

F.C.C. 71R-43

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.
COMMUNICATIONS CORP., SAN FRANCISCO,
CALIF. } Docket No. 18950
File Nos. BTC-5376,
5377, 5378, 5379,
and 5380

MEMORANDUM OPINION AND ORDER

(Adopted February 3, 1971; Released February 8, 1971)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK DISSENTING IN PART
WITH STATEMENT. BOARD MEMBERS BERKEMEYER AND NELSON NOT
PARTICIPATING.

1. This proceeding involves applications for the transfer of control of five UHF television station construction permits held by D. H. Overmyer Communications Company, Inc.¹ and D. H. Overmyer Broadcasting Company, Inc.² from D. H. Overmyer to U.S. Communications Corporation.³ By Order, FCC 67-1312, released December 8, 1967, 10 FCC 2d 822, the Commission, without a hearing, granted the transfer applications. Subsequently, however, a Special Subcommittee of the House Committee on Interstate and Foreign Commerce conducted extensive hearings on the transfers and issued a 62-page report, concluding, *inter alia*, that Overmyer misrepresented his out-of-pocket expenses to the Commission.⁴ Among other things, the Special Subcommittee recommended that the Commission set aside its order consenting to the transfers of the Overmyer construction permits 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. The Commission, having before it the December, 1967, Order granting the transfer applications and the subsequent hearings before, and report of, the Congressional Subcom-

¹ At one time, the permittee of Station KEMO-TV, San Francisco, California; WEKO-TV (now WPGH-TV), Pittsburgh, Pennsylvania; Station WSCO-TV (now WXIX), Newport, Kentucky; and Station WBMO-TV (now WATL), Atlanta, Georgia.

² At one time, the permittee of Station KJDO-TV, Rosenberg, Texas.

³ The original stock purchase agreement between Overmyer and the AVC Corporation was entered into on March 28, 1967. All rights under the agreement were assigned by AVC to its wholly-owned subsidiary, U.S. Communications Corp., on June 6, 1967, prior to the filing of the subject transfer applications on June 30, 1967. Overmyer still holds a 20% interest in the permittees subject to an option by U.S. Communications Corp.

⁴ Hearings before the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce, 90th Cong., 1st and 2d Sess., serial 90-50 and 90-51, pts. 1 and 2 (1967-68). Report of the special Subcommittee 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. (May 19, 1969).

mittee, designated the Overmyer applications for hearing on September 4, 1970,⁵ on the following two issues:

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

2. To determine, whether, in the 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.

The Commission placed the burdens of proceeding and proof under both issues on Overmyer. Presently before the Review Board is a petition for deletion of issue and for shift of burden of proof, filed September 28, 1970, by Overmyer,⁶ requesting the Board to delete Issue 2 and to shift the burden of proof under the remaining issue from Overmyer to the Commission.

DELETION OF ISSUE

2. In support of its request for deletion of Issue 2, Overmyer argues that the Commission's 1967 Order granting the transfer applications was final, and that the time for any appeal has long since expired. Citing Section 1.108 of the Commission's Rules, which gives the Commission thirty days in which to order rehearings of Orders on its own motion, Overmyer submits that the Commission can no longer reconsider or order a rehearing of its previous decision to grant the transfers. Further, Overmyer argues, Rule 1.221 (a) (4) commands the Commission to cite the specific authority upon which it acts when designating applications for hearing. Noting that the Commission did not cite any statutory authority in its designation Order, *supra*, Overmyer contends that this is indicative of the Commission's awareness that it does not have jurisdiction to act on the option agreement as contemplated by Issue 2. Petitioner concedes that under Section 403 of the Communications Act of 1934, as amended, the Commission has the authority to conduct hearings, on its own motion, into whether Overmyer misrepresented his expenses; in fact, Overmyer admits that he is ready to go to hearing on that issue. In Overmyer's view, however, Section 403 is for investigative purposes *only* and therefore does not authorize the Commission to act on the option agreement at this time, citing *WPFH Broadcasting Co.*, FCC 57-764, 15 RR 542. In sum, then, Overmyer argues that the transfer applications approved

⁵ FCC 70-911, 25 FCC 2d 442, 20 RR 2d 1.

⁶ Also before the Board are the Broadcast Bureau's opposition, filed October 12, 1970, and Overmyer's reply, filed October 22, 1970.

without hearing by the Commission in December, 1967, would be altered substantially by sanctions contemplated by Issue 2, and since the Commission has no jurisdiction to alter the transfer, Issue 2 is unnecessary and should be deleted.

3. The Broadcast Bureau strenuously opposes the deletion of Issue 2, urging that the petitioner's request really amounts to one for reconsideration of the Commission's designation Order, and therefore is not properly before the Review Board.⁷ The Bureau contends that Overmyer relies solely on undisputed facts considered by the Commission in the designation Order. The Bureau also points out that on September 29, 1970, the day after the instant petition was filed before the Review Board, petitioner submitted a petition for reconsideration to the Commission. The Bureau submits that the reconsideration request is virtually identical to the deletion petition now before the Review Board. The Bureau concludes that the questions raised in the instant request are subsumed under the more basic question of the Commission's authority to set the matter for hearing in the first instance and that the question is presently being considered by the Commission.

4. Overmyer's request to delete Issue 2 from this proceeding will be denied. The ultimate effect of a grant of petitioner's request to delete Issue 2 would be to substantially alter the basic structure of the whole proceeding, and this the Board cannot do. *Cf. Sundial Broadcasting Co., Inc.*, 15 FCC 2d 1002, 15 RR 2d 353 (1969). Significantly, petitioner has not alleged that the Commission failed to consider any facts relating to the transfer applications. See *Royal Broadcasting Company, Inc.*, 4 FCC 2d 863, 8 RR 2d 637 (1966). Rather, it is his position that the Commission made an error in determining that it still has jurisdiction over the transfer applications. Under these circumstances, deletion of Issue 2 is completely unwarranted. *Cf. New Era Broadcasting Company, Inc.*, 20 FCC 2d 68, 17 RR 2d 586 (1969); *Cosmos Broadcasting Corporation (WSFA-TV)*, 10 FCC 2d 592, 11 RR 2d 672 (1966). Thus, the Board believes that because petitioner seeks to change the entire complexion of the proceeding, the Board has no authority to grant the request and thereby undo what the Commission has already done. See *Sundial Broadcasting Co., Inc.*, *supra*, and cases cited therein, *Cf. Fidelity Radio, Inc.*, 1 FCC 2d 661, 6 RR 2d 140 (1965); *Royal Broadcasting Company, Inc.*, *supra*. Finally, the fact that the Commission did not cite authority for designating the Overmyer applications for hearing, as required by Rule 1.221 (a) (4), does not warrant the deletion of Issue 2 or the inference that the Commission has no jurisdiction in this case. *Cf. Ranger v. FCC*, 111 U.S. App. D.C. 44, 294 F. 2d 240, 21 RR 2030 (1961).⁸

BURDEN OF PROOF

5. Petitioner argues that while the burden of proceeding has been properly placed on him because of facts peculiarly within his knowl-

⁷ Petitions for reconsideration of designation Orders are directed to the Commission under Section 1.111 of the Rules.

⁸ In this connection, we note that the Commission, in its designation Order, clearly set out its reasoning for designating this case for hearing. *Cf. Atlantic Broadcasting Co., Inc.*, 5 FCC 2d 717, 8 RR 2d 991 (1966).

edge, he should not have to bear the burden of proof as designated. Petitioner argues that because this hearing contemplates a "revocation" of an earlier order, or at least a "modification" of it, the proceeding is "in the nature of a revocation, or at least a basic restructuring of final action . . ." and that, under these circumstances, "Congress intended that the ultimate burden of proof be placed upon the Commission." Petitioner, in support, cites Section 312 of the Communications Act, which relates to the revocation of a license or of a permit, and Section 316, which deals with modifications thereof; both sections, states petitioner, place the burden of proof on the Commission. Petitioner maintains that only in Section 309 proceedings, concerning initial licenses and renewals, does the Act authorize the Commission to place the burden of proof upon the applicant. The Broadcast Bureau, in its opposition, expresses the view that Overmyer's request to shift the burden of proof should be dismissed without prejudice to refile until the Commission has ruled on Overmyer's petition for reconsideration of the designation Order.

6. In our opinion, the request to shift the burden of proof to the Commission presents a novel and unusual question. Therefore, the Review Board believes that the matter should be certified to the Commission pursuant to Section 0.361(b) of the Rules for consideration in conjunction with Overmyer's petition for reconsideration, which is presently pending before the Commission.

7. Accordingly, IT IS ORDERED, That the Petition for Deletion of Issue and for Shift of the Burden of Proof, filed September 28, 1970, by D. H. Overmyer, D. H. Overmyer Communications Company, Inc., and D. H. Overmyer Company, Inc. IS DENIED insofar as it relates to the deletion of Issue 2; and

8. IT IS FURTHER ORDERED, That the petition, insofar as it relates to the burden of proof, IS HEREBY CERTIFIED to the Commission for its determination:

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, Secretary.

STATEMENT OF BOARD MEMBER DEE W. PINCOCK

I dissent from the Board's Memorandum Opinion and Order insofar as it does not reach the merits of the burden of proof question. In my opinion, Overmyer's request to shift the burden of proof to the Commission is neither novel nor unusual. Cf. *American Broadcasting Companies, Inc.* (ABC), 20 FCC 2d 603, 610, 17 RR 2d 1080, 1088 (1969). In the past, the Board has on several occasions ruled on such requests (see, e.g., *Daily Telegraph Printing Co.* (WBTW-TV), 20 FCC 2d 976, 18 RR 2d 95 (1969); *South Carolina Educational Television Commission* (WITV), 20 FCC 2d 550, 17 RR 2d 910 (1969), review denied FCC 70-158, released February 11, 1970), and I see no reason why it should not do so in this case. On the merits, Overmyer's request should be denied: under all of the circumstances present in this case, I do not believe that having the burden of proof remain on Overmyer, as the Commission has explicitly directed in its designation Order, is fundamentally unfair or contrary to past precedent. Cf. *United Telephone Co. of Ohio*, 26 FCC 2d 417, 421, 20 RR 2d 602, 608 (1970).