

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

<p>In the Matter of APPLICATIONS FOR THE TRANSFER OF CONTROL OF D. H. OVERMYER COMMUNICATIONS CO., INC., AND D. H. OVERMYER BROADCASTING CO., INC., FROM D. H. OVERMYER TO U.S. COMMUNICATIONS CORP., SAN FRANCISCO, CALIF.</p>	}	<p>Docket No. 18950 File Nos. BTC-5376, 5377, 5378, 5379 and 5380</p>
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MEMORANDUM OPINION AND ORDER

(Adopted August 18, 1971; Released August 24, 1971)

BY THE COMMISSION: COMMISSIONERS BARTLEY AND JOHNSON DISSENTING; COMMISSIONER H. REX LEE ABSENT.

1. The procedural history of this docketed proceeding has been adequately detailed in our Memorandum Opinion and Order (FCC 70-911, 25 FCC 2d 442, released September 4, 1970) designating this case for evidentiary hearing and in a subsequent Memorandum Opinion and Order (FCC 71-213, 27 FCC 2d 982) released March 8, 1971, and, accordingly, is not repeated here. Presently before us for consideration are: (1) a petition for deletion of issues and for shift of burden of proof filed September 28, 1970, by D. H. Overmyer, D. H. Overmyer Communications Company, Inc. and D. H. Overmyer Broadcasting Company, Inc. (petitioners);<sup>1</sup> (2) an opposition thereto filed on October 12, 1970, by the Chief of the Broadcast Bureau (Bureau); and (3) a reply to the opposition filed on October 22, 1970, by the petitioners.

2. When we designated this proceeding for evidentiary hearing, we directed D. H. Overmyer (Overmyer) to proceed with the introduction of evidence and also to carry the burden of proof under the hearing issues that were specified. Petitioners now request that the burden of proof under those hearing issues be shifted to the Bureau. In support of their request, petitioners contend that the Commission's approval in 1967 of the above-captioned applications was a final agency action; that any proposed revision of that action by the Commission, at this late date, is in the nature of a revocation, or at the very least, a modification of a final Commission action; that this designated proceeding is therefore essentially a Commission revocation or modification proceeding and, accordingly, must be governed by either Sections 312 or 316 of the Communications Act of 1934, as amended; and that conse-

<sup>1</sup> This multiple request petition and the responsive pleadings thereto were originally filed with the Review Board. By Memorandum Opinion and Order (FCC 71R-43, 27 FCC 2d 505) released February 8, 1971, the Review Board denied the petitioners' request to delete issues and certified the request to shift the burden of proof to us.

quently the burden of proof under the designated hearing issues of this case must fall upon the Commission, because of the statutory mandates of those sections of the Act. We disagree. Neither Section 312 nor Section 316 of the Act are applicable to this particular proceeding.<sup>2</sup> Those sections of the Act deal only with Commission proceedings looking toward possible revocation or modification of station licenses and/or construction permits. Our Designation Order in this case does not contemplate any agency action respecting such an authorization, and Overmyer has not been ordered to participate in an evidentiary hearing as either a station licensee or construction permittee.

3. While we disagree with the petitioners' arguments in support of their request, we have nevertheless reconsidered, on our own motion, the evidentiary burdens that have been placed upon the parties to this proceeding. Accordingly, we are persuaded that certain revisions in the assignment of these burdens appear warranted because of the unusual nature of this case. Moreover, to avoid any possible misunderstandings and to assist the parties in their hearing preparations, we think it is appropriate, at this time, to also set forth some of the reasons for our determinations in this respect.

4. Certainly, the data needed to substantiate Overmyer's claimed expenses for developing and acquiring the subject UHF television construction permits are peculiarly within the possession and/or knowledge of Overmyer rather than the Bureau, the other named party to this proceeding. Thus, we think, it is both reasonable and necessary to require Overmyer to proceed with the introduction of evidence under the specified hearing issues of this particular case. Indeed, to direct the Bureau to produce, at the hearing, a precise and full documentation of this data would be both unrealistic and unfair. Accordingly, it is for these reasons that we determined, at the time of designation, that Overmyer should be assigned the burden of proceeding.<sup>3</sup> Moreover, in the interest of clarification, we wish to point out that the placing of this burden upon Overmyer not only requires him to proceed with the introduction of evidence under the specified hearing issues, but further requires him to make a *prima facie* showing substantially corroborating his alleged out-of-pocket expenses as were previously represented to the Commission.

5. Concerning the remaining burden of proof question presented by this case, we believe that the better policy would be to require the Bureau to carry this burden under the hearing issues that have been specified. We are persuaded that such an order of procedure would be more in accord with basic fairness and due process, because of both the circumstances surrounding our Designation Order and the seriousness of charges with which Overmyer is required to answer under the hearing issues of this particular proceeding.

<sup>2</sup> The legislative history of these sections of the Act does not support petitioners' additional contention that because this case resembles a revocation or modification proceeding, the Commission must therefore be guided by either Sections 312 or 316 of the Act in determining the burden of proof. The Commission's authority for prescribing the procedural rules, in cases such as this, flows instead from its inherent powers to conduct its proceedings in the manner which will best achieve the proper dispatch of business and the ends of justice, pursuant to Section 4(j) of the Act.

<sup>3</sup> In *D&E Broadcasting Co.*, 5 RR 2d 475 (1968), we indicated that there may be some cases where a departure from the customary evidentiary burdens normally observed in Commission proceedings would be justified. The instant proceeding, we believe, represents such a case.

6. Accordingly, IT IS ORDERED, That the petition for deletion of issues and for shift of burden of proof, filed September 28, 1970, by D. H. Overmyer, D. H. Overmyer Communications Company, Inc. and D. H. Overmyer Broadcasting Company, Inc., IS GRANTED to the extent indicated herein.

7. IT IS FURTHER ORDERED, That the Memorandum Opinion and Order (FCC 70-911, 25 FCC 2d 442) designating this proceeding for evidentiary hearing IS MODIFIED to the extent that the Chief of the Broadcast Bureau IS DIRECTED to carry the burden of proof under the designated hearing issues.

FEDERAL COMMUNICATIONS COMMISSION,  
BEN F. WAPLE, *Secretary*.

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