F.C.C. 74D-29

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
APPLICATIONS FOR THE TRANSFER OF CONTROL OF D. H. OVERMYER COMMUNICATIONS COMPANY, INC. AND D. H. OVERMYER BROADCASTING COMPANY, INC. FROM D. H. OVERMYER TO U.S. COMMUNICATIONS CORPORATION	Docket No. 18950 File Nos. BTC-5376, 5377, 5378, 5379 and 5380

Appearances

Benito Gaguine and *Herbert M. Schulkind* (Fly, Shuebruk, Blume and Gaguine) for Overmyer; *Leon J. Schachter* (Pierson, Ball & Dowd) for U.S. Communications Corporation and AVC; *Joseph Stirmer* and *William D. Silva* for the Chief, Broadcast Bureau, Federal Communications Commission.

(TO BE ASSOCIATED WITH FCC 75R-313, 54 FCC 2D 1045)
Supplemental Initial Decision of
Administrative Law Judge Herbert Sharfman

(Issued: May 13, 1974; Released: May 17, 1974)

Introduction

1. The Review Board remanded this case for one purpose only—so that the present writer, supposedly specially endowed to evaluate the testimonial demeanor of the witnesses, might make findings and conclusions resolving Issue No. 1 by determining whether "Overmyer intentionally or fraudulently misled the Commission." In the initial decision it had been held, in effect, that it was immaterial that Overmyer's heart might be as dark as the inside of Cheops' pyramid, for no action could be taken under Issue No. 2. The reader is referred to the initial decision (Pars. 155-159) for an understanding of its scope and reasoning on this issue. As will be shortly explained, the present writer considers himself precluded from elaborating upon or otherwise modifying the initial decision except within the mandate of the remand. Consequently, however, he might regret his ruling on Issue No. 2—and this is no concession that he does—and might wish to decide it anew with the benefit of further reflection, he cannot do so.

2. The authority of an Administrative Law Judge in a case continues until he has issued his initial decision (see Rules 0.341 and 1.267(c)). Save for the possible correction of clerical errors in the initial decision (and certification and correction of the transcript) he has exhausted his powers once he has issued the document. Second thoughts can only then strengthen a resolve to do better next time. He remains irreparably responsible for the initial decision in the case in which it was written. Reviewing authorities may alter it almost with impunity in

the final decision, but they take the initial decision, *qua* initial decision, as they find it. If the presiding officer cannot change it, it would seem, *a fortiori*, that reviewing authorities cannot ascribe to him an initial decision different from the one he really wrote and issued.

3. To the present writer it therefore appears important to correct any misapprehension of the reasoning of the initial decision, since the subject of the next appeal will be the original initial decision modified by nothing but by the discussion of "fraud."

4. In an order released January 3, 1974 (FCC 74M-4), it has already been indicated that there was a substantial discrepancy, at least in this writer's opinion, between the holding of the initial decision and the Review Board's description of it. It was intended, in the initial decision, to express as politely as the circumstances required, that no relief was possible under Issue No. 2; the proceeding, it was said, was futilely aimed at the 20% option. To the writer's astonishment, however (especially as Paragraph 3 of the Board's memorandum opinion up to this point was an admirable summary of his conclusions), he learned that he had written the initial decision so unclearly that the Board had interpreted it to rule not that the cause was misbegotten but that (Par. 3, Memorandum Opinion and Order, released December 28, 1973 (FCC 73R-420)):

> "The Administrative Law Judge further held that since the value of Overmyer's retained interest was marginal,[3] requiring him to transfer this interest to AVC would be a meaningless gesture.

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[3] The Administrative Law Judge found the present status of the five transferred permits to be as follows:
KEMO-TV San Francisco—silent from 3/31/71; transferred for assumption of liabilities plus $3,500 for furniture.
WPGH-TV Pittsburgh—silent since 8/16/71; in the hands of a receiver.
WXIX-TV Newport, Kentucky—transferred to Metromedia for assumption of liabilities and funds expended after August 1, 1971.
WALT-TV Atlanta—silent since 3/31/71; transfer of construction permit pending—consideration $28,500 for out-of-pocket expenses and $1,000 for equipment.
KJKO-TV Rosenberg, Texas—Permit surrendered and cancelled."

Unless the reader of the memorandum opinion read the initial decision he would not know that footnote 3 in the above quotation had been taken out of context.[1] Nevertheless, it lends an illusory verisimilitude to the Board's paraphrase. The Board's construction has the virtue of simplicity, but it does not accurately represent the initial decision. The writer many years ago said, in a long-forgotten case, that an author is perhaps the last man who should be asked to interpret his own works (it was a book that was then in issue), possibly on a theory that it is a wise father who knows his own child,[2] but he is confident that he has correctly read his initial decision.

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[1] Luckily, he would not have to search far to find it on Page 2, Par. 2. The Board itself offers him no page reference. In the initial decision the text of the memorandum opinion's footnote is a mere informational recital of the status of the CPs; it has no relation to the ruling on Issue No. 2.

[2] Though the passage below is hardly to be cited in support of self-analysis, it was at least personally gratifying to learn very recently that the present writer's observation about the danger of relying on the author to reveal his meaning had been confirmed by Lord Halsbury (1823-1921), apparently in the House of Lords (at what age or state of mental alertness the noble lord delivered his remarks is not shown in the Curtis and Greenslet anthology, *The Practical Cogitator*, Houghton Mifflin Company, 1962, from which the quotation is taken):
"My Lords, I have more than once had occasion to say that in construing a statute I believe the worst person to construe it is the person who is responsible for its draft."

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5. It is hoped that it will be understood that these remarks are not written in a spirit of impertinence, or in derogation of the authority of the Review Board. The writer, it need not be emphasized, fully recognizes the Board's reviewing power, and understands his subordination to its appellate jurisdiction. At the same time, he must insist, whatever the practical effect of a correction, on the integrity, as far as possible, of his initial decision; for, as has already been said, it will be that initial decision, with the addition of the consideration of "fraud," which the Board will review.

6. It is easy to guess what may have happened: The drafter of the memorandum opinion and order (FCC 73R-420) read up to Par. 156 of the Conclusions of the initial decision (to reduce the magnitude of his effort, it should be noted that Par. 156 is the *ninth* paragraph of the Conclusions and the *second* paragraph of the "Conclusions on Issue No. 2"). But Par. 156 set out *Overmyer's contentions*, and the drafter mistakenly took them for the present writer's view. Like Paolo and Francesca, "in the book he read no more that day."[3] The drafter's eagerness to adopt his own view of the initial decision may have been stimulated by an understandable reluctance, or even inability, to believe in a criticism of the Commission's institution of this case; or perhaps by a merciful desire to protect the present writer from further publicizing of a wrong interpretation of Issue No. 2.

7. The facts, difficult though their interpretation may be, as suggested above, are determinative. Tempering whatever disposition the present writer might have to crush alleged malefactors is his realization that proof of "fraud," by precedent and tradition, must be "clear, precise, and indubitable." This requirement is expressed in various but analogous terms by different courts (see 37 CJS 426-30). As *fraud* is the gravamen of the charge in this case, it has been thought appropriate to invoke the standard applicable in fraud cases.[4] The maxim that a citizen must turn square corners with the Government, *Rock Island* v. *U.S.*, 254 U.S. 141, 143 (an obligation which is met with the reciprocal duty that the Government turn square corners with the citizen, see Jackson, J., dissg., in *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 387-8) has no bearing on the right of a litigant, when the Government is a party, to have his case properly adjudicated. This decision, after a short Preliminary Statement, will turn to the facts in an attempt to decide whether the misrepresentation already held in the initial decision to have been established (in the sense that there was an unex-

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[3] Nor, for that matter, have Overmyer counsel more carefully read the initial decision. In their future proposed findings and conclusions they write (p. 5):

"But, as to the conclusory issue (Issue No. 2), the Judge concluded that, in light of the posture of the permits and the expiration of that option, there was no basis for the granting of any of the affirmative relief contemplated.[4] Accordingly, he terminated the proceeding.

[4] The Broadcast Bureau had conceded in its proposed findings that 'events subsequent to designation for hearing tend to moot, or limit the impact' of the very basis for the hearing itself. Thus the Bureau noted that AVC's option to acquire the interest in the TV permits retained by Overmyer had lapsed and that 'the value of Overmyer's retained interests [was] marginal.'"

[4] The recital of the standard does not mean that the force of persuasion had to be unreasonably great. Like many legal catchwords, the standard demands more verbally than in fact. As construed in this supplemental initial decision, it means no more than that evidence must be reasonably convincing.

plained gap between the claimed and proved expenditures) was deliberate, "fraudulent," or innocent.[5]

8. *Demeanor.* At the conference of January 16, 1974 (see Preliminary Statement below), the writer informed counsel that except for Mr. Overmyer he did not even recall how the six witnesses looked, much less the manner of their testifying. He did, however, retain a distinct impression, he said, that he had not been unfavorably affected by their "demeanor." In short, he recalls that he had no reason to believe at the time of the hearing that the witnesses testified in a manner and with an appearance inconsistent with the utterance of the truth.

Preliminary Statement

9. The original initial decision, released May 4, 1973 (FCC 73D-23), contains the earlier history of this proceeding. On Overmyer's petition for special relief, or, in the alternative for remand, the Board, as above noted, remanded the case to the presiding officer for additional findings and conclusions with respect to "fraudulent misrepresentation" (FCC 73R-420, released December 28, 1973). The Board said that the Commission's designation order, read in conjunction with its order denying Overmyer's petition for reconsideration, makes clear that "this proceeding encompasses an inquiry into whether or not Overmyer intentionally misrepresented his expenses in securing approval of his transfer." The Board agreed with the Bureau that Overmyer's "qualifications to remain a licensee [of WDHO-TV, Toledo] cannot be determined until the misrepresentation issue here is resolved completely." This is underscored, the Board declared, "by the fact that the license renewal of WDHO-TV has been placed on deferred status during the pendency of this proceeding." The Board said: "Since the resolution of this matter will necessarily require judgments as to the credibility of witnesses, we also believe that remanding the case to the Administrative Law Judge, who has already had an opportunity to observe the parties and evaluate their testimony, would be the most appropriate course of action."

10. A conference to discuss the remand was held on January 16, 1974. It was there agreed that no further testimony would be offered, but that the present decision would be based upon the existing transcript, to which the parties could direct their additional written submissions. Overmyer and the Bureau filed "further proposed findings and conclusions" and the Bureau a brief on March 18. Overmyer and the Bureau each filed a reply on April 9. Further replies could have been filed by April 30, but none was filed.

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[5] Overmyer writes (Par. 17, further proposed findings):

"As noted above, the Administrative Law Judge has found that Overmyer's expenses, as listed in the transfer application, were overstated. Overmyer respectfully disagrees with the Presiding Officer's findings in this respect; but in presenting these supplemental proposed findings, it is not our purpose to challenge them at this juncture. Rather, it is our position that, assuming *arguendo* that the Presiding Officer's findings are correct that Overmyer's expenses were overstated, Overmyer nevertheless did not intentionally mislead the Commission, was not guilty of 'fraudulent misrepresentation', did not procure the Commission's approval of the transfer through fraud; nor did Overmyer take any action which reflects adversely on his qualifications as a licensee of Station WDHO-TV, Toledo."

11. It is believed that no separate supplemental findings of fact are necessary. When appropriate in the ensuing discussion, references will be made to pertinent portions of the initial decision (FCC 73D-23). To the extent that additional—though instances of this will be rare or non-existent—findings are considered necessary; or findings in the initial decision demand emphasis in relation to the question of "fraud" now being considered, the discussion will, it is hoped, be sufficiently explanatory. Also, the context will show the distinction between the Overmyer companies and Mr. Overmyer as an individual on those few occasions where the labeling is not specific. The next heading is "Findings and Conclusions" as an indication that it subsumes the required findings, as explained above, and the pertinent conclusions.

Findings and Conclusions

12. It was indicated above that Overmyer's failure to substantiate the accuracy of its claimed outlays can be put to one side. For purposes of this decision it is taken as established that Overmyer did not prove that it had expended money in the acquisition and exploitation of the construction permits which furnished a basis for the price it received from U.S. Communications for the sale of the 80% controlling interests. In the terms of the initial decision and as a resolution of Issue No. 1, this was "misrepresentation." The issue now is whether the misrepresentation was intentional or fraudulent or whether it was mistaken or innocent. "Fraud" was the suspected forbidden conduct which expressly initiated this remand. Discussion will center on this term and will embrace all the variants generally associated with it, ignoring the possible distinctions between "fraudulent", "intentional", "willful", "deliberate" or "knowing" behavior; all are here included for discussion under the rubric "fraudulent."[6] If, within the frame of reference discussed below, Overmyer furnished information to the Commission which he knew was substantially inaccurate, or tendered it with reckless disregard of its falsity, he would be guilty of fraudulent misrepresentation; it would be presumed that he intended to deceive the recipient (the Commission);[7] but it is not disputed that the Commission relied on the information submitted to approve the transfer. These are generalities, however. It will be more informative if the discussion is brought down to the Overmyer situation: If Overmyer already possessed data on which its expenditures could be ascertained with rea-

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[6] The present case is of course not the ordinary one in which, for instance, a private citizen brings an action, sounding in Fraud and Deceit, for damages, yet the elements to be considered, taking into account the different circumstances, are similar (see 37 CJS 215):

"a. A representation.
b. Its falsity.
c. Its materiality.
d. The speaker's knowledge of its falsity or ignorance of its truth.
e. His intent that it should be acted on by the person and in the manner reasonably contemplated.
f. The hearer's ignorance of its falsity.
g. His reliance on its truth.
h. His right to rely thereon.
i. And his consequent and proximate injury."

[7] See *Redgrave* v. *Hurd*, Court of Appeal (Eng.), 1881 L.R. 20, Ch. Div. 1: "If it is a material representation calculated to induce him to enter into the contract, it is an inference of law that he was induced by the representation to enter into it. . . ."

sonable accuracy, but because direct determination revealed a figure too low for his purposes he resorted to a formula designed to justify an unreasonably high and otherwise insupportable claim for expenditures, and submitted the exaggerated result to the Commission, which was thus induced to grant the application, he would have engaged in fraudulent misrepresentation.

13. No serious question has been raised as to Overmyer's direct out-of-pocket expenses of $665,386. The real controversy arises from Overmyer's representation that it spent $666,514 (of its total claimed expenditures of $1,331,900) for indirect expenses for the communications companies (OCC) incurred by its headquarters' staff departments on their behalf. As indicated above, Overmyer used an allocation formula to compute these expenses; it had represented to the Commission in the transfer application that records for the staff services were not "available" except for the period September-December 1966. (The period covered by the claimed expenses was July 1964 through March 1967). Before September 1966, expenditures for services rendered the communications companies had been recorded on the books of the D. H. Overmyer Warehouse Company (Ohio)—the parent company—and later on the books of The Overmyer Company, Inc. (TOC). (For a description of the relationship and functions of the components of the Overmyer organization, see Pars. 38-39 of the initial decision.)

14. In its application to the Commission, Overmyer, through Thomas Byrnes, Executive Vice President, represented that an allocation formula was necessary because before the formation of TOC in September 1966, staff expenses were not separated out from the other expenses of the parent company. It was stated in the application (Overmyer Exh. 8, p. 818):

> "The cost of the 'staff' services [performed for the communications companies by the 'staff' departments of The Overmyer Company, Inc. since September 1966, and by the Overmyer Warehouse Company (Ohio) before then] was never separated out when they were rendered by the Warehouse and other companies prior to September 1966. Such costs, especially the non-personnel costs of the various functions, were buried within the total expenses of the Company involved."

Before the Congressional Committee Mr. Byrnes repeated this earlier representation and also said that the base period (September-December 1966) was the only one in which the allocated expenses were set out in such a way that they could be used. Mr. Byrnes in his written testimony in the present proceeding, furnished before his oral testimony, continued to press essentially the same contention that records were lacking for the earlier periods.[8]

15. After it was brought out, and as Mr. Byrnes conceded, that the staff expenses had been recorded in a single series of accounts (6000) since at least September 1, 1964 (see Pars. 42, 45-47, initial decision), and that there had been essentially no change in the type of expenses recorded, however, Mr. Byrnes testified, in a newly claimed justifica-

[8] Overmyer (Par. 30, proposed findings) writes that "the staff expenses were effectively [sic] buried within the total expenses of the Warehouse Company or other companies rendering the services;" and that "the costs of staff services on behalf of the operating line companies were never separated out, when rendered by the Warehouse Company or other companies, with sufficient accuracy to enable the data to be employed in computing costs."

tion of the formula, that the records had not been used because they included other expenses as well, and so were inflated for these earlier periods. Then, referring to records which showed that in the fiscal year immediately preceding the base period, staff expenses had been entered in the same way as in the base period of the allocation formula, Mr. Byrnes testified that the records were *inaccurate.*

16. Paragraphs 45 through 49 of the initial decision contain an account of the course of the Byrnes testimony and of the contentions of the Bureau regarding his failure to corroborate his assertion of inaccuracy by presenting evidence of the independent audit which had allegedly established this. In the initial decision the ability of the Bureau to cross-examine Mr. Byrnes was discussed, as was also the probable significance, were "fraud" a matter for determination, of his failure to adduce supporting evidence "from an unbiased source." Though on the theory of the initial decision, as there explained, it was not necessary to assess the effect of this deficiency, in the present supplemental initial decision it will be done (see Par. 18 ff., below), though, as will appear, without the catastrophic consequences which the Bureau sees.[9]

17. In the opinion of the present writer, it is not the function of the Commission, or of presiding officers, to pronounce magisterial judgments upon the general truthtelling propensities of a witness. Decisions are not like a psychiatric report in which there is an evaluation of the subject's "personality." In decisions there is merely an assessment, on criteria traditionally significant, that the witness's testimony should or should not be credited. The assessment may in fact be unjust to the witness, whose actual virtues may be in complete contradiction to an unfavorable conclusion on his testimony. For the trier of fact has only the testimony and the manner of its delivery to go on; he has, of course, no access to the witness's hidden character. As already written (Par. 8, above), the present writer "recalls that he had no reason to believe at the time of the hearing that the witnesses testified in a manner and with an appearance inconsistent with the utterance of the truth." Obviously, however, more helpful in judging testimony than this recollection are the "traditionally significant" objective matters now to be discussed.

18. "No man has a claim to credit upon his own word, when better

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[9] The Bureau suggests (Pars. 6 and 7, brief) an additional reason for doubting the claim of inaccuracy, typified by the following from Par. 7:

> "At paragraph 54 of the Initial Decision, it is again noted that Overmyer executives knew that staff expenses like those claimed were recorded on the parent company's books for prior periods, yet they said these records were not checked to determine the accuracy of the allocation formula. This revelation, in itself, casts considerable doubt on the care with which Overmyer made its representations to the Commission initially and reaffirmed the accuracy of its representations at the hearing. Again, the explanation offered by Overmyer, i.e., that the records were unreliable, is totally devoid of support."

Overmyer replies (fn. 3, p. 10):

> "The Bureau makes much of the fact that 'Byrnes never examined the records of prior years to test the validity of the allocation formula' [Par. 6, Bureau brief]. Since in Byrnes's judgment the data for the prior years was wholly unreliable, testing the validity of the allocation formula on the basis of such data would have been a wholly meaningless exercise."

The temptation to enter a squirrel cage and chase after a solution to this particular problem can be resisted in view of the conclusions to be drawn on Byrnes's testimony from the matters previously discussed (Pars. 13-16).

evidence, if he had it, may be easily produced." So said Dr. Johnson.[10] This caution by the great apostle of common sense, though from a literary and not from a directly legal source,[11] may serve as a preface to the principle expanded upon below. It is a tenet of the law of evidence that an unexplained failure to produce available testimony in support of an assertion, in circumstances where such support would ordinarily be forthcoming, will warrant an inference that the testimony would have been unfavorable (see Wigmore, *Evidence*, Third Ed. & Supplement, Sec. 285, and especially cases cited in Supplement). Counsel for Overmyer could have come to Mr. Byrnes's aid by offering the audit report in which there were supposed to have been 5,000 corrections. Instead, Mr. Byrnes was left naked to his enemies and, to carry the metaphor further, calling for reliance on his bare word.

19. The only rational conclusion, from a consideration of this testimony by a participant unsupported from an "independent" source, when coupled with the fact that the claim of inaccuracy was broached at the hearing only during cross-examination, is this: that the need for using a formula because of the inadequacy, on whatever ground, of the book entries, was not established. Mr. Byrnes's testimony—no matter how fervently, it may be assumed for the sake of argument, he might himself have believed in its truth—bears no such extraneous indicia of reliability that it can be accepted for the truth of the matters asserted. Overmyer's counsel, who was in charge of trial strategy, had the power to tender corroborative evidence. No complaint can now lie against a refusal to credit testimony which should have been, but was not buttressed.

20. The foregoing analysis has been confined to an examination of the credit to be accorded Mr. Byrnes in his capacity as a *witness*, not to the relationship of his testimony to a charge of fraudulent or intentional misrepresentation. Also, it has been limited to the claim of *inaccuracy* of the books which could have been shown, one way or the other, by the audit report. It has not covered the representation that the relevant entries had been "buried" among others; this, as well as other elements of the misrepresentation inquiry, will be discussed below. At this point there will be a brief[12] consideration of the impact of the ineffectiveness of Mr. Byrnes's testimony on inaccuracy on the accusation of "fraud."

21. Even if inaccuracy had been a prehearing representation, it would be doubtful whether the backhanded attack upon Byrnes's testimony through absence of corroboration could be used to support a count of "fraud." The requirement that evidence of "fraud" be "clear, precise, and indubitable," expressed thus or in any congeneric phrase (see Par. 7, above), might not be met by an impeachment device instead of by affirmative evidence of the malicious intent. See *Mammoth Oil Co.* v. *U.S.*, 275 U.S. 13, 52:

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[10] In 1775 (Boswell's *Life of Johnson*).

[11] The captious may be consoled by the information that Dr. Johnson was, if not a lawyer, versed in the law, as is evident if only from his frequent legal advice to Boswell.

[12] For reasons which will be apparent in a later section of this initial decision.

> " 'Where, for instance, probable proof is brought of a state of facts tending to criminate the accused, the absence of evidence tending to a contrary conclusion is to be considered,—though not alone entitled to much weight; *because the burden of proof lies on the accuser to make out the whole case by substantive evidence*' " (emphasis supplied).

Here the burden of proof to show fraudulent misrepresentation is on the Bureau. (In *Mammoth*, the Court continued the foregoing quotation (from *Com.* v. *Webster*, 5 Cush. 295, 316) positing a situation not present in the case at bar—affirmative proof by the "prosecution":

> " 'But when pretty stringent proof of circumstances is produced, tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is, that the proof, if produced, instead of rebutting, would tend to sustain the charge. *But this is to be cautiously applied, and only in cases where it is manifest that proofs are in the power of the accused, not accessible to the prosecution*' " (emphasis supplied).

The portion just underlined points up the distinction between an attempt to "criminate" an accused where, as an example as in the instant matter, the proof (of the audit report) might have been obtained by the Bureau had it resolutely pursued it; and an attempt at *impeachment*, where the availability of the evidence to both sides is not dispositive, the inference to be drawn depending on the relative importance to either side of producing the testimony (see Wigmore, *Evidence*, Third Ed., Sec. 288). Paragraph 49 of the initial decision tells of the Bureau's alleged frustration in its attempt to learn firsthand of the audit. But it is evident that the Bureau was uncharacteristically docile in acquiescing in the presiding officer's immediate denial of its request. It apparently did not canvass the possible means at its disposal to try to obtain the information despite his ruling.

22. The representation in the application that usable records did not exist, necessitating resort to an allocation formula, stands upon a different footing. It was found in the initial decision, as indicated above (Par. 15), that in fact staff expenses had been recorded in the same series of accounts, although in another Overmyer company, before September 1966, for the entire period for which reimbursement was sought. Mr. Byrnes (see Par. 47, initial decision) "acknowledged that he knew that staff expenses had always been recorded in the 6000 series of accounts." The rapidity with which Mr. Byrnes shifted his ground for reluctance to rely on the book entries (from "inflation" to an unsupported claim of "inaccuracy") makes it appear reasonable, to the extent that any appraisal of a past state of mind is valid, to conclude that the representation that the books were not usable was a deliberate and conscious misrepresentation. The proximate result of this misrepresentation was that Overmyer was able to claim out-of-pocket expenses of $1,331,000—considerably in excess of the amount it substantiated, on the most lenient view of its burden, at the hearing.[13]

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[13] It must be kept in mind that the discussion so far has been about Mr. Byrnes, the executive vice president. Mr. Overmyer, the former sole or majority stockholder of the subject permittee companies is sole owner of the stock of WDHO-TV, whose license is jeopardized by the remand. The significance of the underlined facts will be considered below.

23. Again it should be noted that this finding (Par. 22) should not be construed as branding Mr. Byrnes. As with the testimony on "inaccuracy," Mr. Byrnes may believe wholeheartedly in the truth of his testimony now considered and, in fact, an injustice may personally have been done him in drawing adverse inferences from it. The point is that in a hearing testimony—apart from dubious deductions from "demeanor"—must be judged by objective considerations which largely emerge during the witness's occupation of the stand. That mental processes are involved makes no difference, for, in the frequently quoted phrase, "the state of a man's mind is as much a fact as the state of his digestion." [14] Judged by traditional criteria, the testimony does not permit a finding different from the one expressed in the preceding paragraph.

24. Though, as will appear, because of the ultimate conclusion below, specific decision on alleged misrepresentations, including those already covered above, may be superfluous, since reviewing authority may not agree with this writer how Mr. Overmyer must be tied in to the misrepresentations, there will be an examination of other Bureau's charges (see Par. 2, Broadcast Bureau's brief).

25. The Bureau also maintains that "misrepresentations were made in attempting to substantiate the Overmyer claim of over $92,000 in indirect expenses relating to advertising" (and public relations). The suspicion of the Bureau, and of any observer, is immediately aroused, if by nothing else, by the book entry of only $8.20 for communications companies advertising for the entire year 1967; this should be compared to the several-thousand-fold greater amount claimed for reimbursement. Overmyer explains the huge discrepancy by asserting that its advertising and public relations activities were "institutional," for the benefit of all Overmyer components, including the communications companies. Offhand, it is hard to understand why such huge preliminary expenditures were attributable to television facilities not yet on the air, even on the assumption that Overmyer was building up future good will; but the testimony regarding Overmyer's somewhat flamboyant manner of doing business has not been refuted, and, though describing an unusually aggressive, name-conscious operation, is not inherently incredible. A finding that there has been intentional misrepresentation in respect of expenditures for advertising and public relations would therefore be a product of speculation and not grounded on indispensably cogent proof of fraud.

26. Of the "other matters of record [which] establish that Overmyer materially and substantially overstated the percentage of certain departments' activities attributable to OCC" (Par. 2, Bureau brief), representative extended mention need only be made of the Finance and Development Department (F&D). See Paragraphs 69-75 and 119-128, and 151, initial decision. The gist of the Bureau's criticism is the great disparity between the amount of communications loans consummated and real estate bought relative to the total Overmyer obligations incurred and land acquired, and the sum claimed for reimbursement.

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[14] Psychiatrists are hesitant about quick pronouncements on a person's "mind," but the legal profession is more confident of its expertise in this field.

Overmyer contends that the Bureau's argument rests on an erroneous premise. It says that the ratio of communications loans and realty purchased to the total is not significant; and that the proper measure is the quantity of activity engaged in by Overmyer personnel in order to execute these transactions. Here Overmyer portrays a scene of frenetic effort, which, it is believed, has been sufficiently characterized at Paragraph 151 of the initial decision. There this writer expressed his incredulity at the Overmyer operation as described in its testimony. In the context of the initial decision, a personal disbelief—which means merely that the writer, from his experience, limited though it may be, chose not to believe—was permissible. Yet, outrea as the Overmyer *modus operandi* may appear to a non-businessman, it is a *possible* method of conducting large affairs. Where, as here, "fraud" is under inquiry, more than personal and *perhaps* quite unjustified suspicion is necessary for a finding and conclusion that there was intentional misrepresentation about Finance and Development's allocated expenditures.

27. As indicated in the preceding paragraph, the discussion is typical of the remarks applicable to other claimed expenditures. (See Par. 152, initial decision.) The "not proven" ruling would similarly apply to these sums.

28. There is an apparent but not a real anomaly between a conclusion that there was intentional misrepresentation as to the need to use an allocation formula, and conclusions that no misrepresentations were proved about specific classes of activity. For as to the first conclusion, the inference was drawn from Overmyer's failure to corroborate its witness's testimony by documents in its own possession. It did not discharge an affirmative obligation to support its assertions if it wanted them believed. In the other conclusions, the dispositive factor is the plausibility, even if only minimal, of the Overmyer testimony as to its manner of doing business, which demanded countering testimony to permit a finding of "fraud"; and, to repeat, the verdict of "not proven" is appropriate.

29. Various arguments on both sides have not been overlooked, among them these: (a) Overmyer declares that its good faith is attested by its refusal to include for reimbursement several substantial justifiable items. (b) The Bureau scoffs at Overmyer's contention that an allocation formula was necessary because of the speed with which applications for transfer had to be filed, noting that if time was of the essence the books were handy and could have been used. The conclusions would not be affected by these points of reliance, so they may be passed by with mere mention.

30. *Qualifications of D. H. Overmyer.* The central question in this inquiry, it should not be forgotten, is the personal qualifications of D. H. Overmyer. (a) "Fraud" on the Commission, to whomever chargeable, whether with Mr. Overmyer's consent or directly contrary to his instructions and committed in circumstances in which the facts were deliberately withheld from him, would nevertheless warrant a reopening of the record and a full hearing on the underlying transaction. (b)

But passing the matter of reopening and proceeding to the issue now under consideration, it is evident that one cannot apply a broad brush and indiscriminately smear individuals connected with the Overmyer companies; for the Bureau to succeed it must paint D. H. Overmyer into a corner. "Fraudulent misrepresentation" is an accusation against *Mr. Overmyer*. From the record it must be determined whether *he* is legally chargeable with this personal dereliction.

31. Since this is a hearing matter, where charges are to be substantiated on competent, probative evidence, it will not do to invoke as determinative the general desirability of extirpating wrongdoers to keep the Commission's processes pure. As the Board has construed the designation order, and from the wording of Issue No. 1, it is clear that *Mr. Overmyer* is specifically charged with deliberate and intentional—fraudulent—misrepresentation. Aware as one must be of the easy exculpation of a main *and benefiting* wrongdoer on the Shakespearean plea,[15] "Thou canst not say I did it. Never shake/Thy gory locks at me," one must still be mindful of the affirmative duty of the accuser to bring home to him his responsibility and guilt by "clear, precise, and indubitable" evidence. A frequent criticism of enforcement is that it goes after the little fish and lets the big one escape. Yet, distasteful as this discrimination may be, unless one casts with precision he will not land the prize catch.[16]

32. The discussion starts off by citation of a Court of Appeals case, *WEBR, Inc.* v. *F.C.C.*, 136 U.S. App. D.C. 316, 325, 420 F.2d 158, 16 RR 2d 2191, 2201. There the Court indicated that a facile attribution of vicarious guilt and its consequences may be an abuse of the administrative process. The Court said (regarding a situation of course different from the present one but, it is believed, in cautionary language applicable here):

> "It is WEBR's contention that under principal-agency law Jasinski's attempt to duck under his counsel's umbrella in an attempt to shield himself from full responsibility in the Seaport controversy is 'patently unsound.' Perhaps if this case depended upon the principles of agency law, WEBR's contention would be well founded. This, however, is not the case.
>
> "The Commission must determine not who is acting 'within the scope of his authority' but who is acting with candor. It is not in the public interest for the Commission to attempt to put legal tags on a party's actions and impute dishonesty merely on legal fictions. . . ."

33. As the present writer interprets *WEBR*, it would be insufficient to quote Latin phrases—"*Respondeat superior*" or "*Qui facit per alium facit per se*"—as the sole basis for fastening personal responsi-

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[15] Overmyer, however, as will be mentioned below (Par. 35), has not himself made the plea, which is here suppositionally entered for him merely for purposes of discussion.

[16] Seine fishing may be ineffective, as the following humorous verse implies:

> "The net of law is spread so wide
> No sinner from its sweep may hide.
>
> "Its meshes are so fine and strong
> They take in every child of wrong.
>
> "O, wondrous web of mystery!
> Big fish alone escape from thee!"
> —James Jeffrey Roche (1847-1908)

bility upon a principal. Heeding the Court's admonition, then, to hold Mr. Overmyer at fault there must be more than a determination that officers or employees of the Overmyer companies misbehaved within the scope of their general authority. The conduct must be brought home to Mr. Overmyer by more than a recitation of wrongful acts and a conclusion of their prejudicial consequences. In sum, the facts of a particular case should be appraised.

34. There is nothing in the record from which it could be found that Mr. Overmyer participated personally in the studies which underlay the figures submitted to the Commission. All that appears (Tr. 173) is that the studies were "made under [his] direction," which is interpreted to mean that he directed that studies be made. Mr. Overmyer's testimony in the following exchange (Tr. 173) was not expressly refuted:

> "Q. Did you at that time accept the validity of those studies?
>
> "A. Yes.
>
> "Q. Did you at that time have any reason to believe that those studies were either improper or inaccurate?
>
> "A. No."

Nor was there any development in the record, from which a meaningful finding could follow, that Mr. Overmyer, from his position in the organization, must of necessity have known that the figures were exaggerated; and that his filing of the transfer applications constituted an intentional misrepresentation, or, what was tantamount to the same thing, a negligent or uncaring declaration to be relied upon by the Commission. The following may be quoted (see fn. below [17]) from Paragraph 88 of the initial decision to support a finding and related conclusion that Mr. Overmyer issued no instructions to inflate the figures, and so is not chargeable with "fraudulent misrepresentation" by virtue of any such instruction.

35. There is, then, a complete failure of the record to inculpate Mr. Overmyer personally, directly or by implication. It may be conjectured that in the nature of things, especially in light of his strong interest in raising money for his hard-pressed organization, Mr. Overmyer could not have been ignorant of the mechanics of the submission to the Commission. (His conglomerate was not large as conglomerates go, though large enough (some 350 office employees) not to justify an inference that he must necessarily have been conversant with all the operating and accounting details of the business.) But to substitute

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

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

suspicion for evidential support would, it need not be emphasized, run entirely counter to the requirement of cogent, convincing proof of "fraud" already several times enunciated above, and would be a disservice to and distortion of the hearing process.[18]

36. It must therefore be concluded, in the terms of the remand (FCC 73R-420, Par. 6), that Mr. D. H. Overmyer did not "intentionally or fraudulently misle[a]d the Commission."

37. The conclusion on Issue No. 2, expressed in the initial decision (FCC 73D-23) remains unaffected by the foregoing conclusion on the "misrepresentation" inquiry under Issue No. 1.[19]

38. Accordingly, IT IS ORDERED, That unless an appeal from this Supplemental Initial Decision is taken to the Commission by a party or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the rules, the conclusion in Paragraph 36, above, shall stand.

HERBERT SHARFMAN
Administrative Law Judge
FEDERAL COMMUNICATIONS COMMISSION

Effective 50 days after the release date (see Page 1), subject to the provisions of the rule (1.276) cited in the ordering clause above. Exceptions, if any, must be filed within 30 days of the release date unless an extension is duly granted.

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[18] Neither counsel for the Bureau nor for Overmyer have briefed the question of Overmyer's *personal* responsibility, as an indispensable factor in a decision on Issue No. 1, except perhaps by a mere suggestion in Paragraph 13 of Overmyer's further proposed conclusions and in the use of the personal pronoun. As Overmyer's case is for total innocence of all concerned, however, it would obviously not have been consistent for its counsel to raise the question of Mr. Overmyer's derivative responsibility, if any.

[19] Overmyer writes (further proposed findings, fn. 5, p. 6):

"To resolve any doubt on this score, Overmyer has stated that he stands ready to tranafer to AVC or its designee whatever remaining interests he may still have in any of the permits without any additional consideration."