications; then multiply the 1966 total by 10% to find a total 1964 amount. No effort was made by Overmyer to separate out precisely what would have been the cost of advertising for 1964; thus, there is no indication that the percentage of a specific department's expenses to the overall department costs remained the same during 1964-1967 as it was during the base period.

³³ The staff people allegedly transferred worked in the Controller's Department and the Legal Department.

were filed. Similarly, he indicated that the allocation breakdown of the 1964-1967 expenses was not available at the time the applications were filed. In this connection, counsel for Overmyer indicated that he was willing to stipulate that some other method of calculation could have been used and that the allocation theory could well have been in error when reduced to specific figures. With respect to the transfer of personnel from the Legal and Controller's Departments, Byrnes explained that some of the personnel were not, in fact, transferred; he acknowledged that where actual transfers did occur, there were overcharges for the first-quarter expenses of 1967. He also stated, however, that there were undercharges for the periods from 1964 to 1966 and that the net result was an undercharge of expenses on Overmyer's part. Byrnes also disagreed with the implication of the Adams statement and a supporting exhibit (Exhibit 16) that purported to show that OCC did not begin advertising until February or March 1966. In his statement, Robert Adams, Executive Vice-President and Chief Operating Officer of Overmyer's broadcast interests from early 1964 to December 1965, had indicated that OCC's advertising and public relations were handled generally by himself with the outside firm of the Softness Group, and that until the summer of 1965 there had been no separate advertising or public relations department.³⁴ In contrast, Byrnes testified that the advertising exhibit only represented OCC's direct advertising; he said, "Our advertising programs at that time on which we spent approximately one million dollars through 1966 was a total institutional type of advertising because in all areas the thrust of our company was development." Byrnes added that the advertising was intended to benefit all of the Overmyer activities in one way or another.³⁵

12. Finally, Byrnes disagreed with some of the points in Bryan's statement. Robert L. Bryan, chief executive officer of OCC from the end of February 1966 to December 1966, indicated in his statement that he believed that most of the communications staff devoted their time until mid-May 1966 to getting the Toledo station on the air; that OCC did most of its own accounting and advertising; and that OCC personnel did the bulk of the real estate work themselves. In connection with the real estate work, Bryan acknowledged that the real estate people in the Finance and Development Department (F&D) provided OCC people leads with respect to studio and transmitter sites, but he added that the leads did not prove satisfactory. In rebuttal, Byrnes explained that accounting was a staff function and that Bryan probably had been referring to budgetary submissions. With regard to the comment about the Toledo station, Byrnes stated that Bryan was wrong and that the station must have had thirty or forty people of their own before it went on the air. He also disagreed with Bryan's recollection of the real estate matter. Byrnes testified

³⁴ At the Subcommittee hearings, Byrnes was queried about Overmyer's indirect advertising expenses. Having only a schedule showing base period expenses, he answered, "I certainly don't have all of that detail at my disposal at the moment. I can say this: In the area of both advertising and public relations we maintain[ed] staff departments during this period."

³⁵ The affidavit of Arthur Dorfner, Executive Vice-President of the various Overmyer Communications Companies, which had been attached to the transfer of control applications, reflects that nearly daily meetings were held by the advertising department personnel with the OCC people. Total advertising and public relations expenditures during the pertinent years exceeded \$900,000.

that the "communications group had absolutely no one who knew anything at all about real estate. Our real estate people in our financial and development department were asked to submit potential sites in around Atlanta, Pittsburgh" and other cities. He stated that the sites were unsatisfactory because the communications people had not given any specific guidelines of what they wanted, *i.e.*, that a site could not be too close to an airport or be behind a hill.³⁶ With respect to the other F&D functions, including OCC financing for which Bryan was primarily responsible, Byrnes testified that the department was divided into two types of personnel: (a) the development type of person who traveled the country selling the Overmyer concept to bank and insurance officials; and (b) the finance man who would take the order if the development people could interest either type of lending official to lend Overmyer funds. Byrnes asserted it was the nature of the Overmyer Company that everyone entered in when pursuing financing.³⁷

CONTENTIONS OF THE BROADCAST BUREAU

13. Pointing out in its exceptions that the proposed findings in the Initial Decision are merely recitations of the parties' contentions, the Bureau excepts to the Judge's failure to make definitive findings of fact. Substantively, the Bureau's argument urges the adoption of its contentions concerning: (a) the allocation formula; (b) the alleged erroneous departmental allocations for communications; (c) the deductions for Overmyer's retained communications interest; (d) the leasing fees; and (e) the charging of expenses allocated elsewhere.

14. Regarding the allocation formula, the Bureau alleges that the allocated communications expenses for those intervals of time other than the base period were predicated on the assumption that staff expenses remained at a fixed level throughout 1964 to 1967. Contending that the level of expenses was not constant and indeed that the base period was near the peak period, the Bureau argues that the use of the September to December 1966 period as a basis for computing indirect charges carried with it the potential for inflating Overmyer's expense claims. Using figures taken from the parent company's books in conjunction with the base period fraction of 11.1% of the total departmental expenses allocated to communications, the Bureau contends that the formula had the effect of overstating Overmyer's claimed out-of-pocket expenses by \$227,084.00.

15. With respect to the numerous contentions relating to the alleged erroneous departmental allocations for communications, the Bureau first alleges that there was an overcharge of \$12,586.00 claimed for the Controller's Department because Overmyer failed to recognize

³⁶ G. R. Silcox, Vice-President of Finance and Development of The Overmyer Company, indicated in an affidavit that the amount of time required to check out each potential site had been inordinate because of technical problems: zoning, public relations, and a variety of other difficulties; as well as inexperience of their personnel in the television field.

³⁷ Byrnes was also questioned about the Treasurer's Department. The testimony that Overmyer presented to the Congressional Subcommittee reflected that OCC accounted for eighteen percent of the number and twenty-nine percent of the value of Overmyer's non-real estate loans. Bureau counsel asked whether the loans were used for corporate purposes other than communications: Byrnes testified that "[t]hey might have been. . . . The money was all pooled and disbursed out of a central account." The record reflected that Overmyer's measure of the Treasurer's activity was based on an allocation of its employees' time rather than on the total number or value of the loans.

that TOC had been directly charging OCC from September to December 1966 for basic accounting and related services, and that certain Controller personnel had been transferred from TOC directly to OCC in January 1967. Next, the Bureau points out that Overmyer attributed 14.14% of the costs of the Personnel Department to OCC. Using a health insurance summary for the months of August and September 1965, the Bureau attempts to establish the ratio of the total number of employees for whom the Personnel Department performed services to those in OCC alone. The Bureau states that the summary reveals a total of 336 employees, of whom only two were from OCC; thus, it concludes that the proper estimate for services rendered by the Personnel Department to OCC should have been less than one percent. Third, claiming that OCC's legal work had been performed by its own staff, the Bureau asserts that Overmyer should not have claimed reimbursement for legal expenses between September 1966 and March 1967. The assertion is based on a statement by Bryan that during his tenure (March-September 1966) OCC had its own house counsel whose work was reviewed by the head of the legal department, and on the fact that two attorneys had been transferred from the Legal Department to OCC near the beginning of September 1966. The Bureau's fourth contention relates to the Treasurer's Office expenses of which 12.5% were allocated to OCC. Alleging that Overmyer contended that the appropriate measure of the Treasurer's activity was the non-real estate loans serviced by that department for OCC (eighteen percent of the loans and twenty-nine percent of their value), the Bureau contends that the number and value of the loans in terms of how the money was spent represented only 7% and 16.6%, respectively, rather than the 18% and 29% posited by Overmyer. Adding in mortgage loans, the Bureau argues that the loans attributed to OCC represented less than two percent of the total loans, and that \$680,000 of that amount represented a loan to the Toledo station.

16. Fifth, the Bureau points out that Overmyer claimed 17.8% of the Advertising and Public Relations Department expenses attributable to OCC. Treating advertising and public relations separately, the Bureau alleges that there was no corroboration of statements made before the congressional subcommittee by Arthur Dorfner, Vice-President of OCC, and Thomas Byrnes relative to public relations. Dorfner's statement detailed the activities carried out by the department with respect to public relations and Byrnes's statement related to billing by the public relations firm, *i.e.*, that the firm sent one bill for all Overmyer companies. Other evidence casts doubt on these statements, the Bureau asserts; specifically, the objector alleges that Overmyer had no department of advertising and public relations before the summer of 1965, that OCC had its own public relations firm, and that OCC never called on the Overmyer staff for assistance because of the lack of experience of Overmyer's public relations man. With respect to advertising, the Bureau argues that the evidence contradicted Overmyer's representations that its advertising was institutional. The Bureau alleges that no advertising campaign formalized for OCC until after Adams left in December 1965, and that it was the advertising agency, not the Overmyer staff, that was asked to devise the plan.

Pointing out that OCC's advertising expenditures for the entire year totalled only \$8.20, the Bureau concludes that there was no justification for allocating any portion of the Advertising and Public Relations Department for 1964, 1965, and 1967. Finally, the Bureau notes with respect to the F&D Department that 13.4% and 14.2% of the staff expenses were claimed for home and regional offices of this department, respectively, the function of which was to search out financial institutions willing to lend Overmyer money for warehouse construction, and to investigate and secure real estate sites. With respect to finance, the Bureau states that the chief executive of OCC—Adams and later Bryan—who was responsible for obtaining OCC financing, obtained various loan commitments for OCC without assistance from the finance people and that F&D people were only used during 1966 with respect to the San Francisco, Houston and perhaps the Atlanta stations. Regarding real estate, the Bureau points out that F&D investigated at least 1,750 prospective sites in acquiring 175 for warehouse purposes. The Bureau argues that although F&D would have had to investigate at least two hundred sites to find the five sites that were acquired or leased for OCC, assuming the same proportion, that there is nothing in the record to indicate that such a number of sites was involved.

17. With respect to the remaining contentions, the first Bureau allegation is that Overmyer should have deducted more than twenty percent of its total communications out-of-pocket expenses for retained communications interests, namely, its only operating station, WDHO-TV, Toledo, Ohio; the Overmyer network; and the Dallas application. The Bureau argues that although no network allocations were made for OCC, OCC's primary efforts beginning in July 1966 had been devoted to establishing the network and little progress had been made on the construction permits with the exception of the San Francisco station. To further buttress its allegations, the Bureau refers to an OCC document, allocating home office expenses, that reflects that 100% of the OCC staff expenses in 1964 and 40% in 1965 and the first-quarter of 1966 were for the Toledo station. The Bureau next contends that Overmyer's claim of \$34,330.00 in indirect expenses relating to the unreimbursed services of the Overmyer Leasing Company (LOC) is open to serious questions. Because Overmyer recovered \$93,839.00 of payments made by OCC to OLC on equipment leases, the Bureau contends that Overmyer had recovered \$393,991.00, not counting the \$34,330.00 above, for out-of-pocket expenses on a cash investment of only \$300,152.00. Finally, the Bureau contends that since Overmyer distributed all of the expenditures in the 6000 series of accounts for the 1964-1965 fiscal year to the cost of constructing particular warehouses or as an offset against the income of the parent company, no indirect expenses were left for which Overmyer could have recovered. The Bureau points out, however, that Overmyer did claim and recover approximately \$219,788.00 for this period.

CONCLUSIONS

18. "As a general rule 'one who has the burden of proof must produce evidence which removes the issue or fact as to which the burden relates from the realm of conjecture and establishes its truth with reasonable

certainty. Ordinarily, the requirement is satisfied by a preponderance of evidence.'” *St. Cross Broadcasting, Inc.*, 49 FCC 2d 996, 997, 31 RR 2d 1666, 1668 (1974). Here, the Bureau contends that its calculations (derived from available staff records in conjunction with the allocation formula) reflect that Overmyer overstated its actual expenses by \$227,084.00 and that it has submitted evidence which indicates the existence of specific erroneous departmental allocations in Overmyer’s claims. In our view, however, the record evidence supports neither proposition. Thus, although the Bureau could have met its burden of proof under this issue had it established that there was a substantial disparity between Overmyer’s claimed and actual expenses, it failed to do so. The Bureau’s calculations cannot be accepted since there is neither any record evidence concerning how the supervisory personnel arrived at the levels of communications activities for the periods other than the base period, nor any record support upon which to conclude that the 11.1% fraction of total departmental expenses devoted to communications expenses found in the base period was also true for other periods. Thus, we cannot determine on the basis of the record that the Bureau’s estimate of communications expenses is any more accurate than Overmyer’s estimate of the expenses. See paragraph 20, *infra*. Moreover, we believe that the Bureau’s showing set forth in paragraphs 13–17, *supra*, regarding the specific erroneous departmental allocations falls short of establishing fraudulent misrepresentation.

19. Regarding the Bureau’s first specific contention, the Board finds no record basis for concluding that Overmyer assumed a fixed level of staff expenses throughout 1964 to 1967, thereby potentially inflating its expense claims. To support such a contention, the same percentage of communications expenses to total expenses found for the base period (11.1%) would have had to have existed throughout the full period and as noted earlier in this paragraph, there is no record support for such a finding, nor does an analysis of Overmyer’s allocation formula reflect such a usage. Rather, Overmyer’s statement that it compared only the levels of staff activity attributable to communications in extrapolating the base period data for other periods is not controverted by the record evidence. The Board also finds unpersuasive and without record support the contention that Overmyer claimed an average of \$12,586.00 for Controller’s Department expenses. The document upon which the Bureau relies (Bureau Exh. 11A) to show that from September to December 1966 TOC was directly charging OCC for accounting services is not self-explanatory, and, in any event, Overmyer’s controller informally advised the Bureau that he believed that the disputed expenditure was charged to the Toledo station, which was not involved in the transfer. Moreover, Byrnes’ testimony regarding the transfer of Controller personnel indicates that Overmyer had slightly understated rather than overstated its net expenses relative to the Controller’s Department expense. With respect to the Bureau’s third contention, the Board does not believe that the record evidence reflects that Overmyer acted improperly in charging 14.14% of the Personnel Department expenses to OCC. Byrnes testified as to the efforts of that department in recruiting and processing applicants for positions with OCC; moreover, it is unclear upon looking at the health program summary that only 2 of 336 Overmyer employees are covered by the insur-

ance plan. In any event, even assuming that the summary shows that only two OCC employees are covered by the plan, the Board does not believe that any adverse inferences that could possibly be drawn are sufficient to demonstrate that an improper amount was, in fact, claimed by Overmyer.

20. The Board also finds no basis in the record to support the Bureau's next contention that Overmyer claimed improper legal expenses. Edmund M. Connery, General Counsel of the various Overmyer companies, stated, while testifying as to the various legal activities conducted by TOC for OCC, that the allocation formula resulted in an understatement of legal costs for the 1964 and 1965 periods by more than fifty percent. Byrnes' testimony regarding the transfer of certain legal personnel before or during the base period also indicates that legal expenses were understated; furthermore, there is no indication in the record that OCC did all of its own legal work after the transfer of the two attorneys to OCC. Neither is the Board persuaded that Overmyer allocated an excessive amount of the Treasurer's Office expenses to OCC. Contrary to the Bureau's characterization of the record that the measure of the Treasurer's Office was the non-real estate loans serviced by that office, a review of the record reflects that Overmyer's allocation of expenses was based upon the amount of time expended by office personnel on behalf of OCC. In this regard, Frank J. Lake, Treasurer of the Overmyer companies, avowed that the claimed amount was conservative and, indeed, the actual amount expended exceeded it by a significant amount. The Board, although suspicious of the amount claimed, also rejects the Bureau's contention that Overmyer improperly charged expenses of the Advertising and Public Relations Department to OCC. Byrnes and Arthur Dorfner, who at the time was Executive Vice-President of OCC, both testified as to the work performed by that department for OCC. In addition, Byrnes testified (and the Board believes there is not enough record evidence to support a conclusion to the contrary) that Overmyer, who spent a million dollars on advertising through 1966, utilized an institutional type of advertising that was intended to benefit all of the Overmyer activities. The last contention regarding alleged erroneous departmental allocations relates to the F & D Department. The Board also finds that this contention lacks merit. G. R. Silcox, Vice-President of F & D, who calculated the time spent by F & D personnel for OCC, testified that an inordinate amount of time was required by F & D personnel to check out potential sites for OCC, and, in corroboration, Byrnes testified as to the extensive efforts of the F & D Department to help obtain financing for OCC. Thus, while the amounts apparently claimed (see note 32, *supra*) for advertising and the F & D Department have not been shown to be reliable, there is no record support for concluding that such expenses are, in fact, inaccurate.

21. It is the Board's view that the record evidence does not indicate that Overmyer should have deducted more than twenty percent of its claimed out-of-pocket expenses for retained communications interests. There is evidentiary support for the findings that the services performed by TOC for the Toledo station were substantially diminished or virtually eliminated when the station became fully staffed in May 1966; that the Dallas application never progressed beyond the appli-

cation stage and, thus, did not require the scope of staff services needed for those cities where permits were issued; and that the Overmyer network acquired its staff shortly after formation and only required limited services from the Overmyer staff. The possible variance of the OCC allocations of home office expenses from the figure used in the allocation formula does not, in the Board's view detract from this evidence. Byrnes testified that the allocation formula submitted to the Commission dealt with the allocation of expenses of non-communications personnel headquartered in another company and that it had no direct relationship to the activities of the OCC employees themselves or to the allocation of expenses used internally by OCC. The Board also rejects the Bureau's contention that a serious question exists concerning Overmyer's claims for unreimbursed services of the Overmyer Leasing Company (OLC). There is nothing in the record to contradict Overmyer's explanation that under the transfer agreement, AVC had a right to purchase all equipment leased to the permittee at cost and that the recovery of payments on equipment leases by OCC to OLC was therefore necessary to offset the credit AVC received for rent previously paid by OCC. The additional claim of \$34,330.00 represented profit foregone by OLC. Finally, the Board rejects the Bureau's contention that Overmyer could not recover any indirect expenses for the 1964-1965 fiscal year, since Overmyer had used up the expenditures in the 6000 series of accounts by charging them to warehouse construction or as an offset against income. Overmyer explained that although it had erroneously recorded its capitalization of home office expenses in a 1965 entry, it corrected the entry in 1969. Overmyer claims that, in any event, the expense was incurred and properly claimed as out-of-pocket costs.

22. Moving from the allegations regarding specific erroneous departmental allocations, advanced by the Bureau to sustain its burden of proof, we cannot fully agree with the Bureau's argument that the Administrative Law Judge committed fundamental error in not according decisional significance to Overmyer's alleged failure to meet its burden of proceeding and in not recognizing that the Bureau's burden of proof was concomitantly reduced. Although we believe that Overmyer's submission of affidavits of supervisory personnel attesting to the accuracy of the allocation formula (without additional supporting documentation, records, and an adequate explanation regarding how the estimates of times for communications expenses were derived), cannot be considered as a *prima facie* showing substantially corroborating its alleged out-of-pocket expenses, we are of the view that Overmyer met its burden *with respect to alleged specific wrongdoings* by submitting testimony of its supervisory personnel, each of whom denied that he intentionally misrepresented to the Commission Overmyer's out-of-pocket expenses. *WMOZ, Inc.*, 36 FCC 201, 1 RR 2d 801 (1964), stay granted, FCC 64-227, released March 18, 1964; reconsideration denied 36 FCC 1467, 2 RR 2d 1057 (1964); remanded to the Commission *sub nom. WMOZ, Inc. v. FCC*, 120 U.S. App. D.C. 103, 344 F.2d 197, 4 RR 2d 2004 (1965). If U.S. Communications Corporation's option granted by Overmyer were still executory—or had been exercised—or if the value of Overmyer's remaining interests were anything other than nominal, perhaps void-

ing the option or requiring Overmyer to transfer his remaining interests in the five permits to U.S. Communications Corporation would have been warranted in light of Overmyer's failure to make a *prima facie* showing. Suffice it to say that given the facts before us, we need not make any determination as to whether Overmyer's out-of-pocket expenses were sufficient to support a retention of a twenty percent interest in the five stations.

23. Therefore, in conclusion, based upon the Bureau's failure to sustain its burden of proof under the issue specified herein, we are unable to make an affirmative finding on the basis of the record here before us that D. H. Overmyer fraudulently misrepresented to the Commission his out-of-pocket expenses incurred in obtaining and developing the construction permits by the Overmyer companies and that Issue number 1 must be resolved in Overmyer's favor. As stated above, Issue number 2 is moot.

FEDERAL COMMUNICATIONS COMMISSION,
LEONIDAS P. B. EMERSON, *Member, Review Board.*

APPENDIX

RULINGS ON EXCEPTIONS OF THE BROADCAST BUREAU

<i>Exception No.</i>	<i>Ruling</i>
1-----	Granted in substance.
2-----	Granted. Although the audit report would have been helpful at the hearing in determining the accuracy of Byrnes' representations concerning his testimony that the 6000 series records were ignored because of their inaccuracies, the Judge's error of not admitting the report into evidence was not decisionally significant in light of the scope of the specified issue and in light of our finding that the Bureau failed to sustain its burden of proof under that issue.
3-----	Denied. The paragraph excepted to is an adequate reflection of the record evidence.
4-----	Granted. But see par. 22 of this Decision.
5-----	Denied. The exception is predicated upon an incomplete reading of par. 12 of the Supplemental Initial Decision.
6, 14-----	Granted in substance. A finding of fraudulent misrepresentation may be founded upon a less stringent standard, namely, the preponderance of the evidence. Also see ruling on exception 2, <i>supra</i> , with respect to the probative weight which should be accorded Overmyer's refusal to provide the audit report.
7-----	Granted in substance. See ruling on exception 2, <i>supra</i> .
8, 9, 10-----	Denied. The record evidence does not support the conclusion that Overmyer fraudulently misrepresented its claimed out-of-pocket expenses.
11-----	Granted to the extent that the second sentence objected to does not accurately reflect the Presiding Judge's ultimate conclusion and denied in all other respects for the reasons stated in this Decision.
12-----	Denied as being of no decisional significance.
13, 15-----	Granted. It is well established that the gross misconduct and fraud of an employee will be imputed to the licensee. <i>Continental Broadcasting, Inc.</i> , 15 FCC 2d 120, 14 RR 2d 813 (1968), reconsideration denied 17 FCC 2d 435, 16 RR 2d 30 (1969), affirmed <i>sub nom. Continental Broadcasting, Inc. v. FCC</i> , 142 U.S. App. D.C. 70, 439 F.2d 580, 20 RR 2d 2126 (1971), cert. den. 403 U.S. 905 (1971); <i>Eastern Broadcasting Corp.</i> , 8 FCC 2d 611, 10 RR 2d 383 (1967).

- 16 ----- Denied. The Presiding Judge correctly concluded that the record evidence is inadequate in this significant regard. But see ruling on exception 13, supra.
- 17 ----- Granted in substance. See ruling on exception 6, supra.
- 18 ----- Denied for the reasons stated in this Decision.

RULINGS ON EXCEPTIONS OF OVERMYER

- 1, 2, 7, 15 ----- Granted. We do not agree with the Presiding Officer that Byrnes shifted from inflation to inaccuracy as his basis for reluctance to rely on the 6000 series of accounts. Byrnes' statement that the 6000 series included certain operating people came in response to a question as to whether line expenses were segregated from staff expenses; the response was not in reference to why he chose to disregard the records of the 6000 series of accounts.
- 3, 4, 6, 11 ----- Denied. See rulings on Bureau exception 2, supra.
- 5 ----- Granted. The finding excepted to is controverted by the record evidence.
- 8, 9 ----- Granted. The record evidence does not support the conclusion that Overmyer's failure to substantiate its expenses was the proximate result of Byrnes' misrepresentation. Also see ruling on exception 1, supra.
- 10 ----- Granted in substance. Par. 28 of the Supplemental Initial Decision erroneously indicates that the finding of intentional misrepresentation could be based upon Overmyer's failure to corroborate its witness' testimony by documents in its own possession.
- 12, 16, 21, 22 ----- Denied as being of no decisional significance in light of Overmyer's failure to corroborate its out-of-pocket expenses.
- 13, 18 ----- Granted. The proposed findings are an adequate and accurate reflection of the record evidence.
- 14, 23 ----- Granted to the extent that certain line expenses were included in the 6000 series of accounts and that those records failed to segregate communications expenses from expenses in general. Denied in all other respects as contrary to or unsupported by the record evidence.
- 17 ----- Denied as unsupported by the record evidence.
- 19 ----- Granted to the extent indicated in this Decision, and denied in all other respects as unsupported by the record evidence.
- 20 ----- Denied as unsupported by the record evidence. Also see ruling on exception 12, supra.
- 24 ----- Denied. See par. 22 of this Decision.
- 25, 28 ----- Denied. See par. 22 of this Decision.
- 26, 27 ----- Granted in substance. See par. 20 of this Decision.
- 29 ----- Granted for the reasons stated in this Decision. But see par. 22 of this Decision.

**CONCURRING STATEMENT OF BOARD MEMBER
LEONIDAS P. B. EMERSON**

In addition to the findings and conclusions in the Board's decision, I would also hold that the evidence reflects that Byrnes made a misrepresentation of a material fact to the Commission by initially declaring that the costs of staff services were never separated out by the Overmyer companies prior to September 1966 (see paragraph 7 of Board's decision).¹ Not only was this statement false and misleading,

¹In connection with the Judge's conclusion of law regarding Byrnes' statement, i.e., that to hold Overmyer at fault there must be more than a determination that officers or employees of the Overmyer companies misbehaved within the scope of their general authority, it is well established that gross misconduct and fraud of an employee will be imputed to the licensee. *Continental Broadcasting, Inc.*, 15 FCC 2d 120, 14 RR 2d 813 (1968), reconsideration denied 17 FCC 2d 485, 16 RR 2d 30 (1969), affirmed *sub nom. Continental Broadcasting, Inc. v. FCC*, 142 U.S. App. D.C. 70, 439, F.2d 580, 20 RR 2d 2126 (1971), cert. den. 403 U.S. 905 (1971); *Eastern Broadcasting Corp.*, 8 FCC 2d 611, 10 RR 2d 383 (1967).

but it also served to insure the non-disclosure of potentially relevant evidence (*i.e.*, the records of staff expenses prior to September 1966) until Byrnes testified to the contrary during the hearing.² However, this proceeding centers on whether Overmyer fraudulently misrepresented its out-of-pocket expenses to the Commission, and the Bureau has failed to sustain its burden of proof in this regard. In light of Byrnes' subsequent testimony acknowledging the existence of the records, but asserting that such records were ignored because of their inaccuracies, I believe that it would have been helpful in determining the accuracy of Byrnes' representations if Overmyer had willingly submitted the audit report containing the adjusting entries for the 6000 series (see footnote 30 of Board's decision).³ Nonetheless, I am reluctant to remand this case to an Administrative Law Judge for a further hearing to determine whether the audit report does, in actuality, support Byrnes' assertion, particularly since Overmyer has pending before the Commission an application for renewal of Station WDHO-TV where, unlike here, an effective sanction could be applied if Overmyer were found to lack the requisite character qualifications to be a Commission licensee. Thus, if the Commission deems that an evidentiary hearing with respect to the renewal of Station WDHO-TV is warranted in light of this opinion, such a hearing would be a more appropriate forum in which to assess the significance which should be accorded to Byrnes' misrepresentation. Moreover, the proceeding could also provide for a complete inquiry into the effect of Overmyer's failure to substantiate its claimed expenses and correlatively, the correctness of Byrnes' representations concerning the accuracy of available records.

CONCURRENCE OF BOARD MEMBER BERKEMEYER

I concur with the ultimate conclusion reached in this Decision, namely, that the record evidence does not support a finding that Overmyer misrepresented its claimed out-of-pocket expenses to the Commission. I disagree, however, with the conclusion reached by Board Members Emerson and Kessler in their separate opinions that Byrnes made a material misrepresentation of fact based on an inconsistency between his initial statement in the transfer application concerning staff expense records and his testimony during the course of this proceeding. A lack of inconsistency is readily apparent upon examination of all of Byrnes' representations in this specific regard.

Byrnes initially represented the following in an affidavit attached to the transfer applications:

² Even when Byrnes' statement is viewed in the most favorable light, it can only be characterized as a half-truth. Thus, the evidence reflects that staff expense records, the 6000 series, were available—a fact known to Byrnes—but that those records apparently failed to segregate communications expenses from expenses in general. In addition, certain line or operating expenses may have been included in those records. See paragraph 9 of Board's decision. Thus, although knowledge of the existence of the staff records might not have helped in determining the amount of Overmyer's communications expenses, disclosure of the existence of these records would have alerted the Commission at the time of the filing of the transfer applications, *i.e.*, approximately eight years ago, that records were available and this knowledge may have led to further exploration at that time concerning methods to derive Overmyer's actual communications expenses.

³ I do not believe that the material submitted by Overmyer following oral argument aids the Board in resolving whether the 6000 series records were inaccurate. The material attached to the records, and the affidavit of William Chi, merely contain further conclusory statements that the financial records of the Overmyer companies prior to September 1, 1966, were unreliable.

The cost of the 'staff' services was never separated out when they were rendered by the Warehouse and other companies prior to September 1966. Such costs, especially the non-personnel costs of the various functions, were buried within the total expenses of the Company involved.

On February 7, 1972, the first session at which Byrnes appeared, he testified:

City expenses and regional expenses were separated from home office expenses. But home office expenses are both line and staff people in the Overmyer company. We are in the same joint accounts. They were not separated. That is why we formed Overmyer Company. [TOC] This was one of my problems in the very beginning. And I think for about a year or a year and a half prior to when we did formulate, I did endeavor to convince Mr. Overmyer that we create a separate staff company, so that we could properly get into one place a non-operating, non-line expenses. That is how the Overmyer Company came into being. Prior to that time, [September 1966] if you would look back at those accounts, which you referred to before, the so-called 6000 accounts were selling and administrative salaries. My salary would have been in there. My secretary's salary would have been in there. Mr. Overmyer's salary would have been in there. But so would have all of the executives of the Warehouse Company, who were line people, all in that same series of accounts, because that was the D. H. Overmyer Company. And all expenses would be the same all the way down so that everybody except field operating people were in that particular area. That was my problem. That is why I felt it had to be segregated. (Tr. 269-270.)

In response Bureau counsel asked:

So, am I right, then, that prior to the formation of the Overmyer Company, the 6000 series of accounts would reflect more expenditures than would be, that were reflected subsequent to that?

Byrnes:

I can explain my own way, if you don't mind. If we can take a point in time, let's take the year 1965 through 1967. Let's leave 1966 out for a minute. In 1965 all employees of the company who were not engaged at the branch level in the field would have had their expenses, salary, and other related expenses in this series, the 6000 series. If exactly the same people existed two years later in 1967, there would have been two 6000 series; one for the Overmyer Company alone and one for the remaining warehouse administrative and selling people. (Tr. 270-271.)

On June 9, 1972, the last day of the hearing sessions, Byrnes replied to a question by his counsel:

Well, here we get back to my reason for wanting to have to create TOC. TOC in a sense is all 6000, basically. There could be some other miscellaneous item, of course, but basically the pure corporative administrative group should be basically just 6000 accounts. Unfortunately, in the warehouse group, for instance, which is the biggest company, they had a headquarters staff of their own, and they had 6000 numbers, but they weren't our kind of administrative.

These were really line people. For instance, the president of the warehouse company or the general sales manager or vice president of operations of the warehouse company dealt only with the warehouse company. He was not an administrative employee of the company. Only these persons who reported to me were administrative employees. Those were the ones who I forced into TOC so that we would have a clear interpretation of what our corporative administrative overhead was, because this was eventually—had to be allocated to the various companies it serviced. (Tr. 515-516.)

And when Bureau counsel questioned Byrnes at the very end of the session as to whether Byrnes had testified earlier that the type of people included in the 6000 series of accounts prior to the formation of TOC were actually more than pure administrative type of people, Byrnes replied, "Yes". (Tr. 608.)

Byrnes initially represented that line and staff expenses were never separated out in the 6000 series prior to September 1966. And, he persisted—without reservation or contradiction—in this assertion during the entire course of the proceeding, whether answering questions about the accounting difficulties encountered in the series prior to that time, or directly describing the accounting system for staff expenses. While Byrnes also testified that the 6000 series of accounts was not utilized in computing expenses because of inaccuracies, this testimony can, in no way, be interpreted as an admission that the series segregated line and staff expenses. At worst, his testimony can be characterized as ambiguous. Finally, aside from Byrnes' testimony, there is no other record evidence which establishes that Byrnes' original representation was false.

DISSENTING STATEMENT OF BOARD MEMBER SYLVIA D. KESSLER

1. As stated by Overmyer's counsel repetitively at the oral argument in this proceeding before the Review Board, the crucial question presented for decision is whether a fraud was perpetrated by the Overmyer companies in the subject transaction. Thus, at the outset, it is desirable to define this word. Simply put, as shown by *Bowyer's Law Dictionary* and *Black's Law Dictionary*, the word "fraud" may be defined, as follows:

Fraud is the false representation of a material past or present fact, made with knowledge of its falsity or a reckless disregard of its truth or falsity, which the other party, acting reasonably, relies upon to his detriment. In contrast, misrepresentation,¹ is less technical than fraud; it may be made honestly² and may relate to future conditions, while fraud must be made knowingly and must relate to present or past material facts. Both misrepresentation and fraud may also result from a failure to disclose.³

2. Other major questions required to be resolved in this proceeding are these:

(a) Whether in a series of applications filed June 30, 1967, seeking Commission approval of the transfer and assignment of several construction permits, as well as its approval of reimbursement for out-of-pocket expenses relating to the development of

¹ Cf. *FCC v. WOKO, Inc.*, 329 U.S. 223, 227 (1946), where Justice Jackson remarked: "The fact of concealment may be more significant than the facts concealed." See also *Lorain Journal Co. v. FCC*, 122 U.S. App. D.C. 127, 133, 351 F.2d 824, 830 (1965), cert. denied 383 U.S. 967 (1966), where Judge Leventhal, writing for the U.S. Court of Appeals, stated:

We do not welcome a gigantic bureaucracy second-guessing corporate management on details. But it is useful that the regulatory agencies be alerted and fairly and fully informed upon the emergence of a situation identified as a pressure point by law or regulation.

A cardinal assumption of the regulatory system is undercut by a pattern of false or evasive reports.

* * * * *
Counsel also argue that businessmen can not be held to a standard of conduct as sophisticated as that which may be reasonably demanded of a lawyer. Even businessmen are held to high standards of punctilio when they are in positions of joint venture. . . .

² Compare *S.E.C. v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 200 (1963). Here the Supreme Court rejected the defense that the respondent's advice was honest in the sense that he believed it was sound. The Court said that it is the practice itself, i.e., failure to disclose, which operates as a fraud. See also, generally, the topic "Liability of Public Accountants to Third Parties", 46 ALR 3rd 979, 997. Also see "Public Accountant—Liability", 54 ALR 2d 324. In this connection it is of significance to note that fraud also may be perpetrated by silence when there is a duty to speak; and by half truths which are misleading. 37 *Am. Jur. 2d Fraud and Deceit* § 20.

³ See note 2, *supra*.

those construction permits, the chief financial officer of the Overmyer companies made representations relating to so-called indirect staff expenses (those expenses incident to the performance of services by Overmyer's headquarters personnel connected with the development of these construction permits) which were relied upon by this Commission in granting its consent to the assignments and transfers and its approval of reimbursement for claimed out-of-pocket expenses for so-called indirect staff expenses amounting to \$666,514; and

(b) Whether the record also reveals the chief financial officer's failure to disclose material facts; and

(c) Whether this record establishes that these material representations relating to so-called indirect staff expenses have been shown to be misrepresentations, made by the chief financial officer with the knowledge of their falsity or with a reckless disregard of their truth or falsity; and

(d) Whether it may reasonably be said that this Commission would have, in all probability, acted differently⁴ had it known either (i) that there were misrepresentations of fact, or (ii) the true facts as now revealed by this record, by not approving such claimed expenses for indirect staff services in the amount of \$666,514 purportedly covering the cost of staff services performed by general headquarters staff of Overmyer companies for the period July 1964-March 1967; and

(e) Whether this record establishes by substantial evidence that:

(i) there was misrepresentation, failure to disclose, and fraud with respect to the initial representations; and

(ii) there was misrepresentation and fraud with respect to the expenses, *per se*, of \$666,514 which were approved by the Commission.

3. The answers to these major questions set forth above are unequivocally "yes" based upon (a) a reasoned analysis of the evidence, including the implied admissions of the chief financial officer, and (b) fundamental principles of law. For it is an elementary principle of law that "[w]here a party intentionally or by design misrepresents a material fact or produces a false impression, in order to mislead another . . . there is a positive fraud in the fullest sense of the term." *Bowyer's Law Dictionary*, 1305 (3rd rev. 1914) (emphasis supplied), citing a long line of cases. Hence, (a) the single act of the initial misrepresentations and failure to disclose material facts, standing alone, constitutes positive fraud, and (b) the other evidence relating to the claimed expenses, *per se*, (i.e., that the \$666,514 of claimed expenses was actually something substantially less) establishes positive fraud

⁴ See the Commission's Order, 10 FCC 2d 822, released December 11, 1967, approving the transaction, with three Commissioners dissenting, but not questioning the accuracy of representations, *per se*. Instead, the dissenting Commissioners questioned, among other matters, the complicated allocation method of calculating the sum of \$666,514. See also para. 13, *infra*, where the pertinent portion of the one dissenting opinion, joined in by the other two Commissioners, is set forth *verbatim*. See also para. 13, *infra*, quoting the testimony of the then Chairman before the House Subcommittee in 1968 that there was nothing before the Commission in 1967 "to suggest a misrepresentation in the submissions to the Commission." Cf. *Jack O. Gross, tr. as Gross Broadcasting Co.*, 27 FCC 2d 957 (1971); 34 FCC 2d 780 (1972); 38 FCC 2d 56 (1972), where a finding could not be made that the Commission would have, in all probability, acted differently.

by a combination of acts. Stated another way, fraud when sufficiently proved and ascertained, can consist of a single act. It need not consist of a combination or series of acts, nor need it be compounded by other facts and circumstances despite the fact that in the instant case, this positive initial fraud is indubitably compounded by other facts, as will be shown below. In addition, the totality of the evidence in this record establishes fraud by a combination of acts.

4. In sum, it is my view that the initial representations in the original applications which were relied upon by the Commission, as well as the failure to disclose material facts, created a *false impression* of those facts. This constitutes a positive fraud on the integrity of this Commission's processes and the public interest, amply demonstrated (a) by the investigation of this matter deemed necessary by the House Subcommittee, even though that investigation included other facets of this case not here material, and (b) by the resulting need for this adjudicatory proceeding. Indeed, it is my further view, contrary to the position of Overmyer's counsel, that these initial representations are not "slender reeds upon which to rest a conclusion of misrepresentation", of failure to disclose, and of fraud. It is undebatable that these initial representations in 1967 were, at the least, one of the proximate causes of what has ensued over this eight year period of time, at huge cost to the government and in substantial injury and detriment to the integrity of the Commission's processes and the public interest. For if the Commission had not relied upon and had not accepted these 1967 initial representations of the chief financial officer as true and accurate statements, and had not approved reimbursement for these \$666,514 of claimed indirect staff expenses, it is also probable that this transaction would not have given Overmyer the funds he so desperately needed in 1967 to avoid bankruptcy due to the financial straits of his companies, and that this transaction would, therefore, have probably collapsed. In any event, at the least, it may reasonably be said that this specific aspect of the transaction (approval of reimbursement for Overmyer's indirect staff expenses in the amount of \$666,514) would not have been one of the prime subjects of the House Subcommittee's investigation and hearings; nor would there have been a need for this adjudicatory proceeding.

5. At this juncture, several observations are pertinent with respect to the Judge's Initial Decision and the Supplemental Initial Decision. First, even a casual reading of his decisions will demonstrate that he believed unequivocally that the Commission's institution of this proceeding was ill-conceived and "misbegotten". Secondly, he took a constricted view of the proceeding narrowly interpreting the issues to be limited to the question of fraudulently claimed expenses, *per se*, (*i.e.*, that the \$666,514 of claimed and approved expenses actually totaled something substantially less), even though the Judge in earlier parts of his Initial Decision repeated the specific recitation in the Commission's designation Order that there were substantial questions presented concerning the accuracy of other representations relating to these out-of-pocket expenses. Thirdly, by constricting the scope of this proceeding and by narrowly defining the issue, the Judge, in effect, has held that the Commission condoned, *sub silentio*, these 1967 initial misrepresentations irrespective of the fact that *it was not until 1972 when they were, for the first time, unfolded in the record of this proceeding.*

For example, at paragraphs 41 and 45-48 of his Initial Decision and at paragraphs 13-14 of his Supplemental Initial Decision, it is crystal clear that the Judge recognized these initial misrepresentations on the basis of his own findings of fact set forth therein. Nevertheless, at paragraph 20 of his Supplemental Initial Decision he, in his own words, abandoned them.

6. In sum, it may reasonably be stated that the Judge's decisions are based upon an erroneous assessment of the issues, the facts, and the law governing this case. For it is clear, contrary to the Judge's assessment of the law, that if fraud is established by this record, Overmyer, as the sole recipient of the fruits of that fraud, is charged as a matter of law; with it. 37 *Am. Jur. 2d Fraud and Deceit* §§ 311-312.

7. Suffice it to say that there is nothing in the Commission's designation Order or in any subsequent document issued by it requiring the narrow construction placed upon it by the Judge's interpretation and personal views; nor can I agree with the separate views of Board Member Emerson. Clearly, the recitation in the designation Order that there were serious questions concerning the accuracy of representations constitutes *notice* that these 1967 representations were also at issue in the proceeding. True as it may be (a) that the designation Order could have been more skillfully drafted, and (b) that the Bureau could have sought an enlargement of issue No. 1 when it ascertained the existence of records which had been initially represented as non-existent, Overmyer has not claimed that it had *no notice* that these initial representations are a focal question in this proceeding. At most, it has asserted that it is the Bureau's burden of proof to establish fraud. Moreover, it is of significance that in *Lorain Journal, supra*,⁵ there were no general or specific issues inquiring into the filing of misinformation and withholding of information. In affirming the Commission's decision, the court stated: "We are of the opinion that the Commission's conclusions were amply supported by underlying findings of fact, in turn predicated upon substantial evidence of record." 122 U.S. App. D.C. at 129, 351 F. 2d at 826.

8. It is, accordingly, evident that in *Lorain Journal, supra*, the misrepresentations developed at the hearing were deemed implicitly to be within the ambit of other specified issues relating to unauthorized transfer of control. The instant case involves a similar circumstance, *viz.*, the questions concerning the initial misrepresentations, are within the ambit and subsumed in issue No. 1, particularly in light of (a) the preamble recitation of the designation Order; (b) the implied admissions of the chief financial officer, and (c) Overmyer's proposed findings, exceptions, briefs, etc. which, on their face, indicate that there was adequate notice relating to the initial representations because they are addressed, substantially, to this subject.

9. As will be shown below, there are facts in this record which when considered and analyzed constitute implied admissions by this chief financial officer. Moreover, quite apart from those implied admissions, there are hard facts shown by the Broadcast Bureau's case which establish that there are intentional misrepresentations. These hard facts also establish a failure to disclose material facts. Thus, contrary to the implications of Overmyer's counsel's argument (Tr. 646), the question

⁵ See the Commission's Decision in *WWIZ, Inc.*, 36 FCC 562 (1964), and the prior Initial Decision, 36 FCC 590 (1963).

of whether there were such misrepresentations is not a matter which need be determined on the basis of this Board's "judgment": nor does it, as he contends, have to be built on "imagination, or perhaps more than imagination . . . [*i.e.*] an affirmative desire to prove a point, even though a point does not exist. . . ." Indeed, it is of significance to note that despite this pretentious argument of counsel which, at first glance, may appear to be disarming, it is inconsistent with counsel's own basic adroit theory in his defense of this case which has cloaked him with an argument based upon a general denial of misrepresentation, albeit totally unsupported by the evidence. Without question, counsel's basic defense to this case, as will be shown below, is in the nature of a so-called "negative pregnant" defense. See 61 *Am. Jur. 2d Pleadings* § 173. As stated by *Black's Law Dictionary* 1183 (rev. 4th ed. 1968), negative pregnant is defined as a "form of negative expression as may imply or carry with it an affirmative." As an illustrative example, *Cramer v. Aiken*, 63 App. D.C. 16, 17, 68 F. 2d 761, 762 (1934), is cited for the proposition that a :

[Negative pregnant is] a denial in such form as to imply or express an admission of the substantial fact which apparently is controverted, or a denial which . . . really admits the important facts contained in the allegations to which it relates.

At most, however, the implications of the negative pregnant defense here constitute implied admissions. Hence, standing alone, these implied admissions cannot carry this case. The misrepresentation and fraud must, otherwise, be conclusively established by the evidence in this record. Thus, the discussion which follows is focused on that evidence, and the meaning of that evidence derived by an analysis of it.

THE INITIAL 1967 REPRESENTATIONS

10. First, in determining whether there were knowing or reckless misrepresentations, made with disregard for truth or falsity, it is necessary to analyze, *in camera*,⁶ the thoughts conveyed by the words used in the representations, in the context in which they were presented. It is also necessary to examine, *in camera*, the picture which those words created in 1967, in the minds of reasonable men. Stated a different way, did the words in the context of their presentation portray a sharply defined factual picture, like that of a realistic painting, requiring no imagination and signifying without qualification, *as a matter of fact*, a situation of *absolute*⁷ impossibility of Overmyer authenticating claimed expenses for his indirect staff expenses covering the July 1964–March 1967 period, *unless* (a) a limited four month base period (August–December 1966) was deemed acceptable, and (b) a complicated allocation formula, superimposed on the four month limited base period, to be retroactively applied to the period July 1964 through August 1966 was deemed, likewise, acceptable because books and records were non-existent for the prior period of time. Or, in the alternative, did the words used in their context convey a blurred or fuzzy

⁶ *In camera* is used herein in its colloquial informal sense and not in its technical sense. It is intended merely to indicate that in my private office, pictures have been formed, on the basis of the above analysis, which are being transmitted by this document.

⁷ As used herein, this word is used according to its ordinary meaning, *viz.*, such as absolute truth, *as a matter of fact*, and not dependent on anything else.

picture, more like an impressionistic painting, alerting and arousing reasonable men to the need for further inquiry to sharpen the larger reality, *viz.*, whether Overmyer was, *as a matter of fact*, in such an absolutely impossible situation, due to the non-existence of prior books and records. These are the *verbatim* representations, albeit stripped of their circumlocution:

(a) The cost of the [headquarters] "staff" services [performed for the communications companies] . . . was never separated out when they were rendered by the Warehouse and other companies prior to September 1966. Such costs, especially the non-personnel costs of the various functions, *were buried within the total expenses of the company involved.*

(b) The concentration of the [headquarters] "staff's" services in the [new] separate corporation. The Overmyer Company, Inc., in September 1966, however, enabled the non-personnel as well as the personnel costs of the separate [headquarters] "staff" departments involved to be pinpointed and determined with substantial accuracy. Accordingly, when in the early part of this year [1967] it became necessary to explore a transfer of the TV stations, four months (September–December 1966) of the personnel and *other costs of each department were available* to determine proper allocation of costs to the communications' operations. (Emphasis supplied.)

11. In examining, *in camera*, the meaning of the words and the picture presented, it is axiomatic that the ordinary meaning of words must determine the thoughts aroused and the composition of the transmitted picture. According to *Webster's New World Dictionary*, the word "buried" in the context used in para. 10(a) above, may be defined as "immersed" as if a dead body. Translated into the picture conveyed, it is a crystal clear one, sharply defined, of no records or of the non-existence of any prior records. And when this crystal clear picture is considered with the further representation in para. 10(b) above that books and records were available for a four month base period (September–December 1966), the composition of the picture conveyed is again a crystal clear one projecting a realistic one—requiring no imagination—; it depicted an alleged *absolute* impossible situation—without qualification and *as a matter of fact*—confronting Overmyer in the authentication of these claimed expenses in any other manner than that proposed.

12. Hence, naturally, in the minds of reasonable men, neither the words, nor the realistic painting, evoked the need for additional information, and thus there was no reason for the Commission, acting as reasonable men, to make further inquiry. Accordingly, the Commission in 1967 had an absolute right, as a matter of law, to rely on the unique and peculiar knowledge of the chief financial officer concerning the truthfulness of the subject matter of his representations. It also had the absolute right to rely on the propositions that the chief financial officer here, knew or should have known, (a) of the fiduciary relationship existing between this Commission and all permittees and licensees, and (b) of his special province in his unique capacity stemming from his position to know that the facts he represented would determine the course of the Commission's approval or disapproval of this transaction. In short, the chief financial officer had a "duty" to this Commission not only to act with care if he acted at all, but, in addition, he had a duty not to shut his eyes to the import of his own written words submitted in an affidavit where the facts stated were sworn by him to be true.⁸ He

⁸ See note 2, *supra*.

also had a duty to know that he could not protect Overmyer in his dire financial straits at the expense of the truth.

13. Moreover, in light of the aforementioned duties and responsibilities of the chief financial officer which are grounded upon fundamental legal principles, it is of significance that his initial representations are devoid of any qualifications⁹ whatsoever relating to the non-existence of the prior books. They are also devoid of any markedly different type of representation, such as, one which would have disclosed the existence of the prior books and which would have further explained that the chief financial officer believed such books to be either "not precise" or "grossly inaccurate".¹⁰ Accordingly, it may reasonably be said that the initial representations are devoid of any language whatsoever which would have alerted reasonable men to a misstatement of fact, or which would have provoked the need for further inquiry. Indeed, this fact which is derived from the, *in camera*, analysis of the representations, set forth above, is also corroborated by the testimony of the then Chairman of the Commission before the House Subcommittee hearings in 1968 that the Commission saw "no evidence of any misstatement of the matter at all." It is further corroborated, in effect, by the separate opinion of one of the dissenting Commissioners in which two other Commissioners joined. The separate opinion of the dissenting Commissioner reads, in pertinent part, as follows:

We have been quit 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 [allocation] method of calculating this sum . . . 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. 10 FCC 2d 822, 825 (1967). (Emphasis supplied.)

Noteworthy, too, is the fact that there are no questions whatsoever raised by the dissenting Commissioner with respect to the representations. *per se*, concerning the purported need (a) for the limited four month base period, and (b) for the allocation formula. He questioned only the allocation formula, *per se*.

THE 1972 REVELATIONS AT THE HEARING IN THIS PROCEEDING

14. Five years later at the hearing in this proceeding the direct and cross examination of the chief financial officer took place on February

⁹ This word is intended to convey the following meaning: to modify in some way, limit, and make less strong or positive. Hence, if a qualified statement had been made, it could have translated the prior initial representations into one indicating a virtual impossible situation confronting Overmyer—not an absolute one—of otherwise authenticating expenses. See para. 11, *supra*. Such a qualified statement would have been sufficient to alert and evoke a different response from the Commission; it, at least, would have brought a postponement of Commission approval. In this connection, it may be noted that Overmyer does not contend that the initial representations are ambiguous; it merely asserts that they should have been more aptly phrased.

¹⁰ Clearly, if such a markedly different type of representation had been made in 1967, it would have alerted and provoked further inquiry by the Commission requiring (a) clarification of the patently inconsistent and abstract assertions "not precise" and "grossly inaccurate", and (b) the submission of evidence based upon the books. At least it would have brought a postponement of Commission approval, and in all probability its disapproval. See paras. 14–22, *infra*.

7, 1972, and his redirect and recross on June 9, 1972. However, his written direct testimony is dated November 18, 1971 (Overmyer exhibit 2—Volume 3 of the docket). It reads, in pertinent part, as follows:

On June 16, 1967 I prepared an affidavit for submission to the FCC in support of [the] applications. . . . At the time my affidavit was drafted and executed, it was my opinion and belief that it was accurate. I have reviewed said affidavit and specifically readopt the statements made therein and reaffirm my opinion as to their accuracy.

In light of my relationship to the Overmyer company prior to the filing of the applications for transfer of control, I was aware of the following facts or situations:

(a) No precise records had been kept by the Overmyer Companies which broke out time spent by specific personnel in one Overmyer Company for various functions performed by such personnel for various other companies including the communications companies. (Emphasis supplied.)

15. At this juncture it is necessary to pause a moment and to untangle this direct written testimony of the chief financial officer, a matter which has apparently escaped the attention of the Bureau, the Judge and the majority of this panel of the Board. In order to do so, it is necessary to bear in mind the definition of a negative pregnant defense (para. 9, *supra*), *i.e.*, a "denial in such form as to imply or express an admission of the substantial fact which apparently is controverted." It is also necessary to juxtapose this 1971 written testimony with the 1967 initial representations. In such a juxtaposed position, it is evident, on the one hand, that the 1971 written testimony is a reaffirmation of those 1967 representations and constitutes, in effect, a denial (a negative defense) of any misrepresentation. On the other hand, it also asserts defenses, *i.e.*, that the 1967 representations were purportedly based on opinion of the chief financial officer—and not fact, *viz.*, the non-existence of the books. However, in this juxtaposed position, bearing in mind the definition of a negative pregnant defense, these defenses are asserted in the context of a statement which indicates also (a) an implied admission of the existence of the records previously represented to be non-existent (para. 9, *supra*), and (b) a failure to disclose the existence of these books. In this juxtaposed position, close examination of this 1971 written testimony further reveals that, on its face, it constitutes a qualified denial of a misrepresentation (carrying with it an affirmative)—pregnant with the admission of the substantial fact that the initial representation could or did convey, falsely, the impression that—as a matter of fact—there was no other alternate route for Overmyer to follow because of the non-existence of the books. Indeed, given the ordinary definition¹¹ of the word "precise", *i.e.*, "exactly or sharply defined or stated", or not "minutely exact" or "strictly conforming to rule or convention", it requires no perspicacity to state, in the context of these implied admissions, that these books initially represented as non-existent,—as a matter of fact—were sufficiently accurate to provide an alternate method of computing the claimed expenses, albeit the chief financial officer in his honest opinion did not believe that to be so.

16. However, as indicated above, these implied admissions which have now been untangled based upon the chief financial officer's No-

¹¹ See Webster's New Collegiate Dictionary.

vember 1971 written testimony are not, on their face, contrite confessions. For they, too, were buried in obscure language. Nevertheless, now that they have been unraveled, it is patently clear, as argued by Overmyer's counsel, that there was no choice available to Overmyer in meeting its burden of proceeding with the evidence except through the *ipse dixit* testimony of the chief financial officer, which repeated, in substance, all of the information previously relied upon by Overmyer in 1967 to justify the acceptance by the Commission of the novel allocation formula, including the extraordinary and flamboyant manner Overmyer conducted his business resulting in the enormous amount of claimed expenses for services rendered by headquarters personnel in the development of these construction permits. Or stated another way, Overmyer and the chief financial officer had an absolute right to have the charges proven against them; they also had an absolute right to defend themselves, including an absolute right to rely on a defense based upon the *honest belief* of the chief financial officer even though that line of defense has been rejected flatly¹² by the Supreme Court in the *S.E.C.* case, *supra*, (note 2, *supra*). The cogent reasons of the Court for its flat rejection are equally applicable here despite the fact that the Communications Act is not a general disclosure statute, like those administered by the S.E.C. As stated by the Court in *Lorain Journal, supra*:

Counsel for appellants WWIZ, Inc. and Schafitz argue that the non-disclosure finding was pumped up out of all proportion to its real significance, that this is a statute based on private ownership and is not a general disclosure statute like those administered by the Securities and Exchange Commission. It is the genius of our system that instead of government ownership we retain the spark of private profit and the drive of private enterprise, maintained under government surveillance at critical pressure points of regulatory policy. We do not welcome a gigantic bureaucracy second-guessing corporate management on details. But it is needful that the regulatory agencies be alerted and fairly and fully informed upon the emergence of a situation identified as a pressure point by law or regulation. 122 U.S. App. D.C. at 133, 351, F.2d at 830.

17. This, then, was the state of the record when the chief financial officer appeared to present testimony at the hearing on February 7, 1972. His testimony presented, orally, in substance, comports with this state of the record, even though his testimony wavers between his honest belief that the records were not precise and his honest belief that they were grossly inaccurate. He further testified that in 1967 he knew of no other procedures which could be used to calculate the expenses *in light of the time limitations imposed by Overmyer's dire financial straits and the need to file the applications at the earliest possible time*. He also detailed how the procedures for the complicated allocation formula were devised, and reaffirmed its reasonableness. He further candidly admitted the existence of the prior books. He also explained, *ipse dixit*, Overmyer's extraordinary and flamboyant manner of conducting business in relationship to the headquarters' staff performing services in connection with the development of the construction permits, in particular with respect to the headquarters' Finance and Development department.

¹² The Supreme Court stated: "To impose upon the [S.E.C.] the burden of showing deliberate dishonesty as a condition precedent to protecting investors through the prophylaxis of disclosure would effectively nullify the protective purposes of the statute." (375 U.S. at 200.) *The Court further stated that it is the practice itself, i.e., failure to disclose which operates as a fraud.*

18. Thereafter, the Broadcast Bureau established the actual existence of books and records for the period of time (1964–August 1966) which had been represented previously as non-existent. The Broadcast Bureau also established, *inter alia*, that (a) the cost of communications services rendered by headquarters personnel were no more *buried* within the books of the Warehouse company for the period 1964–August 1966 than they were in the books covering the limited four month base period of August–December 1966; (b) neither set of the books separated the cost of communications services rendered by headquarters personnel; and (c) if the prior books had been used, the 1964–66 headquarters personnel would have had to be contacted¹³ to determine to what extent services were performed for the communications companies, just as Overmyer did contact such personnel, albeit limited to key supervisory personnel, for guesstimates to be used as a base in the complicated allocation formula. Hence, the Bureau further established that—as a matter of fact—it was not absolutely impossible for Overmyer to use any other route than the one it proposed in order to authenticate claimed expenses for the period 1964–66, which is the sum and substance of the chief financial officer's own implied admissions. (See para. 14, *supra*.)

19. The Bureau also established that the Commission did not act on these applications for 8 months, during which period it would have been possible to amend these applications dispensing with the allocation formula, and substituting in its stead a computation based upon the books which, admittedly, would require some adjustments. Obviously, this would have obviated the need for the complicated allocation formula. There would have been a substitution of the data in the books and records for the guesstimates made by Overmyer's supervisory personnel in devising a formula. In short, the Bureau's case makes positive or conclusive what was, in essence, admitted impliedly by the chief financial officer in his November 1971 written testimony. (See paras. 13–15, *supra*.)

20. The Bureau also established, based upon its analysis of those books and computations based thereon, that there were marked discrepancies in the claimed expenses, and that by the use of the books, the claimed expenses would have been substantially less by approximately \$227,084.

21. On June 9, 1972, after the Bureau had established the bulk of its case, the chief financial officer was again, in all propriety and adroitness, called as a witness by Overmyer's counsel. And analysis of his testimony shows again, with all propriety and adroitness, that the charade continues because at that juncture of this case, the chief

¹³ In passing, it may be noted that the Broadcast Bureau attempted to secure Overmyer's social security quarterly reports, Form 941, to do a study of the personnel of all Overmyer companies whose payroll, insurance programs, etc., were administered by headquarters staff, by quarter for the period June 1964 through March 1967. The Bureau was advised that all such records could not be located. Summary sheets of company records were found for the months of August and September 1965 relating to employees covered by the company's hospitalization and insurance program. However, the Bureau was also advised that summary sheets for other periods could not be located. See Broadcast Bureau exhibit 14.

In passing, it may also be noted that these missing documents frustrated the Bureau's case. Where, as here, missing documents having a significant bearing on an issue to be determined are under the control of a party, it is presumed that these documents continue to be in his possession until their whereabouts are established or absence explained. Although no adverse inferences are posited relating to this matter, this record stands barren of any explanation by Overmyer concerning the whereabouts of these records.

financial officer's implied admissions (paras. 13-15, *supra*) apparently had escaped completely the attention of the Bureau and of the Judge. In sum and substance his *ipse dixit* testimony at this point may be summarized, as follows: He changed his defense from one that in his honest belief, the books were not precise, to one that the books were grossly inaccurate. Since both lines of defense are grounded on his purported honest belief, no significant weight can be attached to this late contradictory statement. As shown by the *S.E.C.* case, *supra*, this line of defense is not a valid defense, in the circumstances of this case. Moreover, even assuming that it is a valid defense, there are other reasons why weight cannot be attached to this change of testimony. First, as a contradictory statement it cannot be deemed affirmative evidence of the fact asserted, *viz.*, that the books were grossly inadequate. Secondly, objective proof of this contradictory statement would be destructive of the chief financial officer's prior defense that the books were merely not precise, as well as destructive of his own implied admissions. Indeed, in this connection, it may be noted that this turn of events on the last day of the hearing distracts attention from the fact that in 1968 a private accounting firm commenced an audit of all of Overmyer's companies' books, including those in question here. This was an on-going audit which was completed in early 1971—approximately six months prior to the chief financial officer's November 1971 written direct testimony containing the implied admissions. Year-end adjustment had been required by this accounting firm before it would make its certification. Thus, given this state of affairs, the implied admissions (paras. 13-15, *supra*) of the chief financial officer may reasonably be deemed to comport with the findings of that independent accounting firm.

22. There are also other distractions at this point of this virtual charade, irrespective of their propriety, caused by counsel's arguments. First, at the time this witness reappeared on the last day of this hearing, the Bureau had met its burden of proof in this proceeding by relying, rightly, on the presumption that the books—as a matter of fact—were accurate unless proven by Overmyer to the contrary—as a matter of fact. Secondly, Overmyer has not defended this case or met its burden of proceeding with the evidence on the proposition that—as a matter of fact—those books were grossly inaccurate. Indeed, counsel has, in effect, stated that he had no such choice. (See para. 16, *supra*.) At most, Overmyer's defense has been rested on the theory that the *honest belief* of the chief financial officer is entitled to substantial weight in the resolution of this case; however, as shown by the discussion of the *S.E.C.* and *Lorain Journal* cases, *supra*, that line of defense has been rejected by the courts in the circumstances of this case. Thus, for this reason, as well as the others detailed in para. 21, *supra*, the contradictory change of testimony of the chief financial officer cannot be deemed to discredit or rebut the presumed accuracy of the books, despite protestations of counsel to the contrary.

FINDINGS AND CONCLUSIONS

23. In sum, the ultimate findings and conclusions which are compelled by the evidence in this record, by the, *in camera*, examination of that evidence, by the negative pregnant defenses and admissions

(paras. 13 and 15, *supra*), and by fundamental principles of law governing the duties and responsibilities of a chief financial officer, are these: First, as shown by paras. 27–31 of the Initial Decision, Overmyer was in serious financial straits in 1967 when the initial representations were made. And as shown above, the initial 1967 representations portrayed an *absolute* impossible situation confronting Overmyer in authenticating claimed expenses for indirect staff services due to the non-existence of books for the period July 1964–August 1966, except by the route it proposed. Secondly, the, *in camera*, examination of the chief financial officer's testimony establishes that in 1967 he intentionally misrepresented the state of affairs relating to the books; in 1967, he also intentionally avoided either his 1971 version of the state of affairs (no precise records) or his 1972 version (grossly inaccurate records) because either would have brought about, at the least, a postponement of Commission approval, and in all probability its disapproval. Thirdly, the initial representations can only be regarded as inaccurate and grossly misleading, and his subsequent implied admissions (paras. 14 and 15, *supra*) might well be regarded as ones that should have been a contrite confession of his prior misrepresentation and failure to disclose even conceding his absolute right to have the charges of misrepresentation and fraud proven against him. This was his choice to make; however, he cannot be credited with the attributions of an acknowledgment of guilt stemming from a voluntary confession which would have been conclusive rendering proof unnecessary.

24. Fourth, these facts, considered together with fundamental principles of law relating to the duties and responsibilities of a chief financial officer and of fraud, compel a conclusion of fraudulent misrepresentation and failure to disclose because it resulted in action in 1967 approving these out-of-pocket expenses which otherwise, in all probability, would have been disapproved. While it is true, as asserted by his counsel (Tr. 669), that Overmyer "at the time that the application was filed, [and] at the time that the Commission finally granted the application, . . . was hanging on with one fingernail . . . to raise money . . ." due to his financial straits, in the words of the Court, in *Lorain Journal*, *supra*, such a financial dilemma does "not justify bypassing the public interest. . . ." 122 U.S. App. D.C. at 133, 351 F.2d at 830. Further, unlike the situation in *Lorain Journal*, *supra*, involving businessmen only, the instant case involves in addition a chief financial officer who is charged, as a matter of law, with a special expertise and knowledge. Hence, the fact that the chief financial officer has now (a) admitted candidly his knowledge of the existence of the prior books in 1967 when he made the initial representation: and (b) admitted impliedly that these initial representations could or did convey a false impression, does not absolve the now proven fraud. For they compound the initial fraudulent misrepresentation, and failure to disclose. Such admissions are sufficient to establish that, with ordinary prudence, let alone the extraordinary prudence and special knowledge of a chief financial officer, he willfully shut his eyes to the truth of the initial representations when he swore to their truth in his affidavit.¹⁴

¹⁴ See note 2, *supra*.

25. The initial fraudulent misrepresentation and failure to disclose are also compounded by other facts. Despite Overmyer's need for favorable Commission action at the earliest possible time due to his financial straits, the Commission, nevertheless, did not accord the applications a priority of processing over other such pending applications. Normal processing time was approximately eight months, and the Commission approved this transaction approximately eight months after the filing of the applications. During this eight month period, these initial misstatements could have been corrected—but were not. Hence, the failure to correct these misstatements compounds the initial fraudulent misrepresentation and failure to disclose. The law is clear that where there is a determinate relationship, such as the fiduciary relationship of a licensee or permittee to this Commission, with peculiar knowledge on the part of the speaker as to the subject matter of a statement, there is a continuing duty to correct it if erroneous.¹⁵

26. These findings and conclusions should put to rest the repetitive litany, irrespective of its propriety, by Overmyer's counsel in explanation of its stand pat position in this proceeding; it is wholly lacking in merit and obfuscates the facts, as well as the law, of this case. Essentially, this has been the litany:

I answered questions on the formula to the Commission. I answered questions on the formula on the hill, and actually, the only thing that the hill did say—and I guess what we're going in hearing about—is that the Commission should have asked some more questions [prior to its approval of the transaction and the claimed expenses].

It all wasn't our fault. They didn't ask us. We would have been very happy to have done—to have answered all of the questions which you're asking me today [*viz.*, the extent of the gross inaccuracy of the prior books], but they weren't asked. And you can't build fraud on the fact that questions weren't asked and then say—well, you should have volunteered them.

We gave them [the Commission in 1967] whatever information we felt we had, and was warranted, and was necessary.

(Tr. 668-69.)

THE DISCREPANCIES IN THE CLAIMED EXPENSES, PER SE.

27. As shown above (paras. 18-20, *supra*), the Bureau has also established gross discrepancies in the amount of the claimed expenses, *per se*, based upon computations grounded on those books, which are deemed accurate—as a matter of fact—because Overmyer has not proven that they are grossly inaccurate—as a matter of fact. See para. 22, *supra*. These gross discrepancies and computations remain un rebutted except by the *ipse dixit* testimony of the chief financial officer relating to the extraordinary and flamboyant manner¹⁶ of Overmyer's method of conducting his business. However, in my view, the chief financial officer's *ipse dixit* testimony in this respect (the extraordinary and flamboyant manner¹⁷ in which Overmyer conducted his business), standing alone, and uncorroborated by other substantial evidence does not rebut the Bureau's showing. For it has been demonstrably shown (paras. 1-23, *supra*), that the initial 1967 representations constitute a misrepresentation, failure to disclose and fraud.

¹⁵ See note 2, *supra*; see also 37 *Am. Jur.* 2d *Fraud and Deceit* §§ 148 and 149.

¹⁶ *Cf.* para. 151 of the Initial Decision, and paras. 25 and 26 of the Supplemental Initial Decision.

¹⁷ See note 16, *supra*.

28. Hence, on the basis of the elementary proposition of law "Falsus in Uno, Falsus in Omnibus" (false as to one thing, false as to all things) the chief financial officer's testimony, *ipse dixit*, should not be credited in this respect (*viz.*, Overmyer's purported extraordinary and flamboyant manner¹⁸ of doing business), particularly in this proceeding where he has been found to have misrepresented and to have withheld material facts, which resulted in a fraud on the Commission's processes. This witness' *ipse dixit* testimony relating to the extraordinary and flamboyant manner¹⁹ of Overmyer doing business is not corroborated by other substantial evidence in this record. Admittedly, decisional authorities may exercise discretion in determining whether the *ipse dixit* testimony of the chief financial officer in this respect should be rejected *in toto*, or whether it should be believed in some respects and rejected in others. However, in the circumstances of this case, it would seem that decisional authorities would believe it desirable to be bound by principles of law and morality and justice, and to apply the maxim "Falsus in Uno, Falsus in Omnibus." For what ground of judicial belief can there be left when this officer has shown such gross insensibility to the difference between right and wrong, and between truth and falsehood in the very same transaction, and at most has come forward with an implied admission and not a contrite confession which would have accorded him some of the attributions inherently attached to a voluntary confession. See para. 23, *supra*. At the least, this *ipse dixit* testimony on these purported details should be accorded no weight, let alone the substantial and decisive weight accorded to it by the majority of this panel of the Board in their decision, as well as the Judge in his decisions.²⁰

29. Finally, it is my personal view that it would constitute a grave travesty on Overmyer, as well as the Commission's own processes, if, as suggested by Board Member Emerson, there is any retrial of the questions and facts already litigated in this adjudicatory proceeding. As, in effect, pointed out in paras. 7 and 8, *supra*, such a suggestion comes as an anti-climax considering the state of affairs with respect to this record which includes implied admissions by the chief financial officer, two initial decisions, a majority opinion by this Board, two separate concurring statements, a dissenting statement, and a response thereto. Hence, irrespective of how the Commission decides this matter, the Commission's findings and conclusions should be *res adjudicata* in any subsequent proceedings if, indeed, the Commission should determine that such proceedings are necessary. For it is clear that irrespective of whether the Commission decides here that (a) the initial 1967 representations constitute a single act of misrepresentation, failure to disclose and fraud, or (b) there are a combination of misrepresentations and fraud resulting from the facts established by the Bureau, in the actual claimed expenses, the nub of the problem is whether the Commission, on the basis of existing policy, will deem these transgressions sufficient to raise a serious question with respect to Overmyer's qualifications to remain a licensee of WDHO-TV, Toledo, Ohio. This problem is one for the Commission's determination. I offer no opinion since it is way beyond the scope of the issues here.

¹⁸ See note 16, *supra*.

¹⁹ See note 16, *supra*.

²⁰ See note 16, *supra*.

RESPONSE OF BOARD MEMBER LEONIDAS P. B. EMERSON TO DISSENTING
STATEMENT OF BOARD MEMBER SYLVIA D. KESSLER

1. Member Kessler's dissent is predicated upon her finding of fraudulent misrepresentations to the Commission: (1) in the original Overmyer transfer applications and (2) with respect to the expenses which were approved by the Commission. The first basis for her dissent relates to the assertion in the Byrnes affidavit that "[t]he cost of 'staff' services was never separated out when they [these staff services] were rendered by the Warehouse and other companies prior to September 1966. Such costs, especially the nonpersonnel costs of the various functions were buried within the total expenses of the Company involved." In my view this representation may very well be an erroneous one; it may even constitute a fraudulent misrepresentation.

2. In the light of this representation Board Member Kessler has framed five 'major questions' or issues (Dissenting Statement, para. 2) and has resolved all of them against Overmyer.

3. While I, too, would certainly not wish to condone a fraudulent representation to the Commission—if in fact the quoted assertion may be so characterized—we must resolve this proceeding on the basis of the issues before us and may not broaden them to embrace an inquiry which is outside the parameters of the issues as framed by the Commission in its Order of designation. The only hearing issue which all parties agree is not mooted by subsequent events is Issue 1, which reads:

1. To determine, whether, in the application for transfer of control of D. H. Overmyer Communications 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. (Emphasis supplied.)

One should note that this issue does not call into question all representation made by Overmyer in the transfer applications. Rather, the only misrepresentations which can be considered under this issue must relate to the amount of out-of-pocket expenses incurred by Overmyer in obtaining and developing the construction permits. Any other misrepresentations in Overmyer's transfer applications are not in issue, and any questions (or issues) related to such other misrepresentations, such as those recited in Para. 2 of Member Kessler's dissent, cannot, in my view, be deemed to be subsumed under the above-quoted issue 1.¹

4. As for Member Kessler's second conclusion, that there was misrepresentation and fraud with respect to Overmyer's claimed expenses, she has come up with nothing to support her thesis other than the maxim "Falsus in Uno, Falsus in Omnibus." This is hardly even a weak reed to undergird a conclusion; it is a sophistic rationalization in the instant proceeding.

¹ Member Kessler believes that the Commission's decision in *WWIZ, Inc.*, 36 FCC 562 (1964), is ample precedent for holding that misrepresentations of matters not in issue in a proceeding can still be considered if they have some tangential relationship to an issue in hearing. I cannot agree, because the misrepresentations found in *WWIZ, Inc.* were embraced by a designated hearing issue concerning an unauthorized transfer of control. No such broad-gauged hearing issue is included in this case.

FCC 73D-23

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 Co., INC. FROM D. H. OVERMYER TO U.S. COM- MUNICATIONS CORP.	}	Docket No. 18950 Files Nos. BTC-5376, 5377, 5378, 5379 and 5380
--	---	--

APPEARANCES

Benito Gaguine, Herbert M. Schulkind, and James K. Edmundson (Fly, Shuebruk, Blume and Gaguine) for Overmyer; *William S. Green, Jay L. Scharff, and Leon J. Schachter* (Pierson, Ball & Dowd) for U.S. Communications Corporation; and *Richard M. Riehl, Thomas B. Fitzpatrick, Michael T. Fitch, and A. Thomas Carroccio* for the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE HERBERT SHARFMAN

(Issued April 30, 1973; Released May 4, 1973)

PRELIMINARY STATEMENT

1. On March 28, 1967, D. H. Overmyer agreed to sell to AVC Corp. 80% of his 100% stock interest in five UHF television permits—KEMO-TV, San Francisco, California; ¹ WECO-TV (now WPGH-TV), Pittsburgh, Pennsylvania; WSCO-TV (now WXIX-TV), Newport, Kentucky (Cincinnati, Ohio); WBMO-TV (now WATL-TV), Atlanta, Georgia; and KJDO-TV, Rosenberg, Texas (Houston). The consideration was 80% of Overmyer's expenses alleged to be incurred in the acquisition and development of the TV stations, or \$1 million, whichever was less. AVC agreed, in addition, to lend Overmyer \$3 million,² and Overmyer ^{2a} granted AVC an option to purchase his remaining 20% interest in the stations for an amount not to exceed \$3 million. The option ran from January 15, 1971, to April 14, 1972. AVC assigned all rights under the agreement to its wholly-owned subsidiary, U.S. Communications Corporation, before the filing of the transfer applications on June 20, 1967.

¹ Overmyer held 80% of the stock of KEMO-TV and an option to purchase the remaining 20%. (See Memorandum Opinion and Order of August 26, 1970 (FCC 70-911).)

² The loan was secured by mortgages on real estate valued at twice the amount of the loan; by the remaining 20% stock interest in the TV permittees; and by guarantees of various other Overmyer companies and Overmyer personally. The loan has since been paid in full (see statement of counsel, Overmyer proposed findings, p. 2).

^{2a} Below Overmyer or his companies are indifferently referred to as "he" or "it." The context is explanatory.

2. This is the present status (as known to the writer of this initial decision) of the five construction permits transferred:

KEMO-TV—San Francisco—silent from 3/31/71; transferred for assumption of liabilities plus \$3,500 for furniture.

WPGH-TV—Pittsburgh—silent since 8/16/71; in the hands of a receiver.

WXIX-TV—Newport, Kentucky—transferred to Metromedia for assumption of liabilities and funds expended after August 1, 1971.

WATL-TV—Atlanta—silent since 3/31/71; transfer of construction permit pending—consideration \$28,500 for out-of-pocket expenses and \$1,000 for equipment.

KJDO-TV—Rosenberg, Texas—Permit surrendered and canceled.

By Memorandum Opinion and Order (FCC 72-729), released August 15, 1972, the Commission granted its unconditional consent to the transfer of control of the licensee of WXIX-TV. The transaction was consummated on August 18 and Metromedia assumed operational control on August 19, 1972. (Letter of Mr. Thomas J. Dougherty, Metromedia's attorney, dated September 29, 1972.) Nothing in this initial decision, of course, is intended to affect the finality of the transfer to Metromedia.

3. Overmyer stated that his out-of-pocket expenses totaled \$1,331,900 and that the \$1 million he was to receive under the agreement represented reimbursement for only a part of his out-of-pocket expenses, reduced proportionately in light of his 80% ownership of the stock in the television companies.

4. The transfer applications were granted without hearing by Commission order of December 8, 1967 (10 FCC 2d 822).

5. Between December 15, 1967, and August 1, 1968, the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce held hearings on Overmyer's acquisition and transfer of the permits (Serial Nos. 90-50 and 51); and on May 19, 1969, released a critical Report entitled *Trafficking in Broadcast Station Licenses and Construction Permits* (H. Rep. No. 91-256, 91st Cong., 1st Sess.). Among other things, the Special Subcommittee recommended (pp. 60-61):

1. The FCC should set aside its order of December 8, 1967, consenting to the transfer of Overmyer's five CP's to U.S. Co., and hold public hearings in the community where each station is located to determine whether Overmyer should be authorized to continue as permittee of the five stations.

6. By Memorandum Opinion and Order, released September 4, 1970 (FCC 70-911), the Commission initiated this proceeding. It said that the Subcommittee had developed "information and allegations" which "raise serious questions as to the accuracy of the representations made to the Commission regarding Overmyer's out-of-pocket expenses." Noting that AVC's option to acquire the 20% interest retained by Overmyer was still outstanding, the Commission declared that it had "the duty to determine whether the expenses were as claimed and whether Overmyer has retained a 20% stock interest which is in fact supported by his actual expenses. If Overmyer misrepresented his expenses substantially and if his actual expenses did not exceed the \$1,000,000 he had already been paid, his retention of a 20% interest

and the accompanying option were not justified." On this premise, and without setting aside the transfer of control, the matter was set for hearing on the following issues, with both the burden of going forward and the burden of proof placed on Overmyer:

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.

7. On September 29, 1970, Overmyer petitioned the Commission for reconsideration. At the same time, he petitioned the Review Board for deletion of Issue 2 and a shift of the burden of proof. Overmyer maintained that the action granting the transfers was final as the transfers had been granted more than two and one-half years earlier; no petitions for reconsideration or court appeals had been filed; and the Commission had taken no action on its own motion until the release of its document setting this hearing. It was argued that the Commission has consistently held that it lacks power to extend the 30-day filing period specified for petitions for reconsideration by Section 405 of the Communications Act; that Section 1.108 of the Rules provides that the Commission may set aside an action on its own motion only within 30 days after release of the document containing the full text of the action; and that the Commission is therefore barred not only from considering untimely petitions for reconsideration by other parties, but from taking untimely action on its own.

8. Overmyer urged that while the Commission may have had authority to institute an inquiry, under Section 403 of the Act, to determine whether he had misrepresented his out-of-pocket expenses, since the action granting the transfers was final the Commission lacked authority to undertake the broad determinations contemplated under Issue 2. He contended that the Commission had no authority to effect the basic restructuring of the transaction contemplated under Issue 2.

9. He said to the Review Board that the Commission had erred in placing both the burden of going forward and the burden of proof on him, since the grant of the transfers was final and any effort on the Commission's part to revise its decision was in the nature of a revocation, or at the very least, a modification of its prior action; that Section 312(d) of the Communications Act provides that both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission in revocation cases; that Section 316(b) similarly places the burdens on the Commission in modifications; that only in initial licensing and renewal cases, under Section

309, does the Act permit the Commission to place the burden on the applicant; and even here the Commission may determine whether it ought to be placed elsewhere on issues presented by petitions to deny or to enlarge. Overmyer submitted, therefore, that in a case like this, where the Commission was considering action which could entail a basic restructuring of final action taken more than two and one-half years earlier, Congress had clearly intended that the ultimate burden of proof be placed upon the agency.

10. On February 8, 1971, the Review Board released a Memorandum Opinion and Order (FCC 71R-43) denying Overmyer's petition insofar as it sought deletion of Issue 2, and certifying to the Commission the question regarding burden of proof. The Board explained that deletion of Issue 2 would substantially alter the basic form of the proceeding and was beyond its authority.

11. On March 8, 1971, the Commission released a Memorandum Opinion and Order (FCC 71-213) denying Overmyer's petition for reconsideration, stating that it "had the affirmative duty to re-examine the Overmyer transfer of control agreement to be sure that the Commission's prior approval was not procured by fraudulent misrepresentations" and that it had "an inherent power to reopen a judgment at any time where it is procured by fraud," citing *Hazel-Atlas Co. v. Hartford-Empire Co.*, 322 U.S. 238, and *City of Jacksonville*, 35 FCC 401.

12. On August 24, 1971, the Commission released a Memorandum Opinion and Order (FCC 71-842) in response to the Review Board's certification of the burden of proof matter. The Commission said that although it disagreed with Overmyer's contention that Sections 312 or 316 of the Act were applicable to this proceeding, as its Designation Order "does not contemplate any agency action respecting" a station license or construction permit, it was, on its own motion, reconsidering the "evidentiary burdens" placed upon the parties. The burden on Overmyer to proceed with the introduction of evidence was not disturbed, on the ground that the data needed to substantiate Overmyer's claimed expenses for developing and acquiring the permits were peculiarly within his "possession and/or knowledge"; but the Commission felt that the ultimate burden of proof should be shifted to the Bureau. It said that "such an order of procedure would be more in accord with basic fairness and due process, because of both the circumstances surrounding our Designation Order and the seriousness of charges with which Overmyer is required to answer under the hearing issues. . . ." In continuing the burden of going forward on Overmyer, the Commission pointed out that this "not only requires him to proceed with the introduction of evidence under the specified hearing issues, but further requires him to make a *prima facie* showing substantially corroborating his alleged out-of-pocket expenses as were previously represented to the Commission."

13. Prehearing conferences were held on November 6 and 19, 1970; February 8, June 4, October 13 and December 7, 1971, and hearing sessions on January 24, February 7 and June 7, 8 and 9, 1972. A stipulation and the final exhibits were received in evidence on September 25, 1972, when the record was closed (FCC 72M-1209). Following several requested extensions, the Broadcast Bureau filed

its initial proposed findings of fact and conclusions on November 20, 1972, and Overmyer on January 23, 1973; and the Bureau filed a reply on April 2, 1973.

A NOTE ON THE NATURE OF THIS INITIAL DECISION

14. At the very first prehearing conference the presiding officer expressed his views as follows (Tr. 3-9):^{2b}

The first issue seems *at first glance* to be a straight misrepresentation issue. Yet does it really mean that we are supposed to inquire into Overmyer's *bona fides*, his willfulness, if you please; or are we merely to inquire into the accuracy of his expense attributions, including allocations of expense allegedly incurred by his service company, with *bona fides* a factor to be taken into account only in the assessment of the accuracy of the claims?

From the last sentence in paragraph 4 of the order it looks as if accuracy is the keyword, not good faith. We all know that cost allocation is not a science; indeed it has been called by some commentators an arcane and shifting, not to say shifty, art, with results dependent on the predilection of a proponent. Suppose, however, we learn that Overmyer had no reasonable basis for his statement of out-of-pocket expenses. We glide then into the second issue, which I think raises the bigger problem of the two.

Issue 2 tells us to determine, whether, *in light of the evidence adduced under the foregoing issue*, the executory option held by U.S. Communications Corporation to buy the 20% retained stock of Overmyer *should be declared void*: [or] (and here I am supplying the correlative for the sake of syntax), he should be required to transfer his 20% to U.S. and, if so, whether he should be permitted to receive *any* consideration for the transfer.

It is apparent that the Commission addressed itself not to the transfer as a whole, insofar as the legality of the sale of Overmyer's stock is concerned, but only to the 20% he still holds. The 80% transfer is a *fait accompli*. (I shall return to this below.)

There is nothing in the Commission's designating opinion which would indicate that U.S. should be deprived of the 80% interest. The direct aim is upon Overmyer, not upon U.S. What the issue means to me is that if it is shown that Overmyer cannot substantiate his expenses for 80% of his stock beyond \$1 million (the primary purchase price, forgetting the loans), then he cannot under a scheme of withholding part of his ownership exact additional compensation for it.

If this is so, then because Overmyer acted at the time contrary to an alleged *policy* of the Commission—not at the time enunciated in any published rule, for the rules, 1.597(e) and (f), were issued *after* the Overmyer-U.S. transaction was approved in December 1967 (10 F.C.C. 2d 822), U.S. Communications is to be deprived of the fruits of its bargain.

Several questions immediately arise. One, is the Commission justified in any event in treating U.S. as if it were *particeps criminis* in a plot to subvert the Commission's processes, when the unitary transaction was endorsed by the Commission and U.S. has already paid over to Overmyer \$1 million for the purchase price and loaned him \$1.5 million on the first loan?

Second, by what authority does the Commission presume to say that a transaction not necessarily connected with the transfer of a permit or license is *void*? For it must be remembered, as I have already indicated, that U.S. is now the controller of the permittee, and that Overmyer would be transferring nothing except by propinquity in the nature of control over a permit.

Commission permission is not necessary for the sale of interests not amounting by definition—i.e., majority stock ownership—or in fact, whatever the stock interest, to control.

All that is necessary is to report the transaction to the Commission for its ownership records. The justification for treating the transfer of Overmyer's 20% as not directly associated with the passage of an authorization will, I believe, be made clear by the following hypothesis: Suppose U.S. built all five stations (perhaps it already has, so far as I know) and has applied for and

^{2b} These were only preliminary observations.

received licenses. The acquisition of the remaining 20% has nothing to do with the permits, obviously, which have disappeared or merged into the licenses, and nothing except to make its hegemony complete, with the control of U.S. of its licenses.

Here I think it is in order to examine two Supreme Court cases: *Regents v. Carroll*, 5 RR 2083, and I do not have the official citation on that [338 U. S. 586], and *Radio Station WOW v. Johnson*, 326 U. S. 120. I shall not go into the facts of these cases, but shall ask counsel to consider them if they have not already done so.

I shall merely note that the Supreme Court, in the *Regents* case, quoted with implied approval the Georgia state appellate Court's ruling that "Matters of private concern and contracts affecting such rights, which do not have as their subject matter the rights conferred by a licensee, or do not substantially affect such rights, are not within the scope of the Commission's power to regulate and control in the public interest broadcasting by radio stations and licenses to such station." (5 RR at 2090).

I realize that this opens up a large inquiry, and questions the very basis of the proceeding which I have been directed to hear. Perhaps I am presumptuous in bringing up these matters on my own motion—and this, of course, precedes the petitions—as it may very well be that they have been considered and tacitly passed upon by the Commission in designating the issues.

I also realize that the Commission has acted here in response to what it apparently conceived of as a Congressional mandate to proceed. There is no question that the Congressional Subcommittee was dissatisfied with the Commission's non-hearing approval of the Overmyer-U.S. transaction. The very last remarks of Congressman Moss to Chairman Hyde, at the conclusion of the session of August 1, 1968 (Serial No. 90-50, page 290), were: ". . . That is why I feel so disappointed with your actions in the case here of the blanket transfer of five potentially valuable avenues of access to homes in markets where competition certainly should be encouraged and doing it in a fashion which really makes no findings that the public interest will be served."

In its Report (91st Congress, 1st Session, House Report No. 91-256), the Subcommittee recommended, among other things (pp. 60-61): "1. The FCC should set aside its order of December 8, 1967, consenting to the transfer of Overmyer's five CP's to U.S. Co., and hold public hearings in the community where each station is located to determine whether Overmyer should be authorized to continue as permittee of the five stations."

(Also, as part of its *general* recommendations, obviously prompted by but not limited to the *Overmyer* cases, the Subcommittee recommended that the Commission codify its out-of-pocket expense policy. The Report was "committed to the Committee of the Whole House" on May 15, 1969 but—although I have been unable to discover a prior publication date—I have no doubt that either the proposed Report was transmitted to the Commission well before its Notice of Proposed Rulemaking released September 4, 1968 (FCC 68-889), which I have not examined—or the will of the Subcommittee was on its own anticipated by the Commission in promulgating Rules 1.597(e) and (f)—see 15 RR 2d 1568, 34 FR 5102, released March 6, 1969, which makes no reference to the Subcommittee hearings). The exact facts are not important.

In any event, the Commission has *not* set aside its order in 10 F.C.C. 2d 822, and the transfer of control of the permittee from Overmyer to U.S. remains effective.

I do not intend to carry these remarks too far. They are not in any way intended as a prejudgment, but are expressed in the hope that counsel will respond, either in refutation or by other enlightening comment.

15. In the Findings of Fact, below, after the groundwork has been laid, the contentions of the parties will be separately set out, with occasional intermingled criticism. Not until the ultimate findings will there be any attempt to make definitive "findings" to the extent they are here practicable. As will appear, from the nature of this case it is neither necessary nor possible to ascribe precise, or reasonably close, figures to a particular activity. The only practicable course is to evaluate the persuasiveness of the evidence as a whole.

16. The express purpose of the Commission's inquiry was to determine whether Overmyer had adequately supported its claim that it had incurred over a million dollars in out-of-pocket expenses, and whether the prospective assignment of his remaining interest would involve a recognizable *quid pro quo*. The Commission said (Par. 4, FCC 70-911):

If Overmyer misrepresented his expenses substantially and if his actual expenses did not exceed the \$1,000,000 he has already been paid, his retention of a 20% interest and the accompanying option were not justified.

17. Although the Commission used the term "misrepresentation" in its memorandum opinion of designation, there is nothing to indicate, beyond some reference to possible factual discrepancies in Paragraph 3, that it was primarily concerned with "fraudulent" misrepresentation or with the "character" qualifications of Overmyer. What it was trying to do was to follow—so far, apparently, as it thought it now could—the Subcommittee's injunction that it satisfy itself as to the appropriateness of the consideration for the transfer. The Subcommittee, as has already been noted, suggested that the Commission set aside the entire transfer, lock, stock and barrel, but the Commission let the basic transfer stand and confined itself (with what consequences will be discussed below) to a consideration only of the expected sale of the 20% interest. The Subcommittee was interested in the enforcement of the Commission's policy (at that time not yet embodied in the rules) against profiting from the sale of construction permits.

18. In its designation Memorandum Opinion and Order, then, the Commission evinced its interest in a finding as to the adequacy of Overmyer's claim of expenses incurred to justify the option price.³ It repeated the term "misrepresentation" in the issues, but again in the context already discussed, and not as a basis for an inquiry into Overmyer's personal qualifications.

19. Not until the Commission's memorandum opinion released March 8, 1971 (FCC 71-213), did it refer to the possibility of "fraudulent misrepresentations." It said (Par. 6):

Based upon all of the information before us when we designated this proceeding for evidentiary hearing, we concluded that we had the affirmative duty to re-examine the Overmyer transfer of control agreement to be sure that the Commission's prior approval was not procured by fraudulent misrepresentations. Both Court and Commission case precedents have recognized an inherent power to reopen a judgment at any time where it is procured by fraud.

Yet, despite this assertion of its powers, the Commission did *not* reopen the question of approval of the basic 80%—or majority and controlling—transfer, nor did it amend the original issues, which are still limited, so far as possible effective action is concerned, to the then executory option. One must conclude that the Commission thought it necessary to refute the arguments of petitioner Overmyer, but that it was not changing the essential nature of the proceeding.

20. To avoid suspense it may as well be said now that the ultimate ruling of this initial decision is a negative one on the "active" issue—No. 2. On Issue No. 1 there will be findings, as stated above. They will

³ As Overmyer had not alleged that his expenses exceeded some \$1,300,000, the Commission might, on its theory of the law, have made a ruling without evidentiary hearing.

center on the question of the conformity of the claimed to the actual expenditures. It has been thought unduly and unnecessarily complicating to import into the discussion the inflammatory subject of "fraudulent" misrepresentation, except as the facts incidentally bear on the matter of the expenditures; such misrepresentation, in short, will not be a topic for independent consideration. It is realized that the Broadcast Bureau has accused Overmyer of bad faith, apparently on the Emersonian principle that if you strike at a king you must kill him; and that Overmyer has attempted to absolve itself by showing its purity of heart. To repeat, however: the initial aim of the proceeding, as it appears to the writer of this initial decision, is to assess the validity of the Overmyer assertion of expenditures; "fraud" and "innocence" are not in themselves objects of decision. Overmyer seems to be worried that an unfavorable ruling here would affect its holding of other Commission authorizations. In the initial decision, at least, it has nothing to worry about on that score. The Commission, as stated above, did not constitute the proceeding an investigation into Overmyer's general qualifications, and it will not be so transformed.

FINDINGS OF FACT

21. *Overmyer's entry into television.* Overmyer began a warehousing business in 1947. He rented space for one warehouse in his home town of Toledo. Over the next seven years he projected a national warehousing and distribution system for large businesses in major markets throughout the nation; and in the mid-1950's, planned and began developing what has become the largest undertaking of its kind in national warehousing and distribution. Overmyer bought choice sites and constructed buildings. The real estate values and the prospect of assured revenues from the national concerns using his warehouse facilities generated a ready supply of long-term credit for new warehouses.⁴

22. There were soon funds to finance other ventures. Overmyer was attracted to UHF as an investment. In late 1962 he grew interested in establishing a UHF station in Toledo—he felt that the need for a third TV service and the prospective all-channel set bill gave the venture a reasonable chance for success. He filed an application in April 1963; a permit was granted in March 1965; and WDHO-TV, Toledo, went on the air in May 1966.⁵

23. His Toledo bite whetted Overmyer's appetite. He hired an experienced broadcaster in June 1964 to head his communications operations. His organization made a search for markets capable of supporting a UHF station.⁶ As a result of this study, Overmyer decided to seek additional UHF authorizations in Atlanta, Newport (Cincinnati), Pittsburgh, San Francisco, Rosenberg (Houston) and Dallas.

24. Applications were planned, prepared and filed for these communities between August 1964 and February 1965. In some of the

⁴ Over the 10-year period before the filing of the transfer applications, first mortgage loans substantially in excess of \$100 million were negotiated for construction of over 16 million square feet of warehouse facilities in 55 major markets in the United States and Canada.

⁵ WDHO-TV has operated at a substantial loss, although it has elaborate facilities, including substantial antenna height and power. Overmyer testified in July 1968, that the Toledo operation had lost \$1.3 million.

⁶ Overmyer tried to acquire, either by purchase or grant, UHF stations furnishing a fourth signal in major markets.

markets, negotiations were undertaken to acquire outstanding construction permits for UHF stations which had gone dark or had never been built; in others, applications for new stations were filed.

25. While the applications were pending, Overmyer continued to explore relevant UHF factors—for instance, engineering, set circulation, and program availability, generally and for each market for which applications had been filed. He concluded that a UHF station could not compete with established VHF stations without maximum facilities and full colorcasting. The facilities would have to be the most modern, with antenna heights and transmitter powers to enable the stations to compete, at least in relative coverage, with entrenched VHF stations. Searches were undertaken for appropriate transmitter and studio sites and the equipment market was canvassed. It was decided that the facilities specified in the initial authorizations required upgrading; and proposals for new and improved transmitter sites, studio sites, taller towers, substantially higher transmitter power, more elaborate studio equipment, and new or substitute financing were planned and filed with the Commission.⁷

26. Authorizations for maximum facilities were granted for Atlanta, in January 1967; for Newport, in May 1966 for the transmitter and December 1966 for the studio; for Pittsburgh, in March 1967; for Rosenberg, in January 1967; and for San Francisco, in March 1967.

27. In the latter part of 1966, Overmyer's UHF venture suffered a serious set-back as a result of a credit crisis which threatened his warehouse business. Overmyer assigns, as the principal reason for the disposition of control of the five TV permits, the financial difficulties of Green & White Construction Co. (see below); the unavailability of general credit at the time; and the need for money by other elements of the Overmyer complex.⁸

28. When Overmyer began carrying out his program for a nationwide warehouse system, Green & White became his principal contractor. It set up a field organization and arranged for the construction of the warehouse buildings by local subcontractors. Large-scale building began in 1965, and by August 1966, warehouse space had increased from 2 million to 8 million square feet, with an additional 8 million square feet under construction.

29. In the summer of 1966, however, complaints began to reach Overmyer that Green & White was unduly slow in paying its subcontractors. An initial inquiry disclosed that prevailing credit restrictions on subcontractors were resulting in pressures on Green & White for accelerated payment. But further investigation showed that, probably in the main because of the massive inflation in construction costs and the extensive scope of its undertakings, Green & White was losing money on many of its projects and owed millions of dollars. Overmyer's warehousing activities were soon seriously hampered—completion of buildings was delayed; commitments to serve customers could not be met; and liens, placed on the buildings by subcontractors, blocked expected loans.

⁷ In some markets, studies were initiated to explore the availability of lower UHF channels; and rule making proposals were initiated to change the channel in some cities (Newport, Rosenberg, and Pittsburgh).

⁸ The "Overmyer complex" is described below.

30. Since Overmyer's only alternative was to assume Green & White's liabilities, he had to raise millions of dollars to pay off its debts. At the same time, the construction of the UHF stations, and the large operating deficits anticipated during the initial stages, were presenting Overmyer with demands on the bulk of any profits which could be expected from his warehousing operations over the next few years. After a study of the problem Overmyer concluded that a solution was a sale of his TV properties. His warehousing operations did not have the resources to produce the cash to meet both the debts of Green & White and the requirements of the UHF stations. Preserving the UHF enterprises alone would not have been enough since they depended on the money which the warehousing operations were expected to make; and if the warehousing operations could not be saved, everything would be lost. Overmyer adopted the alternative of paying off the Green & White debts in an effort to keep his warehousing operations alive while trying to obtain some relief from the substantial cash drain of the UHF stations.⁹

31. In the latter part of 1966 and early 1967, Overmyer explored a two-pronged approach. First, he sought to put the Green & White debts on an orderly schedule and attempted to realize some cash from the warehouse properties by means of sale-leasebacks. Second, he tried to find a "partner," preferably a minority stockholder, to provide financing for the UHF stations. He was able to make some progress in arranging for an orderly liquidation of the Green & White debts and in raising some cash through sale-leasebacks, but he could not find a minority stockholder for the UHF operations. Finally, he was able to work out the arrangement (which triggered this proceeding) for the sale of 80% of his interest in the five UHF permits.¹⁰ At the same time, through the \$3,000,000 loans from AVC he obtained cash needed to meet the early maturing obligations of Green & White.¹¹

32. Overmyer had intended to place all the UHF stations for which he had applied on the air, with the hope that the expected deficits during the initial stages of their operation would be defrayed by profits from his warehouse operations and loans which his warehouse properties would warrant. Indeed, Overmyer put Toledo on the air in May 1966, more than a year before the transfer applications were filed, and within 14 months after the grant of the construction permit; and he was trying to get the other UHF stations in operating condition.

33. Overmyer made substantial headway in carrying out plans for the UHF stations. Besides getting WDHO-TV on the air in Toledo, enough work had been done in San Francisco and Newport so that they were almost ready to go on the air by the time of the transfers, and there had been some progress on the other stations, especially in Atlanta and Pittsburgh. The San Francisco station went on the air within a month after the transfer was approved; and Newport went on the air shortly afterwards.

⁹ As explained below. Overmyer was trying to establish a fourth network. He sold the network at a substantial loss to curtail the cash drain.

¹⁰ It had been thought that Overmyer would have to sell the Toledo station—WDHO—TX—along with the other permits. But in light of the success of the measures described above, he was able to retain the Toledo station, although it was still operating at a loss.

¹¹ The \$3 million loans have been repaid in full by Overmyer (see above).

34. Overmyer, as already noted, agreed to sell 80% of his stock ownership in the five UHF permits for 80% of the expenses attributable to his acquisition and development of the TV stations, or \$1 million, whichever was less.¹² He thus had to establish, both to AVC and the Commission, his expenses incurred in connection with the UHF permits. These expenses, moreover, had to be computed as promptly as possible for inclusion in the transfer application.

35. *The claimed investment in UHF*, Overmyer's asserted investment in the five UHF permittees, which he said totaled more than \$1,300,000, was of two basic kinds—(1) money spent directly by or for the permittees, represented by capital or property and equipment bought by other Overmyer companies and donated to the five companies, or by debts for advances by other Overmyer companies which were canceled, and (2) the cost of services rendered and facilities provided by other Overmyer companies (particularly the staff departments) which were not paid by the five companies. Overmyer summarizes:

Net worth of the 5 companies.....	\$53, 500
Cancellation of intercompany debts.....	253, 046
Assets donated by other Overmyer companies.....	358, 840

Direct expenses.....	665, 386
Unreimbursed expenses of other Overmyer companies.....	666, 514

Total investment.....	1, 331, 900

36. Overmyer's claimed direct expenses, totaling \$665,386, include the following (reference to other Overmyer companies can only be fully understood after reading the discussion below, Pars. 38-40):

(a) *Net Worth*—Paid-in capital totaling \$53,500 for the common stock of the five permittee corporations.

(b) *Cancellation of Intercompany Accounts*—Overmyer supplied funds as needed to new companies in their developmental stage. These were furnished by another Overmyer company, usually through the Treasurer's or Controller's office in the "staff" company. The funds were advanced to the new company or were paid directly by the "staff" or other Overmyer companies. For example, money for payroll or for purchases would be advanced to the new company until it was able to generate its own cash and begin repaying the disbursing company.¹³ At the time of the transfer, the net results of these transactions was an asserted debt of the five Communications Companies to other Overmyer disbursing companies totaling \$253,046. The debt was forgiven as part of the Agreement with AVC, and is the basis of an additional claimed capital investment on Overmyer's part of \$253,046.

¹² At the time of the negotiations with AVC, Overmyer testified, he had spent more than \$2 million in his acquisition and development of the five UHF TV construction permits; he was willing, he said, to accept a maximum of \$1 million for only 80% of the stock only because he could not get a better price. It was his opinion, however, that he could properly have received \$1,600,000 for 80% the stock under the Commission's policy. Overmyer chose to retain the 20% interest in the UHF permittees, he declared, because he still believed in the eventual success of UHF. The option under which AVC could have acquired the additional 20% interest was included at the insistence of AVC and over Overmyer's "vigorous objections."

¹³ Overmyer furnished the Commission in the transfer applications with a summary of the major items of expenses in this category (salaries, film rights, etc.).

(c) *Assets Donated*—In addition to the foregoing, certain assets of the Overmyer Leasing Co. which were used by the five Communications Companies were donated to them by the Leasing Company. This similarly resulted in an additional claimed investment by Overmyer in the TV companies. The donated assets included a transmitter site acquired in the Cincinnati area at a claimed cost of \$58,688, and TV equipment on which the Leasing Company had assertedly made payments or deposits of \$300,152, making an additional claimed capital investment on Overmyer's part of \$358,840.¹⁴

37. The second broad category of investments claimed by Overmyer was the unreimbursed services and facilities provided for the five UHF permittees by other Overmyer companies, particularly The Overmyer Company, Inc. (TOC), since September 1966, and before that by the Overmyer Warehouse Company (Ohio) and other Overmyer companies. The services and facilities embraced all those within the purview of the staff departments, described below. These unreimbursed *indirect* claimed expenses totaled \$666,514, as above noted.

38. *The Overmyer Complex.* The Overmyer companies comprised three operating groups—warehousing, leasing, and communications—with a management staff organization to provide services for the line or operating groups.¹⁵ Overmyer at all times made the personnel and facilities of his other operations available to the Communications Companies.

39. Since September 1, 1966, management staff functions have been housed in a separate corporation—The Overmyer Company, Inc. TOC staff personnel, whose sole function was to serve the line companies, were organized under the following departments, with the line companies, Overmyer asserts, looking to TOC staff personnel for the performance of services indicated by the titles:

President's Office	Personnel Dept.
Treasurer's Office	Corp. Relations Dept.
Legal Dept.	Taxes and Insurance Dept.
Advertising & Public Relations Dept.	Auditing Dept.
Finance and Development Dept.	Human Relations Dept.
Controller's Dept.	Data Processing Dept.
Purchasing & Office Services	Acquisition Dept.

Before September 1, 1966, these staff functions were concentrated largely (but not exclusively) in the Overmyer Warehouse Company (Ohio). With the establishment of TOC they were placed in the new corporation, using separate accounting so that the costs of each op-

¹⁴ Overmyer submitted a detailed schedule of the equipment in this category in the transfer application.

¹⁵ The Warehouse group operated warehouses, with 60 regional and branch offices throughout the country at the time of the transfers. The Leasing Company rented equipment to various customers, including affiliated Overmyer companies. The Communications group included WDHO-TV in Toledo; an applicant for a UHF station in Dallas; and five companies developing UHF stations in Pittsburgh, San Francisco, Newport, Atlanta, and Rosenberg.

erating company would be confined to its respective "line" employees.

40. Originally appointed Treasurer and Controller of all the Overmyer companies in August 1964, Thomas J. Byrnes served in that capacity until March 1966, when he became Executive Vice President of the various Overmyer companies (except the Communications Companies, of which he was Vice President). Byrnes has an extensive background in accounting. He has been the Overmyer companies' chief financial officer.¹⁶ He supervised the compilation of the data for the transfers; Overmyer instructed his subordinates that all preparatory documents were to be reviewed and approved by Byrnes and communications counsel.

41. *The Allocation of Indirect Staff Expenses.* As noted in the designation order (Paragraph 3), the principal discrepancies raised in the House Report evolve from Overmyer's claim of \$666,514 in unreimbursed staff expenses of other Overmyer companies. These expenses were estimated because Overmyer said that records for the various staff services were not available, except for the four-month period September–December 1966. An allocation formula was therefore devised which would permit Overmyer to recover those expenses over the entire time in which he was involved in the television projects (July 1964 through March 1967).

42. The staff services for which reimbursement was claimed were based in identified departments in Overmyer's New York headquarters. In September 1966, and afterwards, as written above, staff departments were elements of The Overmyer Company, a non-operating company which was organized to provide administrative services for the Overmyer operating companies in warehousing, communications and leasing. Expenditures of these staff departments were recorded in the "6000" series of accounts—"Selling and Administrative Expense." Before September 1966, expenditures had been recorded on the books of the D. H. Overmyer Warehouse Company (Ohio)—the parent company, and later on the books of The Overmyer Company.

43. The allocation formula devised by Overmyer consisted of several elements, all restricted to the period September–December 1966. First, the amount of time each employee spent on communications matters was estimated on a percentage basis. This percentage was applied to the salary earned by each employee in each department. The total allocated salaries in any given department were compared with the total salaries paid in that department and a percentage of salaries allocated for communications activities was determined. This percentage, determined for each department for which reimbursement was claimed, was then applied to the total expenses of each department for the September–December 1966, period. The amounts arrived at for the several departments were then added to arrive at the total of staff services allocable to communications. The percentage of total depart-

¹⁶ Byrnes, who majored in accounting, holds a Bachelor of Science degree from Fordham University and a Master's degree in Business Administration from the New York University Graduate School of Business. He has had extensive accounting experience—3 years of public accounting with a national CPA firm; 12 years controllership and cost accounting with processing and manufacturing concerns; and 2 years controllership and treasury experience in a service industry.

mental expenses allocated to the communications companies was 11.1%. The formula resulted in the following allocations:

The Overmyer Co., Inc. (staff)	(1) Total salaries for period	(2) Salaries allocated	(3) Percent of salaries allocated	(4) Total department expenses	(5) Total ex- penses allo- cated (4X3)
President's office	\$56,564	\$9,830	17.4	\$88,044	\$15,320
Controller's department (personnel department, purchasing and office services, taxes and insurance de- partment)	207,603	14,303	6.9	352,065	24,292
Auditing department	20,864	2,146	10.3	33,205	3,420
Legal department	41,990	4,827	11.5	71,228	8,191
Treasurer's department	28,557	3,578	12.5	37,581	4,698
Corporate relations department ¹	12,455	-----	-----	16,477	0
Human relations department ¹	2,704	-----	-----	3,186	0
Advertising and public relations department	15,228	2,712	17.8	84,617	15,062
Data processing department ¹	13,209	-----	-----	22,285	0
Acquisition department ¹	4,984	-----	-----	14,175	0
Finance and development depart- ment:					
Home office	134,025	18,004	13.4	208,364	27,921
Regional offices	126,396	17,992	14.2	157,895	22,421
Total, department expenses and amount of allocation				1,089,122	* 121,325
Undistributed general expense al- located on same percentage (11.1 percent) as total expense above				71,038	7,956
Total, expenses and amount allocated to communi- cations companies				1,160,160	129,281

¹ These departments rendered services to the communications companies but no allocation of these expenses to communications has been made.
² Represents 11.1 percent of total department expenses.

44. Once the total amount of staff services was determined for the period September–December 1966, Overmyer estimated the level of communication activity of the staff departments for other periods:

For 1966 other than the base period—the same level.

For 1965—75% of the 1966 level.

For the second half of 1964—10% of the 1966 level.

For the first 3 months of 1967—75% of the 1966 level or 18¾% of the amount allocated for 1966.

In completing its allocation of these indirect charges, Overmyer deducted 20% for communications activities related to interests which were retained—the Toledo station, the Dallas application, and the Overmyer Network, and added an amount which represented unrecovered costs of the Overmyer Leasing Company during the periods. The total claimed is summarized below:

Year ended Dec. 31, 1966: Base period, 4 mo ended Dec. 31, 1966, per schedule E (\$129,281), 1966 year (\$129,281 times 3)	\$387,843
Year ended Dec. 31, 1965 (75 pct of 1966)	290,882
6 mo ended Dec. 31, 1964 (10 pct of 1966)	38,784
3 mo ended March 31, 1967 (18.75 pct of 1966)	72,721
Total charges for period July 1964–Mar. 31, 1967	790,230
Deduct portion applicable to other activities (20 pct)	158,046
Balance applicable to 5 station companies	632,184
Add Overmyer leasing company expense chargeable to 5 station companies	34,330
Total chargeable to 5 station companies	666,514

45. Overmyer, through Thomas Byrnes, its Executive Vice President, represented to the Commission that it had to use the September-December 1966, base period to allocate these indirect expenses because before the transfer of the staff departments to TOC in September 1966, "The cost of the 'staff' services was never separated out when they were rendered by the Warehouse [parent] and other companies prior to September 1966. Such costs, especially the non-personnel costs of the various functions, were buried within the total expenses of the Company involved." (Overmyer Ex. 8, p. 818). In testifying before the House Subcommittee, Byrnes, when questioned about the base period for the allocation formula, said: "It was the only period in which these allocated expenses had been set out in such a way that they could be used, sir" (Bur. Ex. 1, p. 86). His earlier representations to the Commission on this point were also submitted, under affidavit, to the House Subcommittee.

46. Staff expenses had been recorded in a single series of accounts (6000 series) since at least September 1, 1964. For the periods before September 1966, they were recorded on the parent company's books. During the period September 1965 through August 1966, the expenses were recorded in the same department, with minor variations, and in the same manner in the parent company's books as they had been during the base period after these functions had been transferred to TOC. A comparison of the departments from which expenses were allocated, with the Chart of Accounts (Bur. Ex. 3, p. 26) and trial balances of the parent company for the period September 1965 through August 1966 (Bur. Ex. 4, pp. 3A-B to 7A-B) is set forth below:

DHO department expenses allocated	Charted cost centers	1965-66 trial balance cost centers
President's office	92	92
Controller	99	99
Personnel	98	98
Purchasing and office services	82	82
Taxes and insurance	86, 87	86, 87
Auditing	83	83
Legal	95	95
Treasurer	89	89
Advertising and public relations	91, 97	91, 97
Finance and development	96	96

For the period September 1964 through August 1965, these expenses were grouped into the 00 cost center of the 6000 series of accounts.¹⁷

47. When first questioned about this, Byrnes acknowledged that he knew that staff expenses had always been recorded in the 6000 series of accounts. He testified, however, that before September 1966, and the formation of TOC, this series also included more than pure staff expenses and so would have been inflated for prior periods. Shown Bureau Exhibit 4,¹⁸ he said that he knew that during the preceding fiscal year (1965-66) the staff expenses were recorded¹⁹ in the same department cost centers as they were in TOC for the base period used in the

¹⁷ Other cost centers charged for 6000 series expenses during this period were: 01, 02, 08, 09, 10, 11, 12, 13, 16, 17, 22, 23, 28, 29, 30, 31, 34, 40, 44 and 46. The cost centers are either geographic locations or regional offices.

¹⁸ Trial balances for the fiscal year September 1, 1965-August 31, 1966 of inter-company accounts and selling and advertising expenses.

¹⁹ Byrnes testified that the exhibit showed "an attempt to [record]" (Tr. 313).

allocation formula. He said, however, that he had no faith in the accuracy of the entries. At a later hearing session he again testified that the figures for prior periods had not been used because he had no faith in their accuracy. He said that a later audit of the books of the Overmyer companies supported his belief because over 5,000 adjusting entries were required in the parent company's books before the auditors would certify them. He did not know, however, how many of these adjusting entries were in the 6000 series of accounts, nor did he know how many of them involved bookkeeping errors as distinguished from year-end adjusting entries.²⁰ Byrnes did not examine the records of prior years to test the validity of the allocations used in the applications.

48. Overmyer contests the Bureau's denial of the necessity to use an allocation formula. Its reply to the Bureau on this subject is briefly mentioned in Paragraph 92, below.

49. The Bureau argues, in effect, that Overmyer should have been compelled to testify in detail about the claimed 5,000 errors in the parent company books (Tr. 596-600). It was frustrated, it implies, in its attempts to elicit necessary information, because "[t]he Examiner refused the Bureau's request that Byrnes provide the underlying data" (p. 12, Bureau's proposed findings). The transcript of the last hearing day shows the Bureau's request of Mr. Byrnes, which was objected to by counsel for Overmyer (Tr. 596) :

I would like if you can to provide us with some sort of resumé of the kind of adjusting entries and particularly those year-end adjusting entries that Arthur Young required to be corrected before they be certified.

After argument, this ruling followed (Tr. 600) :

I don't see the probative value of these facts as they have been established, Mr. Riehl. The length of time that we would take regarding this matter, the trouble that it would put Overmyer to to get these facts for your benefit now and the appropriateness of closing the record in this case all leave me to say that I shouldn't honor your request, especially since we already have had such long testimony about that \$353,000 item, which in itself would be I suppose a justification for looking at the books askance. I am going to deny that request and let's proceed with the questioning otherwise.

Bureau counsel was in no way, however, inhibited from cross-examining Byrnes on the basis of information the Bureau had been able to glean from the books, which had been made available for the Bureau's inspection. On the other hand, the fact that Overmyer was not *compelled* to produce evidence supporting its contention that the books were inaccurate does not mean that its voluntary failure to do so could not be taken into account. If this case turned—as it does not—on “misrepresentation” in terms of culpability, the fact that Byrnes had chosen not to have his testimony corroborated from an unbiased source would be an element in the appraisal of his testimony. It has been explained, however, that the present decision deals with the substantial agreement or discrepancy between alleged and actual expenses, not with “misrepresentation” in accusatory terms. Nevertheless, for the sake of completeness, Overmyer's contest of the Bureau's denial of the need to resort to a formula will be mentioned below.

²⁰ Byrnes could only “suspect that they would [not] be a great number. I would not suspect they would be more than 10 percent” (Tr. 595). He had had a “gut reaction” (Tr. 595) that expense entries were inaccurate.

50. *The Bureau's analysis of the allocations formula.* While the amounts claimed for staff expenses of other Overmyer companies for other periods are expressed in terms of percentages of the amount declared appropriate during the period September–December 1966, in fact, the Bureau writes, all the allocations were based on the assumption that staff expenses were at the same level for all periods as they had been for the period September–December 1966. Simple computations, the Bureau contends, establish this. For example, in allocating expenses to the Communications Companies (OCC) for all of 1966, Overmyer multiplied the amount allocated for September–December (\$129,281) by 3 for a total of \$387,843. Essentially the same figure is arrived at by multiplying the total TOC expenses for September–December 1966 (\$1,160,160) times 3, times the percent (11.1) of the total departmental expenses allocated to OCC.²¹ Similarly, for the year 1965, using the assumed total departmental expenses for 1966 ($\$1,160,160 \times 3$) times the percent of departmental expenses allocated to OCC (11.1), times the level of activity by these departments with respect to OCC matters in 1965 (75%) the total is \$289,750, about the same amount as that arrived at through Overmyer's method of computation.²²

51. The use of the September–December 1966, TOC expenses as basis for computing indirect charges for other periods, the Bureau argues, carried with it the potential of inflating these expense claims, unless the staff expenses remained at essentially the same level throughout the period to which the allocation formula was applied (July 1964 through March 1967). The Bureau declares, however, that the staff departments grew during the period 1964–66, with 1966 the peak period.

52. The Overmyer allocation formula posited a constant annual staff expense of \$3,480,480, the Bureau continues. For the fiscal year September 1964 through August 1965, the staff expenses recorded on the books of the parent company totaled \$1,912,702.²³ Since the period encompassed by this total includes $\frac{2}{3}$ of the 1964 period (6 months) and $\frac{2}{3}$ of the 1965 period included in the Overmyer computation, it provides a basis, says the Bureau, for comparing what was claimed by Overmyer against what his own books and records (which, it should be recalled, Overmyer says were inaccurate) reflected and might have been claimed.²⁴ Thus, for the 6-month period ending December 1964, Overmyer claimed \$38,784, while, if the "actual" expenses for the period had been used, the Bureau writes, the appropriate amount would have been \$21,231 ($\$1,912,702 \times 11.1\% \times 10\%$ level of activity). Similarly, for the calendar year 1965 Overmyer claimed \$290,882, whereas based on "actual" expenses the amount would have been \$159,232 ($\$1,912,702 \times 11.1\% \times 75\%$ level of activity).

²¹ The actual computation totals \$386,333. The difference comes from rounding off the percentage of total departmental expenses allocated to 11.1. The actual percentage was slightly less than 11.14. This variance (\$1,510 for 1966) is insignificant.

²² The difference between this figure and the \$290,882 claimed again results from the rounding off of the departmental expense allocated to OCC.

²³ According to Byrnes these expenses would have been inflated because some operating company expenses, particularly executive salaries, were included. The figure includes staff department expenses (00 cost center) \$1,782,563, and regional offices (08, 16, 22, 34 and 40 cost centers) \$130,139.

²⁴ The need to extrapolate figures arises because Overmyer chose to estimate these claimed indirect expenses on a calendar year basis, whereas the accounting records are maintained on a fiscal year basis.

53. Staff expenses were recorded on the books of the parent company and TOC ²⁵ for the fiscal year September 1965–August 1966. The total in the parent company was \$2,314,492. TOC's records for this period are not in evidence. One-half the salaries recorded in the TOC staff departments for the four-month test period (September–December 1966) can therefore, says the Bureau, be added in order to arrive at a realistic total of staff expenses for this fiscal year. This amount is \$315,613.²⁶ The total for the fiscal year 1965–1966 would on this basis be approximately \$2,630,105, or \$850,375 less than the \$3,480,480 annual rate assumed in the Overmyer allocation formula. Again, for comparison purposes, according to the Bureau, these approximate "actual" figures can be used for the period January through August 1966. For this period Overmyer claimed \$258,562 in indirect staff expenses ($2 \times \$129,281$), whereas, based on "actual" expenses, the approximate amount would have been \$193,888 ($\frac{2}{3} \times \$2,630,105 \times 11.1\%$). For the three-month period January–March 1967, Overmyer claimed \$72,721, but, using the "actual" TOC expenses for this period, \$748,455, the actual amount claimed should have been \$61,560 ($\$748,455 \times 11.1\% \times 75\%$ level of activity) according to the Bureau.²⁷

54. The Bureau sets forth a tabulation comparing the amounts claimed by Overmyer as indirect expenses with what, in the Bureau's opinion, they should have been had available corporate records been used:

	Overmyer's claim	Per books
September–December 1966.....	\$129,281	\$129,281
January–August 1966.....	258,562	191,842
Calendar 1965.....	290,882	159,232
July–December 1964.....	38,784	21,231
January–March 1967.....	72,721	61,560
Total.....	790,230	563,146

Thus, the Bureau concludes, the use of a fixed level of expenditure equal to those for TOC during the September–December 1966 period, in the formula for estimating indirect expenses attributable to OCC, had the effect of overstating Overmyer's claimed out-of-pocket expenses by \$227,084.²⁸ As previously noted, Overmyer executives knew that staff expenses like those claimed were recorded on the parent company's books for prior periods, yet said that they had not checked them to determine the accuracy of the allocation formula.

55. *Departmental allocations.* The Bureau asserts that "several departmental expense allocations to OCC were overstated [or] included for periods when they should not have been, or both" (Par. 20, proposed findings). The Bureau's comments on particular departments follow.

²⁵ Staff salaries were recorded in TOC for July and August 1966.

²⁶ Salaries excluded were in the corporate relations, human relations, data processing, and acquisition departments, since they were not in the Overmyer computation.

²⁷ The Bureau recognizes that the 1967 figures may not have been available when the applications were filed in June 1967. They were, however, the Bureau points out, available before November 1967, when the applications were granted (Tr. 243–46).

²⁸ This is a conservative figure, the Bureau asserts, since, according to Overmyer's Executive Vice President Byrnes, the book figures in the parent company were inflated for prior periods.

56. *Controller's Department.* The department performed basic accounting and related services for all Overmyer companies. From September to December 1966, however, TOC charged OCC directly for these services and, beginning in January 1967, Controller personnel performing this function were transferred directly to OCC.²⁹ The failure to recognize this resulted in an overcharge, the Bureau claims, for the department of \$12,586 ($\frac{1}{3} \times \$24,164 + \$4,531$).

57. *Personnel Department* performed identical services for all Overmyer companies. Overmyer attributed 14.14% of the costs of the department to OCC. Attempts were made to establish the ratio of total number of employees for whom the Personnel Department performed services to those in OCC alone, but records were not available. A health insurance summary for the months of August and September 1965, however does provide a basis for comparison, in the opinion of the Bureau. The summary shows a total of 336 employees, of whom only 2 were from the Communications Company. OCC personnel represented $\frac{6}{10}$ of 1 percent (0.6%) of all employees in the health insurance program. On the assumption that there is a correlation between employees administered by the Personnel Department and as part of the health insurance program,³⁰ it would, writes the Bureau, appear that something less than 1% was the proper estimate for services rendered OCC by TOC, whereas the amount allocated was 14.14%. This, the Bureau points out, represents an allocation 24 times greater ($0.6 \times 24 = 14.4\%$) than the ratio of all employees to those employed by OCC. The Bureau, then, contends that less than 1% of the costs of the department should have been allocated to the Communications Company instead of the 14.14% claimed.

58. Overmyer's reply to the Bureau's arguments will be set out in a separate section below. At this point, however, to indicate the tenor of Overmyer's objection to the Bureau's criticism, its observations on the Personnel Department follow.

59. Overmyer rejects the Bureau's arguments as "sheer speculation" (Par. 75, proposed findings). It is "specious," writes Overmyer, to base Personnel Department expenses on the number of employees who may have been part of a health plan in August and September 1965.³¹ It cites the "extensive efforts" of the Personnel Department (apparently no matter how scantily staffed) in the recruitment of personnel for the Communications Company, which, it says, the Bureau "cavalierly disregards." As an example of these "extensive efforts" it mentions the search for a Director of Engineering which involved over 40 candidates.

60. *Legal Department.* At the beginning of September 1966 two members of the Legal Department and their secretaries were trans-

²⁹ Robert C. Schmidt, Angela Corubia and Florence Kopley were transferred from the Controller Department to OCC as of January 1, 1967—compare Bureau Ex. 7 with Bureau Ex. 15, p. 4. The only other member of the Controller Department whose work was claimed for OCC was Alban Owens. His employment covered a little more than a month—August–September 1966 (see Bur. Ex. 15, App. C. p. 2).

³⁰ Byrnes testified that a person had to be employed 60 days before he qualified for health insurance.

³¹ Overmyer's first attack on the Bureau's analysis is in itself unconvincing. Noting that an employee had to be with the company at least 60 days before qualifying for health benefits, Overmyer intimates that more than two Personnel Department employees would ultimately have been shown as health plan participants. This may be so, but the facts are left to supposition.

ferred to the books of OCC. The transfer, according to Mr. Overmyer, was effected "to help that interest and to improve its staffing" (Tr. 200). Mr. Bryan, the head of OCC during most of 1966, also said that during his tenure (March–September 1966), OCC had its own House Counsel, whose work was reviewed by the head of Overmyer's Legal Department. The Bureau therefore submits that Overmyer claimed reimbursement for legal expenses between September 1966 and March 1967 when, in fact, the Bureau says, they were being performed by attorneys on the OCC payroll.

61. *Treasurer's Department's* principal functions were the maintenance of all corporate bank accounts and the negotiation and servicing of non-mortgage loans. In addition, the department got "into the act to a degree . . . at the very tail end of the mortgage loan" (Tr. 289). After a warehouse was completed, the department would disburse the mortgage payments. Overmyer allocated 12.5% of the department's expenses to OCC. In supporting this claim before the House, Overmyer contended that the appropriate measure of the Treasurer's activity was the non-real estate loans serviced by that department, and said that 18% of these loans and 29% of their value were for OCC.

62. Examination of these loans, the Bureau contends, reveals a substantially different situation. Non-mortgage loans of all Overmyer companies between July 1964 and March 1967, totaled 22, with a combined value of \$4,605,000, of which 4 totaling \$1,330,000 were carried on the books of OCC. Two of these loans, however (Girard Trust and Pacific National), totaling \$650,000, were used for warehouse purposes. Viewed in terms of how the money was spent, the Bureau says, the OCC allocation represented 7% of the loans and 16.6% of the total loan value. When mortgage loans closed and serviced by the Treasurer's Department are taken into consideration, the Bureau notes, the disparity is even greater. As at August 31, 1964, these loans totaled \$5.4 million; as at August 31, 1965, they totaled \$10.9 million; and by the Summer of 1966, they totaled approximately \$50 million. Based on the \$50 million figure, the loans attributed to OCC represented less than 2% of the total. Finally, the Bureau writes, the five construction permits transferred were allocated for Treasurer's Department Series at an effective rate of 10.5% of the department's services (12.5% × 80%—5 CPS share of the total OCC allocation); and of the \$680,000 in non-mortgage loans attributable to OCC, \$600,000 represented a loan to the Toledo station, which was retained by Overmyer.

63. *Advertising and Public Relations Department.* Overmyer claimed 17.8% of the department's expenses was attributable to OCC. For the period considered, the dollar amounts claimed were (Bur. Ex. 6):

Year:		
1964	-----	\$4, 519
1965	-----	33, 890
1966	-----	45, 186
1967	-----	8, 472
Total	-----	92, 067

The Bureau's comments on Overmyer's claims for Advertising and Public Relations will be treated separately.

64. *Public Relations.* In support of this claim, Arthur M. Dorfner, as Vice President of the Communications Companies, said that the Public Relations Department advised OCC on both national and local publicity, helped in arranging meetings, prepared information releases, and gave instructions and prepared manuals for station personnel on promotion and public relations. He declared that the department spent "significant amounts of time" on these matters (Overmyer Ex. 8, pp. 825-26). In further support of this allocation, Mr. Byrnes, when testifying before the House Subcommittee, stated that the claim for indirect expense was almost twice the direct expenses (\$48,000) because the indirect (staff) expenses included both staff and professional charges, and that the Public Relations firm sent one bill for all Overmyer companies (Bur. Ex. 1, pp. 79-80). Mr. Byrnes also testified that there was a staff department for the function during the entire period (July 1964-March 1967) (p. 79). There was no corroboration of these representations.

65. Other evidence, the Bureau believes, casts doubt on the claims. First, Overmyer had no department or advertising and public relations staff before the summer of 1965. Second, contrary to Mr. Byrnes' testimony, the Communications Company had its own public relations firm, the Softness Group. Further, OCC was charged directly for the Softness Group's services.³² Mr. Robert Bryan in his statement (Bur. Ex. 18, p. 6), said that because of the lack of experience of Kendrick Scott, Overmyer's public relations man, in broadcasting, he was not called upon for assistance by OCC, though he was kept informed.

66. *Advertising.* In support of the advertising allocation, Overmyer told the Commission (Overmyer Ex. 8, p. 825) :

B. The Communications Companies have relied exclusively on the Advertising Department personnel of the Overmyer Companies for leadership in planning and carrying out advertising campaigns. The advertising personnel have served the Communications Companies in designing layouts for business papers, forms, Communications Companies, and individual station logos; in planning and carrying out several national advertising campaigns to promote the Communications Companies and the stations; in planning comprehensive campaigns in each local area to stimulate conversion of UHF, including on-the-air promotion, business cards, local ads, store posters, etc.; reviewing each Communications Company expenditure for space art work, production, etc. Practically daily meetings were held by such personnel with Communications Companies' people.

Overmyer said that these functions had been performed from 1965 on. Mr. Byrnes testified that Overmyer advertising was institutional, for the benefit of all Overmyer companies. He also said that this was true for OCC advertising (Tr. 552-58). No additional evidence, however, was offered to support either the original representations to the Commission or Mr. Byrnes' later testimony.

67. The evidence contradicting these Overmyer representations with respect to advertising activity is clear, the Bureau contends. As noted above, Overmyer had no advertising department until the summer of 1965. Further, says the Bureau, no advertising campaign for OCC was "formalized" until after Mr. Robert Adams left OCC in Decem-

³² A comparison of advertising expenses attributable to the five CPs transferred—\$24,300 (Bureau Ex. 16, Appendix C) with direct advertising expenses claimed—\$48,533.94 (Overmyer Ex. 8, p. 821, Schedule C) also makes it clear, says the Bureau, that professional public relations expenses were charged directly to OCC and not to the parent company, or TOC.

ber 1965, and it was the advertising agency, not the Overmyer staff, which was asked to devise the plan. Institutional advertising for OCC did not begin until May 1966. Moreover, contrary to Mr. Byrnes' contention, Bureau Exhibit 16, Appendix C,³³ the Bureau continues, appears to establish that Overmyer advertising was not exclusively institutional for either all companies or all OCC companies. Advertising charges were separated for each Overmyer operating group and local advertising for Overmyer's Toledo station was separated from OCC institutional advertising. As with public relations, the Overmyer Advertising Department did not participate in developing OCC advertising programs, but only approved them. The Bureau emphasizes that OCC advertising expenditures for the entire year of 1967 totalled only \$8.20.

68. In summary, the Bureau writes, "the foregoing establishes that there was no justification for allocating any portion of the Advertising and Public Relations Department expenses for the periods 1964, 1965 and 1967. Expenses recovered by Overmyer for these periods totalled \$46,881" (Par. 29, proposed findings).

69. *Finance and Development Department (F & D)*. Overmyer attributed \$307,715 of the total of \$790,230 claimed for indirect staff expenses to the Home and Regional Offices of this department, and estimated that 13.4% and 14.2% of the effort of these offices, respectively, were devoted to OCC affairs. The primary function of the department was to search out financial institutions willing to lend Overmyer money (principally for warehouse construction and secondarily for other Overmyer projects) and to investigate and secure real estate sites.

70. *Finance*. The total amount of loans developed by this department was approximately \$50 million in permanent mortgage loans, \$50 million in construction loans, and \$4,605,000 in non-real estate loans, for a total of some \$104,605,000. Loans carried on the books of OCC totaled \$1,330,000, or slightly more than 1% of the total secured by the department. When the loans actually used for OCC purposes are considered (\$680,000), the percentage of loans properly attributable to OCC, according to the Bureau, is substantially less than 1%.

71. The primary responsibility for obtaining OCC financing, according to Mr. Overmyer, fell to the chief executive of OCC, Adams or Bryan, during this period. Adams and Bryan were authorized to call on staff departments for assistance. According to Adams (May 1964–December 1965), he was accompanied by a Finance (Warehouse) employee in Atlanta once, in Cincinnati once by a Warehouse employee, and in San Francisco twice by a Warehouse employee, in attempting to obtain loan commitments for OCC. Byrnes or Mr. Overmyer, or both, not Finance people, assisted Adams in *obtaining* loan "commitments" for Atlanta, Pittsburgh and in Greenwich, Connecticut (the Greenwich application was withdrawn). Adams obtained the Houston (Rosenberg) and Dallas commitments without assistance.³⁴

³³ Recap of advertising expenditures for all Overmyer companies during the fiscal year 1965–1966, as reflected in the records of the advertising agency, Redmond, Marcus & Shure.

³⁴ Byrnes testified that he also participated in loan discussions for OCC in San Francisco, Dallas and Houston (Tr. 563–64). This is not attributable to this department since he was not a member of it and a portion of his time was allocated to OCC.

It was Bryan's recollection that F & D personnel were used only during 1966 with respect to loans for the San Francisco, Houston, and perhaps the Atlanta stations.

72. Letters of F & D personnel submitted to the House Subcommittee describing their activities in OCC financing, demonstrate, according to the Bureau, the limited nature of F & D's involvement. All attended briefings to familiarize themselves with OCC activities, as it was necessary to advise potential lenders of the full extent of Overmyer's commitments in all fields. All acknowledged that OCC was included in their general presentation to lenders on behalf of the Overmyer companies, and to answering questions regarding OCC activities (Bur. Ex. 2, pp. 879-82). The only affirmative representations with regard to seeking or obtaining financing for OCC was made by Henry C. Burbank, who said (p. 881) :

2. As part of my presentation to prospective lenders, . . . I mentioned the television stations and plans for their development. If the lender expressed a particular interest in the subject, I advised the Overmyer people directly responsible for communications development to contact him.

73. *Real Estate.* According to Mr. Overmyer, during the period July 1964 to March 1967, F & D investigated at least 1,750 prospective sites and acquired 175 of them for warehouse purposes.³⁵ During this same period, OCC acquired three sites and obtained options on two others. On a proportionate basis, assuming F & D fully participated in OCC site selections, more than 200 sites would have to have been investigated by F & D personnel for OCC to approximate the effort-percentage attributed by Overmyer to F & D. The description of OCC's activities with respect to transmitter site acquisition does not indicate says the Bureau, that this many sites were involved (Overmyer Ex. 8, pp. 806-09).³⁶

74. During the period 1964-65, Mr. Adams, working with OCC's consulting engineer and local real estate agents, did the work of searching out and negotiating for transmitter and studio sites. In some instances, Adams was introduced to the real estate agents by local Overmyer personnel and at times they talked about the possible location of a piece of land which could be used for a warehouse and a television studio. According to Bryan, F & D's real estate people gave OCC some leads on transmitter and studio sites. Except for Atlanta, the sites suggested did not prove satisfactory as they had been found for warehouse purposes and were not suitable for television. After mid-May 1966, when OCC's nucleus staffs became resident at their station locations, Bryan believed ("so far as I know") that OCC personnel did most of this work themselves (Bur. Ex. 18, p. 4). Mr. Byrnes disagreed "completely" with Bryan's statement that OCC people did the bulk of the site selection work. He said that they knew nothing about real estate. He also testified that when sites were selected, this was done by OCC people together with someone from F & D (Tr. 578-79), though communications personnel made the final decision.

³⁵ Testimony to House Subcommittee. Mr. Overmyer testified that 350 buildings were built on 175 sites, and that at least 10 sites were looked at for every one selected.

³⁶ Transmitter sites investigated at the various locations were *Atlanta*: a number of sites suggested, 5 considered (pp. 807-08); *Pittsburgh*: 12 sites studied (p. 808); *Newport, Kentucky*: 15 sites studied (p. 808); *San Francisco*: 2 sites (pp. 808-09). This comes to 34 sites.

75. Overmyer's reply to the Bureau under this head (Departmental allocations) is discussed in Paragraphs 101 to 132, below.

76. *Amount deducted for OCC activities retained.* In computing the indirect staff expenses attributable to the five construction permits transferred, Overmyer deducted 20% of the estimated expenses, representing work by staff personnel attributable to Overmyer's retained interests in OCC. These were: his only operating station (WDHO-TV), Toledo, the Overmyer Network, and the Dallas application. The Bureau asserts that "[n]othing has been offered to substantiate this allocation percentage. On the other hand, there is other evidence which tends to indicate that a greater percentage allocation should have been made for these retained interests" (Par. 36, proposed findings).

77. Mr. Overmyer claimed a cash investment in all communications activities of \$2,600,000, of which \$1,300,000, or 50%, was attributed to Toledo and his network activities.³⁷ OCC home office expenses were allocated to Overmyer's retained interests as follows (Bur. Ex. 13, p. 3):³⁸

	City	Percent
Year:		
1964.....	Toledo.....	100
1965.....	do.....	40
	Dallas.....	5
1966:		
January thru April.....	Toledo.....	40
	Dallas.....	5
May thru December.....	Toledo.....	5
	Dallas.....	0

No network allocations were made by OCC. According to Bryan, beginning in July 1966, OCC tried chiefly to establish the network, and for the rest of the year, with the exception of San Francisco, there was little progress on the other CPs.

78. Byrnes contradicted the implications of Bryan's testimony that work for the network was not for the benefit of the CPs. He testified (Tr. 574-5) that "the objective of the network, setting up the network" was "[e]xactly the opposite of what Mr. Bryan recollects. The purpose of setting up the network was in the hope of providing programming for this group of stations we were going to put on the air . . ." Lines of credit for the San Francisco and Atlanta stations, however, were used for warehouse purposes. The staffs at the Atlanta and Cincinnati stations were discharged in November 1966.

79. *Leasing Company allocation.* Overmyer also claimed and recovered \$34,330 in indirect expenses related to the "unreimbursed services" of the Overmyer Leasing Company (OLC).³⁹ This recovery was originally based on claimed unrealized profits. The basis was later changed to a claim that the rates charged OCC by OLC for equipment leases were so favorable that they did not cover actual OLC expenses, and

³⁷ The \$1,300,000 attributed to 5 construction permits transferred included \$666,000 in indirect staff expenses.

³⁸ Byrnes first said that these figures were an arbitrary allocation (and that they were not used in computing the formula) and not made on the basis of efforts expended (Tr. 545-50), but he later admitted he had no knowledge of the mechanics of the allocation (Tr. 603-04).

³⁹ Transmitter and studio equipment for the television stations was purchased by OLC and then leased to OCC.

that therefore recovery of these expenses was proper. This claim and the basis for it, the Bureau says, are "open to serious question" (Par. 39, proposed findings).

80. Total expenditures by OLC for equipment related to the five construction permits transferred (\$300,152) were recovered as part of Overmyer's out-of-pocket expenses. In addition, Overmyer recovered \$93,839 of payments made by OCC to OLC on equipment leases and interest payments on the equipment. So, the Bureau says, before adding \$34,300 for the claimed unrecovered OLC costs. Overmyer was already recovering \$393,991 on a cash investment of only \$300,152.⁴⁰

81. Also, while the lease rates charged OCC by OLC were less than OLC charged others, the Bureau notes, this was the result of an arms' length negotiation. Moreover, continues the Bureau, the rate, although lower, was, contrary to Overmyer's representations, sufficiently high to insure OLC a profit on these transactions. The lower rate was based on the fact that the equipment purchased by OLC for OCC involved many hundreds of thousands of dollars and thus OLC's per-dollar costs were lower than for smaller items of equipment OLC purchased for the various warehouse companies. In addition, OLC usually did not have to obtain bank financing for this equipment as it had to with equipment leased to the warehouse companies.

82. *Expenses recovered which had already been allocated elsewhere.* At the close of the 1964-1965 fiscal year, Overmyer distributed all the expenditures in the 6000 series of accounts (the source of the indirect staff expenses) either directly to construction in progress of specified warehouses, to warehouse companies, for warehouses under construction, or as an offset to the income of the parent company itself. Of the total expenses recorded in these accounts, \$1,765,273 was included in the cost of constructing particular warehouses, and \$254,339 was, the Bureau assumes, used as an offset against the income of the parent company and its subsidiaries.⁴¹ Since all the actual indirect staff expenses for this period were, in effect, used up, there were none in fact, the Bureau maintains, available to Overmyer to claim even on his estimated basis. Yet, the Bureau points out, indirect expenses were claimed for both the last six months of 1964 and calendar 1965, totaling \$329,666. Since fiscal 1964-65 encompassed $\frac{2}{3}$ of the 6-month 1964 period (September-December) and $\frac{2}{3}$ of the calendar 1965 period (January through August), it follows, the Bureau concludes, that $\frac{2}{3}$ of the \$329,666 claimed, or \$219,778, was an improper charge and should not have been included. Mr. Byrnes' only testimony with regard to Bureau Ex. 10,⁴² which is the basis for the foregoing, was that these records were not used in connection with the allocation by formula of indirect expenses submitted to the Commission (Tr. 519).

83. The Bureau sums up (Par. 43): "As set forth in the Findings, paragraph 17, Overmyer's actual staff expenses for the 1964 and 1965 periods were substantially less than those estimated. Based on actual expenses, the amounts under his formula which should have been at-

⁴⁰ The terms "recovered" and "recovering" by Overmyer in this paragraph relate to the 80% received in cash from AVC and 20% as his investment in the retained interests.

⁴¹ "[S]ince the journal voucher discloses no other distribution" (Bur. Ex. 10, p. 2, fn. 2).

⁴² "Analysis of Distribution of General Administrative Expenses of D. H. Overmyer Warehouse Company (The Parent Company) for the fiscal year September 1, 1964 to August 31, 1965."

tributed to OCC activities were \$21,231 for 1964 and \$159,232 for 1965. [fn. omitted] Since, as demonstrated in the preceding paragraph, $\frac{2}{3}$ of these claimed expenses were not recoverable at all, the proper claim by Overmyer for these periods should have been: 1964—\$7,077, 1965—\$53,078.”

84. Before proceeding to a consideration of Overmyer's specific replies to the Bureau, certain of its proposed affirmative findings on its cost allocation methods will be discussed.

85. Overmyer says that there was an underallocation of “true” costs. Thus, it asserts, it made no allocation of costs for certain TOC departments—for example, Data Processing, Corporate Relations, and Acquisitions, “although their personnel had rendered substantial service for the Communications Companies” (Par. 42, proposed findings). (The exclusion is referred to in the section on the Bureau's analysis, Paragraph 53, above.) For example, Overmyer continues, Dale Harden, who manned Overmyer's Corporate Relations office in Washington, and his secretary, spent “significant time” on communications, but no portion of the costs of that office was included. Also, “main line” employees in regional and branch offices of the Warehouse Company helped the Communications group, but no part of their expenses of these offices was allocated. Some of the physical assets transferred to AVC had increased in value, according to Overmyer, and it would have been entirely proper for him, he felt, to have been paid for this alleged appreciation. Also, in the light of Overmyer's assumption of Green & White's liabilities, the cost of that company's services for the Communications group—asserted to be more than \$50,000 in unrecouped salary and overhead—could, it is contended by Overmyer, properly have been added to Overmyer's investment in the TV companies.

86. Overmyer wanted to establish a new TV network primarily, he testified, to provide a ready source of programing for his UHF stations. This venture entailed substantial expenditures and was finally sold at a loss early in 1967. Since, as Overmyer asserts, the network's principal purpose was to assist in the development of his UHF stations, the loss on disposition, he argues, was properly attributable to his Communications Companies; nevertheless, none of the network's extensive costs were claimed.

87. Whatever the treatment of other network costs, an allocation could properly have been taken, Overmyer says, for a portion of the salaries of Oliver Treyz, who had headed the network, and of his secretarial help. In November 1966, because of Overmyer's dissatisfaction with the operating management of the Communications Companies, Treyz was made operating head of the Communications Companies; and in this position he reported daily to Byrnes, Overmyer, or both. Bryan, who had been operating head, and other staff members of the Communications Companies reported to Treyz. For roughly half the base period, Treyz was actively engaged in the day-to-day affairs of the Communications Companies, but no portion of his salary, or of the salaries of his clerical help, was included in computing Overmyer's indirect staff costs.⁴³

⁴³ From a review of the allocation of expenses for the President's office Overmyer contends that there had been an understatement of expenses of almost \$10,000 (\$9859) because the salaries of certain people were improperly omitted.

88. In computing the costs for their units, the TOC department heads used various information available, including employee rosters, salaries, and overhead expenses. They discussed the data with the individual employees, where possible. Finally, the allocations were reviewed by Byrnes and outside communications counsel.⁴⁴ It was testified that there were no orders, advice, instructions, requests, or the like, by Overmyer, Byrnes or anyone in the Overmyer organization, that a specific dollar amount be reached in computing the costs attributable to the Communications Companies. Nor, it is asserted, were any allocations inflated because Overmyer, Byrnes or the department head were aware of the terms of the AVC agreement or of the Commission's policy on reimbursement for out-of-pocket costs.

89. A description of the procedures employed by Overmyer in computing his out-of-pocket costs, including the allocation of the indirect staff expenses, and the formula used in computing them, was set out in the transfer applications. During the pendency of the applications, when further information was requested informally by members of the staff or individual Commissioners, it was provided on the express instructions of Overmyer. In the course of the proceedings before the Special Subcommittee, background material requested from the Overmyer files was made available to the staff; and members of the organization cooperated with the Subcommittee. Questions by the staff and requests for further information were extensively answered.

90. Mr. Overmyer did not participate personally in the preparation of the transfer applications or the supporting data, but he reviewed the final draft before filing. He testified to his belief that the procedures devised by Byrnes for computing out-of-pocket costs were adopted in good faith, and that there was no intention on his part, or on the part of anyone in the Overmyer organization, to misrepresent any fact or to mislead the Commission in any way. Furthermore, he testified, he had no reason to believe now that any of the data submitted in support of his showing on out-of-pocket costs were improper or inaccurate.

91. In the light of the questions raised by the Commission's hearing order, an effort was made by Overmyer personnel (Byrnes, Connery and Silcox) to review the staff allocation for communications work during the base period with certain employees no longer with the Overmyer companies. To the extent that they were able to reach the employees by mail, the responses obtained further persuaded them that the allocations were reasonable and substantially accurate. The responses cannot be accorded independent, substantive weight. Undoubtedly, however, they helped bolster Byrnes', etc.'s confidence. For instance, Byrnes wrote to Mrs. Loretta Bejot as follows on May 13, 1971 (Overmyer Ex. 2) :

We are in the process of gathering certain statistical information concerning the development of our TV stations for presentation to the FCC. During the time in which you were employed by the company, your department was engaged in various preliminary activities designed to help the company obtain TV licenses, locate real estate sites for the studio or transmitters, finance the ac-

⁴⁴ As a result of discussions with Byrnes and counsel, Overmyer decided to delete certain expense items to avoid any questions, although he felt, he testified, they could properly have been included in computing his total out-of-pocket costs.

tivities of the potential TV stations, both short and long term, obtain equipment and programming for the station and all of the other preliminary administrative work which must go into the establishment of a business.

We asked the individual department heads to give us their best estimate of the percentage of time spent by their employees in such general development activities, either directly, such as in the case of a finance employee seeking loans, or indirectly, such as a secretary working with such people in TV development, during the period September 1 through December 31, 1966.

In this regard, departmental records indicate that you would have spent 40% of your time in such activities. We would appreciate it if you would indicate in the space below whether or not this is a fair estimate of the percentage of time and effort you expended, sign it, and return it to us in the enclosed self-addressed, stamped envelope. If you do not recall at this date, of course, just say so.

Thank you very much for your help in this analysis. If you have any questions, just call the writer.

Very truly yours,

(S) T. J. BYRNES.

dc

The above percentage is (*is not*) approximately correct. If incorrect, what is the correct percentage?

55%.

(S) LORETTA T. BEJOT,
Date: May 18, 1971.

What "departmental records" "indicated" how Mrs. Bejot spent her time were not disclosed. Not surprisingly in light of the helpful leads in the letter, Mrs. Bejot did not contradict and indeed upped the percentage suggested. Of Mr. Byrnes' addressees who received similar letters, only a few of those who replied wrote that they had spent less time on communications than the percentage mentioned in the letter.

92. *Overmyer's reply to Bureau's analysis.* Overmyer begins its reply to the Bureau with a defense of the need to use an allocation formula instead of "direct" book figures. To the Bureau the alleged need is a sham, and it argues that the misrepresentation is a factor in an appraisal of the "fraudulent" character of Overmyer's conduct. But, as already explained, the initial decision bypasses, in connection with affirmative findings, the question of culpable misrepresentation, and addresses itself to the possible conformity between claimed and "actual" expenditures. No more space need therefore be devoted to the matter than has been taken up above (Par. 45 ff.) and emerges incidentally in the ensuing discussion.

93. The Bureau, declares Overmyer, "erroneously" says that the use of the September-December 1966 base period inflated Overmyer's out-of-pocket costs. To support its contention that expenses computed for prior periods under the formula were inflated when compared with "actual expenditures," the Bureau, Overmyer maintains, uses the very data which Overmyer had rejected as unreliable. Byrnes, who was responsible for preparing Overmyer's showing on out-of-pocket costs, according to his testimony, felt, as already indicated, that the accounting before establishment of TOC was in such a state that "anything was possible."

94. The Bureau, according to Overmyer, assumes that over-all staff expenses were at the same level for all periods as during the base period; and it maintains that use of the TOC base period expenses "as basis for computing indirect charges for other periods carried with it the potential of inflating these expense claims, unless the staff

expenses remained at essentially the same level throughout the entire period to which the allocation formula was applied (July 1964 through March 1967).” It asserts that “this was not the case” since “the staff departments grew rapidly during the period 1964–1966, with 1966 being the peak period . . .” (Par. 16, Bureau proposed findings). It notes that total expenses for the base period were \$1,160,160, giving an assumed annual rate of expenditures for such staff services of \$3,480,480. It then cites lesser staff expenses recorded on the books of the parent company for former periods to charge that the use of the formula inflated expenses. It says, for example, that, for the fiscal year September 1964 through August 1965, staff expenses totaled only \$1,912,702; and for fiscal 1965, expenditures totaled only \$2,314,492. By using this inflated rate of annual expenditures, the Bureau argues, there was an overstatement of indirect expenses of \$277,914.

95. Similarly, the Bureau argues that the allocation formula assumed TOC staff expenditures for the January–March 1967 period to be \$870,120, while they were actually only \$748,455. The Bureau concedes that at the time the application was filed in June 1967, TOC’s expenses for this period were not available as the accounting was some four months behind. But the Bureau says that because these data were at hand before the application was granted in December 1967, Overmyer should have used them and apparently have amended his application. In response, Overmyer declares that it had no reason to question the expenses as computed under the formula; and that, in any event, the Bureau’s contention that the actual expenses for 1967 conclusively demonstrate that Overmyer’s *communications* expenses for 1967 were inflated is not supported by the record. Overmyer maintains that it spelled out in great detail the allocation formula utilized in the application, and that this included a full explanation of the application of its formula to the January–March 1967 period. During the pendency of the application, it points out, Overmyer had furnished additional information requested by various Commissioners and the staff.

96. In applying the data for the base period to other periods, Overmyer compared the level of staff activities on *communications* matters in the periods. For example (see above), it was determined that, for the rest of 1966, the same level of *communications* activities prevailed; and for 1965, 75% of the 1966 level of *communications* activities. The allocation formula was not, Overmyer declares, intended to include the over-all activity of staff personnel for non-communications companies during the other periods.

97. The Bureau, Overmyer argues, erroneously assumes that the same ratio of communications to non-communications activity prevailed throughout the period. The Bureau notes that over-all departmental staff expenses on communications matters during the base period comprised 11.1% of total departmental expenses; and therefore concludes that the same ratio of communications/non-communications activities (11.1%) prevailed in other periods. It takes the data purporting to show over-all staff expenses for the prior period (data which Overmyer rejected as unreliable), reduces this to reach the estimated level of activity specified for the particular by Overmyer, and

then also reduces the amount by the 11.1% ratio to reach what it claims are the actual expenses for communications matters. By reducing what it asserts are the over-all staff expenses for the pertinent period by *both* the 11.1% ratio of communications/non-communications work *and* by the percentage representing the lower level of activity estimated by Overmyer, the Bureau is, Overmyer contends, in essence "double billing." Even if the over-all expense data for prior periods proffered by the Bureau are accurate, Overmyer writes, the Bureau's computations do not establish that Overmyer overstated its staff costs on communications matters for prior periods. The fact that over-all expenses for certain of the prior periods may have been less than these expenses for the base period is completely irrelevant, says Overmyer; what is critical, it argues, is the ratio of communications/non-communications activities for the particular period. In this connection, it writes that there is "absolutely no basis in the record for the Bureau's assumption that the 11.1% ratio applies across the board for the entire 33-month period—July 1964 to March 1967. And as shown below, in the absence of a careful employee-by-employee analysis such as that utilized for the base period, the Bureau's wholly speculative computations for other periods must be rejected" (Par. 59, proposed findings).

98. Overmyer also charges that the Bureau "overlooks the critical fact that, even if Overmyer had had accurate data on staff expenses of the parent company prior to TOC, the only way it would have been possible for Overmyer to have segregated out staff costs for communications, would have been for the department heads to have made the same detailed employee-by-employee analysis of departmental activities on behalf of communications as that undertaken for the base period since it certainly could not be assumed that the 11.1% ratio of communications/non-communications applied for all periods. Clearly, this was impossible in light of the extended passage of time" (Par. 60, proposed findings). But, Overmyer exults, "most of the TOC employees who were on board during the September–December 1966 base period were fortunately still in Overmyer's employ or could be reached when the analysis was made in the spring of 1967,²⁸ [45] so that the analysis for the base period was meaningful." (See Par. 91, above.)

99. The Bureau's contention that Overmyer selected the base period because it was the peak period is disputed by Overmyer. While 1966 may have been Overmyer's peak year, contrary to the Bureau's "presumption," it asserts, the 4-month base period was not the most active portion of that year. TOC's payroll for the last quarter of 1966 was \$500,009, while the payroll for the immediately preceding period (July–September) was \$655,463, or some 30% higher than October–December, which comprised the bulk of the base period. The base period did not represent Overmyer's peak period, says Overmyer, and as it concluded that the level of communications activity was the same for the portion of 1966 outside the base period as for the base period, under the Bureau's own analysis, it argues, Overmyer *understated* his expenses by choosing September–December as its base period.

[45] "A similar comprehensive analysis would . . . have to have been made for the 3-month period in 1967, when the data for this period finally became available. It would not have been feasible to determine Overmyer's out-of-pocket costs for this period simply by taking 11.1% of overall TOC expenses for this period since there is no basis for presuming the 11.1% ratio, which applied during the base period, was still applicable."

100. Turning to the Bureau's comments on the claims for Overmyer's expenditures represented by allocations for various departments, Overmyer calls the criticisms "without merit." Summing up its general objections to the Bureau's method, Overmyer writes (Par. 62, proposed findings) that "the Bureau's contention that the 'actual' expense data for the periods outside the base period [data which, as mentioned above, Byrnes testified Overmyer regarded as wholly unreliable] show that Overmyer overstated his costs is just plain wrong." Conceding that use of an allocation formula was a "novel approach" and that estimates were inevitable, nevertheless, Overmyer says, it was only by employing the formula that it could arrive at a reasonable approximation of its expenses. Overmyer then addresses itself to particular departmental and other allocations which the Bureau regards as erroneous, as "overstated [or] included for periods when they should not have been, or both."

101. *Controller's Department.* The Bureau contends that during the September-December 1966 base period, TOC was charging the Communications Company directly for "basic accounting and related services" and that starting in January 1967, personnel performing this function were transferred directly to the Communications Company. It argues that "failure to recognize this resulted in an overcharge for this department of \$12,586 . . ." (Par. 20, proposed findings). The Bureau would disallow the full amount attributed to the Controller's Department for the base period (\$8,055), as well as the full amount for the first 3 months of 1967 (\$4,531). On the basis of TOC accounting records which reflect certain administrative service charges to the Communications Company totaling \$4,545, the Bureau concludes that these were the only accounting services by TOC on communications matters during the September-December 1966 period (Tr. 419; Bureau Ex. 11). Overmyer says, "There is no support for this presumption" (Par. 64, proposed findings).⁴⁶

102. The accounting services performed for the Communications Company by TOC personnel, for which \$8,055 was allocated, were, Overmyer points out, described at length (though without quantification) by John T. Murray, TOC's Controller at the time, in the material submitted in support of the transfer application. (Subcommittee Hearings, Part 2, p. 828). This material has not been in terms refuted. And the Bureau concedes that Overmyer's current Controller, Bernard Guttilla, advised that the accounting services listed in Bureau Exhibit 11 were ultimately charged in their entirety to Toledo, which was not involved in the transfer (Bureau Ex. 11-A).⁴⁷

103. With respect to the remaining \$4,531 alleged overcharge, Overmyer seems to concede (Par. 66, proposed findings) that as an isolated unit there might be merit in the Bureau's objection to it. It argues, however, that "[i]n applying the data on staff costs for the

⁴⁶ No testimony was offered in support of Bureau Ex. 11 which the Bureau now contends purports to show "double billing." The Presiding Judge commented that "this exhibit [Bur. Ex. 11] on its face is certainly not self-explanatory to me. Now, there has to be some argument on the basis of the document, there ought to be some testimony regarding its meaning" (Tr. 471).

⁴⁷ Moreover, Overmyer says, the Bureau would delete the entire indirect staff charges totaling \$8,055 for the base period on the basis of accounting records purporting to reflect direct charges to the Communications Company totaling only \$4,545 (Bur. Ex. 6 and Bur. Ex. 11-A).

base period to other periods, Overmyer, of necessity, had to employ estimates based on the level of staff activity on communications matters during such periods. It was concluded in this respect that the level of such activity for the January–March 1967 period for TOC was $\frac{3}{4}$ that of the level of communications activity for the base period. But obviously this did not mean that the same 75% level of activity prevailed for every single unit. For what Overmyer submitted was his best estimate of the level of communications activity for the other periods for *all* of the staff services in comparison with the level of such activity during the base period. It is not surprising, therefore, that in case of certain departments, there may have been some variations from the 75% figure, but this is no indication that the estimate was inflated on an overall basis.” Actually, contends Overmyer, as already indicated, the allocation formula *understated* expenses “in several cases” (Par. 67) and it cites the affidavits, couched in general terms, of Overmyer employees submitted to the Commission with the transfer applications.

104. *Legal Department.* The Bureau writes (Par. 21, proposed findings) that in September 1966, two members of the Legal Department and their secretaries were transferred to the books of the Communications Company. It concludes that “Overmyer claimed reimbursement for legal expenses between September 1966 and March 1967 when, in fact, they were being performed by attorneys on the OCC payroll”; and that Overmyer’s claim that 11.5% of the Legal Department’s efforts were attributable to communications matters “is substantially overstated for the period September 1966–March 1967” (Par. 13, proposed conclusions). Here, again, Overmyer maintains (Par. 70, proposed findings), “the Bureau’s contention is based on sheer speculation wholly unsupported by the record.”

105. The activities of the Legal Department on behalf of the Communications Company were described in detail by Edmund M. Conery, Overmyer’s General Counsel, who made the allocation of costs. “There is absolutely nothing in the record to support the Bureau’s bald contention,” Overmyer writes (Par. 71, proposed findings), “that these extensive activities were all accomplished by attorneys on the Communications Company’s payroll rather than the Overmyer staff.”

106. In fact, Overmyer contends, the record shows that expenses for the Legal Department’s efforts for the Communications Company were understated. Byrnes, upon reviewing the allocation for the department, noted that while the salary of one attorney (Merle Tom) had been shown as allocated 100%, only \$480 was charged for him. An investigation determined that Tom had been transferred to the Communications Company full time early in September 1966 and that the \$480 charged for him for the base period represented his salary for the entire base period. This, Overmyer concludes, resulted in a net understatement for Tom’s salary for the prior periods of \$4,287.⁴⁸

107. Similarly, Lemuel Schofield had been on the TOC Legal Department staff before the base period but had been transferred to the Communications Company, and his salary also was not taken into

⁴⁸ While Tom’s salary of \$480 for the base might have resulted in an overstatement for the first 3 months of 1967 of \$1,700, the net *understatement* totaled \$2,572 (Tr. 533–540), Overmyer asserts.

account in computing the costs for the prior years. This, Overmyer says, resulted in a further understatement.

108. Overmyer objects to the Bureau's reliance on the statement of Robert L. Bryan, who succeeded Robert Adams as Chief Executive Officer of the Communications Company between March and December 1966, that the Communications Company had its own house counsel whose work was reviewed by the head of Overmyer's Legal Department. It argues that this is insufficient to validate the Bureau's "speculation" that "Overmyer claimed reimbursement for legal expenses between September 1966 and March 1967 when, in fact, they were being performed by attorneys on the OCC payroll" (Par. 21, proposed findings). Overmyer concedes that the activities of the Communications Company had reached a point where it "may have required" the services of some attorneys assigned directly to OCC, but says that the Bureau has overlooked the fact that additional legal work was in fact performed by the Overmyer staff attorneys. Connery, TOC's General Counsel, allocated the expenses of the Legal Department on the basis of his personal experience and knowledge. The record, Overmyer maintains, "does not show that his allocation of costs [was] overstated in the slightest. Indeed, Connery noted that while applying the allocation formula for the rest of 1966 and the first 3 months of 1967 was proper, the formula resulted in an *understatement* of Legal Department costs by more than 50% in the other time periods (O. Ex. 8, pp. 824, 825)" (Par. 74, proposed findings).

109. *Personnel Department.* See Paragraph 59, above.

110. *Treasurer's Department.* The Bureau asserts that in supporting the allocation of expenses for the Treasurer's Department before the House Subcommittee, Overmyer "contended that the appropriate measure of the Treasurer's activity was the non-real estate loans serviced by that Department and advised that 18% of these loans and 29% of their value were for OCC," and that an examination of such loans "reflects a substantially different picture" (Pars. 22-23, proposed findings). The Bureau contends that "[v]iewed in terms of how the money was spent, the OCC allocation represented 7% of the loans and 16.6% of the total loan value"; and claims that "when mortgage loans closed and serviced by the Treasurer's Department are taken into consideration, the disparity is even greater," since Communications Company loans represented less than 2% of the total. Finally, the Bureau argues that "of the \$680,000 in non-mortgage loans properly attributable to OCC, \$600,000 represented a loan to the Toledo station which was retained by Overmyer."⁴⁹ "But, at best, surely this is a matter of accounting theory, not 'fraudulent misrepresentation' as the Bureau claims," Overmyer argues.

111. Contrary to the Bureau's assertion, says Overmyer, it was not Overmyer who suggested that the appropriate measure of the Treasurer's activity was the non-real estate loans serviced by that Department,

⁴⁹ The Bureau would discount two loans (Girard Trust and Pacific National) totaling \$650,000, which it contends were used for warehouse purposes. Byrnes testified, however, that the loans could have been used for other purposes; that the money was all pooled and disbursed out of a central account (Tr. 292). Overmyer writes (fn. 36, proposed findings): "The mere fact that the funds might have been employed temporarily [there is no record reference for this statement that the Warehouse Company might have used the funds "temporarily"] for use by the Warehouse Company is not controlling."

but Congressman Moss. He said during the Subcommittee Hearings that the "more important point [would] be the total number of loans serviced by the organization and the percentage this represents of the total cost of the operation." Mr. Druhan, special consultant to the Subcommittee, then said (Bur. Ex. 1, p. 90) that Overmyer "chose to use an allocation of employees' time and they did not choose to submit based on a relationship to total services." Nevertheless, Congressman Moss directed that Overmyer supply data on his suggested basis to the Subcommittee and it was furnished.

112. TOC's Treasurer, Frank J. Lake, had said that the allocation of expenses for the department was based on an estimate of work of department personnel on behalf of OCC. Lake determined that a minimum of 12.5% of the total salaries paid by the Treasurer's office during the base period should be charged to communications. On this basis, the expenses of the department for the base period came to \$4,698; and for the full period, to \$28,717.⁵⁰

113. *Advertising and Public Relations.* The Bureau challenges Overmyer's allocation of indirect expenses for advertising and public relations. It argues that Overmyer had no advertising and public relations department or staff before the summer of 1965; that the Communications Company had its own public relations firm, the Softness Group, and was charged directly for its services; and that because of his lack of broadcast experience, Overmyer's public relations man was not called upon for assistance by the Communications Company. The Bureau asserts that no advertising campaigns were formalized for the Communications Company until after Adams left in December 1965; and that it was the advertising agency, not the Overmyer staff, who formulated this plan. The Bureau argues that institutional advertising did not begin for the Communications Company until May 1966; and that Overmyer advertising was not exclusively institutional. Finally, the Bureau would reject entirely the claim for TOC advertising expenses during the first 3 months of 1967 because direct advertising expenditures for the Communications Company totaled only \$8.20. Again, maintains Overmyer, "these contentions are wholly speculative and are simply not supported by the record" (Par. 83, proposed findings).

114. The allocation of indirect expenses for Public Relations and Advertising, Overmyer notes, was made by Arthur M. Dorfner, who was then Executive Vice President of the Communications Companies and who had been Executive Vice President since October 1965. He was, according to his statement, "intimately familiar" with the work performed for the Communications Companies by the Public Relations and Advertising Department of TOC since the summer of 1966 and before that, by the corresponding department of the Overmyer Warehouse Company; and he said that he was informed of these activities before he joined Overmyer from people in the department and other Communications personnel. Dorfner described in some detail the activities of the personnel of the staff department for the Communications Companies. "There is nothing in the record," writes Over-

⁵⁰ With respect to the reasonableness of the allocation of \$28,000 for the Treasury Department, Byrnes told the Subcommittee that this did not represent "an awful lot of money a year" "over a 3½ year period" and was "a lot less . . . than you pay an assistant treasurer" (Bur. Ex. 1, p. 90).

myer, "to indicate that his allocation of expenses for the department was in any way erroneous or improper" (Par. 84, proposed findings).

115. Overmyer rejects the Bureau's "speculative contentions, based in large part on its own interpretations of broad statements in depositions of Adams and Bryan, former Communications Company executives" (Par. 85, proposed findings). The Bureau, it says, has ignored "the comprehensive explanation as to how Overmyer utilized public relations and advertising. For it is perfectly clear that the expenses incurred in assisting the Communications Companies in the area of Advertising and Public relations were not in any way unusual in the Overmyer operation. Thus, as Byrnes told the House Subcommittee:

As a matter of normal policy within our companies, we have always been firm believers, in advertising and public relations and for all of the companies; giving an analogy of the warehousing company, before we would ever build a warehouse we would expend time, effort, and money in public relations and in advertising in given communities. Now, we do the same thing, I am quite sure, to the best of my recollection, it was the same policy for the Communications Companies, to pave the way. I do know that I can recall seeing advertising material, the point of sale type of thing which was made up for individual stations like Cincinnati, San Francisco, to be distributed to pave the way for activation of the station. For many, many months before we anticipated going on the air, we knew that it was our intention to put these stations on the air. . . . [W]e didn't believe as a company in waiting to prepare the community for this new facility. So, public relations and advertising work went on all the time even though the thrust of the technical people in the Communications Company . . . [perhaps] was on finding sites. That did not stop public relations or advertising . . . from going on. (Subcommittee Hearings, Part 1, pp. 80-81).

In sum, the primary function of the Advertising and Public Relations Department was to publicize *all* Overmyer enterprises on an institutional basis, and this specifically included the Communications Companies. And the sincerity of Overmyer's commitment to this concept is the fact that the total advertising and public relations expenditures during the years involved exceeded \$900,000 (BB Ex. 2, p. 876)."

116. Overmyer explained that it used institutional advertising since the thrust of the Overmyer companies was development (Tr. 552). Advertising was designed to draw attention to the Overmyer name, and was slanted "to a very large degree" towards the financial community (Tr. 552-553). Advertising, Overmyer declares, was used to pave the way for approaches to be made at a later date in obtaining loans from banks and other financial institutions and, in the case of television, to get the Overmyer name known in the area where the Company would be doing business. "This was simply the way Overmyer operated throughout all his enterprises. For example, the same kind of advertising was employed in connection with the warehouse company, to call attention to the Overmyer name, to prelease and presell, and to get the name before the financial community even before a warehouse was built (Tr. 558)" (Par. 86, proposed findings).

117. The Bureau, says Overmyer, relies on its Exhibit 16, which is a recap of media advertising expenditures for fiscal 1965-1966, to support its assertion that Overmyer's institutional advertising for the Communications Companies did not begin until May 1966, and that Overmyer advertising was not exclusively institutional. But, Overmyer argues, "the Bureau overlooks the fact that the bare data it utilizes to support its contentions, simply did not comprise all the

advertising effort for the Communications Companies, but merely encompassed the direct advertising charges in the name of the Communications Company (Tr. 552).⁸⁹ [51] In any event, the record fully reflects the extensive reliance on advertising under the Overmyer philosophy, and fully supports the allocation for staff expenses in this area."

118. The allocation for advertising and public relations was, in Overmyer's opinion, "wholly proper in the light of the nature of the institutional advertising concepts employed by the Overmyer Company. And, viewed in the context of the extent of Overmyer's overall financial commitment to advertising, the allocation for communications was not at all out of line" (Par. 89, proposed findings). Overmyer contends, somewhat incorrectly, that the Bureau's objection "is really directed towards the wisdom of the type of advertising undertaken by the Overmyer Companies, and the more than \$900,000 expended, and not whether the time and money was actually spent in these efforts by the staff on Communications matters" (Par. 89, proposed findings).

119. *Finance and Development Department.* The Bureau notes that Overmyer attributed some \$308,000 for indirect staff expenses to the home and regional offices of the Finance and Development Department, estimating that 13.4% and 14.2%, respectively, of the efforts of these offices were devoted to affairs of the Communications Companies. The Bureau challenges these allocations. Overmyer says, however, that the Bureau's contentions are speculative and wholly unsupported by the record.

120. *Finance.* The Bureau, Overmyer points out, asserts that loans carried on the books of the Communications Companies totaled \$1,330,000, only slightly more than 1% of the loans secured by this Department; that when loans actually used for communications purposes are considered, they came to only \$680,000, or substantially less than 1%. The Bureau, then, says Overmyer makes the same argument advanced in connection with the Treasurer's Department: that Overmyer's staff expenses should not be based on the time and effort spent in obtaining the loans for communications, but on the amount of the loans. Overmyer submits that there is no merit to this contention, "as established above in connection with the Treasurer's Department, since the allocation was properly made on the basis of the staff's activities on communications matters. And since Overmyer advised the Commission precisely how the allocation was made, the Bureau's contention really relates to accounting theory and not misrepresentation (O. Ex. 8, pp. 831-832)" (Par. 91, proposed findings).

121. The Bureau, Overmyer writes, argues that Adams and Bryan, Communications Company executives, had the primary responsibility for obtaining financing, not Finance and Development. And the Bureau submits that Adams (who served as an executive of the Communications Company from July 1964 to December 1965) was accompanied by warehouse finance people only once in Atlanta, once in Newport, and twice in San Francisco; that Byrnes or Overmyer, not Finance and

[51] "Similarly, the contention that advertising services during 1967 were 'spurious' since total Communications Company advertising expenditures for that year totalled only \$8.20 is pure speculation. This has nothing to do with staff activities of the TOC Advertising Department for the Communications Company. Dorfner, who made the allocation, determined that the level of communications activity as indicated in the formula employed, was reasonable for this period (O. Ex. 8, p. 826)."

Development people, assisted him in obtaining loan commitments for Atlanta and Pittsburgh; and that Adams obtained commitments for Rosenberg and Dallas without outside help. The Bureau similarly maintains that Finance and Development personnel were used only to a limited extent during 1966, when Bryan was employed by the Communications Company, with respect to loans for San Francisco, Houston and possibly Atlanta.

122. Overmyer adds (Par. 92, proposed findings): "The Bureau argues that letters of Finance and Development personnel submitted to the Subcommittee describing their activities with respect to Communications Company financing, demonstrate the limited involvement of this department, the only affirmative representation with respect to efforts of the staff in seeking or obtaining financing being made by Henry C. Burbank (BB Ex. 2, p. 881). Contrary to the Bureau's contentions, the letters are wholly consistent with Overmyer's allocation. See, *e.g.*, the letter of Arthur J. Buchter, who confirmed that a portion of his time involved the Communications Company. He noted that 'the TV stations and franchises owned by the Overmyer Company were an integral part of the whole Overmyer machinery and were certainly a topic talked about by ourselves as representatives of Overmyer and by the lenders, such as banks and insurance companies, who certainly wanted to know what the status of these various enterprises were'; that 'the various television stations were naturally discussed with these people since the banks and insurance companies had to determine the extent of Overmyer's commitments in these fields and as a natural matter of interest and curiosity on their own behalf, since a fair amount of publicity on behalf of the Overmyer Communications enterprises was involved'; and that such activities also constituted a portion of the training of the Finance and Development personnel. Buchter recalled spending several weekends in New York City listening to lectures by Dorfner, Treyz and Overmyer on the company's communications activities. He explained that 'these sessions were meant to acquaint us with the communications activities and certainly constituted a portion of my time.' (BB. Ex. 2, pp. 879-880); See also, the letters of Dilts, Jacobs, Rousseau, Mann, Cain, and Whitman (BB. Ex. 2, pp. 880-882)."

123. The allocation for Finance and Development was prepared by G. R. Silcox, Vice President of TOC's Finance and Development Department. He held the corresponding position in the Warehouse Company from 1963 through September 1966, when the functions of that department were performed by the Warehouse Company. He attempted to allocate, "as accurately as possible," says Overmyer, the amount of time spent by the Finance and Development Department on Communications matters for the base period, using such documents as were available to him, including a list of the employees of the department⁵² and their respective salaries; the overhead expenses of the department; and his knowledge of the type of services which his personnel were required to perform for the Communications Companies.

⁵² Of the 85 employees listed in the Finance and Development Department, 13, says Overmyer, were directly involved in selecting real estate for transmitter and studio sites; 25 were directly responsible for searching out financial resources; 15 were involved in both real estate and financing; and 32 were supporting clerical and secretarial personnel (Bur. Ex. 2, p. 877).

He reviewed with the personnel still available in the New York office (virtually all the employees, as he recalled) and with key supervisors in the offices outside New York, the functions which he believed had been performed for the Communications Companies. After initial figures were compiled, he went back and reviewed them with key department personnel and satisfied himself that the allocations comported with their views. The allocations prepared by Silcox were, he swore, as accurate as he could ascertain—indeed, if anything, he said, following the advice of counsel, he made them conservative. Moreover, in connection with the preparation for the instant hearing, Silcox noted that he reviewed the allocations again and confirmed his judgment that they were wholly proper. He also tried to review the allocations with personnel of his department who could be reached.

124. A key function performed by Finance and Development on behalf of the Communications Company, Overmyer writes, was developing financial sources, with everyone exploring the availability of financing to cover all Overmyer projects, specifically including the Communications Companies (Bur. Ex. 2, p. 875). A good deal of time, it declares, was spent in simply visiting with financial people and making "oral presentations" with respect to the Overmyer complex, including the OCC (Bur. Ex. 1, p. 87). Mr. Overmyer testified that in their search for financing, he was confident personnel of the Finance and Development Department would try to get financing for all the Overmyer interests, including Communications (Tr. 222-223). "In sum," Overmyer writes, "the Finance and Development Department was charged with initial investigation, searching for methods and areas of financing with any available financial institution which might be interested in assisting the various Overmyer enterprises including warehouse construction, equipment leasing and, specifically, television (BB. Ex. 1, p. 89; Ex. 2, p. 875)" (Par. 94, proposed findings).

125. While it is correct, as the Bureau contends and Overmyer concedes, that as executives of the Communications Company Adams and Bryan had the principal responsibility of obtaining necessary financing and locating sites, within the purview of over-all corporate policy developed by Overmyer (Tr. 179), "this," it argues, "in no way dispels the validity of Overmyer's showing that they were afforded massive assistance in these endeavors by the staff of TOC and other Overmyer companies (Tr. 178, 183-4)."⁵³ Thus, Overmyer asserts, while they may have had authority to seek out and establish transmitter sites, studios, and to attempt to find financing (Tr. 179-180), they also were authorized to call on the Finance and Development Department for assistance (Tr. 183-184). (Par. 95, proposed findings.)

126. The Finance and Development Department was, according to Overmyer, split into two basic types of employees: (1) purely development people, normally bank trainees, who traveled around the country "selling concepts" (Tr. 284). They tried to talk to bank officers and insurance company officials, it is said, to present the "Overmyer Story,"

⁵³ The transcript citations do not support this imaginative reference to "massive assistance." The appendices to the proposed findings are more prolix than persuasive of "massive" aid.

including plans for television, with a request for financing all Overmyer interests. If a bank officer or insurance company official evinced an interest in financing one of Overmyer's ventures, this was reported to the advance man's superior. (2) At this point, Overmyer says, a "finance man" would appear to make a more specific effort. Sometimes the development man, continues Overmyer, returned for a second visit along with the finance man, or the former was on his own for a time. But eventually, Overmyer declares, the development man dropped out and the finance man took over. Depending on the reaction of the potential lender, additional Overmyer people, it was testified, were brought into the picture, including the Treasurer (since bankers "might want to talk to the Treasurer)" (Tr. 286). At times the lender wanted to talk to Overmyer personally, Byrnes, or other key executives; and it was the corporate policy, the testimony reads, that everyone, from Overmyer on down, be "ready to be trotted in" for financing (Tr. 286). This, writes Overmyer, is simply the way Overmyer did business. Byrnes testified: "And that is why I know it sounds confusing on the surface. This was how so many people got into the act so many times. . . . Whenever an opportunity came along, all the horses necessary were thrown into that job, right up to and including Mr. Overmyer and myself" (Tr. 286).

127. Overmyer, Byrnes and Silcox developed a standard presentation on financing for staff personnel. Staff employees were brought in, Byrnes testified, and instructed in seminars on presenting the Overmyer sales pitch (Tr. 561). And, similarly, to enable Finance and Development personnel to understand the Overmyer complex, he continued, executives of the Warehouse Company, the Leasing Company and the Communications Company attended these sessions to brief them. Adams and Bryan attended the meetings to "educate" the staff on communications fundamentals, and to outline television plans and progress so that personnel would be equipped to inform potential lenders.

128. "In sum," Overmyer concludes, "the record clearly belies the Bureau's speculation that the allocation of time spent on Communications activities for the finance staff was in any way inflated. The Bureau once again appears not to be contending that the time and effort was not actually spent, but that the amount of time expended by Finance and Development personnel in connection with Communications matters was somehow wasted or imprudently expended. But surely this is not misrepresentation" (Par. 98, proposed findings).

129. *Real Estate.* The Bureau asserts that from July 1964 to March 1965, Finance and Development personnel investigated some 1750 prospective sites and acquired 175 of them for warehouse purposes while, during this same period, only 3 sites were acquired for the Communications Companies, with options obtained on two others. The Bureau "speculates," Overmyer declares, that, "assuming Finance and Development participated fully in site selections for the Communications Companies, more than 200 sites would have had to have been investigated to approximate the effort which Overmyer attributed and that the description of the Communications Companies activities with respect to transmitter site acquisition does not indicate that this many

sites were involved.^{44 [54]} Contrary to the Bureau's contention, Overmyer argues, "the record fully supports the extensive efforts of the Overmyer staff in connection with transmitter and studio sites (see, e.g., Appendix A, pp. 5 et seq.)" (Par. 99, proposed findings).

130. The record "establishes," Overmyer contends, that the Finance and Development Department "served the Communications group extensively in locating, evaluating, negotiating for and acquiring real estate not only for antenna-transmitter sites, but for studios and office space as well, and handled the manifold problems related to this matter" (Par. 100, proposed findings). Personnel in this department, both Home Office and Regional, spent an "inordinate" amount of time, says Overmyer, "in this endeavor in locating sites and space in Atlanta, San Francisco, Pittsburgh, Newport (Cincinnati) and Rosenberg (Houston). Moreover, this involved not just one but many sites being investigated, studied and evaluated in all markets and over extended periods. All possible staff resources were employed in assisting the communications venture (O. Ex. 8, p. 853). As the Commission was advised:

There has been no area of activity involved in planning the stations which has required more time or effort on an almost continuous basis since 1964 than that of locating and studying prospective land areas as potential antenna sites and of getting the numerous local and federal approvals. Each of the five cities presented very difficult problems. Many possible sites—even after weeks of searching and studying—had to be discarded because of their inability to measure up to the requirement of antenna height above ground comparable to that of the established stations—usually a minimum of 1,000 feet. Selection of other sites—after additional months of negotiations for their acquisition—was frustrated by unanticipated subsoil conditions, zoning problems and price demands. All resources available to OCC were utilized to resolve each site problem. (O. Ex. 8, p. 853)" (Par. 100, proposed findings).

131. Because of the staff's experience in real estate matters and their knowledge of and ability to work with local realtors, Overmyer argues, the department was able to make available to the Communications Companies a much greater selection of sites and service than they could have made themselves. But, because of technical problems, zoning and public relations considerations inherent in the use of land for television, as well as the inexperience of staff personnel in TV, the amount of time required to locate and check out each potential site, Overmyer says, was "inordinate." Indeed, it writes, contrary to the over-all impression conveyed by Robert Adams' deposition submitted by the Bureau (Bur. Ex. 17), in a memorandum submitted to Com-

[54] "The Bureau contends that at least 1750 sites were inspected during the period on the basis of Overmyer's testimony before the Subcommittee to the effect that 'we would look at at least 10 sites for every one we selected' (Subcommittee Hearings, part 1, p. 88). It appears, however, that Overmyer was indicating that at least 10 sites were studied for each television site selected. [The transcript of the Subcommittee hearings shows, on the contrary, that Mr. Overmyer was not specifically talking of television sites in mentioning the 10-1 ratio.] Thus, in response to questioning as to the allocation of 14% of the total costs for real estate efforts, Overmyer referred to the memorandum sent to Commissioner Robert Lee in December 1965, which spelled out in detail the extensive efforts in locating transmitter sites (*Id.* at 88-89). In any event, it is clear that the amount of time involved in locating sites by the Overmyer staff people, as determined in the allocation undertaken by G. R. Silcox, should prevail, not an allocation based on the number of TV sites vs. warehouse sites. The Bureau also overlooks the fact that staff personnel were also utilized extensively in searching out, negotiating for, and acquiring and constructing transmitter buildings, studios and offices. (See e.g., O. Ex. 8, pp. 855-856)."

missioner Robert E. Lee in December 1965, Adams noted (Bur. Ex. 2, p. 864) :

An endless number of man hours have been spent on obtaining sites—more than on any other aspect of the proposed stations—including careful study of better than 66 potential sites, many trips by headquarters personnel to the various cities, searches by local Overmyer personnel. . . .

Adams stated, moreover, that staff help had been made available to, and was extensively used by, the Communications Companies (Bur. Ex. 2, p. 863).⁵⁵ He said that it had been necessary to obtain new sites in each of the cities and that “[o]btaining the correct and acceptable sites in some of the above markets has proved to be the most difficult of all problems connected with establishing the new stations” (Bur. Ex. 2, p. 864). In connection with Newport, for example, Adams said (Bur. Ex. 2, p. 865) :⁵⁶

Two local real estate companies, local D. H. Overmyer Warehouse Company land experts and OCC executives have been searching for, studying and negotiating for a desirable site. . . .

132. In the transfer application Overmyer had told the Commission that “[t]here has been no area of activity involved in planning the stations which has required more time or effort on an almost continuous basis since 1964 than that of locating and studying prospective land areas as potential antenna sites. . . .” (Overmyer Ex. 8, p. 853). So, Overmyer argues (Par. 102, proposed findings), “it is certainly not surprising that all resources available were utilized in attempting to resolve site problems, including the large staffs of other Overmyer companies who were engaged in land acquisition and development throughout the country. Specialists from these staff departments, including regional offices in or near each of the five TV cities, made concentrated and sustained efforts, from 1964 on, to locate suitable sites, to solve the many complex problems arising, and to assist in negotiations and acquisition (O. Ex. 8, p. 853).⁴⁷ [57]” “Clearly,” it concludes (Par. 102), “the record fully supports Overmyer’s allocation for the staff assistance of the Finance and Development Department in this area.”

133. *Amount deducted for retained activities.* The Bureau argues that Overmyer has not substantiated the deduction of 20% of his indirect staff expenses as representing efforts attributable to his retained interests—Toledo, the Overmyer Network, and the Dallas application. Here again, maintains Overmyer, the Bureau’s contentions are based on “sheer speculation.”

⁵⁵ Adams noted in the memorandum that “[s]ubstantial additional help has been available to and extensively used by us”; that Overmyer warehousing operations maintain a staff of approximately 200 people in New York and a sizeable staff in all of the cities where TV stations will be operated (Atlanta, Cincinnati, Toledo, Pittsburgh, Houston and San Francisco), and that “[r]eal estate, financial personnel, administrative and other employees in these operations have been called on to render many services in connection with various TV stations’ needs” (Bur. Ex. 2, p. 863).

⁵⁶ Over 15 separate sites in Newport had been considered “in substantial detail,” Adams said in the memorandum. In Atlanta, Adams said, the permit had been acquired without a site and that “the problem of finding a suitable site [was] an extremely difficult one . . .” (*Id.* at p. 866). He pointed out that the Communications Company had employed 10 local real estate firms “as well as the local real estate personnel of the Overmyer Warehouse Company searching out sites for review by OCC, and its engineering and FAA consultants”: and that out of “at least 30 possible sites, at least 9 [were] reviewed in detail and given serious consideration.” Similarly, he told Commissioner Lee, in Pittsburgh the difficult site problem required “an intensive search for sites by realtors, Overmyer Warehouse personnel and OCC executives . . .” (Bur. Ex. 2, pp. 866–867).

⁵⁷ “The difficult problems involved in each city are described in detail in Appendix A [to the proposed findings] (p. 5 et seq.)”

134. The Bureau notes that Overmyer claimed a cash investment in all communications activities of some \$2,600,000, of which \$1,300,000, or 50%, was attributed to Toledo and network activities.⁵⁸ The Bureau then refers to the following allocation of home office expenses of the Communications Company to Overmyer's retained interests and apparently argues, says Overmyer, that this should have been followed in allocating staff expenses:

	City	Percent
Year:		
1964.....	Toledo.....	100
1965.....	do.....	40
	Dallas.....	5
1966:		
January thru April.....	Toledo.....	40
	Dallas.....	5
May thru December.....	Toledo.....	5
	Dallas.....	0

(See Par. 77, above)

The Bureau also notes the statement in Bryan's deposition to the effect that, beginning in July 1966, the primary efforts of the Communications Company were devoted to establishing the network and that for the remainder of the year, with the exception of San Francisco, progress on the other construction permits remained relatively static. The Bureau argues in support of its contention that lines of credit for the San Francisco and Atlanta stations were used for warehouse purposes; that the staffs at Atlanta and Newport were discharged in November 1966; and that all advertising beginning in September 1966, except for one trade publication ad, was for the network.

135. Contrary to the Bureau's "speculative contentions," however, Overmyer insists, "there is nothing in the record to indicate that the 20% deduction for Toledo, Dallas and the Network was in any way insufficient. For one thing, the Toledo station went on the air in May 1966 and its staff of some 30-40 people was intact well before that date; thus the services performed for Toledo by the Overmyer staff were substantially diminished, or virtually eliminated, when the station became fully staffed and thus self-sufficient (Tr. 573; BB. Ex. 2, pp. 868-869).⁵⁹ [59] As for Dallas, since contrary to the Bureau's presumption, this never progressed beyond the application stage, it did not require nearly the scope of staff services as were needed for other cities where actual permits had been issued (BB. Ex. 2, p. 869). The Network also acquired its own staff shortly after formation and therefore it, too, required only limited services from the Overmyer staff (BB. Ex. 2, p. 869)" (Par. 105, proposed findings).

136. As for the allocation of home office expenses by the Communications Company, "relied upon so heavily by the Bureau," these were wholly arbitrary, Byrnes testified (Tr. 546). It was not used in computing the *indirect* staff expenses because it was purely an *internal*

⁵⁸ In addition, Overmyer declares, Overmyer incurred contractual debt on equipment and programming of \$8,000,000, for a total investment of \$10,600,000.

⁵⁹ "Indeed, the Communications Company borrowed some personnel of the Toledo station, including its Chief Engineer, to assist it in other locations (Tr. 573)."

allocation of the Communications group, which had its own head office, he said. The formula developed for computing Overmyer's indirect staff expenses, on the other hand, he continued, was an allocation for services of non-communications personnel headquartered in another company, and bore no direct relationship to the activities of the Communications Company employees or the arbitrary allocation used internally by the Communications group.

137. In any event, Overmyer argues, the allocation among the Communications group, with its unrealistically precise percentages, was "patently arbitrary" (Tr. 547) (Par. 107, proposed findings). For example, Overmyer notes, while 100% of costs was allocated to Toledo in 1964, Byrnes testified that he had been personally involved that year with Adams in negotiations for the acquisition of Newport (Cincinnati), and that "my finance people" were working with Adams in Atlanta (Tr. 547-548). Although there were no charges for anything but Toledo in 1964, outside communications counsel, Byrnes testified, and an engineering consultant were working on matters other than Toledo at that time and the Overmyer staff company was billed for their work. In sum, concludes Overmyer, the Bureau's premise is erroneous (Par. 107, proposed findings).

138. As for Bryan's statement that beginning in July 1966, primary efforts were devoted to establishing the network, the Bureau concedes, Overmyer notes, that this was flatly contradicted by Byrnes (Tr. 574-575, and see above, Par. 78). The very purpose of the network, it was testified, was to provide programing to the stations (Tr. 574). Bryan participated in meetings with Brynes and Oliver Treyz, who headed the network, at which it was made clear that development of the stations was a major objective (Tr. 576). When Treyz later took over the Communications Company in November 1966, Overmyer asserts, it became his over-all responsibility to get the stations on the air as quickly as possible (Tr. 584). "An indication that he performed the task well is the fact that San Francisco went on the air [within one month] after the transfer and Newport shortly [after the transfer] (BB. Ex. 2, p. 833)"⁶⁰ (Par. 108, proposed findings). In any event, Overmyer contends, "the record fully develops the extensive [sic] efforts of the Overmyer staff on Communications matters throughout the period (See, e.g., Appendices A & B)" (Par. 108, proposed findings).

139. *Leasing Company allocations.* The Bureau contends that the basis for Overmyer's recovery of \$34,330 in indirect expenses for the related activities of the Overmyer Leasing Company is "open to serious question." It states that the total expenditure by the Leasing Company for equipment related to the five permittees transferred to AVC (\$300,152) was recovered as part of Overmyer's out-of-pocket expenses and that, in addition to this, Overmyer recovered \$93,839 in payments by the Communications Companies to the Leasing Company in equipment leases and interest payments. The Bureau argues that, before adding the \$34,330 for the unrecovered indirect expenses of the Leasing Company, Overmyer had recovered \$393,911 on a cash investment of

⁶⁰ While the staffs at Atlanta and Cincinnati were let go, Overmyer says, this was because their hiring had been premature; operating personnel were not yet needed, so they constituted an unnecessary cash drain. It was felt that the hiring of the staff for these stations could be put off until they were "absolutely needed" (Tr. 578).

only \$300,152 and consequently overstated the net amount actually expended by the Leasing Company for equipment by almost \$94,000; and that, while the rates charged by the Leasing Company may have been less than those charged others, this was a result of arms' length negotiations. The Bureau says that the rates were high enough to insure a profit; that the lower rates were based on the fact that the equipment purchased for the Communications Companies involved many hundreds of thousands of dollars and that the Leasing Company's per-dollar costs were lower than for the type of items purchased for the warehouse companies; and that the Leasing Company did not have to obtain bank financing for the equipment as was the case with equipment leased to the warehouse companies.

140. The Bureau's contention that Overmyer recovered \$93,839 in Communications Company payments to the Leasing Company is based on an "analysis of major operating expenses" of the five permittees submitted as Exhibit III, Schedule C, with the transfer application (Overmyer Ex. 8, p. 821). This schedule showed payments on equipment leases totaling \$82,861 and interest on leased equipment of \$10,977, for a total of \$93,838+. Overmyer objects that the Bureau's argument is based solely on this schedule, without any supporting testimony, and that the Bureau did not inform Overmyer of the substance of its contention during the hearing. Had the Bureau done so, it says, "Overmyer would have been able to explain that, under the terms of the Stock Purchase Agreement with AVC (see Par. V B(7)),⁵² [61] AVC had the right to purchase all equipment leased to the permittees at cost. Accordingly, AVC was given a credit for rent previously paid by the Communications Companies. What the Bureau believed to be a discrepancy was thus taken care of by an appropriate adjustment at the closing and Overmyer did not gain any unjust enrichment" (Par. 110, proposed findings).

141. The Bureau, however, replies (Par. 21, reply findings) that it is beside the point whether AVC offset payments made by OLC on the equipment against the amounts expended by OCC; and that the nub of the inquiry is the "amounts Overmyer advised the Commission he had expended." It points out that Overmyer claimed as expenditures in connection with the equipment leased to OCC by OLC, a total of \$428,321 (\$300,152 in OLC payments to equipment manufacturers; \$93,839 in payments from OCC to OLC for this equipment; and \$34,330 in claimed unreimbursed expenses or profit loss of OLC). The Bureau continues (Par. 22): "The record is clear that the total amount paid by OLC to equipment manufacturers was \$300,152 (Tr. 583-84). The amount received to offset those payments from OCC was \$93,839 (see Bureau Finding 40). Thus, while Overmyer represented to the Commission that his expenditures on equipment totaled \$393,152, his net expenditures (not counting the OLC \$34,300 allocation) never exceeded \$300,152."

142. The Bureau's contentions, Overmyer argues, are also without merit with respect to the \$34,330 in indirect expenses for activities of the Leasing Company. "Thus, while the Bureau asserts that the arrangements with the Communications Companies were arms' length

^[61] "Official Notice has been taken of the transfer application including the stock purchase agreement . . ."

transactions, Robert Rader, who was Chief Executive of the Leasing Company, noted that when Robert Adams, Chief Executive of the Communications Company, had urged that the Leasing Company subsidize the Communications Companies [until] they got on their feet. Overmyer resolved the matter by directing, over Rader's objection, that the rate be reduced below that usually charged by the Leasing Company, although high enough in Rader's opinion to insure some profit (BB. Ex. 19, pp. 1-2)" (Par. 111, proposed findings). Contrary to the Bureau's premise, Overmyer says, some profit was in fact foregone, as the Commission was advised in the transfer applications (Overmyer Ex. 8, p. 819). Charges to the Communication Companies, Overmyer informed the Subcommittee staff, were made at cost plus 1% (later 1½%), while charges for rentals to other affiliates of the Overmyer complex and to outside companies were made with profit margins of 20% to 40% (Bur. Ex. 2, p. 884).

143. The asserted basis for the \$34,330 allocation was explained in Rader's affidavit submitted with the application.⁶² Rader estimated that approximately 20% of the Leasing Company payroll could reasonably be attributed to services for the Communications Companies for the period between June 1965 and April 1967. Using this as a base (but excluding interest expense), he determined that the total expenditures of the Leasing Company for communications were \$41,200. "Since the lease contracts included Toledo in addition to the five permits transferred," Overmyer concludes, "1/6 of such expenses were allocated to Toledo, leaving \$34,330 properly attributable to the five permits (Subcommittee Hearing, Part 2, pp. 829-830)."⁶³

144. *Expenses recovered which the Bureau alleges had already been recovered elsewhere.* The Bureau asserts that at the close of the 1964-1965 fiscal year, Overmyer distributed all the expenditures in the account representing indirect staff expenses (the 6000 series of accounts) directly to construction in progress of specified warehouses, to warehouse companies, for warehouses under construction, or as an offset to the income of the parent company; and that of total expenses recorded in these accounts, \$1,765,273.90 was included in the cost of constructing particular warehouses and \$254,339.09 as an offset against the income of the parent company and its subsidiaries. The Bureau argues, on this premise, that since all the actual indirect staff expenses for this period "were, in effect, used up, there were none in fact available to Overmyer to claim even on his estimated basis." The Bureau states that indirect expenses were claimed for the last 6 months of 1964 and calendar 1965 totalling \$329,666; that fiscal 1964-65 encompassed 2/3 of the 6-month period of 1964 and 2/3 of calendar 1965; and that 2/3 of the \$329,666 claimed, or \$219,778, was an improper charge in light of the above contention. The Bureau further argues that, under its analysis, Overmyer's staff expenses for the 1964-1965 periods were overstated and that, based on "actual" expenses, the proper claim should have been only \$7,077 for 1964 and \$53,078 for 1965. Overmyer calls this "patently ridiculous" (Par. 113, proposed findings).

⁶² Rader, Chief Executive of the Leasing Company, swore he spent about 30% of his time on Communications Company matters (Bur. Ex. 19, p. 1).

⁶³ Rader's affidavit submitted at the time of the transfers (Part 1, pp. 829-830), Overmyer submits, "should take precedence over the general statements submitted in his deposition some 5 years later to the extent that they may appear to be in any way inconsistent."

145. The Bureau relied on the accounting records in Bureau Ex. 10, which purported to present an analysis of distribution of general administrative expenses of the Warehouse Company for fiscal 1964-1965. "The fact of the matter, however," Overmyer says (Par. 114, proposed findings), "is that the principal journal entry relied on by the Bureau was reversed. Thus, appended to the Bureau's Exhibit were Journal Vouchers Nos. 8-362 and 8-374, which entries were made in 1965. However, Journal Voucher No. 8-777 entered in 1969 reversed Journal Voucher No. 8-362.^{55 [64]} Thus, Journal Voucher No. 8-362 has been made in error since an overhead allocation was not made to the construction Permits, and later entries changed the amounts distributed between expense and building accounts. This entry related to the \$1,675,273.90 figure referred to by the Bureau^{56 [65]} (BB. Ex. 10. App. C). Thus, the Bureau erroneously presumed the \$1,765,273.90 was charged to warehouse construction in progress or to various warehouse companies as reflected in Journal Voucher No. 8-362."

146. In any event, Overmyer declares, the Bureau is not contending that the money claimed as expenses on behalf of the Communications Companies during this period (fiscal 1964-1965) was not actually spent on communications matters, but rather that, on its own accounting theory, which Overmyer calls "esoteric," the expenses were somehow improperly included. "The Bureau has not shown, moreover, that even if the principal accounting entry on which it relies had not been reversed, Overmyer would have achieved some improper benefit therefrom. The simple fact of the matter is that the expenses were incurred by the staff on behalf of the Communications Companies and were properly claimed as out-of-pocket costs, and the Bureau is arguing that this was improper under its accounting theory. But accounting is not an exact science. In any event, surely this is a far cry from 'fraudulent misrepresentation'" (Par. 115, proposed findings).

147. As indicated in fns. 64 and 65, above, and as the Bureau declares in its reply (Pars. 23-24), "[f]or the first time in its proposed findings Overmyer now claims the accounting entries relied upon by the Bureau were reversed"; Overmyer then argues, the Bureau continues, "that the Bureau's findings must, therefore, be disregarded." The Bureau rejects the contention on two grounds. The first, and obvious one, is that the alleged reversal is not part of the record and must therefore be disregarded. The second is that even if accepted, the result would not be changed for they were not made "until 1969, *two years after* the Commission accepted Overmyer's representations regarding his out-of-pocket expenses."

ULTIMATE FINDINGS AND CONCLUSIONS

148. To repeat to some degree what has already been indicated (see Par. 15 above) : It will have been noted that the Findings of Fact have

^[64] "A copy of Journal Voucher No. 8-777 is set forth as Appendix D [to the proposed findings]. The 'Explanation' for the item clearly states: 'To reverse '65 JV 8-362 which recorded the capitalization of Home Office Expenses.'" [This voucher was not introduced at the hearing.]

^[65] "Information relating to the accounting treatment of Journal Voucher No. 8-374 (BB. Ex. 10, Appendix C) reflecting the transfer of balance in income and expense accounts to earned surplus (\$254,339.09) has been mislaid. Overmyer's Controller is confident, however, that this item was similarly corrected." [Overmyer had complained (Par. 114, proposed findings) that the Bureau had "offered no supporting testimony" but relied solely on Ex. 10. Here Overmyer is attempting itself to rely on an extra-record document.]

not been constructed on the orthodox plan. It was felt that the evidential presentation did not lend itself entirely to the simple extraction of basic factual findings embodying relative certainties—for instance, that Overmyer's expenditures for a particular purpose were in the order of an ascertainable amount. The only practicable way to proceed, then, after some expository paragraphs, was to juxtapose the contentions of the parties to see whether, from the totality of the evidence, Overmyer had shown that its outlay reasonably approximated its claims. The discussion started off with the Bureau's proposed findings because they adequately subsumed the substance of Overmyer's affirmative presentation and the Bureau's objections to it. Rounding out the account with Overmyer's and, to the limited extent here shown, the Bureau's reply, permits the making of the following Ultimate Findings and Conclusions.

149. At the decisional stage the question of sustaining the evidential burdens recedes from the importance it may bear during a hearing⁶⁶—or, rather, *would* bear if a Commission hearing were now attended with the procedural remedies available in a court trial—involuntary non-suit and directed verdict. Nevertheless, the effectiveness with which a party has shouldered its burden determines the quantum of evidence upon which the trier must decide.

150. The Commission took care to define the burden Overmyer had to carry. It said (31 F.C.C. 2d 203, 204):

. . . Moreover in the interest of clarification, we wish to point out that the placing of this burden upon Overmyer not only requires him to proceed with the introduction of evidence under the specified hearing issues, but further requires him to make a *prima facie* showing substantially corroborating his alleged out-of-pocket expenses as were previously represented to the Commission.

Overmyer essayed to meet its burden in accordance with its own interpretation of "corroboration." It did not present "facts" "substantially corroborating" its representations in the applications, in the sense, for example, that it produced the persons directly involved in the initial incurrence of the alleged out-of-pocket expenses. Instead, Mr. Overmyer and other key executives submitted affidavits which essentially repeat earlier representations, reaffirm their belief in the accuracy of the original submissions, and disclaim any intent to deceive the Commission. The affirmative Overmyer case at the hearing went no further. The Broadcast Bureau expresses its disapproval (Par. 4, proposed findings):

The Bureau believes Overmyer's failure to carry the burden imposed on him by the Commission could have technically resulted in a decision adverse to Overmyer without any affirmative presentation on our part. Nevertheless, the Bureau elected to go forward. However, limitations, particularly the complexity of the Overmyer organization, the multiplicity of its books of account and other records and lack of familiarity with its operation, restricted the Bureau's ability to unearth all the material discrepancies. . . .

151. The evidence in this case could be held insufficient to substantiate the claim that Overmyer spent even \$1,000,000—the amount which would support the 80% transfer—of its represented expenses. As an example of its failure to corroborate its claims by acceptable proof, one may take the Finance and Development Department, which purportedly accounts for some \$308,000 of the \$790,230 claimed for in-

⁶⁶ See Wigmore, *Evidence*, Sec. 2497.

direct staff expenses.^{66a} It is not convincing to read of the Overmyer functionaries who descended upon a community like a carnival troupe to persuade local bankers to look favorably upon an Overmyer enterprise and open up their vaults to it. It will not do to say that "this is the way Overmyer operated." It would exceed the limits of credulity to believe that an entrepreneur like Overmyer thought it necessary or effective to employ these capering blandishments. Bankers are notoriously Gradgrinds or Sergeant Fridays in their insistence on "facts." It would be a small encomium upon their perspicacity to believe that they could be inveigled by public relations campaigns, or that a businessman regarded them so lightly that he thought he could cajole money from them by flackery.

152. The insufficiency of Overmyer's corroboration of its representations infects other elements of its claims, but is adequately characterized by the finding on Finance and Development. There is no need to consider separately such other departments as Personnel and Advertising, except to say that they would fare differently only in degree if representations regarding them were similarly scrutinized.

153. The point of the foregoing is that while it was not expected that Overmyer could attribute a precise—or reasonably approximate—dollar amount to the various activities, it cannot be allowed to slough off its responsibilities to the record by echoing generalities that had failed to quiet the Subcommittee's concern. Findings need not be more exact than this. There is no necessity to appraise the reliability of the books which Overmyer attacked and which the Bureau used as a measure of the exaggeration of the representations. The absence of a benchmark does not detract from the force of a finding that the evidence is otherwise inadequate.

154. *Conclusion on Issue No. 1.* It is therefore held that in the applications for transfer of control Overmyer misrepresented to the Commission the amount of out-of-pocket expenses incurred in obtaining and developing the construction permits. "Misrepresentation," as has been emphasized, does not connote culpably false statement or intent to mislead the Commission. It should, however, be understood that no certificate of innocence is intended; whether Overmyer acted from blackest motives or was merely mistaken is immaterial. The point is that from the evidence adduced in this case—Overmyer's and the Bureau's—it cannot be found that there is a reasonable concordance between the represented and "actual" expenses. This is "misrepresentation."

155. *Conclusion on Issue No. 2.* Despite the conclusion, unfavorable to Overmyer, on Issue No. 1, can any affirmative relief be granted? In Paragraph 20. above, it was said that there would be a negative ruling on Issue No. 2. The following discussion will develop the reasoning on which this conclusion is based.

156. Commenting on the "current posture of the case," Overmyer (Pars. 10–11, proposed conclusions) says that "the option under which AVC had the right to acquire the remaining interest retained by Overmyer has lapsed; and, as the Bureau states, 'the value of Overmyer's retained interests are marginal,' to say the least . . . In sum, the sub-

^{66a} Only a portion (see Par. 69, above), of course, was attributed to OCC. But the principle is not affected by the dollar amount involved.

stance of the relief which the Bureau now seeks under the Commission's conclusory Issue 2 has already been realized without requiring any determination under Issue 1—the option has run and it is abundantly clear that no additional consideration of any substance will be realized by Overmyer in the light of his retained 20% interest in the permits. Thus, all of the 'terrible consequences' foreseen by the Subcommittee have proved illusory. . . ." Overmyer goes on to express his fears (see Par. 20, above) that, regardless of the mootness of the issues, an unfavorable ruling would be in the nature of a bill of pains and penalties, disqualifying him as a holder of other Commission authorizations. As Overmyer has been told in this initial decision, if the theory of the initial decision is upheld its fears are groundless. Rather than summarily disposing of Issue No. 2, however, there will be an extended consideration of its practicability, if any, preparatory to the ultimate ruling as to its nugatory character.

157. Since, as already written, it could be held that there is no acceptable proof that Overmyer spent even the \$1,000,000 which would have supported his 80% transfer, there is obviously no balance as consideration for the option, if exercised. And if the option were regarded as part of the original transaction it would have to be declared void because it would be infected with the same infirmities as the immediate 80% transfer. The bar to such an easy conclusion, however, is the Commission's failure to set aside the entire dealing between Overmyer and AVC, as the Subcommittee recommended, and leaving in effect the passage of the majority interest, with Overmyer still owning a 20% share. The retained 20% interest has an independent validity. As a minority stockholder not suspected of attempting to transfer control, Overmyer could sell (if there were a market) his interest for whatever he could get. Nothing in the rules would stop him. The Subcommittee recognized the possibility (House Report No. 91-256, fn. 179) :

Interestingly, a minority stockholder can sell his interest for whatever the market will bear, for such a person is not subject to this restriction [against profiteering]. Legislation to preclude the realization of a profit from the sale of any shares of a permittee is suggested at the conclusion of this report.⁶⁷

The rule does not cover a naked sale of a minority interest.

158. Turning now to the subject of "fraud": The Commission, as previously noted, justified its reevaluation of a completed transaction on the ground that its prior approval may have been "procured by fraudulent misrepresentations" (Par. 6, FCC 71-213). In allowing the underlying part of the sale to stand and concerning itself with the subsidiary (albeit monetarily larger) option agreement, the Commission apparently⁶⁸ was analogizing its powers here to those it must exercise

⁶⁷ Rules 1.597(e) and (f) were enacted after the Subcommittee hearings (see Par. 14, above). Laying aside any question of retroactivity, the rules refer to the retention of an interest by the seller in a transfer of control matter. Once control passes, it does not appear that even under those rules, and in a separate transaction, there would be any limitation on the consideration to be received by the seller. Thus, Rule 1.597(f) (4) reads:

Applications subject to this paragraph (f) will, in any event, be designated for evidentiary hearing in any case where the agreements, arrangements or understandings with the seller provide for the seller's option to acquire equity in the station or to increase equity interests he retains at the time of the assignment or transfer of control. An evidentiary hearing will similarly be held in any case in which the assignee(s), transferee(s) or any of their principals, or any person in privity therewith, has an option to purchase all or part of the seller's retained or subsequently acquired equity interests in the station. (Emphasis supplied.)

⁶⁸ "Apparently" because the Commission contented itself in Par. 5 of FCC 71-213 with citing the Broadcast Bureau's asserted precedents, but did not expressly say that it followed them. It seems reasonable to believe, however, that the Commission was convinced of their authority and based its ruling on them.

when it seeks to enforce the public interest. Yet none of the cases cited in Par. 5 of FCC 71-213 would permit an enlargement of the Commission's powers to warrant the mandate contemplated by Issue No. 2. From a reading of the entire issue it is clear that the Commission was not concerned with Overmyer's *retention* of the 20% interest so that it would continue to have a share, though a minority, in the permittees and prospective licensees. The Commission looked to getting Overmyer "out of there" and invoked authority which, as indicated above, does not aid it. The Commission is not limited, as a court might be, in the enforcement of its policy and its necessity to protect the public interest (see *Fly v. Heitmyer*, 309 U.S. 146, citing *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134). But this does not mean that it can assume powers over *contracts*—a subject peculiarly within a court's purview—which even a court of equity could not exercise. Courts cannot remake contracts or reform them beyond the parties' agreements (see 76 C.J.S. Sec. 5); they do not exercise a *cy pres* power over contracts as they do over decedents' trusts. Yet here the Commission, with no discernible relation to the public interest, would transfer a minority interest from Overmyer to U.S. Communications on terms which were not in contemplation of the contracting parties. The logic of conferring upon U.S. Communications an unexpected windfall does not commend itself. It is not immediately clear how the public interest is benefited by taking from Overmyer and giving to U.S. Communications so that the latter would have 100% ownership instead of the 80% which the Commission had not interfered with.⁶⁹ Even if Overmyer were held guilty of "fraudulent misrepresentation"—and it has several times been stated that the initial decision would steer away from this area, *Occam's Razor*—it is impossible to see how divesting Overmyer of his share and conferring it on an entity which stands in the shoes of a participant—even though not *particeps criminis*—in the original transaction would benefit the public.

159. Cast about as one will, one cannot grant affirmative relief under Issue No. 2.

160. Accordingly, IT IS ORDERED that, unless an appeal from this Initial Decision is taken to the Commission by a party or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the rules, this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
HERBERT SHARFMAN, *Administrative Law Judge*.

⁶⁹ The expiration of the option does not appear significant, as the Commission would, from the issue, compel the transfer on terms it would set regardless of the existence of an option. For if the option is "declared void" it would be the same as if it expired by its own terms.