

F.C.C. 71-213

**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.</p>	}	<p>Docket No. 18950 Files Nos. BTC-5376, 5377, 5378, 5379, and 5380</p>
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MEMORANDUM OPINION AND ORDER

(Adopted March 3, 1971; Released: March 8, 1971)

BY THE COMMISSION :

1. The Commission has before it for consideration: (a) a petition for reconsideration of a Memorandum Opinion and Order, FCC 70-911, released September 4, 1970, filed jointly by D. H. Overmyer, D. H. Overmyer Communications Company, Inc.,¹ and D. H. Overmyer Broadcasting Company, Inc.,² on September 29, 1970; and (2) an opposition to the petition for reconsideration, filed October 12, 1970, by the Chief, Broadcast Bureau.

2. In March, 1967, D. H. Overmyer (Overmyer) agreed to sell to AVC Corp. (AVC) 80% of his 100% stock interest in the permittees of five UHF television permits for a total consideration of the lesser of 80% of Overmyer's out-of-pocket expenses attributable to the acquisition and development of the TV companies and stations as of the date of the agreement, or \$1 million.³ AVC also agreed to loan Overmyer \$3 million in return for an option, running from January 15, 1971 to April 14, 1972, to purchase Overmyer's remaining 20% interest at a cost not to exceed \$3 million. Thereafter, Overmyer filed applications for transfer of control of the television companies and represented to the Commission that his out-of-pocket expenses for the five construction permits had been \$1,331,900. After finding that the Overmyer applications complied with Commission policy of allowing no more than out-of-pocket expenses to transferors of construction permits, the Commission by Order, 10 FCC 2d 822, adopted December 8, 1967, granted the transfer of control applications.

3. Subsequently, the Special Subcommittee on Investigations of the House Interstate and Foreign Commerce Committee conducted an investigation and held extensive hearings on the transfers and issued

¹ The former construction permittee of KEMO-TV, San Francisco, California; WSCO-TV (now WXIX-TV), Newport, Kentucky; WECO-TV (now WPGH-TV), Pittsburgh, Pennsylvania; and WBMO-TV (now WATL), Atlanta, Georgia.

² The former construction permittee of KJDO-TV, Rosenberg, Texas.

³ AVC Corp. assigned all rights under the agreement to U.S. Communications Corporation, a wholly-owned subsidiary.

a report⁴ which raised serious questions as to the accuracy of the representations made to the Commission regarding Overmyer's out-of-pocket expenses. By Memorandum Opinion and Order, FCC 70-911, released September 4, 1970, the instant proceeding was initiated to explore the following matters:

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

2. To determine, whether, in light of the evidence adduced under the foregoing issue, the executory option held by the U.S. Communications Corporation or any assignee thereof, to purchase D. H. Overmyer's interests in the holders of the above-mentioned construction permits should be declared void; whether D. H. Overmyer should be required to transfer to U.S. Communications Corporation his interests in the holders of the construction permits and, if so, whether he should be permitted to receive any consideration for the transfer of his interests.

4. On September 29, 1970, Overmyer filed a petition for reconsideration of the above-noted order. In essence, Overmyer makes two arguments contesting the validity of that order. First, he asserts that the designation order is beyond the Commission's jurisdiction because the action proposed contemplates both the reconsidering and restructuring of a transfer agreement which was approved more than two-and-one-half years ago.⁵ Since no petitions for reconsideration have been filed pursuant to Section 405 of the Communications Act of 1934, as amended (Act), since the time for judicial appeal has lapsed pursuant to Section 402 of the Act without an appeal being filed, and since we took no action on our own motion, Overmyer submits that the transfers are now final transactions and that they cannot be disturbed at this late date. Secondly, Overmyer observes that in designating this proceeding for evidentiary hearing, the Commission failed to state the legal authority for its action as required by Section 1.221 (a) (4) of the Commission's Rules. Overmyer believes that such a procedural defect in the designation order is of added significance because of the "serious question" regarding the Commission's jurisdiction to reopen this proceeding.

5. The Broadcast Bureau (Bureau) opposes Overmyer's petition. The thrust of the Bureau's arguments is that the Commission has both the inherent power and the duty to take the action ordered in this proceeding and, if necessary, redress any public interest abuses by reforming the Overmyer transfer agreement, if there has been an abuse of Commission process, fraud or misrepresentations. In support of its arguments, the Bureau cites *Fly v. Heitmeyer*, 309 U.S. 146 (1940); *Churchill Tabernacle v. FCC*, 160 F.2d 244 (1947); *National Broadcasting Co., Inc.*, 37 FCC 427, 2 RR 2d 921 (1964); and *Washington Broadcasting Co.*, 2 FCC 2d 952 (1966), contending that all of these cases clearly establish the Commission's authority to order an evidentiary hearing in this case.

⁴ Report of the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce on *Acquisition and Transfer of Five Overmyer Television Construction Permits*, H. R. Rep. No. 91-256, 91st Cong., 1st Sess. (1969).

⁵ Contrary to Overmyer's assertion, this order is only directed at possible reformation of the executory option involving Overmyer's remaining 20% stock interests.

6. We find no merit to Overmyer's first argument. Based upon all of the information before us when we designated this proceeding for evidentiary hearing, we concluded that we had the affirmative duty to re-examine the Overmyer transfer of control agreement to be sure that the Commission's prior approval was not procured by fraudulent misrepresentations. Both Court and Commission case precedents have recognized an inherent power to reopen a judgment at any time where it is procured by fraud. See *Hazel-Atlas Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944) and *City of Jacksonville*, 35 FCC 401 (1963). Furthermore, Overmyer's reliance on *CAB v. Delta Airlines*, 367 U.S. 316 (1961), and *U.S. v. Seatrain Lines, Inc.*, 329 U.S. 424 (1947), to support its contrary contention is misplaced. Those cases do not involve a reopening on the ground involved here, but rather construction of a different statutory scheme in a normal reconsideration situation.

7. We now turn to the other major challenge to our designation order as raised in Overmyer's petition. Overmyer is correct in noting an apparent procedural defect in the designation order in this proceeding; *i.e.*, the failure to set forth therein the legal authority upon which our action was based as required by Section 1.221 of the Commission's Rules. We are convinced, however, that this technical oversight is not sufficient to invalidate this entire proceeding. The pertinent notice provision of Section 1.221 raised here by Overmyer is merely one of the many procedural requirements incorporated in the Commission's Rules to provide certain due process safeguards for affected parties and the public in their dealings with the Commission. Indeed, the failure of the Commission to comply with such a procedural requirement does not, in and of itself, invalidate the agency's action, in the absence of a demonstrated showing that the party's substantive rights have been prejudiced. Overmyer has neither alleged nor attempted to demonstrate that the technical defect in our designation order has prejudiced his substantive rights, and in the absence thereof, we are persuaded that the public interest would not be served by concluding that form rather than substance should dictate the conduct of this particular proceeding. However, to avoid any possible misunderstandings, we wish to indicate herein that the evidentiary hearing in this proceeding was ordered pursuant to Section 309 of the Communications Act of 1934, as amended, and the judicial authority cited above.

8. Accordingly, it is ordered, That the petition for reconsideration filed jointly by D. H. Overmyer, D. H. Overmyer Communications Co., Inc. and D. H. Overmyer Broadcasting Co., Inc. IS DENIED.

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