91st Congress, 1st Session - - - - - - House Report No. 91-256

TRAFFICKING IN BROADCAST STATION LICENSES AND CONSTRUCTION PERMITS

ACQUISITION AND TRANSFER OF FIVE OVERMYER TELEVISION CONSTRUCTION PERMITS

REPORT

OF THE

SPECIAL SUBCOMMITTEE ON INVESTIGATIONS

OF THE

COMMITTEE ON
INTERSTATE AND FOREIGN COMMERCE
HOUSE OF REPRESENTATIVES

(Pursuant to Section 136 of the Legislative Reorganization Act of 1946, Public Law 601, 79th Congress, and House Resolution 116, 91st Congress)

MAY 19, 1969.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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91ST CONGRESS, *1st Session* } HOUSE OF REPRESENTATIVES { REPORT No. 91-256

TRAFFICKING IN BROADCAST STATION LICENSES AND CONSTRUCTION PERMITS

MAY 19, 1969.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. STAGGERS, from the Committee on Interstate and Foreign Commerce, submitted the following

REPORT

[Pursuant to sec. 136 of the Legislative Reorganization Act of 1946, Public Law 601, 79th Cong., and H. Res. 116, 91st Cong.]

CONTENTS

TRAFFICKING IN BROADCAST STATION LICENSES AND CONSTRUCTION PERMITS

I. The Legislative Background and Purpose of the Special Subcommittee

The Special Subcommittee on Investigations was first established under the name of the Special Subcommittee on Legislative Oversight in the 85th Congress. It has been re-created in each subsequent Congress.

For the 90th Congress, on March 9, 1967, Chairman Staggers announced its composition of the following members:

Harley O. Staggers, West Virginia, *Chairman*

John E. Moss, California	Hastings Keith, Massachusetts
John D. Dingell, Michigan	Glenn Cunningham, Nebraska
Paul G. Rogers, Florida	James Harvey, Michigan
Lionel Van Deerlin, California	Donald G. Brotzman, Colorado
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Brock Adams, Washington	

The special subcommittee was appointed and continued under the authority of section 136 of the Legislative Reorganization Act of 1946 and House Resolution 168, 90th Congress, agreed to February 27, 1967. This authorization was continued in effect by House Resolution 116, 91st Congress.

Section 136 of the Legislative Reorganization Act of 1946, which is included in the rules of the House of Representatives, provides that "To assist the Congress in appraising the administration of the laws" each standing committee of the House of Representatives "shall exercise continuous watchfulness" of the execution of the laws by the administrative agencies of the Government, within the jurisdiction of the committee.

In addition, House Resolution 168, 90th Congress, authorized the committee to investigate and study the administration, by the various departments and agencies of the Government, of the statutes which they administer, including "ownership, control, and operation of communications and related facilities * * * and the administration by the Federal Communications Commission and the Director of Telecommunications Management of statutes which they administer." [1]

[1] The resolution was as follows:

H. Res. 168, 90th Congress, Agreed to February 27, 1967

Resolved, That effective January 3, 1967, the Committee on Interstate and Foreign Commerce may make investigations and studies into matters within its jurisdiction including the following:

(1) Policies with respect to competition among the various modes of transportation, whether rail, air, motor, water, or pipelines; measures for increased safety; adequacy of the national transportation system for defense and the needs of an expanding economy; and the administration by the Interstate Commerce Commission of the statutes which it administers.

II. Dates and Principal Purposes of Overmyer Hearings

Hearings of the special subcommittee on the D. H. Overmyer acquisition and transfer of five television station construction permits (CP's) were held in public session in room 2123, Rayburn House Office Building, Washington, D.C. on December 15, 1967, July 16, 17, 19, 31 and

[1] (continued)

(2) Policies with respect to the promotion of the development of civil aviation; measures for increased safety; restrictions which impede the free flow of air commerce; promotion of travel and tourism routes, rates, accounts, and subsidy payments; airport construction, hazards of adjacency to airports, and condemnation of airspace, aircraft, and airline liability; aircraft research and development, and market for American aircraft; air navigational aids and traffic control; and the administration by the Civil Aeronautics Board and the Federal Aviation Agency of the statutes which they administer.

(3) Allocation of radio spectrum; pay television; ownership, control, and operations of communications and related facilities; policies with respect to competition among various modes of communication, including voice and record communications and data processing; policies with respect to governmental communications systems; coordination of communication policies both domestic and foreign; impact of foreign operations, international agreements, and international organizations on domestic and foreign communications; technical developments in the communications field; and the administration by the Federal Communications Commission and the Director of Telecommunications Management of statutes which they administer.

(4) Adequacy of the protection to investors afforded by the disclosure and regulatory provisions of the various Securities Acts; and the administration by the Securities and Exchange Commission of the statutes which it administers.

(5) Adequacy of petroleum, natural gas, and electric energy resources for defense and the needs for an expanding economy; adequacy, promotion, regulation, and safety of the facilities for extraction or generation, transmission, and distribution of such resources; development of synthetic liquid fuel processes; regulation of security issues of and control of natural gas pipeline companies; and the administration by the Federal Power Commission of the statutes which it administers.

(6) Advertising, fair competition, and labeling; and the administration by the Federal Trade Commission of the statutes which it administers.

(7) Research in weather, including air pollution and smog, and artificially induced weather; and the operations of the Weather Bureau.

(8) Effects of inflation upon benefits provided under railroad retirement and railroad unemployment programs; and inequities in provisions of statutes relating thereto, with comparison of benefits under the social security system; and the operations of the Railroad Retirement Board, the National Mediation Board, and the National Railroad Adjustment Board.

(9) Adequacy of medical facilities, medical personnel, and medical teaching and training facilities; research into human diseases; provisions for medical care; efficient and effective quarantine; protection to users against incorrectly labeled and deleterious foods, drugs, cosmetics, and devises (sic); and other matters relating to public health; and the operations of the Public Health Service and the Food and Drug Administration.

(10) Disposition of funds arising from the operation of the Trading With the Enemy Act; and the operations of the Foreign Claims Settlement Commission.

(11) Current and prospective consumption of newsprint and other papers used in the printing of newspapers, magazines, or such other publications as are admitted to second class mailing privileges; current and prospective production and supply of such papers, factors affecting such supply, and possibilities of additional production through the use of alternative source materials.

(12) Traffic accidents on the streets and highways of the United States; factors responsible for such accidents, the resulting deaths, personal injuries, and economic losses; and measures for increased traffic and motor vehicle safety.

Provided, That the committee shall not undertake any investigation of any subject which is being investigated by any other committee of the House.

August 1, 1968. During these 6 days of hearings approximately 26 witnesses were heard.

The hearings had two fundamental purposes:

First, to ascertain whether the Federal Communications Commission (FCC or Commission) had adequately administered those provisions in its organic statute and rules and regulations which pertained to the facts and circumstances involved in the Overmyer acquisition and transfer of these five CP's.

Second, to ascertain whether the Communications Act of 1934, as amended (Communications Act) and FCC rules and regulations, contained provisions adequate to protect the public interest in light of the testimony and evidence received during the course of these proceedings.

As more fully described below, trafficking in broadcast station licenses and CP's has for years been of particular concern to the Commerce Committee as well as to its special subcommittees, such as the Special Subcommittee on Legislative Oversight. The Overmyer transfer to U.S. Communications Corporation (U.S. Co), therefore, was but one of numerous assignments examined in light of this problem and in furtherance of the special subcommittee's oversight jurisdiction over the Commission.

During these proceedings, the special subcommittee stressed that it was concerned with the Overmyer transfer only as it related, if at all, to this broader problem of trafficking in broadcast licenses and CP's;

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[1] (continued)

For the purposes of such investigations and studies the committee, or any subcommittee thereof, may sit and act during the present Congress at such times and places within or outside the United States, whether the House has recessed or has adjourned, to hold such hearings, and to require, by subpena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, and documents, as it deems necessary. Subpenas may be issued under the signature of the chairman of the committee or any member of the committee designated by him, and may be served by any person designated by such chairman or member.

The committee may report to the House at any time during the present Congress the results of any investigation or study made under authority of this resolution, together with such recommendations as it deems appropriate. Any such report shall be filed with the Clerk of the House if the House is not in session.

Notwithstanding section 1754 of title 22, United States Code, or any other provision of law, local currencies owned by the United States shall be made available to the Committee on Interstate and Foreign Commerce of the House of Representatives and employees engaged in carrying out their official duties under section 190d of title 2, United States Code; *Provided*, That (1) no member or employee of said committee shall receive or expend local currencies for subsistence in any country at a rate in excess of the maximum per diem rate set forth in section 592(b) of the Mutual Security Act of 1954, as amended by Public Law 88–633, approved October 7, 1964; (2) no member or employee of said committee shall receive or expend an amount for transportation in excess of actual transportation costs; (3) no appropriated funds shall be expended for the purpose of defraying expenses of members of said committee or its employees in any country where counterpart funds are available for this purpose.

Each member or employee of said committee shall make to the chairman of said committee an itemized report showing the number of days visited in each country whose local currencies were spent, the amount of per diem furnished, and the cost of transportation if furnished by public carrier, or if such transportation is furnished by an agency of the United States Government, the cost of such transportation, and the identification of the agency. All such individual reports shall be filed by the chairman with the Committee on House Administration and shall be open to public inspection.

not, as it may have related to the reputation of Overmyer, his organizations, or any other individuals concerned.

III. Summary of FCC's Approval of Overmyer's Transfer of Five CP's to U.S. Co, and the Dissents Thereto

On December 8, 1967, the FCC consented to the transfer of six UHF television stations, located in the top 25 markets, to U.S. Co.[2] Overmyer held the CP's for five of these stations, which were in varying stages of construction at the date of transfer (tr. 305).[3] They were—

WSCO–TV Newport, Ky. (covering Cincinnati, Ohio)
WBMO–TV Atlanta, Ga.
WECO–TV Pittsburgh, Pa.
KJDO–TV Rosenberg, Tex. (covering Houston)
KEMO–TV San Francisco, Calif.

The sixth broadcasting entity involved in the transfer, WPHL–TV, which was not of primary concern in these special subcommittee hearings, was licensed to Philadelphia Television Broadcasting Company and was on the air in that city when this transaction was approved.

A. Salient Features of the Sale of the Five CP's

On March 28, 1967, Overmyer entered into a Stock Purchase and Loan Agreement with AVC Corporation (AVC) (tr. 440 and 448).[3a] Under the terms of the Stock Purchase Agreement, Overmyer was to sell 80 percent of the outstanding capital stock of each of his five TV companies for an amount "* * * equal to eighty percent (80%) of the cost and expenses attributable to the acquisition and development of the TV Companies and Stations * * *" but not to exceed $1 million or a lesser sum as called for by the FCC (tr. 440). Since the Commission approved Overmyer's expense claim of $1,331,900, it appeared as though consideration for such sale was $1 million (tr. 889).

However, pursuant to the Loan Agreement, AVC also agreed to lend Overmyer $3 million to assist his warehousing business (tr. 448).[4] This document further provided that AVC has an option to purchase, during 1971,[5] the remaining 20 percent stock interest which Overmyer retained in the 5 permittees for a sum not to exceed $3 million (tr. 454–456). Based on the price formula contained in this agreement, the option price will not be less than $3 million. Accordingly, the $3 million loan Overmyer received from AVC will be offset entirely by AVC's exercise of said option (tr. 454–456).[6]

[2] FCC order adopted Dec. 8, 1967 (FCC 67–1312, 9408, File Nos. BTC 5376/80 and BALCT 327).

[3] Transcript page numbers refer to printed hearings, "Trafficking in Broadcast Station Licenses and Construction Permits—Acquisition and Transfer of Five Overmyer Television Construction Permits," held before the Special Subcommittee on Investigations of the Committee on Interstate and Foreign Commerce, 90th Cong., first and second sess. (Serial Nos. 90–50 and 90–51).

[3a] On June 6, 1967, AVC assigned to its wholly owned subsidiary, U.S. Co, all of its right, title and interest under these agreements. (tr. 491 and 493).

[4] AVC provided Overmyer with $1.5 million on May 3, 1967, and $1.5 million on Jan. 15, 1968 (tr. 491 and 560). Payment of principal is deferred until sometime between Jan. 15, 1971, and April 14, 1972, depending upon the exercise or lapse of the option (tr. 453). Interest is payable on the first day of each month at the rate of 5¾ percent and 6¼ percent on each respective $1.5 million (tr. 108). The loan is secured principally by second mortgages on 23 warehouse properties owned by Overmyer (tr. 448 and 451).

[5] Between Jan. 16, 1971 and Jan. 15, 1972.

[6] See, also, subcommittee staff analysis of the option arrangement (tr. 590). In Commissioner Cox's opinion: "* * * I think both parties expect the option to be exercised and I am morally certain that it will be" (tr. 308). Since AVC assigned the Loan Agreement to U.S. Co, the latter company actually will exercise this option. See footnote 3a *supra*.

AVC's grant of a loan to Overmyer itself gave him more consideration than he was entitled to under the Commission's policy of limiting reimbursement to out-of-pocket expenses. But, in addition, since there can be little doubt that U.S. Co will exercise its option on Overmyer's remaining stock interest for $3 million, the actual consideration for the sale of these five CP's will total $4 million, well in excess of expenses legitimately reimbursable to Overmyer.[7]

B. FCC'S OPINIONS IN OVERMYER TRANSFER

By a 4-to-3 margin, the Commission without a hearing authorized Overmyer to transfer his five CP's to U.S. Co, a subsidiary of AVC. The Commission's majority opinion was contained in a single two-sentence paragraph: such action, it was stated would "* * * foster the development of UHF television stations" and "* * * be consistent with the Commission's efforts to provide a more competitive nationwide television service to the public" (tr. 305).

Commission Chairman Rosel H. Hyde testified that a separate public interest determination was made for each of the five markets concerned, as required by the Communications Act (tr. 10).[8] However, the Commission's decision and memorandum of its broadcast bureau staff, which recommended that the transfer be approved, do not contain such findings.

Moreover, because this sale involved stations in the top 50 television markets (all five here were in the top 25 markets), a full evidentiary hearing became necessary because of the Interim Rule, unless the applicant made a "compelling affirmative showing" that such requirement should be waived.[9] Despite Commission testimony to the contrary, with respect to its waiver, no evidence of such a "compelling affirmative showing" appeared in the record of these transfer proceedings (tr. 14).

Commissioners Bartley, Cox, and Johnson dissented, the opinion of Commissioner Cox encompassing the views of his two colleagues. Commissioner Cox objected to the transfer on three basic grounds.

First, he stated that the majority's action has "eroded" the Commission's interim policy against concentration of control in the nation's top 50 television markets (tr. 306).

> I do not think the majority can make a finding, on the basis of what is now before us, that there is such an unusual and urgent need for additional television

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[7] See discussion of FCC out-of-pocket expense policy, *infra*, p. 10. Overmyer contended that the "* * * option cannot be considered as an advantage to, or an enrichment of Overmyer, but rather as an element which is essentially disadvantageous to Overmyer and obviously for the benefit of AVC alone" (tr. 899). This view is based on the possibility that U.S. Co might not exercise the option or, if exercised, that the price may be substantially less than $3 million (tr. 899).

But apart from the facts with respect to computing the option price, which of themselves weaken any argument that the option price could be less than $3 million; and, which demonstrate that such an arrangement was a device to circumvent the Commission's out-of-pocket expense policy, it should be noted that the purchase of these five CP's will cost AVC well over $7 million, even excluding the $3 million "loan" (tr. 685). With such a heavy investment initially committed, and still many millions more proposed for making these stations viable, it is unreasonable to assume that U.S. Co will not exercise the option to gain full ownership control. (See Price Waterhouse cost/income projections made for AVC (tr. beginning 900). Moreover, statements were made to special subcommittee staff members by Mr. Joseph L. Castle, a partner in the firm of Butcher and Sherrerd, financial advisors to AVC, that the Company sought to obtain 100 percent ownership, but was turned down during sale negotiations with Overmyer. The record contained no evidence contradicting AVC's intentions in this regard.

[8] 47 U.S.C. 310(b).

[9] FCC's "Interim Policy Concerning Acquisition of Television Stations," 5 R.R. 2d 271, June 21, 1965. "RR" refers to *Pike & Fischer Radio Regulations*.

service in these five communities that we must disregard important policies in other areas in order to rush these stations to completion. UHF is important, but not all important (tr. 310).

Commenting further, Commissioner Cox said:

I am amazed * * * that we should fight an already undesirable degree of concentration by allowing other major group owners to develop (tr. 311).

Commissioner Cox explained that he is in favor of a more competitive nationwide television service, but does not feel that it will be achieved by allowing UHF to fall into the same old patterns of concentrated ownership and control characterizing VHF service (tr. 309).

Second, Commissioner Cox argued that the transfer also violated the Commission's out-of-pocket expense policy.

* * * having received $1,000,000 outright for 80% of his interest in these permits, Overmyer is getting an additional $3,000,000 for the remaining 20%—a markup of 12 to 1 for this last fifth of his present holdings. I think this represents profiteering from the sale of permits in violation of our past policies and practices. I think this entire complex transaction has been carefully designed to achieve exactly this heretofore prohibited result (tr. 308).

As to the $3 million loan, which lay at the heart of the out-of-pocket expense controversy, Commissioner Cox contended that it was merely a deferred payment device "to get around" the Commission's policy restrictions (tr. 308).

* * * our policy has always been to prevent such a permit holder from realizing a profit in disposing of his authorization. I think the majority is breaching that policy here (tr. 306).[10]

Third, Commissioner Cox said that Overmyer's application contained many unusual features and claims which had not been supported with evidentiary proof. Therefore, it was his opinion that a hearing was essential before the Commission could make a determination that the public interest would be served by the transfer.

It seems to me, and I think Commissioners Bartley and Johnson, that in this case it was quite clear that this was a novel transaction; it was unusual in its scope; there were a lot of loose ends. We thought, therefore, even though there would be delay and expense both to the parties and the Commission, that a hearing was imperative (tr. 288).

Two major aspects of the sale which according to Commissioner Cox, particularly warranted a hearing, were Overmyer's method of calculating out of pocket expenses[11] and the Loan Agreement (tr. 307). He indicated, for example, that provisions regarding the price of AVC's stock option, which was based on gross receipts rather than income, were "odd" and clearly required examination before their validity could be ascertained (tr. 307).

Furthermore, Commissioner Cox pointed out that it would have been virtually impossible for AVC to have acquired five such major market permits if it had been compelled to undergo a comparative hearing for each. The FCC's criteria for comparative cases, he indicated, "* * * do not favor non-local corporations with no past broadcast

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[10] According to the Commissioner: "* * * for all practical purposes the parties have made a present contract for the complete sale of Overmyer's five construction permits for $4,000,000 * * *" (tr. 308).

[11] Commissioner Cox had specific reference to unreimbursed staff expenses in the amount of $666,514 (tr. 307).

experience whose principals do not propose to be personally involved in the management of a station applied for." And, he added, if AVC did get one permit, this factor would weigh against it in the remaining proceedings were its opponents without other broadcast interests (tr. 307).[12] Yet here, Commissioner Cox observed, a diversified investment corporation, with no experience in the local markets concerned and no background in broadcasting, was able to obtain five CP's without the public receiving the protective benefits of a noncomparative evidentiary hearing, let alone a hearing in which other applicants competed for the permits. The transfer was approved despite the fact that issues of serious magnitude were presented (even on the face of the application) which could only be resolved in a hearing (tr. 312).

Commissioner Cox's final major objection was that he did not think that the FCC's staff had performed a full or careful enough examination of the transfer application itself and looked behind the representations and self-serving declarations contained therein, as it was required to do by law.[13]

> I think we have to look underneath the surface to the real nature of what the parties are accomplishing. I don't think the staff ever reached that stage (tr. 312).

IV. Statutory and Regulatory Provisions Applicable to the Acquisition and Transfer of Broadcast Station CP's and Licenses

A. Definition of "construction permit" and "station license"

The Communications Act defines "construction permit" as "that instrument of authorization * * * for the construction of a station, or the installation of apparatus, for the transmission of energy or communications, or signals by radio" * * *[14] The term "station license" is defined as "that instrument of authorization * * * for the use or operation of apparatus for the transmission of energy, or communications, or signals by radio" * * *[15]

Under the Communications Act, upon the completion of station construction, * * * "it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest", the CP terminates ipso facto and a regular operating license is issued to the permittee.[16] For all practical purposes, however, the grant of a CP

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[12] Also, he explained, the FCC's interim policy on concentration of control then in effect (see footnote 32) would have limited AVC to three CP's were it seeking to acquire them on an individual basis (tr. 307).

[13] See 47 U.S.C. 309(a), wherein it is provided that "* * * if the Commission, upon *examination* of such application * * * shall find that the public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application." (Emphasis added.)

[14] 47 U.S.C. 3(ee).

[15] 47 U.S.C. 3(cc).

[16] 47 U.S.C. 319(c). Upon completion of station construction, a permittee usually conducts equipment tests to assure compliance with terms of the CP. (See FCC Rule 73.628.) Then, upon filing an application for the station license, a permittee may request authority to conduct program tests. During this period of testing, extension of the CP is not required. Program test authority is automatically terminated by final Commission determination upon application for the station license. (See FCC Rule 73.629.)

is equivalent to the grant of a license, unless the public interest requires otherwise. As the Commission has stated: [17]

> We agree that the grant of an application for station license normally follows almost automatically from the issuance of a construction permit and the completion of construction in accordance therewith * * * and that to reach a different result in the context of a license application requires an affirmative finding that a grant thereof would be *against* the public interest on the basis of matters first coming to our attention after grant of the construction permit * * *.

B. PROCEDURES AND CRITERIA FOR OBTAINING CP'S AND LICENSES

1. Governing transfers and non-transfers

During the special subcommittee hearings on December 15, 1967, FCC Commissioner Nicholas Johnson outlined various approaches a person might take to obtain a broadcast CP or license. Some of these, he testified, would necessitate costly hearings, while others might involve considerably less time or money (tr. 30–31):

1. Application for a CP for a new channel. If there is more than a single applicant, a comparative hearing is mandatory.[18]

2. Application for the transfer of an assigned channel from one community to another. Here, also, mutually exclusive applications will be designated for a comparative hearing.[19]

3. Application for the transfer of a CP.[20]

4. Application for the transfer of an existing license.[21]

In considering applications for licenses and permits, the Commission is required under the Communications Act to "* * * make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." [22]

The Communications Act requires, further, that all applications for station licenses: [23]

> * * * set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require.

Similar data is required in making application for a CP.[24] Applications for a station license or CP cannot be granted without the Commission first determining "whether the public interest, convenience, and necessity will be served by the granting of such application." [25] Moreover, any party in interest may file with the Commission a petition to deny an application.[26] If a substantial and material question of fact is presented, or the Commission is for any reason

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[17] *Effingham Broadcasting Co.*, 4 R.R. 2d 496.
[18] FCC Rule 51.572.
[19] *Ibid.* Also see FCC Rule 53.607(b). Irrespective of whether a *comparative* hearing is required, an applicant might be designated for an evidentiary hearing if the Commission is unable to make a finding that the public interest, convenience, and necessity will be served by the granting of such transfer application (47 U.S.C. 309(e)).
[20] 47 U.S.C. 310(b).
[21] *Ibid.*
[22] 47 U.S.C. 307(b).
[23] 47 U.S.C. 308(b).
[24] 47 U.S.C. 319(a).
[25] 47 U.S.C. 309(a).
[26] 47 U.S.C. 309(d)(1)

unable to make its public interest finding, a hearing is designated.[27] The Communications Act also contains restrictions on granting station permits or licenses to aliens,[28] and where such grants would substantially lessen competition or restrain commerce.[29]

Over the years, Commission policy has evolved a number of additional factors which it considers in determining a station applicant's qualifications: broadcast experience, business practices, character qualification, civic activities, community influence, community needs, control over programs, diversification of background, diversification of control, economic interests of existing station, effect upon employees, equities of existing licensees, financial qualifications, good faith, integration of ownership and operation, technical interference, labor relations, legal qualifications, litigation matters, local ownership, multiple ownership, need, new station versus expansion of existing service, participation in civic activities, past performance record, priority of filing, program service, program control, public service responsibility, station rates, time sharings, trafficking, and site violations.[30]

2. Involving transfers and assignments only

Section 310(b) of the Communications Act furnishes the statutory guidelines for transfers and assignments of station licenses and permits and is discussed more fully, *infra*, beginning page 12. It provides:[31]

> No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

(a) Multiple ownership criteria and the Interim 50 Market Rule

According to the Commission, the twofold purpose of its multiple ownership rules is "to promote maximum competition among broadcasters and the greatest possible diversity of programing sources and viewpoints" (tr. 652).[32] It would be inappropriate here to chronicle the long history of those guidelines, enunciated both in the Communications Act and in Commission policies, to avoid undue and unreasonable concentration of ownership of broadcasting facilities.[33] Brief mention of the Interim 50 Market Rule, which was in effect at the time Overmyer's transfer was approved, will suffice, instead, for purposes of this report.

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[27] 47 U.S.C. 309(e).
[28] 47 U.S.C. 310(a).
[29] 47 U.S.C. 314.
[30] See FCC Rule 53.24. Although it deals specifically with the showing required in applications for AM radio stations, applications for other broadcast services are also governed thereby. *Northeastern Indiana Broadcasting Company, Inc.*, 9 RR 261 (1953).
[31] 47 U.S.C. 310(b).
[32] Report and order, docket No. 16068, dated Feb. 7, 1968. "In Matter of Amendment of section 73.636(a) of the Commission's Rules Relating to Multiple Ownership of Television Broadcast Stations" (tr. 652).
[33] This topic is covered in a special subcommittee staff memorandum (tr. 673–681).

On June 21, 1965, the Commission released a notice of proposed rulemaking and memorandum opinion and order [34] which would have adopted an amendment to the concentration of control portion of the television multiple ownership rule, substituting a new interim policy for that previously in force, as follows:

> Absent a compelling affirmative showing to the contrary, we will designate for hearing any application filed after June 21, 1965, for a new television station, assignment of license, or transfer of control, the grant of which would result in the applicant or any party thereto having interests in violation of those provisions set forth in proposed section 73.636(a)(2)(ii) [not more than three television stations or more than two VHF stations in the top 50 television markets].
>
> Divestiture will not be required, but commonly owned stations in excess of the number set forth in the proposed rule which are proposed to be assigned or transferred to a single person, group, or entity will be designated for hearing (tr. 653).

The first waiver of the new interim policy occurred in 1966 [35] and was followed up with seven others prior to Overmyer's (tr. 784). Subsequent to FCC consent to this sale, the Commission waived the hearing requirement for the ninth time in a case involving the transfer of a CP for a UHF station in Denver, Colo., from Harcourt, Brace & World, Inc., to The Denver Post, controlled by Samuel I. Newhouse, who also controlled Newhouse Broadcasting Corporation, the majority stockholder in six TV stations, three AM, and four FM radio stations.[36]

On February 7, 1968, the Commission terminated its interim policy in the top 50 markets, stating that it would continue carefully to scrutinize every acquisition, whether in those particular areas or in other communities, to prevent undue concentration:

> * * * we will expect a compelling public interest showing by those seeking to acquire more than three stations (or more than two VHF stations) in those markets. The compelling showing should be directed to the critical statutory requirement of demonstrating, with full specifics, how the public interest would be served by a grant of the application—that is, the benefits in detail that are relied upon to overcome the detriment with respect to the policy of diversifying the sources of mass media communications to the public (tr. 655).

It is important to note that the "compelling public interest showing" under the Interim Rule prior to February 7, 1968, like present Commission policy, required an applicant to prove how the public interest would be enhanced by the grant of his application without a hearing.

(*b*) *Out-of-pocket expense policy*

Section 311(c)(3) of the Comunications Act concerns agreements between mutually exclusive CP applications whereby one applicant, for a consideration, withdraws in favor of another applicant: [37]

> The Commission shall approve the agreement only if it determines that the agreement is consistent with the public interest, convenience, or necessity. If the agreement does not contemplate a merger, but contemplates the making of any direct or indirect payment to any party thereto in consideration of his withdrawal of his application, the Commission may determine the agreement to be consistent with the public interest, convenience, or necessity only if the

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[34] 5 RR 2d 1609.
[35] *Channel 2 Corp.* 6 RR 855(1966) (tr. 789).
[36] FCC Report No. 6944, Jan. 9, 1968.
[37] 47 U.S.C. 311(c)(3). See Senate Rept. No. 1857, vol. 6, serial No. 12238, and House Rept. No. 1800, vol. 4, serial No. 12246. Also, *Four States Broadcasters, Inc.,* 3 R.R. 1545 (1947), and *Cherry and Webb Broadcasting Co.,* 14 R.R. 873 (1957).

amount or value of such payment, as determined by the Commission, is not in excess of the aggregate amount determined by the Commission to have been legitimately and prudently expended and to be expended by such applicant in connection with preparing, filing, and advocating the granting of his application.

These out-of-pocket expense provisions, implemented by FCC Rule 51.525, were enacted to prevent payments to the withdrawing party in excess of the value of any material, equipment, or services which he may have rendered.

There is no FCC out-of-pocket expense *rule* with respect to the transfer or assignment of CP's. There is, however, an FCC out-of-pocket expense *policy* relating to this subject, which is based on the language of section 311(c)(3) and enunciated in decisions of the Commission.[38] Administered by the FCC on an ad hoc basis, it is designed to limit the consideration which can be received by the transferor of a CP to (*a*) expenses legitimately and prudently expended by such transferor in obtaining a permit, such as costs of professional services, travel, printing, market research, surveys, etc.; and (*b*) funds, spent after granting of the CP and prior to licensing, for acquisition of land, buildings, equipment, film rights, furniture, and fixtures (tr. 611). However, the Commission has neither defined out-of-pocket expenses nor provided any regulatory guidelines for classifying the numerous kinds of expenditures which might be reimbursable to a transferor.

(*c*) *The "3-Year Rule"*

FCC Rule 51.597 provides for hearings on all license transfer applications where a transferor has operated its station for less than 3 consecutive years. This rule may be waived where:

*** * * The assignor or transferor has made an affirmative factual showing, supported by affidavits of a person or persons with personal knowledge thereof, which establishes that due to unavailability of capital, to death or disability of station principals, or to other changed circumstances affecting the licensee or permittee occurring subsequent to the acquisition of the license or permit, Commission consent to the proposed assignment or transfer of control will serve the public interest, convenience, and necessity.**

The accelerated trend in sales of broadcast properties involving short-term ownership was the principal cause for the adoption of Rule 51.597:[39]

As to "trafficking" the Commission is seriously disturbed over the very high ratio of transfer and assignment applications involving short-term ownership of stations in numerous communities. It believes that it has a special obligation to insure that such short-term assignment or transfer applications do not constitute trafficking in licenses. An applicant who seeks to dispose of his license within the first few years encompassed by his initial license period obviously warrants special scrutiny.[40]

Rule 51.597, however, has not been applied to CP's for stations which have not yet begun operations. These permittees thus remain outside the purview of the proscription and are free to barter away their permits whenever, and to whomever they so choose. According to Chairman Hyde: "If the station goes on the air but has not yet been fully

[38] See, for example, *Matter of Bernard Rappaport,* File Nos. BMPCT 5818 and BAPCT 393, July 5, 1967 (tr. 337), and *Desert Broadcasting Company, Inc.,* Doc. No. 14714, File No. BMPH 6746, July 18, 1962 (tr. 341).

[39] 23 R.R. 1504. See Report of the Special Subcommittee on Legislative Oversight, 85th Cong., second sess., Jan. 3, 1959. Also, "Investigation of Regulatory Commissions and Agencies", hearings before Special Subcommittee on Legislative Oversight, pt. 8, 85th Cong., second sess., p. 2914. However, since this rule was adopted on March 15, 1962, it has been waived approximately 90 times by the Commission, and such assignments allowed without the fact-finding benefits of the hearing process (tr. 619).

[40] *Id.* at 1504.

licensed, the rule applies. It applies also to the situation where a license and related modified construction permit are being transferred" (tr. 617).[41] This rule's hearing escape and lack of CP coverage make it ineffective as a deterrent against sales of broadcast permits and licenses by short term holders.

C. SECTION 310(b)—"AVCO RULE"

On August 2, 1945, the Commission, by a vote of 4 to 3, consented to the transfer of control of The Crosley Corporation, licensee of WLW, Cincinnati, Ohio, to The Aviation Corporation (AVCO), a diversified manufacturing and investment organization.[42] At the time of this decision, most transfers of station licenses were routinely handled by the FCC, which approved, with only rare exception, the transferee selected by the transferor who was retiring from broadcasting.[43] Licenses would go to the highest bidder, even though many other persons, better qualified, might be willing to take over the operation of the station.

As a result, the following situation was created: In transfer cases, a person could select his successor without regard for the proposed transferee's qualifications, while in the case of licensing new station applicants, FCC procedure insured that everyone interested in a particular broadcast frequency had an opportunity to apply. The Commission majority in AVCO said:

> We have an anomalous situation where the agency created by Congress and given regulatory responsibility in this field simply examines the qualifications of the proposed transferee while the broadcaster, who is selling the station, exercises the really important function of deciding which of a number of qualified possible successors should be selected to operate the station. The procedure which has prevailed in transfer cases is in sharp contrast to that prescribed by Congress for the consideration of applications for new stations although the standards prescribed by the act are identical. In the case of licensing new stations the procedure followed insures that everyone who is interested in applying for a particular broadcast frequency shall have the opportunity to do so. This usually results in a competitive situation where the Commission has a choice between applicants. Thus, so far as new stations are concerned, Congress has kept the door open so all who are interested in going into the broadcast business have the opportunity to apply and present their case.

These members stated, further:[44]

> It is difficult to reconcile procedures which on the one hand take such pains to insure the fullest competition among applicants for new stations and on the other hand permit a licensee to transfer to whomsoever he pleases—provided the transferee whom he selects is found qualified.

At the conclusion of its decision, the FCC proposed new procedures to govern future transfer cases, which were adopted, after rulemaking proceedings, on July 25, 1946.[45] Under this so-called "AVCO Rule",

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[41] Commissioner Bartley has argued that the 3-Year Rule should apply to bare CP.'s: "The chief purpose of the rule was to retard trafficking in Commission authorizations. The policy basis of the rule *does* have application to stations not constructed, because trafficking in Commission authorizations takes place through permittees of bare CP's bringing in, by transfer or assignment, new partners or stockholders with additional money. The original permittee profits by the additional money and increased value of the permit" (tr. 636).

[42] 3 R.R. 6 (1945).

[43] Prior to its amendment in 1952 to read as shown on p. 9, *supra*, sec. 310(b) read as follows: "The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing."

[44] 3 R.R. 16, 17.

[45] Sec. 1.388, 11 Federal Register 9375 (August 27, 1946). This section number subsequently was changed to Sec. 1.321, 11 Federal Register 1171 (Sept. 11, 1946).

the Commission would hold a transfer application in abeyance for 60 days to allow local advertisement of such sale so that other interested parties might have an opportunity to file competing applications. If no competing application was filed, and it was in the public interest, the Commission would grant the original application. Otherwise, a hearing was designated. In the case of competing applicants, all were considered simultaneously upon their merits. If it were clear that the licensee's choice of transferee was the best qualified, and the transfer to him was in the public interest, the original application would be granted without a hearing. Otherwise, a comparative hearing would be held to select the most qualified from among all the applicants.[46]

On June 9, 1949, the Commission repealed its AVCO Rule because few competitive applications were filed and severe economic and other hardships, allegedly, were suffered by parties interested in such transfers.[47] But, the continuing protest over the Commission's AVCO Rule, despite its earlier repeal, led to the amendment of section 310(b) in 1952.[48] Prior to its amendment, section 310(b) provided that a station license could not be transferred or assigned unless the Commission determined that the transfer or assignment was in the public interest.[49] At present, the Commission is still required to apply the test of public interest, convenience and necessity but, in making this determination, it cannot consider the fact that a different transferee other than the one selected by the transferor would make a better licensee.[50]

V. The Commission's Abdication of Its Statutory Responsibility

During the hearings on legislation to change section 310(b), spokesmen for the FCC argued that the proposed language (which ultimately became law) that[51] ". . . the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment or disposal of the permit or license to a person other than the proposed transferee or assignee," would preclude the Commission from questioning the public interest desirability of the transfer per se.[52]

The changed wording in the House version raises a question as to whether the Commission would merely be prevented from considering whether the transfer should be made to someone other than the proposed transferee (as was formerly done under the AVCO procedure where an opportunity was given for others to request the facilities), or whether it is intended in addition that the

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[46] Regarding its AVCO Rule, former FCC chairman C. R. Denny said: "The Commission believes that the adoption of this procedure enables it to carry out more adequately the congressional intent that the best qualified person should be licensed for each available frequency. Nor does the procedure harm the existing licensee since under its terms he either sells his station to the person he selected under the terms of the contract or he sells to another person on the same terms, or retains his station. Thus, we think the adoption of this procedure has improved the Commission's ability to insure the maximum utilization of the limited number of broadcast facilities." Hearings on S. 1333, 80th Cong., first sess. p. 49–51.

[47] 14 Federal Register 3235, June 15, 1949.

[48] See text, p. 9, *supra*. Prior to the 1952 amendment CP's were not covered in sec. 310(b). However, sec. 319(b), as it then read, provided that rights under a CP could not be assigned or otherwise transferred to any person without Commission approval. This provision was stricken along with the change to 310(b).

[49] See footnote 43, *supra*.

[50] See p. 9, *supra*, and Bartley dissents referred to in footnote 63.

[51] *Ibid.*

[52] From a memorandum dated April 18, 1952 to the Commission from its general counsel, Benedict Cottone, which contained a section by section analysis of S. 658. Also see testimony of FCC Chairman Wayne Coy on S. 1973, predecessor to S. 658, set out in full at pp. 78–84, 94–98, 99–138 in the hearing record of S. 658, House Interstate & Foreign Commerce Committee, 82nd Cong., first sess. S. 658 contained the version of 310(b) which was enacted in 1952.

Commission may not question the desirability of the transfer per se. The change in wording made by the House Committee leaves room for argument in support of either interpretation. The language of the House Report sheds no light on this matter.

This interpretation of section 310(b) has persisted despite the specific public interest finding called for in this section—and elsewhere throughout the Communications Act (sections 303, 307, 308, 309, 315, 316 et al.) and in the legislative history of the section, as amended—which clearly indicates that "the Commission must determine if the public interest will be served by the proposed transfer." [53] During hearings before the Senate Commerce Committee, FCC Chairman McConnaughey expressed the Commission's attitude then towards section 310(b), an attitude which still prevails today: [54]

I think this committee ought to know that the act, as amended in 1952, section 310(b), pretty much took away any discretion on the Commission's part in acting upon these transfers.

Mr. Cox. Does it still require you to make a finding that the public interest will be served by approving the transfer?

Mr. McConnaughey. It does, but it is noncomparative. That is what the Congress threw in that was never there before, and they say, and I quote: "But in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee."

Mr. Cox. Does the Commission have authority under the present law to set for public hearing any case where transfer is requested in which it feels there may be an issue raised because of the nature of the transferee?

Mr. McConnaughey. Oh, yes; we can set it for hearing.

Mr. Cox. If after such a hearing you felt, not on a comparative basis, not in terms of the quality of someone else, but if you felt the public interest would not be served by a transfer, you could decline to authorize the transfer?

Mr. McConnaughey. You could do it, but, you see, most of these sales and transfers are to people who already own a facility, one or more facilities. You have already stated or already found that they are acting in the public interest.

Mr. Cox. But you have not found it would be in the public interest for them also to act in this market.

Mr. McConnaughey. That is right, but that is a very, very difficult thing. You are really skating on thin ice.

While it is true that section 310(b), as amended, does limit Commission authority to the extent that the provision states that it may not consider the merits of third parties in transfer proceedings, such authority was not attenuated in 1952 so as to restrict the Commission's fundamental duty to find that "the public interest, convenience, and necessity" would be served by the granting of a transfer application. The Commission not only has the power but the obligation to inquire into the public interest aspects of transfer cases and to construe the public interest requirements of the Communications Act as a whole.[55]

[53] See comments on 1952 amendments by Congressman Wolverton, 98 Cong. Rec. 7397. Other experts in the broadcasting field were also aware of the continued public interest requirements of section 310(b), as amended. For example, Sydney W. Head, Director of Broadcasting and Film Services, University of Miami, in his *"Broadcasting in America,"* 1956, stated at p. 345: "Such extreme cases as the AVCO transfer can be more readily prevented by the Commission under a 1952 amendment to section 310(b) * * *. Previously the licensee had merely to secure written consent for a transfer from the FCC, which could decide whether the public interest would be served by the proposed transfer. The amended section requires the same action on an application for transfer as on an original application for a license. This amendment prevents the consequence complained of by the majority in the AVCO decision—the choice of licensees by transferors instead of by the Commission."

[54] 85th Cong., 1st sess., pp. 3372, 3373. Part V, pursuant to Senate Resolution 26, Hearings entitled "Television Inquiry".

[55] "Regulation of Broadcasting: Half a Century of Government Regulation of Broadcasting and the Need for Further Legislative Action," Study for Committee on Interstate and Foreign Commerce, 85th Cong., second sess., November 1958, p. 164.

As special subcommittee research assistant Robert S. McMahon contended over a decade ago: [56]

> Certainly the Commission today, as at any time, has express authority to consider the public interest aspects of any case, including that of transfer. The question may be asked as to whether or not the Commission has all too readily relinquished its desire to do so.

Nevertheless the Commission has argued persistently that under section 310(b), when a permittee seeks to assign its CP, the FCC is empowered to consider only whether the assignee selected by the permittee is qualified. It has no power, the Commission contends, to consider the comparative qualifications of prior unsuccessful applicants or the merits of any third parties despite the overall public interest requirement in sections 308 and 309 which must be met prior to Commission grant of any application.[57]

> * * * the Communications Act Amendments [of 1952] have resulted in a situation where the Commission claims it has no power over the transfer and sale of television licenses except that of pro forma approval.[58]

A classic example of the inequities caused by such a myopic reading of the statute is *Aladdin Radio and Television, Inc.*, a decision in which the Commission approved the transfer of channel 7, Denver, Colo., from Aladdin Radio & Television, Inc., to LTF Broadcasting Corporation a wholly owned subsidiary of Time Magazine.[59] Less than 1 year before this transfer was effected, Aladdin's original application for television 7 in Denver had been approved after a comparative hearing with Denver Television, Inc. The Commission found that Aladdin had superior local and integrated ownership and operation, greater participation in community affairs, and greater broadcasting experience than Denver Television. When Aladdin submitted its application for transfer, Denver filed a petition requesting the reinstatement and grant of its application and the revocation of Aladdin's permit.

In denying Denver's petition, the Commission stated that it could not consider the merits of any third party in an application for transfer of control or assignment of a license. It found the qualifications of Denver "completely irrelevant" to its consideration of Aladdin's transfer application, even if it were persuaded that Denver would be a superior operator of the station in question.[60]

In his dissent, Commissioner Lee stated: [61]

> In my opinion, approval of transfers such as this, where the sale is arranged before the license is issued, cannot be justified without a hearing. The Commission is required to make the same determinations on a license application as on a construction permit.
>
> While I agree that the Commission can only revoke under section 312(a)(2) if it comes into possession of facts that were knowledgeable at the time of the original grant, and that these [facts in second preceding paragraph hereof] were not, I do not think our hands are tied. I find it difficult to believe that Congress intended that we should go through a long, complicated hearing to pick the best applicant and then be forced to sit back and watch that applicant transfer his permit and dissipate the very grounds for our decision. Congress has provided in section 308(a) that all applications for station licenses shall

[56] *Id.*, footnote, p. 144.
[57] Hearings before Special Subcommittee on Legislative Oversight, pt. 8, 85th Cong., second session, *Id.* at pp. 2916–2918, 2983–86.
[58] McMahon, *Id.*, p. VII.
[59] 10 RR 773 (1954).
[60] *Id.* at 775.
[61] *Id* at 775–778. Also, see 47 U.S.C. 308(b) and *Independent Broadcasting Co.* v. *FCC*, 193 F. 2d 900 (1951).

set forth such facts as the Commission may prescribe as to the qualifications of the applicant to operate the station. I think we might well examine this applicant's qualifications to be a licensee in the light of the facts now known to us. In so suggesting, I am not, of course, ruling out all transfers of construction permits without a hearing.

Commissioner Lee also made the further statement:

I have previously gone on record as being greatly concerned at these large transfers which seem to me to circumvent the Commission's elaborate procedures to protect the public interest. I am even more concerned in this case, since the license has not been issued, and I must object most strenuously to the approval of this transfer without a hearing. There seems to be a trend to place use of the people's property in those who have not been scrutinized as clearly as the original grantee. This refers to those cases, of course, where the original grant was in conflict. It is contended that if there is a remedy, it must come from Congress. In view of the provisions of section 310(b) I can agree with this to some extent, particularly in the case of established licensees. However, I feel strongly that this Commission has a solemn obligation to examine this problem with extreme care and if necessary petition the Congress for legislative relief. I wish I had the wisdom to suggest the exact remedy, but I do not have it. I do know that the problem cries for solution.

By consenting to this sale, the Commission rendered meaningless those qualification standards announced in its original grant to Aladdin. For LTF, in the first proceeding, would not have been able to measure up to such criteria. Thus, LTF was able to obtain via the transfer route, without any hearing or consideration of the merits, a valuable public privilege which it could not have obtained in a comparative proceeding competing with original applicants for the channel.

From 1954 through 1965 the Commission consented to the transfer of 4,002 radio stations, 304 television stations and 192 combined radio-television stations (tr. 593). In the Chicago, Los Angeles, Philadelphia, Cleveland, Boston, and Detroit metropolitan areas alone, 50 radio stations (AM and FM) were transferred two or more times during the same period (tr. 600–608). For the years 1954 through 1967, 21 television stations located in the top 50 markets were transferred two or more times (tr. 595–599).[62]

This rubberstamp approval of station transfers has not occurred without vigorous dissent by Commissioner Bartley. He would give an assignee or transferee the burden of establishing its overall superiority to the assignor or transferor in the following public interest areas: licensee responsibility, integration of ownership and management, local residence, diversification of control of mass media, fostering competition among broadcast stations, participation in community affairs, direct supervision of the station, public service responsibility and a continuing awareness of an attention to the needs of the area to be served. If an affirmative showing, with respect to those items, were not made from data presented in the application, Commissioner Bartley would designate the transfer request for a hearing to de-

[62] "With the passage of the Communications Act Amendments of 1952 there began a situation in the process of television station license transfers which has been taken full advantage of by speculative license holders in the television field. Testimony before the Special Subcommittee on Legislative Oversight has effectively illustrated the ends to which parties have gone in the buying and selling of stations. To a considerable extent, the responsibility for the conditions which have arisen lies with the Commission, which has chosen to rely on a single limiting provision of the act rather than choosing to interpret the act as a whole. This provision states that the Commission may not consider the qualifications of a third party in cases of broadcast license transfer. The Commission has chosen to interpret this provision as implying that licenses should be permitted to change hands without any action on its part other than pro forma approval" (McMahon, *Id.* at p. IX).

termine whether FCC consent would be consistent with the public interest, convenience and necessity.[63]

VI. Rubberstamp Transfer Approval of Five Overmyer CP's to U.S. Co Demonstrates FCC's Ineffectuality in Regulating Against Trafficking in Broadcast Station CP's and Licenses

*** * * I view this action as one of the most serious instances of the Commission's inability or unwillingness to discharge its regulatory functions that I know anything about (tr. 306).**

These opening words of Commissioner Cox's dissent to the FCC majority's approval of Overmyer's transfer of five CP's to U.S. Co on December 8, 1967 epitomize the collapse of regulatory effort to halt trafficking in broadcast station CP's and licenses.

CP's and licenses are not property rights to be bartered and sold. The Communications Act so provides.[64] But, as the statistics of Commission approved station sales demonstrate, and as the Overmyer transfer compellingly emphasizes, there is, indeed, a serious gap between statutory command and regulatory action.

The Commission's record in this vital area of the public interest tells its own story of ineffectuality and neglect. Since March 15, 1962, when its 3-Year transfer Rule 51.597 was adopted, the FCC has waived it approximately 90 times, allowing station sale after sale to be consummated without consideration of the merits in evidentiary hearings (tr. 619). Hearings, in fact, under those provisions have become the exception, not the rule as was intended.[65]

Since June 21, 1965, when the Interim 50 Market Rule was promulgated to promote "maximum competition among broadcasters and the greatest possible diversity of programing sources and viewpoints," the FCC has waived the hearing requirement contained in that rule in every case, allowing a handful of giant business and financial complexes to obtain access to still more millions of American living rooms (tr. 619 and 784).[66] On February 7, 1968, the Commission voted to terminate this rule and deal with the problem of concentration in the top 50 markets on a case-by-case basis. It took such a step despite the special subcommittee's pending deliberation of this matter, during hearings on the Overmyer/U.S. Co transfer which began on December 15, 1967.

By virtue of the Commission's approval of Overmyer's sale, and the transfer of WPHL–TV, Philadelphia, U.S. Co acquired six UHF television stations in the top 25 markets (Philadelphia 4, San Francisco 7, Pittsburgh 9, Cincinnati 16, Atlanta 19, and Houston 25), with a potential audience of more than 12.9 million people. According to Commissioner Cox, this was "* * * a flagrant violation of our policy—

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[63] See Bartley dissents in *KMIN, Inc.*, 3 RR 2d 657 (1964); *Veterans Broadcasting Co., Inc.*, Feb. 10, 1965; *Tacoma Bicers, Inc.*, Jan. 27, 1967; *WITC–TV Corporation*, Nov. 20, 1964; *Southern California Associated Newspapers*, Dec. 23, 1965.

[64] 47 U.S.C. 301. Also see *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470 (1940), wherein the court stated: "The policy of the act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license. Licenses are limited to a maximum of 3 years' duration, may be revoked, and need not be renewed. Thus the channels presently occupied remain free for a new assignment to another licensee in the interest of the listening public."

[65] 23 RR 1503.

[66] Report and order adopted Feb. 7, 1968. See footnote 32. The hearing requirement was waived nine times prior to the termination of this Interim 50 Market Rule. See p. 10 *supra*.

and of the public interest in a diversely controlled broadcast system" (tr. 308). He stated further, that:

*** * * I am amazed * * * that we should fight an already undesirable degree of concentration by allowing other major group owners to develop (tr. 311).[67]**

There is little doubt that, absent the Commission's automatic acquiescence in approving station transfers, U.S. Co could not have acquired these five valuable channels (six including Philadelphia). As Commissioner Cox stated: [68]

*** * * if the company were to seek entry into these five markets in any other way it would find that no channels remain unassigned in Pittsburgh, and that there are one or more applications pending for the last channel in each of the other four. If it went into hearing it would face substantial costs, probably a significant delay, and the very real likelihood that it would not prevail in all four cases—and the possibility that it might lose all of them (tr. 307).**

The Overmyer transfer also underscores the ineptness of the Commission's out-of-pocket expense policy which restricts profit-taking from sales of bare CP's. The majority allowed Overmyer credit for more than double the sums expended directly by or for the five permittees. And this amount, $666,514, representing unreimbursed staff services furnished to the permittees by other Overmyer companies, was calculated in such a "novel manner," it should have been tested in the hearing process, as urged by Commissioner Cox and Commissioners Bartley and Johnson. But, even assuming that Overmyer's total out-of-pocket expenses were $1,331,900 as claimed, a $3 million loan arrangement tied to an option to purchase at a future date Overmyer's retained 20 percent stock interest in the permittees, for not more than the same $3 million amount, will enable Overmyer to realize a substantial profit in this transaction. According to Commissioner Cox:

*** * * I don't think Overmyer will ever repay the $3 million which he purportedly is borrowing—and I don't think the parties ever contemplated that he would. Instead, having received $1 million outright for 80 percent of his interest in these permits, Overmyer is getting an additional $3 million for the remaining 20 percent—a markup of 12 to 1 for this last fifth of his present holdings. I think this represents profiteering from the sale of permits in violation of our past policies and practices. I think this entire complex transaction has been carefully designed to achieve exactly this heretofore prohibited result (tr. 308).**

The Overmyer transfer was not the first instance where a transferor had circumvented the FCC's out-of-pocket expense policy through the subterfuge of a stock option arrangement. The Commission had acceded to this device in three prior transfers: one involving WFLD–TV in Chicago, Ill.; another, WKBF–TV in Cleveland, Ohio (each

[67] It is interesting to note that upon the Commission's assignment of WCBM and WCBM–TV to Metromedia, Inc., minute No. 463–A–63, meeting of Nov. 27, 1963, Commissioner Loevinger, who voted in favor of the Overmyer transfer, dissented in this case using language similar to Commissioner Cox's in Overmyer: "It seems to me that these circumstances in themselves suggest the existence of an issue involving the most important and delicate function entrusted to the Commission. The most significant task of this Commission is to insure diversity and dispersion of control of the media of mass communications and to prevent any tendency or incipient development toward monopoly or concentration in this field. The proper performance of this task requires, at the minimum, a careful inquiry, full examination, and deliberate judgment concerning any transaction that will significantly increase the market scope of an enterprise that includes a substantial percentage of the population within the market of the licenses which it already holds. However, the Commission here permits such a transaction with casual, cavalier, and perfunctory formalities."

[68] Also see FCC file No. BTC–2311 concerning the transfer of WISH, WISH–TV, WANE, and WINT–TV, wherein Commissioner Bartley observed: "* * * it appears that the primary purpose of the transferee is to diversify its corporate activities, which are already widespread, and to expand into so-called growth industries. Of late, this trend toward 'diversification' by major corporate interests seems to be increasing and the broadcast and electronics industries have apparently attracted those seeking profitable investment opportunities. The development and implementation of such a trend could have profound effects on our present competitive broadcast structure * * *."

of which also involved option prices running into millions of dollars); and, the transfer of KEMO–TV, San Francisco from Sherrill C. Corwin to Overmyer, which was the blueprint for Overmyer's stock option scheme with AVC (tr. 783). However, in none of these earlier situations was there a loan agreement tied in with the stock option.

Another policy objective basic to broadcast communications, but undermined by the Overmyer transfer, is local ownership and management of stations.[69] AVC, a diversified investment holding company, had no prior experience in broadcasting and no previous public interest involvement in any of the five major cities concerned with the transfer. Local management of these stations will be a mere financial figurehead for operational controls emanating from the far distant corporate headquarters of a large conglomerate organization.

The Commission approved each of Overmyer's five original CP applications without a hearing despite his failure to demonstrate qualifications which were compatible with the Communications Act and the rules and regulations of the Commission. (See *infra*, beginning p. 22.) Less than 3 years later, the Commission approved, again without a hearing, Overmyer's application to transfer these five CP's, despite the fact that such a transfer further controverted established legal principles and regulatory precedents.

As is often the case when the Commission is making seat-of-the-pants judgments, the Commission refers to its "continuing experience in the broadcast field—sometimes referred to as 'accumulating insight'." [70]

Unfortunately, in this matter of broadcast station bartering, the Commission's "accumulating insight" has provided nothing to safeguard the public interest. Rather, it has aided and abetted private speculation with one of the Nation's most vital resources—the public airwaves.

VII. Description of Overmyer's Corporate Enterprises

A. BROADCASTING

D. H. Overmyer applied for and received from the Commission CP's for six UHF television broadcast stations [71] in the top 25 markets as follows:

Market	Name of corporate permittee	State of incorporation
Toledo	D. H. Overmyer Telecasting Company, Inc	Ohio.
Newport (Cincinnati)	D. H. Overmyer Broadcasting Company, Inc	Do.
Atlanta	D. H. Overmyer Communications Company, Inc	Georgia.
Pittsburgh	....do	Pennsylvania.
Rosenberg (Houston)	D. H. Overmyer Broadcasting Company, Inc	Texas.
San Francisco	D. H. Overmyer Communications Co., Inc	California.

[69] See comments of Congressman John D. Dingell in 114 Congressional Record. H389–390, Jan. 25, 1968: "* * * the history of the Communications Act of 1934 reveals unequivocably that local control and management, that diversity of ownership were paramount considerations when this legislation was enacted."

[70] Remarks of Commissioner Johnson from his dissent to the report and order adopted Feb. 7, 1968, on the termination of the Interim 50 Market Rule (tr. 656–659).

[71] Only five of Overmyer's CP's—those transferred to U.S. Co—were considered by the special subcommittee during its hearings. Overmyer's Toledo station was not part of this inquiry.

Each of these corporations was wholly owned by Overmyer, except the California company, in which he held an 80-percent stock interest plus an option to purchase the remaining shares.[72] As a result of his sale to U.S. Co, Overmyer has retained a 20-percent stock ownership interest in the Cincinnati, Atlanta, Pittsburgh, and Houston permittees and purchase rights to 20 percent of the San Francisco company's stock under an option agreement with Sherrill C. Corwin.[73]

Other broadcasting activities engaged in by Overmyer included the submission of CP applications for UHF channels in Stamford, Conn. and in Dallas, Tex., and the development of a fourth television network operation. None of these matters were successfully concluded.

B. WAREHOUSING AND RELATED ACTIVITIES

Overmyer's principal business is warehousing, which he conducts in 33 States through his wholly owned holding company, D.H. Overmyer Company, Inc., and its many subsidiaries and affiliates.[74] This organization has 60 regional and branch offices throughout the country (tr. 817). Overmyer also wholly owns: the D. H. Overmyer Trucking Co., Inc., which leases trucks and equipment and does cartage; the D. H. Overmyer Leasing Co., Inc., an equipment leasing firm; and, Merchants & Manufacturers Warehouse, Inc.[75]

C. OTHER BUSINESSES

Overmyer is owner and chief executive officer of the Toledo Business Research Institute, Inc., which publishes the *Toledo Monitor*, and chairman of the board of Progress National Bank in Toledo, Ohio, in which he holds 81 percent of the capital stock.[76]

D. OVERMYER'S MODUS OPERANDI

The Overmyer Company, Inc., was chartered[77] to perform various executive and management staff functions, such as payroll, advertising, finance and development for the three operating company groups—warehousing, communications, and leasing (tr. 816).[78] Although bank accounts for these groups were maintained in the numerous locations where Overmyer's business was conducted, most of the operating

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[72] The record, certified as complete by the Commission, of all Overmyer CP application proceedings for these stations—from acquisition through transfer—is on file with the special subcommittee.

[73] This remaining ownership interest is subject to a stock option by AVC, pursuant to the Loan Agreement dated Mar. 28, 1967, by which AVC (now U.S. Co since AVC's assignment of the Loan Agreement to that subsidiary) will obtain all of the outstanding capital stock of these five permittees. (See discussion, *infra*, p. 53.)

[74] At Feb. 28, 1966, Overmyer had 16 wholly owned subsidiaries chartered and operating in Arizona, Colorado, Florida, Georgia, Indiana, Louisiana, Massachusetts, Minnesota, New York, North Carolina, Oregon, Pennsylvania, Tennessee, Texas, Virginia, and Washington. At this same date, D. H. Overmyer Company, Inc., was affiliated with 17 other warehousing corporations operating warehouses in the following States: Alabama, California, Connecticut, Illinois, Kentucky, Maryland, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Mexico, New Jersey, Oklahoma, Utah, and Wisconsin. See Dun & Bradstreet analytical report dated July 19, 1967, for D. H. Overmyer Communications Co., Inc. (Ohio).

[75] Dun & Bradstreet, *Ibid.*

[76] *Ibid.*

[77] In the State of New York on Mar. 28, 1966.

[78] According to one of Overmyer's officials: "The 'staff' personnel assigned to this corporation are broken down into the following departments: president's office; treasurer's office, legal department, advertising and public relations department, finance and development department, controller's department, purchasing and office services, personnel department, corporate relations department, taxes and insurance department, auditing department, human relations department, data processing department, acquisition department. The operating companies look to the staff of The Overmyer Company, Inc. for the performance of services of the nature indicated by the titles of these departments" • • • (tr. 817).

funds were commingled in two New York City bank accounts to provide centralized disbursements (tr. 574).

VIII. Date Chronology With Respect to Overmyer's CP Acquisitions, Certain Extensions Thereof and Transfer to U.S. Co

Five CP's were transferred to Overmyer (except for the FCC's grant of a new station facility in Houston, Tex.), by the Commission without protests, competing applicants, or evidentiary hearings.[79]

City	Applicant	Date of original CP application	Date of CP grant
Newport (Cincinnati)	D. H. Overmyer Broadcasting Company, Inc.	Aug. 28, 1964	Mar. 10, 1965
Atlanta	D. H. Overmyer Communications Company, Inc.	Aug. 13, 1964	May 12, 1965
Pittsburgh	do	Feb. 9, 1965	July 28, 1965
Rosenberg (Houston)	D. H. Overmyer Broadcasting Company, Inc.	Feb. 8, 1965	Aug. 12, 1965
San Francisco	D. H. Overmyer Communications Co., Inc.	Nov. 10, 1964	Oct. 20, 1965

Overmyer could not complete construction during the time authorized in his CP's and received extensions to do so. Within an 8-month period prior to the submission of his U.S. Co transfer application to the FCC (on June 30, 1967), Overmyer requested the following CP extensions:[80]

City	CP expiration date	Extension application date	Extension approval date
Atlanta	Jan. 27, 1966	Jan. 10, 1966	Jan. 27, 1967
Pittsburgh	Dec. 7, 1966	Nov. 23, 1966	Mar. 7, 1967
Newport (Cincinnati)	Apr. 1, 1967	Mar. 29, 1967	Dec. 8, 1967
Rosenberg (Houston)	do	do	Do.
San Francisco	May 20, 1967	Apr. 19, 1967	Do.

Beginning October 1966 subcontractors' liens were filed against Overmyer's warehouse companies for debts of the Green & White Construction Co. (tr. 803). A chronology of other significant dates is as follows:

March 28, 1967: A Stock Purchase Agreement was executed with AVC calling for the sale of 80 percent of the stock of Overmyer's five permittees, and $1 million was received by Overmyer as a down-payment pursuant thereto (tr. 440).

A Loan Agreement was executed with AVC, calling for a $3 million loan to Overmyer and an option for AVC to purchase Overmyer's 20-percent stock interest which he retained in the permittees (tr. 448).

A Stock Pledge and Escrow Agreement was executed with AVC and Girard Trust Bank whereby all of permittee's stock was pledged as security for the repayment of the $3 million loan (tr. 463).

May 3, 1967: $1.5 million was received by Overmyer pursuant to the Loan Agreement (tr. 491).

June 6, 1967: AVC executed an agreement with U.S. Co whereby AVC assigned to said company its rights and interests in the Stock Purchase and Loan Agreements (tr. 491).

[79] See discussion, *infra*, p. 22.
[80] See discussion, *infra*, p. 35.

June 8, 1967: AVC executed an agreement with U.S. Co and Philadelphia Television Broadcasting Company, licensee of WPHL–TV, whereby Philadelphia Television Broadcasting Company agreed to merge with U.S. Co (tr. 491).

June 30,1967: Overmyer submitted an application for FCC consent to the transfer of the five permittees' stock to U.S. Co.

October 27, 1967: The FCC's broadcast bureau recommended that Overmyer's proposed transfer be approved (tr. 889).

December 8, 1967: The FCC approved Overmyer's transfer application (tr. 305).

December 15, 1967: The first day of the special subcommittee's hearings on the Overmyer transfer (tr. 1).

February 7, 1968: The FCC terminated its Interim 50 Market Rule (tr. 652).

IX. Overmyer's Acquisition of Five Television CP's

A. SUMMARY

The Communications Act requires that a broadcast station applicant demonstrate financial qualifications to construct and operate a station. It also mandates that the FCC prescribe financial standards as conditions precedent to the grant of a CP.[81]

The inability of Overmyer to finance the construction and initial operation of any of the five UHF stations should have been apparent from the outset. Each of his applications submitted to the Commission failed to supply the appropriate financial information required. No certified financial statements, no firm loan commitments or other substantiated financial data were furnished. Information which Overmyer did file with the Commission showed by his own estimates that anticipated costs would exceed his alleged sources of outside funds; and that, as a result, the chances of a single station being constructed, let alone five stations becoming viable operating institutions, were remote. Why the Commission undertook to grant any of the five permits to Overmyer without a hearing under such circumstances is as much a mystery to the special subcommittee as it was to Commissioner Cox and other members of the FCC, who objected to the transfer of these same five CP's to U.S. Co without a hearing first being held.

A review of the facts pertaining to each of the CP applications can lead to one conclusion only: The Commission, carelessly and in disregard of the law and its own requirements,[82] committed serious errors

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[81] 47 U.S.C. 319(a).

[82] In *Graybar Electric Co. v. Daley*, 273 F. 2d 291 (1959), the court said that, because of the scarcity of broadcast frequencies and the exclusivity of a Commission grant to operate in a particular locality, it is "particularly in the public interest that an applicant for such a permit or license * * * be required to show financial ability to utilize the particular frequency for public benefit. * * *" Also, see the Commission's opinion dated Nov. 26, 1968, with respect to the mutually exclusive CP applications of Harry D. Stephenson, Robert E. Stephenson and China Grove Broadcasting Company, docket nos. 18385 and 18386, file nos. BP17021 and BP17686, wherein the matter of China Grove's financial qualifications were set for hearings on the basis of its failure to satisfy the requirements of FCC form 301, section III, question 4(h).

in making permit grants to Overmyer in the first instance, and compounded that error by subsequently approving their transfers.

B. OVERMYER'S CP APPLICATIONS WERE PATENTLY DEFECTIVE

Overmyer's CP applications and supporting data, submitted to the Commission for authority to build television stations in Cincinnati, Atlanta, Pittsburgh, Houston, and San Francisco, were materially deficient in showing the prerequisite financial qualifications for such grants. The following are among the more obvious defects to be found in each of these permit requests:

1. Estimated costs of station construction and initial operation exceeded estimated funds for such activities

FCC policy [82a] requires a CP applicant to give "estimated initial costs of making installation" and "operation" for the first year together with details of financing such construction and operation (tr. 344). In three of his five CP financial presentations, Overmyer's costs exceeded outside funding arrangements, including estimated income to be derived from first-year advertising revenues (tr. 368). In the other two applications, where estimate advertising revenues, combined with outside financing, would enable income to exceed costs, the FCC rejected out of hand Overmyer's advertising projections because they were without evidentiary support (tr. 364 and 366).

Each of the applications disclosed, even on a most cursory inspection, that Overmyer did not have the financial capability for station construction and operation.[83] Each disclosed, also, that it violated

[82a] As implemented in its form 301 (Application for New Stations) and form 314 (Application for Assignment of CP's or Licenses), section III, question 1.

[83] This shortage of capital was most cogently illustrated in the broadcast bureau's own cost/income summary appearing as an appendix to its memorandum of Oct. 20, 1965, approving Overmyer's San Francisco CP application (tr. 368). Individual station subtotals and advertising revenue estimates have been added for purposes of this graphic presentation:

APPENDIX A [a]

ESTIMATED COSTS OF 5 OVERMYER STATIONS AND OUTSIDE FINANCING AVAILABLE

	Cincinnati [b]	Houston [b]	Atlanta [b]	Pittsburgh [e]	San Francisco [e]
Costs:					
Cost of construction	$860,000	$1,147,744	$455,005	$505,000	$475,000
1st year expense	225,000	320,000	300,000	400,000	400,000
16 months installments [d]	149,619	215,529	80,010	106,680	91,000
Payments to sellers	100,000	----------	100,000	28,000	----------
Interest [e]	57,660	81,488	42,000	45,000	65,000
Total	1,392,279	1,764,761	977,015	1,084,680	1,031,000
Outside financing:					
Bank credit	400,000	550,000	400,000	350,000	475,000
Equipment credit	561,000	808,132	300,000	400,000	340,000
Contribution from Corwin					90,000
Subtotal	961,000	1,358,132	700,000	750,000	905,000
Advertising projections	225,000	350,000	200,000	450,000	400,000
Total	1,186,000	1,708,132	900,000	1,200,000	1,305,000

[a] Only those portions relevant to this discussion were excerpted from this chart, as it appeared in appendix A of FCC staff's San Francisco memorandum.
[b] Total costs exceeded total financing available.
[c] Advertising projections were rejected by FCC leaving costs in excess of total financing available.
[d] Installments were for deferred payments on equipment.
[e] Interest was estimated at 6 percent of total credit in all cases but KEMO–TV (San Francisco), for which figures given by applicant were used.

and was not in compliance with the Commission's own requirements concerning financial information which must be filed by applicants. A basic enigma in this case is what public interest or other consideration justified the Commission in blinding itself to such patent deficiencies?

2. Bank letters furnished as loan commitments were not binding obligations to supply funds

FCC regulations require that for financial institutions which have agreed to extend loans or credit, a CP applicant must "submit a verified copy of the agreement by which the institution or manufacturer is so obligated, showing the amount of loan or credit, terms of payment, if any, and security, if any." [84] Commission policy also necessitates that "reasonable assurance" be demonstrated that such outside funds will be furnished.[85] In this regard, a showing of "actual availability" is the standard applied (tr. 613).

Bank letters submitted by Overmyer satisfied none of these regulatory guidelines. Indeed, not only did the banks disavow any alleged agreement to provide Overmyer with such money, but the FCC itself testified that these letters could not be construed as "commitments." [86]

3. Letters purportedly committing the resources of Overmyer and his warehouse company to financially assist the five permittee companies were not binding commitments

Letters signed by Robert Adams, executive vice president of the five permittee companies, were submitted as evidence of a commitment by Overmyer to use his personal resources and those of his warehouse company, when needed, for the construction and operation of these stations.[87] However, the applications contained no authority or power of attorney for Adams to act on behalf of Overmyer personally or on behalf of his warehouse company, of which he was not an official. Despite its reliance on such "commitments," the FCC testified that its only evidence of Overmyer's intentions to financially underwrite the five permittees were these letters from Adams (tr. 132). No attempt was made to get a written commitment from Overmyer himself or from his warehouse company, or to ascertain whether Adams, a stranger to the warehouse company, had any authority to commit its resources to the five permittees (tr. 130–132).

But, even if such writings by Adams had been properly authorized, FCC requirements were unfulfilled because the letters were not verified and did not show the amount of funds to be provided, terms of repayment, if any, and security, if any.[88]

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[84] Forms 314 and 301, sec. III, question 3(h) (tr. 345).
[85] See footnote 96, *infra*.
[86] See, for example, tr. 125 and 260 with respect to Cincinnati and Houston letters.
[87] No such letters were contained in the Pittsburgh and Houston application records. Nonetheless, Commission staff stated that such letters were considered in determining Overmyer's financial qualifications as a CP applicant (tr. 475 and 477).
[88] Forms 314 and 301, section III, question 4(c) (tr. 345).

4. Balance sheets for Overmyer and his warehouse company did not substantiate representations that funds would be made available from these sources to assist the five permittees

Commission policy requires that an applicant's current and liquid assets be sufficient to meet current liabilities.[89] Overmyer's unaudited and uncertified personal balance sheet revealed a liquidity of only $963.14 (tr. 348). [Current assets were $10,299.39 and current liabilities $9,336.25 (tr. 348–349).] Commission policy also requires a showing of cash availability where certain assets are relied upon to meet proposed commitments.[90] No such demonstration of availability was contained in the five CP applications with respect to Overmyer's close corporation stock, which at August 31, 1964 amounted to $5,244,194—virtually the entire sum of his alleged personal net worth (tr. 348). Nor were receivables and payables itemized as required.[91] Moreover, the "surplus" figures presented in Overmyer's warehouse company balance sheets at August 31, 1964 and 1965 did not reveal whether such organization had actual earnings from previous operations or merely paper profits as a result of assets having been appreciated to new evaluations based on estimated market value (tr. 350–351). Further, there was no showing in any of the applications that the sums by which current assets exceeded current liabilities, as reflected in both warehouse company balance sheets, could be used or made available for use by the communications companies.

5. Statements of net income for Overmyer and his warehouse company were not submitted

FCC forms require each person who will furnish funds to a CP applicant to provide a statement of net income, after Federal income tax, received during the 2-year period preceding the date of the CP application.[91a] Overmyer and his warehouse company were, purportedly, to furnish funds. But, in none of the five Overmyer applications did either provide the required statement concerning net income. And, the Commission in this instance closed its eyes to such a violation of its requirements. Again, there is a question why this exceptionally favored treatment to Overmyer? No public interest justification could be advanced for the Commission's failure to enforce its own rules.

6. Support was lacking for projected station income from advertising

Under Commission regulations, an applicant who relies upon estimated advertising income to establish his financial capacity must provide detailed supporting data to justify such estimates.[92] However, Overmyer failed to supply this evidentiary support. His revenue presentations for Pittsburgh and San Francisco were so factually weak, they were rejected out of hand by the FCC. And, no data of any merit accompanied his projections for the Cincinnati, Atlanta and Houston operations.[93]

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[89] Question 4(d), *id.*
[90] *Ibid.*
[91] *Ibid.*
[91a] FCC forms 314 and 301, section III, question 4(f).
[92] This was an FCC requirement prior to July, 1965, when two of Overmyer's CP applications were filed, and became an even stricter financial qualification standard thereafter upon Commission determination of its Ultravision proceedings. See *Ultravision Broadcasting Co.*, 5 RR 2d 343 (tr. 403–407). The Pittsburgh, Houston and San Francisco applications were subject to the new evidentiary test; Cincinnati and Atlanta had to meet the older standard.
[93] See footnote 118, *infra*.

A station-by-station review, which follows, will highlight the foregoing deficiencies and further document the FCC's abdication of its public interest responsibilities in each of these Overmyer CP application proceedings.

C. A REVIEW OF OVERMYER'S DEFICIENCIES IN EACH CP APPLICATION

1. Newport (Cincinnati, Ohio) Kentucky

Overmyer's application for the assignment to him of WSCO–TV Cincinnati, was filed on August 28, 1964, and approved on March 10, 1965. FCC policy, at that time, required a CP applicant to demonstrate financial ability to construct and operate a station for at least 3 months.[94] The application and supporting data filed with the Commission showed on its face that Overmyer did not possess enough financial resources to construct and operate the station for the initial 3 months.

First, Overmyer submitted cost estimates which exceeded his funding plans by almost $200,000.[95] But, the Commission, for reasons undisclosed in the record, raised no objection to Overmyer's monetary proposal (tr. 471–472).

Second, it was apparent that a letter from the First National Bank of Cincinnati, the proposed source for about 50 percent of the funds needed to construct and operate WSCO–TV, did not obligate the bank to such a $400,000 undertaking (tr. 378). A loan to Overmyer from this institution was contingent upon unspecified "terms and conditions" as well as upon the receipt of "certified audited" figures "of the D. H. Overmyer Broadcasting Co., Inc., and of Mr. Overmyer (tr. 378)." The bank informed the special subcommittee that no commitment was intended (tr. 378).

Financial statements accompanying Overmyer's Cincinnati applications were unaudited and uncertified (tr. 348–349). Yet, no questions were raised by the Commission's staff as to whether such "certified audited" reports were available or whether Overmyer was prepared to undergo an independent audit of his finances in order to obtain this bank loan. Robert Adams, executive vice president in charge of all Overmyer broadcasting companies testified that he knew of no instances where certified financial statements were submitted to lending institutions (tr. 52).

Commission policy requires "reasonable assurance" that these bank loans were to be furnished.[96] The amount of the loan or credit, terms of payment, and security also has to be shown, according to FCC application forms.[97] Applicant's funds are analyzed both to determine their overall sufficiency and their *actual availability*" (tr. 613). (Emphasis added.) However, FCC Chairman Rosel H. Hyde admitted that none of these standards were met:

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[94] See *United Artists Broadcasting, Inc.*, 4 RR 2d 459 (1964); *Cleveland Broadcasting, Inc.*, 1 RR 2d 676 (1963); and, *Rhinelander Television Cable Corp.*, 25 RR 476 (1963).

[95] Overmyer's estimated costs were $975,928 and his proposed financing, $993,000. However, equipment and interest charges totaling approximately $200,000 were not shown by Overmyer (tr. 480). The FCC apparently overlooked them in its consideration of this transfer application just as it overlooked these same items in the Atlanta and Houston applications. Such expenses do appear, however, in its staff memorandum in connection with Overmyer's San Francisco application (tr. 480). See footnote 83 *supra*.

[96] See *Kokomo Pioneer Broadcasters*, 6 RR 304 (1956), wherein the Commission ruled that: "The Commission's primary concern is not whether the applicant company has legal recourse against the promisor * * * but whether the record indicates *reasonable assurance* that the promisor will fulfill his commitment to the applicant company." (Emphasis added.) Also, *Connecticut Broadcasting Company*, 9 RR 2d 847 (1967).

[97] FCC forms 301 and 314, section III, question 4(h) (tr. 345).

We certainly did not rely upon this as a contract commitment by the bank to take on this responsibility (tr. 125).

All you have is an offer to consider a loan under conditions which they prescribed (tr. 126).

I don't find any commitment in the letter (tr. 126).

Third, a letter written by Robert Adams, purporting to commit the personal resources of Overmyer and funds of his warehouse company to the Cincinnati venture, was an unsupported exercise of authority (tr. 359–360).[98] It had not been established that Adams was an official of the Overmyer Warehouse Company or was acting in any authorized capacity as Overmyer's personal agent. When asked what evidence the Commission possessed that Adams had such broad power, Mr. Robert J. Rawson, FCC Chief, Renewal and Transfer Division, stated, "no evidence at all" (tr. 132).

Fourth, the balance sheets of D. H. Overmyer and the D. H. Overmyer Warehouse Co. & Affiliates at August 31, 1964, also furnished to the FCC, raised substantial doubt about Overmyer's financial ability to construct and operate a major market television station (tr. 348–351).

The Commissions requires that an applicant's current and liquid assets be sufficient to meet current liabilities.[99] However, Overmyer's personal balance sheet revealed liquidity only amounting to $963.14 (tr. 348). Chairman Hyde testified that "Obviously, a difference of less than a thousand dollars would not be a sufficient showing" (tr. 134). But, the Commission raised no issue with Overmyer on this point.[100]

FCC policy also requires a specific showing of cash availability where certain types of assets, such as stock of closed corporations, are relied upon to meet proposed commitments.[101] Overmyer's personal balance sheet reflected $5,244,194 in closed corporation stock, but no showing of cash availability was requested by the Commission (tr. 136).[102]

Another financial requirement [103] is that receivables and payables be broken down into amounts due within 1 year and those due thereafter. Overmyer's personal balance sheet showed $78,476.37 in mortgages payable (tr. 349). This figure was not itemized as required, and the Commission did not seek further information from Overmyer on the point (tr. 136).

Regarding the statement of D. H. Overmyer Warehouse Co., & Affiliates, surplus was shown as $3,207,394 at August 31, 1964 but with no indication as to whether such sum was earned, capital or appreciation surplus (tr. 350). Despte the obvious importance of knowing whether this figure represented actual or mere paper profits, the Commission made no effort to inquire as to its meaning. To Robert J. Rawson, FCC Chief, Renewal and Transfer Division, surplus meant

[98] Overmyer's lawyers argued that the commitment by Adams was valid and made upon the authority of the sole stockholder and chief executive officer of both companies. D. H. Overmyer (tr. 838). However, the record of the Cincinnati application proceedings, did not contain evidence of such authority.

[99] Form 314, section III, question 4(d) (tr. 345).

[100] Overmyer claimed that "Although the current assets over current liabilities were limited, the total assets were more [than] adequate to meet any reasonable contingency" (tr. 837).

[101] Form 314, *id.*

[102] An argument was presented that Overmyer's stock could be used to generate funds through the sale and leaseback of warehouse company properties (tr. 837). Assuming that this statement were valid, evidence with respect thereto was not contained in the Cincinnati application.

[103] Form 314, section III, question 4(d) (tr. 345).

"the balancing figure, that is all" (tr. 136). Mr. Robert H. Alford, FCC Chief, Transfer Branch, who was responsible for processing the Cincinnati application, testified that he knew "very little about balance sheets" (tr. 137).

It should be noted that in none of Overmyer's five applications was a statement of his net income, after Federal income tax "for the past 2 years," provided as required by the Commission.[104] Had Overmyer furnished this information, the Commission would have become aware that he was reporting losses, instead of earnings, to Internal Revenue Service for those periods. (See discussion of Overmyer's IRS statements, *infra* p. 32.)

The Commission stated that it relied upon the warehouse company's $1 million in current assets over current liabilities (tr. 253). However, no clarification was sought as to whether these funds could be diverted to broadcasting company purposes or whether mortgage or loan restrictions precluded such use (tr. 254). Moreover, no assurances were given by Overmyer that such funds might be available at some future date or had been segregated for future use (tr. 255).[105]

Fifth, Overmyer furnished no support for his projection of $225,000 in first year station revenues. Robert Adams testified that visits had been made to advertisers and agencies in the Cincinnati market to ascertain their interests in the station (tr. 62). But, the CP application record lacked evidence attesting to the reality of this income estimation.

Commission testimony concerning each one of the five Overmyer CP applications, including Cincinnati, disclosed that the Commission not only failed to perform its legal duty to carefully examine all of his submissions presented for the record, but, more inexplicably, failed to take any action whatsoever in connection with the very obvious defects appearing on the face of the applications themselves. Such glaring inconsistencies surely would have been noticed if only the most superficial review had been rendered. An awareness of these patent deficiencies, in turn, perhaps would have cautioned the Commission's staff to scrutinize, in some detail, other portions of Overmyer's presentations.

"We didn't go behind the document submitted in the application," Martin I. Levy, FCC Chief, Broadcast Facilities Division, stated (tr. 254). None of the five applications contained written evidence that the required analysis had been performed.[106] As one FCC staff member testified, "If we had a very important matter you can rest assured that the discussion would be reduced to writing and a memorandum placed in the file" (tr. 133).

The absence of any attempt to insist upon Overmyer's compliance with the law respecting his financial capacity; the turning of a blind eye to flagrant violations of the Commission's own regulations calling for the filing of specific financial data in a prescribed form, would seem to require a more meaningful excuse than such matters as these not being very important. Moreover, the Commission's total reliance on

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[104] Form 314, section III, question 4(f), *Id.*

[105] Overmyer concluded that: "The liquidity of the Overmyer warehouse company was established on the face of the balance sheets" (tr. 837). See, however, FCC decisions requiring a detailed demonstration that liquidity can meet current liabilities: *Luis Prada Martorell*, 9 RR 2d 509 (1967) and *Florida-Georgia Television Co., Inc.*, 10 RR 2d 848 (1967).

[106] The FCC Chief of the Transfer Branch testified that: "I do remember at the time feeling that this man [Overmyer] was well qualified, that he was quite a wealthy man" (tr. 133).

the threat of criminal action to deter dishonesty,[107] and as a substitute for its own statutory obligations, is further proof that a great regulatory void has overcome management of one of this nation's most vital public resources.

2. Atlanta Ga.

Overmyer's CP application for Atlanta, filed August 13, 1964, like its Cincinnati counterpart, was deficient in presenting assets sufficient enough to construct and operate a TV station for the prescribed 3-month period. Approving this application on May 12, 1965, the Commission either disregarded or overlooked the fact that Overmyer's costs exceeded his funding plan.[107a] Nor was Commission concern evidenced that Overmyer's estimation of $200,000 in advertising revenue was virtually unsupported (tr. 163).

Instead, as Mr. James O. Juntilla, Deputy-Chief Broadcast Bureau, testified, the Commission deemed the representation by Robert Adams that Overmyer and his warehouse company would provide all necessary funds as the decisive factor in approving this application (tr. 156). Such a rationalization prevailed, notwithstanding the lack of authority of Robert Adams, executive vice president of the broadcasting companies, to commit such parties, in addition to the many obvious balance sheet incompatibilities with FCC financial policies discussed previously.

Although established Commission precedent also required that an analysis be made of the Cincinnati and Atlanta applications together, to determine whether Overmyer was financially qualified to hold both CP's,[108] this review was not effected (tr. 163–164).

3. Pittsburgh, Pa.

Overmyer's Pittsburgh CP application, filed on February 9, 1965, was approved on July 28, 1965, several weeks after Commission policy had been changed to require applicants to demonstrate a 1 year, instead of a 3 months, capacity to construct and operate broadcast stations. A strict evidentiary showing was mandated for estimated advertising revenues (tr. 406).[109]

However, support for projected advertising income was not presented by Overmyer, and resulted in a $450,000 disallowance by the Commission from his projected funding plan (tr. 474). This left the costs for constructing and operating the Pittsburgh station far in excess of the amount available for financing the project (tr. 480).[110]

Notwithstanding this important disparity, whereby station costs exceeded proposed funding, the FCC staff again indicated that their decision regarding Overmyer's qualifications was based upon his unaudited and uncertified balance sheets, wherein he claimed a net worth of $5,900,000 and $4,271,310 "in unemcumbered realty and personalty" (tr. 474).

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[107] The Commission accepted Overmyer's economic credentials because he certified to their truth and correctness, and FCC staff explained that were he guilty of misrepresentation, sanctions imposed by the criminal code would punish him for such an offense (tr. 120–121). 18 U.S.C. 10001. (See tr. 778–781.)

[107a] Costs were $855,000 and revenue $900,000. But, approximately $120,000 in interest and equipment payments, not included in expenses as required, caused an $80,000 arrearage in funding (tr. 480).

[108] *Sawnee Broadcasting Co.* 7 RR 2d 407 (1966).

[109] *Ultravision Broadcasting Co.*, 5 RR 2d 343 (1965) (tr. 403–407).

[110] Without acceptance of $450,000 in anticipated income, the amount available for construction and operation for one year was $750,000 as compared with estimated costs of $1,084,680. See footnote 83.

But, as in the Cincinnati and Atlanta application proceedings, the Commission made no examination of these financial statements to determine if Overmyer's financial status was in fact as alleged. It neglected to perform this duty, mandated by law and by its own rules and regulations, despite having very apparent doubts that these balance sheets were accurate. Indeed, one FCC staff member, experienced in processing CP applications, stated that he would not lend Overmyer funds on the basis of his balance sheets, which he characterized as "remarkable" (tr. 254 and 258).

Nor did the Commission attempt to have Overmyer bring the so called "loan commitment letter" from the Western National Bank into conformity with policy guidelines enunciated in its forms and decisions.[111]

4. Rosenberg (Houston), Tex.

Overmyer made application for a new UHF facility in Houston, on February 8, 1965. The Commission approved this application on August 12, 1965 notwithstanding the fact that, without even questioning Overmyer's financial presentation for obvious lack of supporting data, the listing of costs and revenues showed that expenses were well in excess of estimated income. Turning to Overmyer's projection of funds, he had represented that money would be made available from a bank loan of $550,000, a $250,000 loan from his warehouse company and estimated first year revenues of $350,000 (tr. 476).

However, the letter of the Southern National Bank was not, as FCC regulations required, a commitment to lend Overmyer funds (tr. 375). This was not only emphasized by the bank but, also, by FCC staff members who processed the application (tr. 375 and 260). Nonetheless, Overmyer was not asked by the Commission to obtain an agreement which conformed with its bank letter policies.[112]

Two hundred and fifty thousand dollars, also, was purportedly committed by Overmyer's warehouse company, in a letter from Overmyer, as chief executive of that organization, to himself as chief executive of the broadcasting company (tr. 358). This letter, too, was lacking in those essentials specified in FCC financial policy pronouncements.[113]

A brief document was submitted in this application, which contained Overmyer's $350,000 first-year advertising revenue projection. However, it fell far short of the evidentiary standard imposed on CP applicants by the Commission in its *Ultravision* decision:

> **Where * * * viability of the proposed facility during the first year is dependent upon income, the accuracy of the estimate becomes a critical factor in determining whether a continuing operation is likely. In such cases, we deem it to be essential that the applicant demonstrate the soundness of the figures submitted. Only if the factors which were considered in arriving at the estimate are fully disclosed will we be able to judge whether the figure is realistic and whether it has a sufficient foundation in fact (tr. 406).**

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[111] See tr. 376–377 and 345. Also, ***Chicago Federation of Labor and Industrial Union Council***, 11 RR 2d 1118 (1968) and ***Lebanon Valley Radio***, 5 RR 2d 45 (1965).

[112] Form 314, section III, question 4(h) (tr. 345). In the words of the Commission, "* * * if an applicant intends to borrow money to finance the station, he must file a loan commitment setting forth the terms and conditions of the loans" (tr. 613).

[113] Form 314, section III, question 4(c) (tr. 345). Chairman Hyde stated: "Initial verification of cost and revenue estimates is limited to examining the supporting documents (balance sheets, letters of credit, loan commitments) which are filed with the application. If these documents show firm commitments, if the estimates appear reasonable and if there are sufficient funds to construct the station and operate it for the first year, the staff determines that the applicant is financially qualified. However, if esimates or supporting documents involve questionable items, the applicant is requested by the staff to furnish additional information" (tr. 613).

The FCC staff memorandum, which recommended that the Houston application be approved, referred to Overmyer's commitment to use warehouse company resources, were they to be needed in putting this station on the air (tr. 477). However, no such commitment appeared in the record of the Houston CP proceedings and the Commission admitted that no commitment had in fact been furnished (tr. 262).

5. San Francisco, Calif.

On October 20, 1965, the Commission approved Overmyer's application of November 10, 1964, as amended, for a San Francisco CP (tr. 477). As was the case with the Cincinnati, Atlanta, Pittsburgh, and Houston applications, Overmyer's financial presentation of costs and revenues cast sufficient doubt upon his financial ability to construct and operate a major market TV station.[114] But, as before, the Commission disregarded Overmyer's obvious funding deficiencies and resultant need for an evidentiary hearing. Instead, it undertook to rely completely upon Overmyer's unaudited and uncertified balance sheets.[115]

The many areas of uncertainty surrounding his August 31, 1964 warehouse company, unaudited and uncertified balance sheet were enlarged still further, on the basis of data contained in that firm's August 31, 1965 statement furnished with his San Francisco CP application. Comparing the two balance sheets, "surplus" increased from $5,224,194 to $7,711,344 (tr. 350–351). This would appear to suggest that Overmyer's warehousing operations were making profit. Yet, quite the contrary was true, as a brief inquiry into the matter by the Commission might have shown. Testimony of FCC staff members indicated that they had not even considered the possibility that such figures represented appreciation surplus instead of earnings (tr. 137).

Further, the 1964 statement showed long-term debt at $8.76 million, with the current portion, $267,000 or 2.7 percent of the total. The 1965 statement showed that long-term debt had escalated to $25.6 million, but the current portion thereof only to $450,000, or 1.7 percent of the total. Despite this unusual amortization picture—a 300-percent increase in debt with a corresponding 60-percent decrease in current debt payments—the FCC did not seek to have it clarified (tr. 257). Yet, the FCC staff members who reviewed this application testified that they could not, on the basis of these financial statements, tell what Overmyer's true debt status was (tr. 257–258). Commission testimony, during these special subcommittee proceedings, made it apparent that Overmyer's balance sheets were not analyzed.

"The Commission relied upon the truthfulness, the veracity of the applicant who filed this and took it at face value" (Martin I. Levy, tr. 257).

In addition, were Overmyer to have obtained all bank loans represented in the four previous CP applications as "committed," his own

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[114] 47 U.S.C. 309(e) provides that: "If, in the case of any application * * * a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding [whether the public interest, convenience, and necessity will be served by the granting of such application] * * * it shall formally designate the application for hearing * * *."

Once again Overmyer's costs were not matched by anticipated revenues, because $400,000 in projected advertising income was unsupported and, consequently, rejected as a credit by the Commission (tr. 478). See footnote 83.

[115] Although the FCC testified that Overmyer's personal balance sheet of Aug. 31, 1964 was not relied upon, even in part, language of FCC staff's approval memoranda with respect to these five CP applications strongly indicated otherwise (tr 258 and 470–480).

personal guarantees, required to support such borrowing, would have totaled approximately $1.7 million.[116] However, Overmyer's 1965 balance sheet did not contain any reference to these possible future liabilities. The Commission testified that it did not inquire to determine if this bank financing had been obtained; if Overmyer had not been extended such funds, why not; and, if such loans were received by the various broadcasting companies, why Overmyer's balance sheet did not reflect even a footnote reference to his contingent liability for their repayment (tr. 262).

With respect to a letter from the Bank of America, which purported to commit that institution to a $475,000 loan to Overmyer, it was, on its face, markedly noncommital (tr. 380). Although the FCC apparently considered that this letter provided "reasonable assurance" such funds would be furnished, the bank considered it to be a "highly conditional expression of interest" (tr. 478 and 380).

In appendix A to the FCC's staff memorandum recommending that Overmyer's San Francisco application be approved, costs and outside financing were shown for the five stations (and Toledo) (tr. 480). This chart indicated that Overmyer would be more than $1.5 million short of meeting total expenses for the five permittees.[117] To offset such a deficit, the Commission reasoned that the stations could expect to receive almost $850,000 in advertising revenue. However, no support for this calculation appeared in the record (tr. 479).[118] If broadcast station applicants must make a strong evidentiary showing to support their projections of advertising revenue, surely the Commission is under an obligation to do no less when it, too, engages in projection-making. In passing, the Commission also noted that Overmyer's ability to convert certain fixed assets, shown on his personal and corporate financial statements, to cash when needed would enable him to construct and operate these five stations (tr. 479). But, no facts to substantiate this determination appeared in the record.

D. OVERMYER'S FINANCIAL STATEMENTS SUBMITTED TO THE FCC WERE INCONSISTENT WITH HIS INCOME TAX STATEMENTS SUBMITTED TO IRS

Overmeyer's warehouse company balance sheet dated August 31, 1964, submitted to the Commission to support his applications for four CP's showed total assets of $15.6 million. On the other hand, the balance sheet of the same date submitted with Overmyer's Federal income tax return for the warehouse group showed total assets of only $10.6 million. Overmyer testified that the difference between the two balance sheets was accounted for by the fact that a number of companies included in the statement submitted to the FCC were not included in the consolidated income tax return for the warehouse group. Instead, they were reported on separate income tax returns (tr. 68).

Overmyer was directed by the special subcommittee to submit "a detailed and verified explanation of these deficiencies" (tr. 69). In response, however, he merely repeated his contention that the con-

[116] Cincinnati, $400,000; Atlanta, $400,000; Pittsburgh, $350,000; and Houston, $550,000.

[117] Costs were $6,250,535 and revenue $4,674,132, leaving a deficit of $1,576,403.

[118] As noted previously, the FCC rejected, outright, Overmyer's projection of revenues for Pittsburgh ($450,000) and San Francisco ($400,000) and admitted that evidence was lacking for Cincinnati ($225,000) and Atlanta ($200,000). Even the estimate supplied for Houston ($350,000), was unsupported by the kind of evidence called for in *Ultravision*.

solidated return submitted to Internal Revenue Service (IRS) included companies which had completed construction of at least one building and were formally in operation; separate returns were filed for companies still in the process of constructing their first building (tr. 844–847). He indicated that such differences were accounted for by the assets and liabilities of 16 affiliated companies not included on the consolidated balance sheet filed with IRS (tr. 843–847). Without further documentation, such as the verified balance sheets of each of these affiliates, this so called "reconciliation" hardly clarified any of the major disparities noted with respect to these two different sets of statements.

Because the FCC was unaware that many Overmyer warehouse affiliates were not operating companies, it was also unaware of the following essential aspects of the uncertified 1964 balance sheet Overmyer submitted in support of his financial qualifications to obtain four of the five CP's discussed herein (tr. 550–556):

(1) $5 million of the $15.6 million assets shown in this 1964 statement represented warehouses under construction, based on a common stock investment of only $16,000.

(2) $1.4 million of the $1.7 million in available cash represented cash advances by banks for warehouse construction purposes, which may not have been available for broadcasting company purposes.

(3) More than $900,000 of the $1 million excess in current assets over current liabilities was represented by warehouses still under construction.

(4) The $3.2 million in surplus represented appreciation of assets—$1 million for warehouses under construction—and not earnings.

Overmyer's balance sheet dated August 31, 1965, which he submitted to the FCC, contained similar disparities in comparison with financial returns furnished to IRS. The statement provided to the FCC showed total assets of $34.8 million, whereas the one submitted for Federal income tax purposes showed total assets of $23.5 million (tr. 548). Here, too, Overmyer stated that the difference was accounted for by the assets and liabilities of 11 affiliated companies which were not included on the consolidated balance sheet submitted with the warehouse company for this period (tr. 68). And, supplemental data furnished to the special subcommittee provided no further insights in this regard (tr. 843–847).

Moreover, as noted previously for the 1964 balance sheets, $1.2 million of the $2.3 million cash shown as available in the 1965 statement furnished to the FCC represented advances by banks for warehouse construction activities which might not have been available for other purposes, such as constructing and operating television stations. Further, the balance sheet submitted to the FCC showed current assets exceeding current liabilities by $2.1 million. But, excluding from this figure the current assets of warehouses under construction or the "appraisal-type adjustment," current liabilities actually exceeded current assets by $686,000 (tr. 847).

The surplus account as shown in the statements submitted to the Commission increased from $3.2 million in 1964 to $5.7 million in 1965. But without knowledge of what surplus meant, the staff apparently assumed that this sum represented earnings (tr. 72). In this regard, consolidated income tax returns submitted to IRS showed an operating loss of $29,000 in 1964 and a $94,000 loss in 1965. If Overmyer had

submitted the net income after tax information required in answer to question 4(f), section III of FCC form 314, the Commission staff would have had no alternative except to find that he was financially incapable of constructing and operating any of the five stations he was seeking.

E. CONCLUSION

Commission testimony stressed Overmyer's alleged $1 million in available cash as the major financial factor for its favorable disposition of each of his five CP applications. Even if there were evidence in the record to support Overmyer's liquidity contentions, and his ability to make use of such funds for broadcasting company purposes when needed, he still would have been $500,000 short of meeting the permittees' financial needs, according to the Commission's own calculations.[119] But even this sum was a liberal assessment of Overmyer's potential cash problem. The Commission admitted that most of the letters which Overmyer submitted as proof of attainable bank financing did not meet the "commitment" standards of its regulations. Because availability of the additional $1.7 million in funding was highly doubtful, this, to any prudent person, would mean that Overmyer's deficit was not just $500,000 but closer to $2.2 million.[120] Assuming the validity of the Commission's estimate that approximately $850,000 in advertising revenues would be earned during the permittees' first year of operation, Overmyer would still need almost $1.3 million more to meet expenditures (tr. 479).

Despite Overmyer's failure to demonstrate financial capacity to construct and operate a single television station, the Commission awarded him permits to construct and operate five television stations in the top 25 markets. In each of Overmyer's five CP applications, there were obvious omissions of fact. But, the Commission did not pursue the data omitted, either in or outside of the hearing process, as required by the Communications Act. There were obvious incompatibilities with Commission regulations. But, the Commission chose to overlook these, in violation of its own policies. There were unsupported statements of net worth. But, the Commission accepted them without examination, in violation of established law and regulatory principles. Rather than conduct an independent analysis and review of each permit application, and hold evidentiary hearings where factfinding so required, the

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[119] Derived by subtracting $1 million in such alleged available cash from Overmyer's expense deficit of approximately $1.5 million. See footnote 117.

[120] In rebuttal, Overmyer stated: "Credit letters from banks submitted to the Commission were valid. (a) They were submitted under oath as part of the application. (b) They were similar to letters obtained by other Overmyer companies in both communications matters and noncommunications matters * * *. (c) They were similar in nature to bank letters normally submitted to, and accepted by, the FCC at the time of the processing of the applications. (d) Of the seven bank letters submitted to the FCC, three eventually ripened into actual loans. (e) Overmyer followed through on each of the bank letters and attempted to consummate each loan. (i) The statement by an officer of The First National Bank of Cincinnati to the contrary is in error". (tr 837).

The facts of record, however, are that of the five bank letters submitted to the Commission only one loan actually materialized (from the Girard Trust Bank, for $300,000) approximately 1½ years after the Atlanta CP had been granted to Overmyer. Even then, the president of this permittee company at the time, Robert Bryan, testified that these loan proceeds did not go directly to the Atlanta station (tr. 66). Two other bank loans, from San Francisco financial houses, were obtained by Overmyer: $80,000 from the Barclays Bank and $300,000 from the Pacific National Bank. These funds were purportedly used to help put the San Francisco station into operation. In this regard, it should be pointed out that representations in the five Overmyer CP applications submitted in 1964 and early 1965, that bank loans were committed for these stations, are incompatible with Overmyer's later assertion that 25 persons were employed in his finance and development department from 1964 through 1966 at a cost of $307,715 to arrange for such bank loans (tr. 580).

Commission relied completely on Overmyer's certification that his statements were true and correct.

Since there was no competition for these UHF channels, or objections raised by other interests, it became doubly important for the Commission to fully and critically examine all data in these applications. However, the Commission did not fulfill this statutory obligation. Instead of basing its findings upon an evidentiary record, the Commission relied upon unsubstantiated representations and refused to subject them either to staff analysis or the scrutiny of the hearing process. Measures to correct such administrative abuse are suggested at the conclusion of this report.

X. Extensions of Overmyer's Five CP's

A. SUMMARY

Overmyer did not construct his five television stations during the original time periods authorized in his permits. While delay was due in part to difficulties locating antenna sites and gaining approval from various governmental authorities, much of the building lag was caused by a shortage of funds. Needed cash was not provided despite representations in Overmyer's original CP applications that his personal resources and those of his warehouse company would be utilized when required. It therefore became necessary for him to seek extensions of his CP's from the Commission.

While applications for these extensions were pending before the Commission, Overmyer assumed liability for the debts of the Green & White Construction Co., his principal warehouse contractor, and sought a buyer for the five CP's. However, the extension applications were not amended, as required by FCC Rule 1.65, to disclose Overmyer's intentions to sell the stations; the state of his negotiations; that stock purchase, stock pledge and loan agreements had been executed with AVC and funds received pursuant to them. Overmyer's failure to honor this rule enabled him to retain his CP's, even though he did not plan to fulfill his public interest obligations with regard to them. Despite having knowledge of Overmyer's disclosure violation, the Commission consented to the transfer of these CP's without first holding hearings to ascertain if he possessed the requisite qualifications to be a permit holder.

B. OVERMYER DELAYED CONSTRUCTION OF THE STATIONS

The Overmyer record indicated that difficulties in finding suitable antenna sites, erecting towers and obtaining necessary building permits from the Federal Aviation Authority and local zoning boards were contributing factors in the permittees' seeking additional time in which to construct the five stations. However, the chief cause of delay was apparently due to the lack of available funds for carrying on a building program.

Robert Adams, chief executive officer of the various station companies before leaving Overmyer's employe at the end of 1965, testified that Overmyer expressed intentions not to use bank loans for funding his expenses, as he had represented earlier in his original CP applica-

tions (tr. 59). Adams stated, further, that he [Adams] thought that there was a desire in the top echelon of Overmyer's organization not to go on the air (tr. 58–59, 63 and 100). He indicated that he had encountered obstacles in attempting to obtain necessary funds and personnel from Overmyer (tr. 59).

In January 1967, Adams, then an independent television consultant, in a status report of the stations prepared for a client, stated:

Pittsburgh.—No local financing yet available to Overmyer in Cincinnati or Pittsburgh. All activity stopped.

Cincinnati.—* * * Stainless won't deliver and erect until payment from Overmyer. Stainless also built the Pittsburgh tower which Overmyer had not paid for yet. Instead, he paid for the Cincinnati tower which was built after Pittsburgh which Stainless applied toward unpaid Pittsburgh bill. Stainless to put a lien on Overmyer.

Rosenberg.—Nothing has been done here * * *. No people have been engaged, no equipment delivered.

Atlanta.—Stainless ordered steel although contract was not signed. Now Overmyer says he won't pay until delivered, erected, and station transmitting. Needless to say, Stainless won't deliver without payment schedule being followed (tr. 540).

Robert Bryan, in charge of the stations during most of 1966 as Adams' successor, testified that:

We had expected lines of credit in Cincinnati that didn't come through. San Francisco came through, but a little late. Nothing in Pittsburgh, and Atlanta. In the overall picture, we weren't able to secure the lines of credit that were necessary. We just had to cut down until we could get going again (tr. 102).

C. OVERMYER FAILED TO AMEND HIS CP EXTENSION APPLICATIONS SO AS TO DISCLOSE SUBSTANTIAL CHANGES OF CONDITIONS AFFECTING HIS ABILITY TO CONSTRUCT AND OPERATE THE FIVE STATIONS

During the 8-month period prior to filing his application for FCC consent to transfer the five CP's (June 30, 1967), Overmyer submitted extension requests for them, as follows:

City	CP expiration date	Extension application date	Extension approval date
Atlanta	Jan. 27, 1966	Jan. 10, 1966	Jan. 27, 1967
Pittsburgh	Dec. 7, 1966	Nov. 23, 1966	Mar. 7, 1967
Newport (Cincinnati)	Apr. 1, 1967	Mar. 29, 1967	Dec. 8, 1967
Rosenberg (Houston)	do	do	Do.
San Francisco	May 20, 1967	Apr. 19, 1967	Do.

In the Cincinnati, Houston, and San Francisco applications, it was provided that:

Applicant has found the need for outside funds and has just concluded arrangements which will result in additional financial resources being made available. An appropriate application will be filed (tr. 432, 435 and 438).

By virtue of this statement, and the very fact of making application to extend the CP's, the following was implicit:

That Overmyer still intended to fulfill his obligations to construct and operate the five stations;

That Overmyer planned to retain controlling ownership interest in the five permittees despite seeking further monetary assistance from outside sources;

That Overmyer's original financial plans for the five permittees were substantially unchanged.

The Commission relied upon these representations [121] (tr. 179). However, in order to keep his CP's in salable status and avoid hearings on whether he should be authorized to continue as permittee, Overmyer failed to amend his extension applications to show the following substantial changes which had occurred since the five permits were originally granted to him:

1. That substantial liens had been filed against his warehouse organizations in late fall of 1966 (should have been disclosed in the Atlanta and Pittsburgh extension applications); [122]

2. That these liens impaired the permittees' financial stability and would prevent them from carrying out financial representations made to the FCC (should have been disclosed in the Atlanta and Pittsburgh extension applications);

3. That he intended to sell the five CP's (should have been disclosed in the Atlanta and Pittsburgh extension applications);

4. That a buyer for the five CP's had been found, a Stock Purchase Agreement executed, and $1 million received as a downpayment with respect thereto on March 28, 1967 (should have been disclosed in the Cincinnati and Houston extension applications, which were filed 1 day after execution of the Stock Purchase Agreement, and in the San Francisco extension application which was filed 22 days thereafter);

5. That a $3 million Loan Agreement had been formalized with AVC, the proposed CP assignee, on March 28, 1967 (should have been disclosed in the Cincinnati, Houston, and San Francisco extension applications).

6. That all of the permittees' stock had been pledged as collateral security for funds extended pursuant to said Stock Purchase and Loan Agreements (should have been disclosed in the Cincinnati, Houston, and San Francisco extension applications);

7. That $1.5 million was received pursuant to said Loan Agreement on May 3, 1967 (should have been disclosed in the Cincinnati, Houston, and San Francisco extension applications).

D. OVERMYER'S FAILURE TO AMEND HIS CP EXTENSION APPLICATIONS VIOLATED FCC RULE 1.65

Overmyer's failure to disclose these substantial changes by amending his extension applications violated FCC Rule 1.65.[123] This rule provides that an applicant "is responsible for the continuing accuracy and completeness of information furnished in a pending application * * *" (tr. 466). Whenever such information is no longer substantially accurate and complete in all significant respects an applicant is required as promptly as possible and in any event within 30

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[121] "The Communications Act, as amended, contemplates that an applicant for a construction permit shall establish those qualifications which would make the grant of the application serve the public interest, and this necessarily presupposes a frank, candid, and honest disclosure as to the facts relative to the applicant's qualifications deemed by the Commission essential to enable it to act within its powers and properly to discharge its responsibilities. Financial qualifications are among the requisite qualifications." *Mid South Broadcasting Co.* 13 R.R. 102 (1955).

[122] As previously noted, Green & White Construction Co. (in which Overmyer held an option to purchase a controlling stock interest) was Overmyer's principal warehouse contractor. In the summer of 1966, these builders allegedly suffered mounting financial difficulties which caused substantial mechanics liens to be filed against various Overmyer warehouse affiliates beginning in October of that year.

[123] The Commission stated in *Matter of Bernard Rappaport*, FCC 67-787: "As we have said on numerous occasions, compliance by applicants with this section [1.65] is crucial to the adequate administration of the Commission's functions."

days to "amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate" (tr. 466).[124]

The Commission has stated that applicants should notify it whenever substantial changes have occurred with respect to the applicant's basic qualifications (legal, technical, financial, character)—those matters affecting "the nature of the proposed operation." [125] Although applicants have 30 days in which to report such changes, they should be reported as promptly as possible. Where time is of the essence and the change is of a nature which can and should be reported without delay, applicants are under an obligation not to await expiration of the full 30-day period.[126]

At the time an applicant is granted a CP, he ceases to be an "applicant to the Commission" and thus is not governed by Rule 1.65. However, if a permittee subsequently applies for additional time in which to construct his station (as was the case with Overmyer) he once again would become an "applicant", during the pendency of his application, and become subject to the provisions of Rule 1.65.

Rule 1.65 has become implemented in FCC form 701, "Application for Additional Time to Construct * * *." Question 1 of this form reads as follows:

Have there been any changes in the information submitted in the original application for construction permit, any amendment thereto, or modification thereof since filing? If the answer is "Yes" give particulars in the space below (tr. 423).

This provision emphasizes the Commission's concern that it have complete information prior to acting upon an application.

Although there was some doubt whether Overmyer filed a copy of all the pertinent contracts and agreements involved in the AVC stock sale and loan, pursuant to FCC Rules 1.613 and 1.615,[127] such filings, in any event, would not have satisfied the disclosure requirements of Rule 1.65 (tr. 481–482). To discharge its duties under this rule, a permittee must file an amendment to the pending application.[128]

The seriousness with which the Commission considers possible Rule 1.65 violations is best illustrated by steps which it took in the *Gross Broadcasting* case. Gross had applied for an extension of time in which to complete construction of station KJOG–TV, San Diego, Calif.[129] While this request was still pending, Gross allegedly sought a buyer

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[124] In its Report and Order, 8 R.R. 2d 1624, the Commission pointed out that this rule applies "(i) where there has been a substantial change, and (ii) where that substantial change may be significant to the Commission's consideration of an application and determination of the public interest. The information contained in the application itself is definite and the obligation to keep it substantially accurate and complete is akin to the duty of avoiding an initial misrepresentation or lack of candor" (tr. 468).

[125] *Ibid.*, at 1624 (tr. 468).

[126] *Id.* at 1626 (tr. 469).

[127] During the special subcommittee hearings on July 31, 1968, the Commission produced the various papers relating to this sale, alleging that they had been filed with it on Apr. 28, 1967. However, the FCC's certified record of the Overmyer application and transfer proceedings contained no reference to the transmission or receipt of such instruments. Moreover, the FCC's broadcast bureau staff, which was responsible for processing Overmyer's transfer application, was not aware that such documents had been furnished (tr. 179).

[128] See *Cleveland Broadcasting, Inc.*, 7 R.R. 2d 205 (1966); *Central Broadcasting Corp.*, 8 R.R. 2d 345 (1966); and *Gordon Sherman*, 8 R.R. 2d 366 (1966). Rule 1.613 requires *inter alia*, that an applicant file with the Commission, within 30 days, copies of contracts relating to future ownership of a permittee's stock, including loan, stock purchase, pledge, and option agreements. Rule 1.615 requires a permittee to file supplemental ownership reports.

[129] Also see *Desert Broadcasting Co., Inc.*, 25 R.R. 948 (1963), wherein the Commission held that: "No equities arise in favor of a party who has concealed material facts when the undisclosed truth is ultimately revealed. While the anticipated failure of a sincere plan of financing might furnish warrant for an extension of construction time while other arrangements are made, no such action is indicated where the true financial facts have been concealed from the Commission."

for the station but failed to amend his application accordingly. Upon discovery of this omission, the Commission wrote to Gross as follows:

> Specifically, during the time that your application for modification of facilities was pending before the Commission and prior to the grant of that application on June 22, 1967, you manifested on April 1, 1967, your intention to assign the station's construction permit. However, you failed to amend your pending modification application to inform the Commission of this substantial change in your plans for the construction of the station. Since the obligation of an applicant to maintain the continuing accuracy and completeness of information furnished in a pending application is clearly set forth in section 1.65 of the Commission's rules, your failure to provide the Commission with information which may have been of decisional significance to the Commission in its consideration of your modification application raises a question as to your qualifications to be a licensee of the Commission.
>
> Furthermore, the Commission has carefully considered the statement submitted with your present extension application. It appears therefrom that delay in construction has been due not to any difficulty in the procurement of equipment or to an inability to complete construction because of reasons beyond your control, but rather to your voluntary decision to postpone construction because of your belief that the station could not succeed financially. On this basis, the Commission is unable to find that you have been diligent in proceeding with the construction of the facility authorized in your permit, or that you have been prevented from completing construction by causes not under your control. Accordingly, the Commission has concluded that a grant of your application would not be warranted.
>
> The Commission believes that an evidentiary hearing will be necessary to resolve the foregoing matters. Accordingly, you are hereby advised that unless you notify the Commission within 30 days of the date of this letter that you desire an evidentiary hearing, your application for an extension of time within which to complete construction of station KJOG–TV will be dismissed, your construction permit canceled, and your call letters deleted.

According to the testimony of those FCC staff members responsible for processing Overmyer's application for consent to transfer to U.S. Co, the Commission did not in fact have actual notice of such sale and loan agreements until June 30, 1967, the date said application was filed (tr. 179 and 181).[130] Samuel L. Saady, FCC Chief, Television Branch, testified that Overmyer's delayed disclosure violated Rule 1.65 (tr. 180). Saady stated, further, that he was unable to explain the broadcast bureau's October 27, 1967 recommendation that the Commission approve the transfer, without first raising a Rule 1.65 issue with Overmyer. Absence of a hearing on this rule violation was in contravention of established Commission policy:[131]

> The Commission has repeatedly held that a licensee or permittee has nothing to assign or transfer unless and until he has established his own qualifications to hold the authorization in question, and assignment and transfer applications are dismissed as moot upon a finding that the selling party lacks such qualifications * * *.
>
> Were the Commission to abandon the longstanding policies discussed in the previous paragraph, a permittee or licensee would operate in defiance of the law with the knowledge that if his conduct were discovered he could still seek a buyer for his station. Such a proposition is totally foreign to any logical concept of the public interest standard.

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[130] Chairman Hyde claimed, however, that the Commission was first placed on notice when the various sale documents were filed with it on April 28, 1967, pursuant to Rules 1.613 and 1.615 (tr. 243). Notwithstanding any validity to this claim, or lack thereof, such filing would not satisfy the mandate of Rule 1.65 which requires that disclosure be made by amendment to the pending application.

[131] WDUL Television Corp., 2 R.R. 2d 140 (1964). Also see *Mid South Broadcasting, supra*, at p. 107: "One of the sanctions * * * which the Commission may invoke to deter misconduct on the part of licensees or permittees is the bringing of a revocation proceeding against the offender. If a licensee or permittee is permitted successfully, by the device of a transfer of interest or assignment of license or construction permit of a broadcast station, to escape responsibility for acts of misconduct reflecting upon basic character qualifications, the deterrent effect of the sanction will be effectively diminished or even vitiated."

Administrative rules and regulations are deemed to have the force and effect of law. Thus, the Commission was as bound by its responsibility to enforce Rule 1.65, as Overmyer was to abide by its provisions. The FCC cannot ad hoc impose one kind of substantive and procedural requirement on Overmyer and a different kind on others. Nor can it temporarily repeal a regulation in an administrative proceeding by ignoring it.[132]

E. CONCLUSION

Despite the disclosure requirements of FCC Rule 1.65, Overmyer failed to amend his CP extension applications to show his intentions not to construct the five stations and what had transpired in furtherance of their sale, including details of the purchase and loan agreements reached with AVC. Overmyer's violation of this essential rule should have caused the Commission to hold an evidentiary hearing on his qualifications to continue as a permit holder. Instead, the Commission ignored Overmyer's rule infraction and approved his transfer application, thus breaching its own regulations and policies and enabling Overmyer to evade the legal consequences of his misdeed.

XI. Overmyer's Transfer of the Five CP's to U.S. Co

On June 30, 1967, Overmyer submitted an application to the Commission for its consent to the transfer of his five CP's to U.S. Co. The most essential aspects of this transaction were contained in the Stock Purchase and Loan Agreements, and exhibits in which Overmyer related his reasons for the proposed transfer, station construction activities, and financial data of the communications companies. In these documents, Overmyer alleged the following:

1. That "plans were proceeding according to schedule to put all or most of the * * * five stations on the air during 1966";[133] when
2. Heavy debt obligations in connection with his warehouse construction program forced him to seek a purchaser for the five stations;[134] whereby
3. The only financial arrangement he could make was a package sale of 80 percent of the stock of all five stations to AVC in consideration for 80 percent of his out-of-pocket expenses (but not to exceed $1 million) incurred during their acquisition and construction;[135]
4. That out-of-pocket expenses of $1,331,900 were legitimately incurred by him;[136] and
5. That provisions for a $3 million loan from AVC to assist him in meeting creditor demands, and an option exercisable by AVC to purchase his remaining 20 percent stock interest in these

[132] See *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407 (1942); *Chapman* v. *Sheridan-Wyoming Coal Co.*, 338 U.S. 621 (1950). *Also, Mississippi Valley Barge Line Company* v. *United States*, 252 F. Supp. 162 (1966); *Appeal dismissed*, 385 U.S. 995 and, *McKay* v. *L. C. Wahlenmaier*, 226 F. 2d 35 (1955). Also "Judicial Enforcement of Administrative Adherence to Express Regulations and Established Customs," by Donald L. Holford, *The George Washington Law Review*, vol. 23, June 1965, beginning at p. 751.

[133] Tr. 804.

[134] Allegedly, Green & White Construction Company was losing money and in debt to subcontractors for millions of dollars (tr. 803). This, in turn, caused liens to be placed on building properties owned by Overmyer (tr. 803).

[135] Tr. 440.

[136] Tr. 820.

five permittees for an amount not to exceed $3 million, were not designed to circumvent the Commission's out-of-pocket expense restrictions on CP tranfers.[137]

A cursory examination of these application submissions by the Commission would have disclosed characteristics sufficiently unusual to have warranted further exploration in a full evidentiary hearing. But, a more careful investigation of this transfer would have disclosed flagrant violations of the law and regulatory policy which would have made such a hearing mandatory in the public interest. However, this transfer was effected without the benefit of such a hearing.

A. STATION CONSTRUCTION PROGRESS

It should have been obvious to the Commission that Overmyer's claims with respect to station construction progress were grossly exaggerated.[138] Based on Overmyer's own submissions to the FCC prior to June 30, 1967, there should have been little doubt that the stations were far from broadcast readiness at June 30, 1967, let alone earlier in 1966. As discussed above, Overmyer was obliged to request extensions of all 5 CP's during 1966 and 1967 because his building program had not proceeded anywhere close to schedules projected in his original CP applications or subsequent timetable modifications.[139] The facts submitted by Overmyer in these forms alone refute any contention that the stations would begin broadcasting in 1966.

Testimony of Overmyer's former executives confirmed that little, if any, progress had been made toward this objective while they were directly responsible for putting these stations on the air during the period 1965–66.[140] Their statements are corroborated (1) by Overmyer's sporadic but continuing search during 1966 for funds to enable work even to begin on some of these stations;[141] (2) by the fact that Overmyer ultimately fell $1,378,000 short in meeting his station financing goal, represented to the Commission as necessary to put them on the air;[142] and, (3) by the fact that when bank funds were obtained in a few cases this money was furnished to Overmyer in 1967, not in 1966, and its use could not be directly traced to the station for which it was ostensibly obtained.[143]

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[137] Tr. 448 and 456.

[138] Overmyer stated in his transfer application that "* * * as shown in exhibit II hereto, plans were proceeding according to schedule to put all or most of the * * * 5 stations on the air during 1966 when the rug was pulled out during the later part of 1966 by the unexpectedly large deficit of the company constructing the warehouses" (tr. 804). Further, that the San Francisco and Cincinnati stations "* * * have been brought almost to the point of readiness for going on the air." and that "* * * very substantial progress has been made in constructing and equipping the other three stations (especially Pittsburgh and Atlanta)" (tr. 805). To support these contentions, Overmyer provided a description of work accomplished in acquiring sites, facilities, equipment, a film inventory and other necessities for making these stations operational (tr. 805); an unverified schedule indicating costs and amounts paid for assets of the five stations; and, their respective, uncertified and unaudited balance sheets, all as at Mar. 31, 1967 (tr. 821–822).

[139] See extension application discussion, *supra* beginning p. 35.

[140] See statements of Robert Adams and Robert Bryan, *supra*, p. 36.

[141] See, for example, the letter dated Dec. 21, 1966 from Mr. Charles R. Wilson, senior vice president of the Union National Bank of Pittsburgh, stating that "We have been approached by the Overmyer Television Division to finance the installation of a UHF station in Pittsburgh * * *" (tr. 399).

[142] Tr. 573.

[143] See Girard Trust memorandums, tr. 389, 394, and 395. Also, special subcommittee staff memorandum, tr. 574: "In the case of the San Francisco station, for example, the loan payable to the Pacific National Bank is recorded as a liability for this particular station and all interest payments on the loan were recorded as an expense of this station." However, the study continued, "total expenses of the station as of Mar. 31, 1967 (including interest on the loan amounting to $12,880), were $166,123 less than the loan proceeds ($350,000 minus $183,877)".

Other contradictions were evident from the representations contained in the application. For example, expenditures for equipment at San Francisco amounted to only $19,700, and none had been made for such key items as land and buildings (tr. 822). Moreover, the total cost of equipment for this station, and down payments thereon, were well behind most of the other facilities (tr. 822). Yet, Overmyer stated that San Francisco was "* * * almost to the point of readiness for going on the air" (tr. 805).[144] As to Pittsburgh, and Atlanta in particular, neither station seemed on its way to becoming operational, based on the statistics Overmyer himself supplied. A mere $79,000 out of costs of over $1 million had been paid as of March 15, 1967 toward equipping Atlanta. In Pittsburgh, only $89,000 had been rendered toward $1 million worth of equipment purchases (tr. 821–822).

The testimony of Dr. Frank H. Reichel, Jr., president of AVC, the purchaser of these stations, adds still more weight to the many facts contradicting Overmyer's state-of-readiness claims.[145]

Mr. LISHMAN. What was the situation at Houston?
Mr. REICHEL. * * * In the case of Houston I think land exploration was perhaps the extent of the development there. There was a site located which we will probably use.
Mr. LISHMAN. How about Pittsburgh?
Mr. REICHEL. Pittsburgh, again considerable land development.
Mr. LISHMAN. By considerable land development, had the tower been erected?
Mr. REICHEL. No.
Mr. LISHMAN. What development had occurred?
Mr. REICHEL. The evaluation of a number of possible site locations. It is our intention that we will probably use one of the locations developed by Mr. Overmyer.
Mr. LISHMAN. And in Atlanta, what was the status there?
Mr. REICHEL. Again, land development, location for a station. To what extent buildings had been erected, I am uncertain. The tower had not been erected, but the location determined (tr. 107).

Finally, the Commission's own broadcast bureau staff rejected Overmyer's representation that very substantial progress had been made in constructing and equipping its Pittsburgh, Atlanta, and Houston stations. "There was no actual construction on the * * * three stations, * * *" according to Mr. Samuel L. Saady, FCC, Chief, Television Branch (tr. 217).

B. REASONS FOR THE PROPOSED TRANSFER

Overmyer claimed that because his warehouse company assumed the indebtedness of Green & White Construction Company, warehousing profits could not be utilized in constructing the five UHF stations. This, in turn, forced him to seek a purchaser for them (tr. 803).[146]

The Overmyer Warehouse Company had no alternative under the circumstances to assuming and endeavoring to pay the liabilities of Green & White (tr. 803).

[144] The fact that the San Francisco station did not commence its operations until April 1968 and Cincinnati not until August 1968 (with test patterns), of itself suggests that Overmyer's claims of "substantial progress" were sheer hyperbole (tr. 107).
[145] It is an interesting fact that AVC, prior to signing the Stock Purchase Agreement, had not conducted a physical inspection of the stations (tr. 106). This point, together with AVC's more costly improvement plans for placing the stations on the air, indicated that bare CP's were the true objective of sale, not any tangible station assets which may have been present on Mar. 28, 1967, the date the purchase was consummated.
[146] Tight money and inflated construction costs were also presented as contributing factors in making such a sale necessary (tr. 803).

The FCC accepted this opinion without question.[147] However, apart from Overmyer's own declarations, no proof was submitted to the Commission to substantiate this claim of financial distress. No effort was made to seek pertinent, verified documentation of Green & White's state of affairs and Overmyer's involvement therein. No audited or certified financial statements of Green & White or the D. H. Overmyer Warehouse Co. & Affiliates were requested to determine first hand such purported liabilities and resultant cash problem. No verified accounting of the exact sums ostensibly due creditors of these companies or a certified itemization of the liens themselves were sought, though they remained unproven. Indeed, without even the benefits of a single, monetary statistic relevant to the two principal companies involved in the adversities posed—Green & White and the D. H. Overmyer Warehouse Co. & Affiliates—the broadcast bureau, and a majority of the Commission alike, found such reverses a justifiable reason for Overmyer's sale to AVC.[148]

Moreover, Overmyer's reference to "profits" of the warehouse company, as the means by which the stations were to be constructed and operated initially, contradicted representations he made to the Commission in his original CP applications. Upon those occasions, Overmyer presented a revenue plan which relied principally on bank and warehouse loans and advertising income. These were funds allegedly "committed" in writing at that time to his station building program. His warehousing company and personal resources were to be utilized *only if* such financial schemes failed unexpectedly or were insufficient; but, not as the main or single source of capital for such large undertakings.

This substantial and vital change in Overmyer's financial plan—the reliance on inside rather than outside funds—should also have been disclosed to the Commission under Rule 1.65. Absent this, however, once detected by the Commission from a review of his transfer application, it at least should have become an issue set for resolution in an evidentiary hearing. Proper administration of the law dictated no less.

But, not only did the Commission fail to bring this matter under scrutiny, assuming that Overmyer's use of warehousing profits had been his original funding plan, the Commission neglected to solicit information as to the amount of warehousing "profits", if any, which may have been furnished to the five permittees before Green & White's professed difficulties arose. This would have provided an insight into the role, if any, of warehousing company earnings in furthering the cause of these stations. Nor was an attempt made to relate the alleged state of readiness of these stations to any future warehouse company

[147] The Commission's broadcast bureau parroted Overmyer's claim in justifying its approval recommendation of his transfer application: "The transfer is dictated by reverses in Overmyer's warehouse operations, which make it impossible to construct the stations through warehouse profits" (tr. 889). The senior attorney who processed the application said, however, that no financial statements were submitted by Overmyer to support this contention. "I went mainly on the fact that this was an affidavit under oath and that the reasons here were truthful reasons. There was no reason to suppose the contrary" (tr. 197).

[148] The broadcast bureau's Oct. 27, 1967 memorandum recommending approval of the transfer provided: "* * * the intervening circumstances which have made it impossible for Overmyer to go forward with construction—the 1966 credit crunch and Green & White's nonpayment of warehouse subcontractors—involve forces largely unforeseeable and beyond Overmyer's control" (tr. 894). Commissioner Hyde testified that: "Because of untold financial difficulties, because of conditions beyond the control of this permittee * * * it found itself in a position where it was unable to go ahead with the development of the stations * * *" (tr. 3).

sums, which might have been needed for their completion and early operation, or to the availability of funds from other sources for this purpose.

It should be noted, also, that the warehousing company was not making "profits," according to its Federal tax returns for these periods. Thus, it was misleading for Overmyer to imply in his transfer application that warehousing company "profits" had been utilized in helping to construct the stations[149] and that the absence of such "profits"—now to be diverted to Green & White's liabilities—would make continued work on these stations impossible (tr. 803–804).[150]

C. THE PACKAGED SALE OF ALL FIVE STATIONS

Assuming, the validity of Overmyer's financial distress claim, the Commission did not request audited or certified financial data to support his need to sell any of the stations, let alone five of them in one package. If money were so urgently needed for his warehouse activities, elementary steps of caution should have mandated that Overmyer support steps he claimed were taken to find funding alternatives short of complete divestiture for these stations.[151] "The attempt to find a minority stockholder for the UHF operations was unsuccessful," Overmyer stated in his transfer application (tr. 804). This generalization, though of critical importance in evaluating Overmyer's intentions with respect to the trafficking issue, went unchallenged by the Commission (tr. 891).[152]

D. OUT-OF-POCKET EXPENSE CLAIM

Overmyer stated that he incurred $1,331,900 in reimbursable out-of-pocket expenses (tr. 820). They included:

1. Net worth of the 5 stations (representing paid-in common stock of the 5 stations)	$53,500
2. Cancellation of amounts payable by the 5 stations to affiliated Overmyer companies (representing amount of preoperating expenses paid by Overmyer—remainder was paid by loans and notes)	253,046
3. Assets donated by affiliated Overmyer companies (representing TV equipment on which Overmyer Leasing Co. made payments or deposits of $289,103; a transmitter site acquired for the Cincinnati station at a cost of $58,688; and, construction by Green & White at the transmitter site at a cost of $11,049)	358,840
4. Charges for services performed by employees of other Overmyer companies (representing charges for the services of employees of The Overmyer Company, Inc. and the Overmyer Leasing Co., which devoted a portion of their time to activities of the communications companies)	666,514
Total	$1,331,900

[149] See discussion of Overmyer's income tax returns, *supra*, p. 32.

[150] In fact, there is considerable doubt whether Overmyer could have used any of the cash generated by his warehousing activities for communications company purposes. At the time of his original CP applications, the FCC failed to inquire about restrictions, if any, which may have been imposed on Overmyer's warehouse company assets by its creditors. Instead, the Commission accepted, carte blanche, statements of a non-warehouse company officer, allegedly made on behalf of that organization, to the effect that it would provide whatever cash was needed to construct and operate these five stations. See discussion in part IX of this report.

[151] Chairman Hyde testified that the Commission had no information on this point other than Overmyer's contention that he sought other means for financing his stations (tr. 32). "We did not make an independent investigation in this. With the resources we have in our place, we don't undertake to substantiate the usual application" (tr. 32).

[152] In this regard, it is important to observe that no written record was maintained by Overmyer of his search for new capital. Further both he and Dr. Frank Reichel, president of AVC, testified that their discussions also were not reduced to writing (tr. 93 and 105).

On this extremely important aspect of the transfer, the Commission also neglected to perform its statutory duty. Instead of seeking evidentiary support on which to base its determination in the public interest, it accepted without question the unverified material Overmyer submitted in support of these expenditures.[153] The FCC's one-sentence opinion of Overmyer's expense claim also apparently measured the extent of its probe into the details comprising the $1,331,900 representation:

> In the bureau's view, the financial arrangements here are compatible with the public interest, and out-of-pocket expenses (which are subject to a question of proof) have been proven adequately (tr. 889).

Just as in all five of Overmyer's original CP applications,[154] the Commission chose here to rely completely on the information submitted by the applicant without conducting its own independent staff inquiry to determine the validity of the presentation. Similiarly, with respect to both this transfer and the initial CP grants, when discrepencies developed or facts were lacking in Overmyer's applications, the Commission failed to require evidentiary hearings prior to making its determination. This refusal to subject unsupported claims to the test of proof was particularly flagrant in light of the many novelties involved in Overmyer's expense submissions. An awareness of these unusual aspects was not only manifest by Commissioner Cox in his dissenting statement,[155] but was shared, as well, by members of the broadcast bureau. "The claim for expenses falling in the second category," they stated, "presents a novel question, i.e., the right to reimbursement for 'out-of-pocket' which are substantiated by opinion evidence" (tr. 893). Nevertheless, a hearing was not held.

The largest portion of this out-of-pocket expense claim—$666,514—was comprised of charges for services allegedly performed by employees in other Overmyer organizations for the benefit of the broadcasting companies. According to Overmyer, records were not maintained as to the value of these services, so that estimates had to be made as to the amount of time devoted to these activities (tr. 818 and 819).[156] As to the formula devised, Commissioner Cox testified as follows:

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[153] The pertinent documents involved were six unaudited and uncertified financial schedules and numerous self-serving affidavits from certain Overmyer company officials. As to Overmyer's out-of-pocket expense claim, Commissioner Cox stated: "It is my judgment, after a careful review, that they were at least 100 percent inflated. I think there I am being most generous in recognizing their validity even to that extent" (tr. 285). And, further, "* * * it seemed to me that the claim of in excess of $1,300,000 for out-of-pocket expenses for simply acquiring five permits and getting them no further along than was the case here was excessive on its face" (tr. 269).

[154] See discussion in this report, sec. IX.

[155] "I think this was a novel approach Generally, in transfers of construction permits, the sums involved are much smaller than this. In some cases they get down to mere hundreds of dollars. I think that our staff has usually been quite rigorous in requiring substantiation of these expenses, and, in many cases, I think they go as far as getting actual copies of bills and invoices. What I was pointing out here is that this was novel. They substantiate about half of this $1,300,000 in the form of direct payments, such as legal and engineering fees. The prices paid for some of these permits are shown, because Overmyer bought some of them from earlier holders. He purchased equipment, and perhaps has acquired program rights for film and other programs on many of these stations. To jump this sum by more than double without testing this new approach in a hearing seemed to me unsound * * *. I would feel a lot more comfortable about this if our hearing attorneys had a chance to cross-examine the parties who are making these claims" (tr. 20).

[156] The value of the services was computed for each department of The Overmyer Company, Inc. by: (1) estimating the percentage of time the applicable employees devoted to broadcasting activities during the period of September through December 1966; (2) multiplying the percentage thus ascertained by the salary charges of these employees during the period; (3) dividing the total of the charges thus ascertained by the total salaries of all employees in the department; and (4) multiplying the percentage thus ascertained by the total expenses of the department. The total of allocable charges for all departments for this test period was used as a basis for the charges for the other periods during which the permits were held. See the schedule summarizing the charges for all periods (tr. 576 and 823).

I knew some such allocation was being made. It seemed to me this was based on mere assumption, which we had not verified and, therefore, it was not wise to accept these results without further inquiry (tr. 277).

Certain deficiencies with respect to the formulation and effects of this formula should have been readily apparent to the FCC, even were its application review of the most superficial nature. Instead of analysis and investigation, the FCC rationalized that Overmyer was "enthusiastic" about UHF and apparently honest about his expenses despite their lack of substantiation; because, when they were incurred, a transfer was furthermost from his mind:

Considering the enthusiasm of Overmyer's commitment to entering UHF, there is no question that substantial expenses were incurred in attempting to get the stations on the air (tr. 893).

And the supporting affidavits of the various department heads * * * who rendered staff services to the permittees, reveal, on close reading, that every effort has been made to be completely fair and objective in appraising the value of departmental contributions to the permittees. In view of this, the fact that expenses were incurred (*a*) under a former organizational setup which did not maintain complete cost records, and (*b*) were incurred at a time when transfer of the permits was the last thing in Overmyer's mind, should not bar recovery here (tr. 893).

Had the Commission's staff in fact made a "close reading" of the "supporting affidavits," it would have observed the following serious flaws:

(1) The charge for services rendered from July through December 1964 ($38,784) was excessive, because the CP's had not been acquired. Thus, many services, such as auditing and bookkeeping, could not have been performed.

(2) The charge for services rendered during 1965 ($290,882) was excessive because it was more than three times as much as direct expenses for the same period. Here, too, many of the services claimed could not have been provided, since only a minimum of activity occurred with regard to the newly acquired CP's.

(3) The charge for services rendered from January through March 1967 ($72,721) was excessive because there were fewer employees during this period than in the September–December 1966 test period and, the principal activity at the time was searching for a buyer for the stations, not advertising or acquiring real estate as indicated.

(4) The charge for services failed to account for the sequential fashion by which station construction activities are conducted. Hence, charges were levied during periods when certain services were not performed.[157]

(5) The charge for services failed to deduct the cost of services performed by employees of the communications companies for the benefit of other Overmyer organizations.

(6) The charge for services with respect to some departments should have been based on actual costs in performing similar services rather than on estimated time costs.

(7) The charge for services did not exclude all costs of services rendered for the Toledo and Dallas stations and network activities.[158]

[157] It was not proven, representations to the contrary notwithstanding, that all departments expended the same proportion of effort at different times. For example, the advertising department obviously did not provide the same amount of service proportionately to, say, the legal department in late 1966, as well as in 1964 or 1965 when there would have been little or no advertising.

[158] The inclusion of invalid claims relating to Overmyer's network activities was confirmed by FCC Chairman Hyde, when he testified that: "Overmyer was making an all-out effort to establish not only these stations but to get a fourth network going. These were part of the expense of promoting and developing such an enterprise" (tr. 20).

Regarding Toledo alone, it was obvious that because ultimately it did begin broadcasting operations, more effort had been expended to make it ready than was provided on behalf of all other stations combined.

Had the Commission taken the time and effort to probe more carefully into the anatomy of Overmyer's out-of-pocket expense claim, it would have become aware of many more of its failings which should have been examined in a hearing.[159] The paragraphs which follow highlight some of the inaccuracies in connection with charges to the communications companies for services allegedly rendered by personnel in other Overmyer companies. Altogether, the review by special subcommittee staff disclosed excessive charges amounting to at least $376,965 out of a total claim of $666,514 for expenses in this category (tr. 559).

1. The base period used was erroneous [160]

The transfer application stated that The Overmyer Company, Inc., was established September 1, 1966 as a management staff organization for Overmyer's operating companies; namely, warehousing, leasing and communications (tr. 816–817). In fact, however, The Overmyer Company, Inc. had been incorporated on March 28, 1966, and its expenses recorded from that date (tr. 577). Overmyer's failure to use the full period for which expense records were readily available—from March 28, 1966 through March 31, 1967—had significant cost ramifications. Since expenses of The Overmyer Company, Inc., were considerably less during those months outside the September–December test period, their inclusion in computing the salary allocation percentage would have resulted in a sizable reduction in charges to the communications companies.[161]

Charges assessed against the communications companies for April through August 1966, based on estimated expenses of The Overmyer Company, Inc., amounted to $1,450,200; whereas, in fact, such expenses totaled only $847,569. By virtue of the use of estimated rather than actual expenses for this period, out-of-pocket expenses became inflated by $67,155 (tr. 577).

Moreover, since Overmyer's warehouse operations greatly expanded in 1966, and its expenses were considerably less in prior years, charges for the 6-month period ended December 31, 1964, for the year ended December 31, 1965, and for the 3-month period January through March 1966 were, also, grossly overstated. Assuming, therefore, that the rate of overcharge for these periods was the same as for the period April through August 1966, Overmyer's out-of-pocket expense claim would be overstated by $177,306 (tr. 577). And, for the period January

[159] On this point, Commissioner Cox testified that: "I don't believe we have ever had this method of justifying expenses used before. That does not mean it may not be valid, but I feel before it is accepted in such a significant amount it would have been desirable to test it in a hearing. * * * To simply accept the aggregate of these figures without detailed testing seems to me to be unsound. That is why I suggested a hearing would have been appropriate" (tr. 28). For a discussion of the seven items listed above, see special subcommittee staff memorandum "Report on review of D. H. Overmyer transfer of five UHF television station construction permits to U.S. Communications Corp." beginning at tr. 570.

[160] The base period was September–December 1966.

[161] Overmyer contended that although The Overmyer Company, Inc. was formed in March 1966, payroll charges were not recorded until July 1966; and, that at the time the computations were submitted to the Commission (June 30, 1967), expenses for The Overmyer Company, Inc., were not available for the period after Dec. 31, 1966 (tr. 86 and 874). However, Mr. George Kinsley, Overmyer's former comptroller, testified that expenses probably were first recorded for The Overmyer Company, Inc., shortly after it was formed in March 1966 (tr. 292). He also said that while he was comptroller (until November 1966) financial statements were prepared monthly within 45 days after the end of the period. And, since a balance sheet as of the end of February was available at the time of negotiations in March, there was no reason why the expense figures for January–March 1967 should not have been available by the June 30, 1967 date of Overmyer's transfer application (tr. 293).

through March 1967, actual expenses of $748,457 could have been utilized instead of estimated expenses amounting to $870,120. This resulted in still further inflation of Overmyer's out-of-pocket expense claim by $10,171 (tr. 577).

In summary, because estimated expenses of The Overmyer Compay, Inc. were used for periods when actual expenses were available, Overmyer's out-of-pocket expense claim was overstated by at least $254,632 (tr. 577).

2. Many employees performed no services

In an attempt to compare the estimates of employees concerned with estimates of their supervisors, utilized in Overmyer's computation, a letter was directed to a number of persons formerly employed by The Overmyer Company, Inc. requesting the approximate percentage of time they devoted to broadcasting activities.[162]

Overmyer based his computation of charges on the contention that 52 percent of the total number of his employees of record during the base period devoted time to activities of the communications companies (tr. 500). Thirty-nine, or 21 percent, of these persons received the special subcommittee's inquiry and 33 responded (tr. 500). Of these 33 returns, 23 indicated that they had performed no services of any kind for the communications companies (tr. 500). The other 10 stated that their efforts for these organizations were less than Overmyer's supervisory personnel had represented (tr. 500). Twenty-six responses were from persons formerly employed by the finance and development department (tr. 502). Broadcasting service charges allocated to this department ($307,715) represented 41 percent of the total charges for all departments. Yet, 17 of the 18 employees included in Overmyer's computation denied performing any services.[163]

3. Many employees did not render service for the full period, as charged

The allocation of charges for services for the period July 1964 through March 1967 is based on employees of record during the test period September through December 1966. However, not a single individual queried indicated that he had been employed for this entire July 1964 through March 1967 period.[164] Many, in fact, indicated that they had been employed for only a few months—usually in the September–December 1966 test period (tr. 499–539).[165]

As one example of the large expense disparity which resulted from such computations, Overmyer employed an individual for approximately 6 weeks and paid him $665 in total wages. But, due to Overmyer's computation method, utilized for the sole purpose of his transfer application, this employee was shown as devoting July 1964 through March 1967 on communications matters. Consequently,

[162] The letter was sent to 106, or 31 percent of the employees of record during the base period, September through December 1966. 70 of the 106 returned a completed questionnaire (tr. 499).

[163] Three persons only from this department indicated that they had performed any communications services. No allocation was made for two of them. Of these persons, one indicated that he had spent 1 percent of his time over an 11-month period seeking antenna and studio location sites, and the other indicated that he devoted less than 5 percent of his time over a period of 10 months to these activities. Such an effort would have had a negligible effect on the charges. The third individual, for whom an allocation of 20 percent was made, stated that his time given to communications work was quite limited, but could not estimate what it might be in terms of a percentage (tr. 533, 535–536).

[164] These persons were responding to an inquiry by the special subcommittee's staff (tr. 499–539).

[165] In addition, a considerable number of employees were hired early in 1966 to assist an enlarged warehouse construction program and were dismissed as an economy measure later that year. These changes in personnel also were not reflected in Overmyer's allocation.

$5,428 was charged to the permittees for his services—$4,763 more than his total earnings (tr. 512 and 582). In another case, an individual was employed for 10 months only. Although his total earnings amounted to $8,461, more than $12,000 was charged to the communications companies for his services (tr. 518, 519, and 583).[166]

4. Many departmental services were not performed, as charged

Overmyer's justification for this expense of $666,514 included a description of the services supposedly performed by the employees of the various departments of The Overmyer Company, Inc. for the communications companies. Many of these duties, however, were either not performed at all or not performed to the extent represented, as more fully described below.

(*a*) *Controller's department*

Overmyer's controller described the communications services performed by his accounting department as follows:

> For each of the Communications Companies, the Controller's office established and maintained general and subsidiary ledgers; books of original entry; prepared payrolls and payroll checks; cash receipts; disbursements; billings and collections; prepared financial statements and, as required, special management reports; and handled financial correspondence with respect to the foregoing. The above accounting services are rendered to approximately 50 corporations (tr. 828).

Since the communications companies had no income, there naturally was no evidence of this department having prepared cash receipts, billings and collections, as claimed. Moreover, there was no evidence of any special management reports or financial correspondence. Since no preoperating expenses were recorded for the 6 months ended December 31, 1964, the permits having not been acquired, there was no evidence that services shown above were performed during such period. Yet, $2,068 was levied for this half year (tr. 582). And, in 1965, there were no field employees and only a few employees in the New York office (only 14 even during the peak 1966 period). Therefore, payroll preparation was minimal at this time [167] and could not help to sustain Overmyer's controller's department expense claim of $15,509 (tr. 582).

The lack of support to back up the total charge of $49,234 allocated to this department was underscored by a former supervisor of the general accounting section of Overmyer's warehouse company. He stated:

> One of my clerk-typists prepared the D. H. Overmyer Communication Co.'s vouchers and checks. This was a simple typing function. Also, on occasion, any one of my bookkeepers may have "helped out" the bookkeeping section of the communication company (tr. 514).

One employee in this department was represented as having devoted 75 percent of her time to communications company activities. However, the former controller for The Overmyer Company, Inc. stated that she devoted all of her time to network activities, for which expense

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[166] Overmyer's executive vice president testified that it was not significant that a number of particular employees were not employed for the entire period of July 1964 through March 1967 (tr. 85). He contended that the allocation of charges was based on work effort, personnel required and function involved, not on what actual work was performed by an individual employee (tr. 85). However, this argument was unsupported, since little work, if any, was indicated as having been accomplished during certain extended periods: for example, there was no activity shown in 1964 before the permits were acquired, which would have required the services of the taxes and insurance department, the controller's department, the auditing department or purchasing and office services. Moreover, after it was decided to dispose of the permits, there was no support to show that work effort was expended for a number of services, such as advertising and land searches.

[167] There were a few transactions comprising preoperational expenses, consisting of $96,474 broken down into professional services ($37,841), New York office expenses ($50,615), and miscellaneous expenses ($8,017) (tr. 582).

reimbursement was unauthorized. Nevertheless, Overmyer's allocation included $14,951 for the services of this individual (tr. 582).

(*b*) *Personnel department*

The personnel department of The Overmyer Co., Inc. allegedly performed services as follows:

> As the Communications Companies were formed, personnel were recruited which required interviews, testing, and screening of job applicants; requesting and processing background checks and other information relating to personnel matters; processing of correspondence and other functions relating to termination, vacations, and similar personnel matters (tr. 828).

The communications companies had 14 employees in their New York office and nine in their field offices at December 1966 (tr. 583). The only communications services this department performed related to terminations and/or vacations. Thus, there was no evidence to sustain Overmyer's charge of $14,394 for its efforts (tr. 583). Further, there was no support for $2,763 in charges for services purportedly rendered in 1964, when the CP's had not been acquired and there were no employees of record (tr. 583).

Charges estimated for 1965 and 1966 totaled $48,361, primarily to cover the cost of hiring 23 employees. However, there was no factual justification for this allocation. Since the preoperating expenses, recorded in the communications companies accounts, included payments to personnel agencies for hiring employees, at least some of this cost had already been charged directly to these organizations. Yet, a substantial indirect charge was allocated for these same services, allegedly performed by other Overmyer company employees.[168]

(*c*) *Taxes and insurance department*

Services performed by the taxes and insurance department were described as follows:

> The department filed federal, state, and local income/franchise tax returns; state and municipal sales-use tax returns; state, county, and local property tax returns; and applications for such local business and other licenses as may have been required. Correspondence with taxing officials or with other company personnel is handled by this department.

The communications companies did not require the filing of state and municipal sales-use returns, and their Federal income tax returns were prepared by an independent public accountant (tr. 584). There was, also, no evidence that services in connection with "correspondence with taxing officials or with other company personnel" were either required or performed for these companies.[169]

Regarding insurance services, Overmyer stated:

> This department negotiated coverage in all fields for the Communications Companies and handled claims, correspondence, and followed up on all insurance matters (tr. 828).

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[168] The total charge for the personnel department ($56,306) was $2,448 per employee; whereas, agency fees paid by The Overmyer Company, Inc. for hiring 56 employees was $406 per employee. At this latter rate, the 23 employees of the communications companies could have been hired at a cost of $9,338. There was no support for the cost of performing other personnel services accounting for the $46,968 difference between this amount and the total charge (tr. 583).

[169] Overmyer testified that a total of 22 Federal income tax returns were filed for the communications companies, and that the public accountant was responsible for only 12 of them (tr. 876). According to the special subcommittee's investigation, this accountant was involved in the preparation of all these returns from incorporation of the companies until their sale. Those returns not involving this accountant came after out-of-pocket expenses had been computed. These services were subject to a separate charge by AVC (tr. 584).

However, insurance premiums totaled only $6,041, up to the date of sale, and the first one was not paid until May 1966 (tr. 584). There was no evidence to support the contention that this department processed "in excess of 44 insurance claims" (tr. 498). The charges of $23,681, ascribed for tax and insurance services, reflect a reckless disregard of facts and law (tr. 584).

(*d*) *Auditing department*

In a sworn statement, Overmyer's chief internal auditor said that the auditing department reviewed the communications companies' New York office accounting records, performed field audits, and reviewed costs incurred by Green & White (tr. 826).

When asked to produce reports of these reviews, Overmyer officials stated that none had been prepared (tr. 585). It is however, an accepted accounting practice that reports be prepared at the conclusion of all such reviews. Their conspicuous absence mitigated against the validity of the $20,905 charge allocated for this department's performance.[170]

(*e*) *Treasurer's department*

Overmyer's treasurer stated that his department's principal duties for the communications companies pertained to obtaining and servicing loans (tr. 825).

Rather than using an unsupportable estimate of time expended by certain employees as a basis for charges to the communications companies, which was the way Overmyer computed his charge for this department, it was suggested that it would have been more accurate to have allocated a portion of the total expenses of the department by a ratio of the amount of loans consummated and/or sought for the communications companies to the amount of loans consummated and/or sought for all affiliated companies during the period in which the CP's were held (tr. 90). In response to the special subcommittee's request that information be furnished to test this method of allocating expenses, Overmyer submitted a schedule which "sets forth the non-real-estate bank loans from July 1964 through March 1967 serviced by the treasurer's department, and the companies for which the services were rendered" (tr. 498). This schedule showed three loans totaling $730,000 for the five permittee companies and 19 loans totaling $3,875,000 for other Overmyer organizations. This schedule would suggest that the 12-percent cost allocation for the department was warranted. But, on closer examination, it was discovered that the schedule did not include real estate loans, which had also been serviced by this department and which, during this period, constituted its major effort. Warehouses had been constructed on 175 sites, with a separate loan negotiated for each, totaling over $100 million (tr. 88 and 98). Under this criterion, the allocation of charges was closer to 1 percent of cost instead of 12 percent.

(*f*) *Advertising and public relations department*

In his affidavit, Thomas Byrnes, Overmyer's executive vice president, stated that the advertising and public relations department performed the following services for the communications companies:

[170] With regard to the contention that reviews were conducted of costs incurred by Green & White for the construction of TV facilities, such reviews could not have been significant since the only construction of record amounted to $11,049 (at the transmitter site in Cincinnati) (tr. 585).

The advertising personnel have served the Communications Companies in designing layouts for business papers, forms, Communications Companies' and individual station logs; 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 (tr. 825).

Allocated charges for this department were $92,067, whereas direct expenses of the communications companies, primarily advertising agency fees, amounted to $48,534. There was no evidence to justify charging the communications companies $92,067 to perform exactly the same services their advertising agency was doing for one-half that cost.[171]

In its search for facts, the special subcommittee requested that Overmyer furnish a list of all advertising and public relations contracts, copies of all advertisements utilized in each of the communities concerned, and the names of any agencies employed. He was unable to provide any contracts with individual media or canceled checks, or copies of any published advertisements. Although news clippings were furnished, they related to warehouse, not communications activities.

Overmyer's transfer application showed advertising department charges at $38,409 for the period July 1964 through December 1965, while, during the same period, total direct charges amounted to $3,869 (tr. 587). Thomas Byrnes testified that Overmyer attempted to prepare each community for the new facilities many months before anticipated on-the-air dates (tr. 80). However, no evidence of specific advertising placements or proposed layouts were produced to substantiate this contention. Moreover, Overmyer's "station profile" promotional material stated that such an advertising campaign was to begin "approximately 4 weeks prior to our air date" (tr. 586). Accordingly, no such advertising campaigns would have occurred, since none of the five stations were within 4 weeks of actual broadcasting.[172]

(*g*) *Finance and development department*

The vice president of The Overmyer Company, Inc.'s finance and development department described its responsibilities for the communications companies as follows:

* * * locating, evaluating, negotiating for and acquiring real estate for antenna sites and studios and for office space for the TV stations and handling problems related thereto * * * searching out, negotiating for, arranging for and servicing short- and long-term loans and other financing arrangements (tr. 831).

Charges allocated for its employees ($307,715) was more than 41 percent of the total charges for all departments (tr. 587). However, the purchase of one parcel of land, no studios or buildings, does not support this charge (tr. 588).

[171] Statements to the effect that Overmyer believed strongly in advertising were irrelevant to the merits of this cost situation (tr. 80). Nor did the contention that six of the seven employees in the department during the September–December 1966 test period devoted 5 to 30 percent of their time to communications duties, absent further documentation, lend any more weight to Overmyer's claim (tr. 586).

[172] The vice president of The Overmyer Company, Inc., in charge of advertising and sales promotion stated that the department's advertising effort was directed toward the Todelo station (tr. 526). Since this station was not transferred to U.S. Co, costs relating to it should not have been considered in any charge allocated for the other five stations.

Nor was there evidence to support a total of 85 employees being involved in any capacity to acquire real estate necessary for five stations (tr. 588). Overmyer stated that:

> * * * only 13 of the 85 were actually directly involved in selecting real estate for transmitter and studio sites; 25 were directly responsible for searching for financing; 15 were involved in both real estate and financing; and 32 were supporting clerical and secretarial personnel (tr. 877).

However, in light of the scant evidence of financing sought and ultimately obtained, there were no data to justify 25 persons being involved directly and 15 persons indirectly, together with clerical assistance, in such alleged activities.[173] Furthermore, since applications for the CP's, which were filed in 1964 and early 1965, indicated that all required financing already had been arranged with five banks, there would appear to be no justification for any charges covering the period July 1964 through March 1967 for this department.

E. AVC LOAN AND STOCK OPTION ARRANGEMENT VIOLATED THE COMMUNICATIONS ACT AND THE COMMISSION'S OUT-OF-POCKET EXPENSE POLICY

In addition to the $1 million consideration Overmyer received from AVC pursuant to the Stock Purchase Agreement, he also received $3 million pursuant to the Loan Agreement in return for giving AVC an option to purchase his remaining 20 percent stock interest in the five permittees for a price not to exceed $3 million. The broadcast bureau informed the Commission that the loan was consistent with the public interest and justified because it was fully collateralized and bore interest at the prevailing market rate (tr. 893). In addition:

> Beyond these strictly legal considerations, there are—in the particular factual setting here—certain equities which weigh in Overmyer's favor. We have in mind here his dedication to UHF and losses suffered in efforts to establish a fourth network. The genuineness of this dedication to UHF is unquestioned, and there is nothing to suggest that permits were acquired as mere paper speculations, with no intention of building (tr. 894).[174]

The broadcast bureau recognized that the extension of loans by a transferee to a transferor presented an "* * * unusual situation which should be approached with some skepticism" (tr. 893). Despite this awareness and the patent irregularities and inconsistencies with respect to this borrowing, the Commission failed to perform its public-interest duty to hold evidentiary hearings in order to test the validity of the proposal. Had the Commission taken the time, as required by law, to read the stock purchase and loan instruments involved in the transfer, it would have discovered that on their face they violated its out-of-pocket expense policy by enabling Overmyer to profit by the transfer of his five CP's.

Under Commission guidelines, Overmyer was entitled to reimbursement for expenditures incurred in connection with the acquisition and construction of the stations. But, no more. However, the Stock Pur-

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[173] See bank correspondence, tr. beg. 374 and 399.

[174] It is too obvious for prolonged comment that Overmyer's "genuineness" and "dedicatio to UHF" were completely irrelevant, even if proven, to the factual determination which the Commission was obligated to make in the public interest. Nor were any losses the FCC said Overmyer sustained in efforts to establish a fourth network pertinent to the vital issues raised by his transfer application. (It should be noted that at the time the FCC's broadcast bureau memorandum was written, on Oct. 27, 1967, there had been no evidence submitted for the transfer application record that Overmyer had sustained any loss in connection with this network.)

chase Agreement not only provided that Overmyer was to receive up to $1 million for his expenses, but, in addition, a loan of $3 million. The mere provision for such a loan, notwithstanding its amount, pushed the consideration in this transfer beyond the point of permissibility. The key provision in the Stock Purchase Agreement, demonstrating this violation of Commission policy, is as follows:

> (2) The obligation of Overmyer to close hereunder shall be subject to fulfillment of the following condition:
> (*a*) AVC shall have made the loans to Overmyer, Inc., or its subsidiaries called for under the loan agreement * * * (tr. 446).

Without a loan from AVC, there would have been no sale. It was clearly part of the purchase price for the stations, indeed, the most critical part for Overmyer, since, according to his own statements, he had been unsuccessful, otherwise, in finding cash for his warehousing debts (tr. 804).

The Commission had no authority to aid and abet Overmyer in taking care of his warehousing debts by approving a $4 million sales price for the CP's. The rigged nature of the $3 million loan and option, to purchase Overmyer's 20-percent stock interst for $3 million, was apparent. The Commission's terse approval of such transfer arrangements without a hearing and its accompanying waiver of its Interim 50 Market Rule indicated a faithlessness to the trust imposed upon it to act only in the public interest.

1. The option price arrangement for purchasing Overmyer's remaining stock interest was one of form, not substance

The option price formula was an ill-disguised means of circumventing the Commission's out-of-pocket expense policy—a paper attempt to legitimize for FCC consumption the unauthorized $3 million stock payment afforded earlier to Overmyer under the mask of a loan.

According to the Loan Agreement, AVC can purchase Overmyer's remaining 20-percent stock interest in the five permittees [175] for a price not to exceed $3 million (tr. 454 and 456). There were two methods provided for computing the option price. First:

> The price shall be fixed by multiplying 20% by five times the gross receipts of the TV companies during the 12 full calendar months immediately preceding the date on which the option shall be exercised * * * (tr. 455).

However, if any of the stations have not been on the air for at least 112 hours per week during the 18-month period immediately preceding the date on which the option shall be exercised, then the second method must be utilized (tr. 455). This arrangement would work as follows:

> The price shall be fixed by multiplying 20% by five times the gross receipts of the TV companies * * * the gross receipts * * * shall be deemed to be that share of the "total broadcast revenues" in the latest report then available of TV Broadcast Financial Data published by the Federal Communications Commission for the several markets as indicated below:

	Percent
San Francisco	3
Houston (Rosenberg station)	5
Atlanta	5
Cincinnati (Newport station)	8
Pittsburgh	8

(Tr. 455.)

[175] Authorised period for exercising the opinion—between Jan. 15, 1971 and Apr. 14, 1972.

To the result reached by either method would be added or subtracted "20 percent of the net amount for all the TV companies of the aggregate amount of * * * current assets on the one hand, and of the aggregate of all debts and liabilities of the TV companies, * * * provided that the aggregate of all debts and liabilities for any one of the TV companies shall for purposes hereof be considered not to exceed $500,000" (tr. 455).

Whichever method is used, the option price is virtually certain to be $3 million, not less. Under method 1, AVC, itself, estimated in the transfer application that first year revenues would amount to $3,920,000. And, according to a study which it commissioned Price Waterhouse & Co. to undertake, revenues will significantly increase in subsequent years (tr. 900). Thus, pursuant to this arrangement, the price will be locked in at $3 million. Utilizing the second approach, and revenue data published by the FCC at August 2, 1966 (the latest data available at the time of the agreement), the price of the stock would have been $5 million. And, based on more recent figures (published in 1968), the price would have been $5.7 million.[176]

It was also readily apparent that the choice of option methods was a sham. On its face, the first method will be inoperable. A check of 21 UHF stations in the Boston, New York City, Newark, Washington, Baltimore, Chicago, and Los Angeles areas disclosed that none are currently on the air 112 hours a week. Indeed, AVC's own application indicated that two of the stations would operate only 95 hours a week and the other three, but 85 hours per week.[177]

Such a pecuniary scheme should have immediately raised the spector of trafficking and called for a full-fledged review in a public hearing of Overmyer's activities. Failure of the FCC staff to conduct an analysis of the price formula, among other essentials of this loan arrangement, was contrary to the public interest mandate of the Communications Act. And, the nature of this option arrangement, which places beyond doubt its exercise at a price of $3 million, results in a flagrant violation of the Commission's out-of-pocket expense policy.[178] By any standard, $3 million for five bare CP's would be sheer profit-taking even assuming the validity of all out-of-pocket expenses which Overmyer has claimed.[179]

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[176] Although there is no way to estimate what station assets and liabilities will be in 1971 or 1972, based on balance sheets of the communications companies as at Mar. 31, 1967, only $416,000 would be deducted from the foregoing price. Moreover, if U.S. Co improves the financial position of the companies, this deduction becomes even less.

[177] Although Overmyer testified that his Toledo station broadcasts approximately 112 hours a week, in fact the station is on the air 101 hours, according to a check by staff of the special subcommittee.

[178] Congressman Paul Rogers suggested that if Overmyer was seeking in return only what he had put into the stations since the beginning, he would have mortgaged his remaining 20 percent stock interest for the approximate $300,000 out-of-pocket expense balance he claimed was due him. In response, Chairman Hyde stated that: "* * * it would appear that Mr. Overmyer had found a source of capital to rescue some other operations" (tr. 17).

[179] Even if the option were not exercised by U.S. Co pursuant to the Loan Agreement, Overmyer could ultimately dispose of his holdings under some other arrangement and realize a return over and above his alleged $331,900 out-of-pocket expense investment for which he sought no reimbursement. There was very little risk that Overmyer's 20-percent interest in the five stations would not be worth substantially more once they began broadcasting. The FCC itself attested to this fact: "* * * implicitly we recognized that once the stations were on the air, they would have greater value * * * I think that was recognized by the Commission" (tr. 222). Thus, with or without an option agreement, the retention by a transferor of any ownership interest in the new station company could result in profiteering which circumvents the Commission's out-of-pocket expense policy. Interestingly a minority stockholder can sell his interest for whatever the market will bear, for such a person is not subject to this restriction. 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.

2. The FCC failed to examine the alleged loan collateral

One final aspect about the $3 million "loan" should be noted briefly. It was primarily secured by second mortgages on 23 Overmyer warehouse properties. As another indication of the "close reading" given to Overmyer's transfer application, the FCC's Chief of the Broadcast Bureau testified that he did not know whether the loan collateral were first or second mortgages (tr. 238). Equity values of the 23 warehouses, based on appraisal value, were represented as $6,130,000 (tr. 563). However, a cursory review of some of the appraisal reports disclosed a number of inconsistencies in their preparation (tr. 563). AVC officials said that although these appraisals were required as part of the Loan Agreement, they relied primarily on analyses made by their own counsel (tr. 563). The Commission made no effort to procure such analyses or the appraisal reports themselves. Indeed, the only evidence it had to support its conclusion that the loans were "fully collateralized" were the self-serving transfer application documents (tr. 231 and 234). The following colloquy illustrates the total unawareness of the Commission with respect to this essential aspect of the transfer:

Mr. DINGELL. Is there even a certification by independent appraisers to the worth of this property on file with the Commission?

Mr. GEORGE SMITH. I don't think so.

Mr. DINGELL. Then the Commission in making its judgment, never had the vaguest judgment of what the real worth of these 23 warehouses actually happened to be. Am I correct?

Mr. GEORGE SMITH. I think that is fair to say so. Yes (tr. 235).

XII. THE FCC AND OVERMYER—GRANTS OF PUBLIC PROPERTY WITHOUT PUBLIC HEARINGS

The most enigmatic aspect of Overmyer's CP history—from acquisition to transfer—has been the FCC's failure to hold public hearings in connection with any of his numerous station applications. This singularly important fact in and of itself demonstrates the shocking abdication of regulatory responsibility and disregard for the public interest which have characterized Commission performance under the Communications Act and its own rules and policies. The many compelling reasons, which should have necessitated hearings at those times Overmyer first applied for the five television channels in question, were reviewed in earlier sections of this report. So, also, were the obvious omissions and irregularities which pervaded Overmyer's CP extension applications and made additional fact finding imperative on such occasions. Later, upon request for the transfer of these same invaluable public grants, and with equallly cogent reasons for subjecting Overmyer's declarations to the test of truth, the Commission once again shrunk from its statutory obligation.

In preceding paragraphs, the Commission's own descriptive terminology for certain more obvious uncertainties about the transaction have been underscored. "A novel question," "an unusual situation" was the way some of these very apparent and unprecedented features were referenced (tr. 893). Yet, despite this realization that Overmyer's submissions might not, on closer examination, measure up to the law and its own standards, the Commission refused to effect the needed review in or out of the hearing process.[179a] Indeed, FCC staff refused to

[179a] Commissioner Cox said:

*** * * I think the parties bargained for the sale and purchase of these permits as if our policies didn't even exist; then, having agreed to the overall price, they sought to fit their**

recognize the many incompatibilities and discrepancies evident on the face of the documents presented. These issues alone should have provoked a hearing, not to mention the larger policy and public interest implications of the transfer which should have mandated an evidentiary review. (See discussion of Interim 50 Market Rule below.)

In lieu of facts, the Commission substituted "belief" and "dedication" and "enthusiasm" (tr. 893–894). In place of findings, the Commission recited a string of contentions supported by no factual evidence of record (tr. 894). When comparing its cavalier administration of the law, as respecting Overmyer's $4 million deal, with stringent standards imposed by the Commission on other applicants, the complete absence of regulatory responsibility in this case becomes even more shocking. For example, in its recent decision concerning H–B–K Enterprises, the Commission disallowed one expense item amounting to $1.10 because there was insufficient evidence to show that it was incurred in the construction of the station.[180] In the Overmyer proceeding, $4 million was allowed to pass unquestioned.

Perhaps the best illustration of its statutory dereliction, was the complete absence of a separate determination in the public interest, as required by section 310(b), for *each* of the five stations transferred. Chairman Hyde insisted that such a finding had been made for the respective markets involved, that such an essential analysis had been performed by staff (tr. 10). But, George Smith, FCC Chief of the Broadcast Bureau, who signed the memorandum recommending approval of the transfer testified as follows:

Mr. LISHMAN. Where in the staff memorandum approving this transfer is there any determination that the public interest for each of the five CP's would be served by the transfer?

Mr. GEORGE SMITH. Paragraph 26 on page 12 contains the recommendation that the above-captioned applications be granted and the Commission of course is aware that it can only grant if it makes a finding that it is in the public interest. We try to save a little work where we can and that is the law.

Mr. LISHMAN. Is it a fact that there is no determination with respect to any individual location here as to whether the public interest would be served or not?

Mr. GEORGE SMITH. That is inherent in the memorandum.

Mr. LISHMAN. I don't understand that. Aren't conditions different in each market?

Mr. GEORGE SMITH. We recommended that the Commission grant these transfers for all five.

Mr. LISHMAN. Did you make a study of the market conditions in Cincinnati?

Mr. GEORGE SMITH. No, sir.

Mr. LISHMAN. Was any submitted to you by the applicant?

Mr. GEORGE SMITH. I don't believe so (tr. 203).

Without evidence, this legally indispensable finding could not be made. Overmyer had not supplied the necessary data in his application and the Commission did not seek it in a hearing.

Three ill-fashioned rationalizations were presented for the FCC's decision not to hold hearings on Overmyer's CP applications.

First, as discussed previously, the idea prevailed that close scrutiny of broadcast applications by the Commission is not compelling. In the

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transaction to the policies which we have been following for years. The result is to violate the spirit of our rules in a way which I find intolerable (tr. 308).

The method of calculating this sum [indirect expenses of $666,514 claimed as reimbursable out-of-pocket expenditures] as outlined by our staff, seems very complicated and open to possible abuse. Certainly it represents a novel approach which I think would have to be tested in a hearing before it could be accepted (tr. 307).

I think we have to look underneath the surface to the real nature of what the parties are accomplishing. I don't think the staff ever reached that stage (tr. 312).

[180] H-B-K Enterprises, FCC 68R517, dated Dec. 13, 1968, docket nos. 18183 and 18184, file nos. BP13823 and BP14486.

Commission's view, if an applicant misrepresents facts the criminal penalties for such an offense will somehow rectify the situation and safeguard the public interest.[181] Such a view makes a mockery of the law and of the regulatory process. Congress created the FCC to carry out certain critical responsibilities in the public interest. To unlawfully evade such a mandate would be a breach of trust of the most serious consequence. Commission members take an oath to faithfully administer the Communications Act. The fact that there are criminal penalties for misrepresentations in a license application cannot relieve the Commission from its duty of making findings supported by evidence and founded upon the public interest.

Second, the idea prevailed that the private interests associated with UHF should be afforded a special treatment if the public's interest in this broadcasting band is to be fully satisfied. Thus, in the eyes of the Commission, it was more important to expedite approval of Overmyer's original CP applications than adhere to the legal qualification standards for constructing and operating such channels if the UHF vacancies were to be filled—that is, the success of UHF at any cost.

As Chairman Hyde testified:

> When you do designate a matter for hearing you have to take into consideration the consequences of that action. It may mean in some instances a hardship, the complete destruction of a project. It will in almost any instance mean a considerable delay in any construction or implementation of a permit. You would have to consider these factors against the background of the Commission's interest in encouraging the investment of funds in the development of UHF stations so that people buying all-channel sets under the all-channel law would get something for their investment in UHF.
>
> In the overall of this particular case representing one where you had an applicant who the Commission was satisfied had a bona fide interest in exploiting UHF stations, who had the money, at least a million and a half dollars in liquid assets when he entered the business, to put stations on the air. Our experience in UHF has been somewhat discouraging. We have issued permits in many instances where no construction took place. In this instance, the permittee did proceed and his record is rather better than many UHF holders. Then he did come into financial difficulties. At that point he undertook this assignment to the AVC people. When this matter of assignment came up the Commission would have to consider, should we proceed on these applications for extensions, or should we look toward the possibility of some constructive course which would see these stations on the air promptly.
>
> You have an applicant, AVC, which is in strong financial position and in the judgment of the majority it was in the public interest to get these TV stations going rather than to undertake deletion of permits and invitations to newcomers (tr. 285).

The Commission apparently confused its role as guardian of the public interest with that of guardian of the private interest (tr. 11). Its main concern here was to safeguard the UHF investments of broadcast entrepreneurs and insure that new sources of UHF capital are given regulatory accommodation even over the proper administration of the law (tr. 11 and 17). Thus, to assist Overmyer in saving his warehouse group and satisfy AVC's desires to diversify its investment portfolio with six major market TV stations, expedition of the transfer was required and at any price (tr. 30).

It should be observed that none of the five major markets involved in Overmyer's CP applications were lacking in maximum TV diversity. And, according to Overmyer, his stations were not going to offer listeners anything new in programing (tr. 62). Thus, there was no justification for rushing yet another voice of sameness into areas al-

[181] Tr. 33 and 199. See 18 U.S.C. 1001.

ready sated with similar fare. As Commissioner Cox stated: "I do not think the majority can make a finding on the basis of what is now before us, that there is such an unusual and urgent need for additional television service in these five communities that we must disregard important policies in other areas in order to rush these stations to completion. UHF is important, but not all-important" (tr. 286 and 310).

Third, the idea prevailed that the Commission does not have the manpower or budget to adequately inquire into every application. "With the resources we have in our place, we don't undertake to substantiate the usual application. We examine them and if we find indications of any irregularity we make a study" (Chairman Hyde at tr. 32). Whatever the Commission's budgetary and manpower difficulties, the largest portion of Overmyer's application flaws were visible without intensive investigation. Therefore, failure to resolve these could not be blamed on any internal organizational needs.

On August 28, 1968, apparently as a result of the special subcommittee's hearings, the FCC issued a notice of proposed rulemaking [182] which would require evidentiary hearings on loans, options, or other forms of retained interest, such as occurred in the Overmyer transfer. "Such arrangements," the Commission stated, "raise the question of whether, in essence, the total yield to the assignor or transferor in fact includes, in addition to out-of-pocket expenses, a return which for our purpose is tantamount to a prohibited profit * * *."

THE OVERMYER TRANSFER—A VIOLATION OF INTERIM 50-MARKET RULE

In consenting to Overmyer's transfer to U.S. Co, the Commission held that its "Interim Policy Concerning the Acquisition of Television Stations"—the so-called 50-market rule—[183] should be waived in order to "* * * foster the development of UHF television stations" and "* * * be consistent with the Commission's effort to provide a more competitive nationwide television service to the public" (tr. 305). The record of these proceedings, however, did not contain the "compelling affirmative showing" required by this rule. "I think," said Commissioner Cox, "that the Commission's majority has a duty to fully explicate the grounds for the result they reach" (tr. 309). Thus, in this instance, as in other phases of Overmyer's CP applications, the FCC proceeded to violate the letter and intent of its own rules, simply by disregarding them, and the Communications Act by failing to base its public interest determinations on findings of fact.[184]

In the notice of proposed rulemaking, announcing its interim policy, the Commission said that it believed it was not necessary to rely upon multiple owners to bring independent UHF operations to major markets. More recent views of the Commission concerning UHF stations, being able to produce worthwhile TV programs in competition with local network affiliates or independent VHF licensees, have been consistent with this opinion (tr. 618). Yet, the broadcast bureau found that Overmyer had met the "compelling affirmative showing" test, because his application indicated that the financial requirements

[182] FCC docket No. 18305, dated Aug. 28, 1968. On March 5, 1969, FCC Rule 1.597 was amended to incorporate all of the changes proposed in this notice of proposed rulemaking. See Report and Order, FCC 69-209, 27735.

[183] See *supra*, sec. IV 2(a).

[184] In its memorandum and report on television multiple ownership rules, docket 16068, dated June 23, 1965, 5 RR 2d 1616, the Commission stated: "* * * what we do propose is to designate for hearing, applications concerning which we do not feel able to make a finding that the grant would serve the public interest. This procedure is required by the Communications Act." See 47 U.S.C. 309(e) and 319(c).

of competition in these particular five markets made transfer of the CP's to individual buyers impractical (tr. 894). Such acceptance of UHF's inability to compete, except under group ownership, appeared incompatible with FCC theory that nongroup UHF independents could become viable in these areas of greatest broadcasting diversity. Moreover, not a single statistic was evident in Overmyer's presentation to support his contention. Nor were such facts sought by the bureau's staff, which stated, further, that since it had waived the hearing requirement on similar showings in every prior instance involving the top 50 markets, it might as well so the same in this case (tr. 894).

Previously, there had been eight waivers of the 50-market rule (tr. 784). But, even in those cases, there had been some showing that before selling to a multiple owner, the transferor had first tried to sell to a party whose acquisition of the stations would not violate the interim policy.[185] Such factual support was not present here. Moreover, many of those prior decisions involved licensees of operating stations, not holders of bare CP's, who had proven losses of substantial sums.[186] This condition was also not present in the Overmyer transfer, where the majority of stations were only in the earliest stages of construction, despite the lengthy period which had elapsed since the permits first had been granted.

There have been a plethora of issues raised by the growing control of mass media by conglomerates such as AVC. Most of these questions have not been adequately studied or achieved the necessary concern or direction of the Commission. Indeed, its regulatory approach toward ownership of broadcast properties has been less than considered, consistent or logical.[187] Despite the critical need to evaluate all of the myriad ramifications of public opinion making by increasingly fewer diverse means of communications, the Commission on February 7, 1968, suddenly terminated its Interim 50-Market Rule without even allowing for oral arguments. * * * "the problem of concentration," wrote the majority, "in the top 50 markets should continue to be dealt with upon the basis of case-by-case consideration within the standards of the present multiple ownership rules" (tr. 655).

As evidenced by its abandonment of multiple ownership hearing requirements in every case prior to February 7, 1968, there is nothing in the history of the Commission's involvement with this most complex and increasingly serious problem to warrant satisfaction that an ad hoc approach will be any more meaningful or effective than its earlier, feeble attempts at regulation. On the contrary, the public interest will be affected still more adversely as a result of the Commission's tacit recognition of bigness as the only salvation for steadily decreasing competition and diversity in our largest population centers. A proposal looking ultimately toward legislation in this area is suggested at the conclusion of the report.

XIII. Legislative and Administrative Recommendations

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

[185] See dissenting opinion of Commissioner Cox in *The Superior Broadcasting Corporation*, 11 RR 2d 211 (1967) (tr. 785).

[186] See *Channel 2 Corporation*, 6 RR 2d 855 (1966) (tr. 789).

[187] See Commissioner Johnson's dissent, docket 16068, dated Feb. 7, 1968, "In matter of amendment of section 73.636(a) of the Commission's rules relating to multiple ownership of television broadcast stations" (tr. 656–659).

hearings in the community where each station is located to determine whether Overmyer should be authorized to continue as permittee of the five stations.

2. The FCC should amend its forms 301 (application for a new station) and 314 (application for assignment of a station), section III, question 4—

(*a*) To require broadcast station applicants for CP's to furnish a copy of their Federal income tax returns for the 2 years immediately preceding the date of application (see pp. 32–34, *supra*);

(*b*) To require written, legal commitments of all credit or funds which an applicant represents that he will utilize in station construction and operation (see pp. 24, 26–27, 30, 32, 34, *supra*).

3. The FCC should make the following amendments to its rules:

(*a*) Under rule 51.611, require permittees whose stations have not yet begun operations to submit annual financial statements, including balance sheet, income and expense statement, and source and application of funds statement, certified by independent public accountants (see pp. 35–36, 41–44, *supra*).

(*b*) Under rule 1.65 require permittees with or without applications pending before the Commission to report substantial and significant changes in information and representations contained in their original CP applications (see pp. 37–40, *supra*).

4. The FCC should promulgate new rules—

(*a*) To codify its out-of-pocket expense policy with respect to the transfer or assignment of CP's and define those out-of-pocket expenses for which a permittee may be reimbursed (see pp. 10–11, 18, 44–53, *supra*);

(*b*) To preclude the seller of a controlling stock interest in a permittee from retaining any minority stock interest in such permittee, and preclude the seller of a minority stock interest in a permittee from obtaining, upon such sale, more than his pro rata share of the total out-of-pocket expenses incurred in the construction of the station (see pp. 4–6, 18–19, 53–55, *supra*).

5. The Communications Act should be amended as follows:

(*a*) *Section 307.*—Require an evidentiary hearing in the community in which the station is located for CP extension applications where two prior CP extensions have already been granted to such permittee (see pp. 35–37, *supra*).

(*b*) *Section 308(b).*—Require the Commission to conduct its own independent examination of all material facts shown in a broadcast station application and provide for the record a detailed, written analysis of the findings of such investigation (see pp. 7, 28–29, 34–35, 45, 57–58, *supra*).

(*c*) *Section 310.*—Add a new subsection to prohibit CP's from being transferred for more than the transferor's out-of-pocket expenses and require the submission of certain books and records to enable the Commission to determine same (see pp. 10–11, 44–53, *supra*).

(*d*) *Section 310(b).*—

(1) Require the Commission to make a separate public interest finding for each CP or license to be transferred and for each market concerned (see pp. 5, 57, *supra*).

(2) Require an evidentiary hearing, in the community in which the station is located, for each transfer application (see pp. 6, 18–19, 22–23, 34–35, 39–40, 45, 53, 55–59, *supra*).

(3) Require that all decisions, orders, and reports involving transfers contain statements of findings and conclusions as well as the reasons or basis therefore upon all material issues of fact, law, or discretion presented in the record (see pp. 22–32, 43, 45, 57, 59, *supra*).

(4) Repeal the last phrase of such subsection beginning with the semicolon and the words "but in acting thereon the Commission may not consider * * *" (see pp. 12–17, *supra*).

6. The committee should undertake a complete study of the ownership of broadcast facilities by large diversified corporations to ascertain its effect upon the public interest, competition, diversity, and the regulatory process (see pp. 5–7, 9–10, 17, 19, 59–60 *supra*).

Additional Views of Congressman John E. Moss

In lieu of legislative changes referred to above as 4 (a), (b), and 5(c), I favor the following Communications Act amendment: Section 310(b) should be amended to prohibit the transfer of CP's and require their return to the FCC. The Commission should prescribe appropriate rules and regulations to carry out such a provision.

This amendment, as frequently urged by FCC Commissioner Bartley, should halt trafficking in bare CP's. It would also reaffirm a basic principle of the Communications Act that a CP or license does not create any ownership or property rights that can be bartered and sold. Such an amendment would provide the fairest and most effective method to prevent profiteering in the transfer of bare CP's.

The Commission's present ineffective and costly attempts to control elaborate schemes to circumvent the act and its out-of-pocket expense policy would be eliminated. The proposed amendment would restore an opportunity for all relevant, local interests to be heard before a regrant of the permit. It would compel the Commission to exercise its statutory responsibility to make a determination that the transfer is in the public interest. Since 1952, the Commission, by its rubberstamp approvals of transfers, has failed, neglected, and refused to perform this statutory obligation. The act, while permitting a grantee to propose a transferee, did not confer upon such grantee the power to make any public interest determination. Such power was and is lodged exclusively in the Commission.

It should be noted that this amendment would not restrict a CP holder from disposing of his station assets for whatever the market would bear. But it would relieve the pressure on proposed assignees, as was the case with AVC, to pay as part of a reimbursable out-of-pocket expense purchase price the costs of station equipment and other assets not desired or of only marginal value. (AVC paid $940,500 for such material.)

When a CP is granted to one party it automatically freezes out other local interests who desire to construct and operate a broadcast station. Thus, were it required that a permit be returned to the FCC upon failure of a permittee to construct as obligated, it would provide earlier and far more new opportunities than presently exist for others to apply for the CP. As of January 1969, according to FCC statistics, there were approximately 162 CP's for commercial UHF television stations still unconstructed. And some of these CP's have been outstanding for more than 4 years. Although the FCC has recently taken some measures toward calling in these dormant CP's, this amendment to section 310(b) would totally eliminate the problem and thaw the present freezeout of interested, local UHF entrepreneurs.