

F.C.C. 70-911

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 File Nos. BTC-5376, 5377, 5378, 5379, and 5380</p>
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MEMORANDUM OPINION AND ORDER

(Adopted August 26, 1970; Released September 4, 1970)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE CONCURRING IN THE RESULT; COMMISSIONER JOHNSON DISSENTING.

The Commission has before it: (1) its Order, adopted December 8, 1967 (10 F.C.C. 2d 822) granting, *inter alia*, applications for the transfer of control of D. H. Overmyer Communications Co., Inc.¹ and D. H. Overmyer Broadcasting Co., Inc.² from D. H. Overmyer to U.S. Communications Corp.,³ and (2) the subsequent Hearings before and the Report of a Special Subcommittee of the House Committee on Interstate and Foreign Commerce on the *Acquisition and Transfer of Five Overmyer Television Construction Permits*.⁴

1. In March, 1967, Overmyer agreed to sell to AVC 80% of his 100% stock ownership in the five television permittees⁵ for a total consideration of the lesser of 80% "of the cost and expenses of Overmyer attributable to the acquisition and development of the TV Companies and Stations as of the date of this Agreement" or \$1 million.⁶ On the same day, AVC agreed to loan Overmyer \$3 million in return, *inter alia*, for an option for AVC to purchase Overmyer's remaining 20% interest in the television companies for an amount not to exceed \$3 million, the amount of the loan. Under this agreement, AVC may exercise the option between January 15, 1971 and April 14, 1972.

¹The then permittee of KEMO-TV, San Francisco, California; WECO-TV (now WPGH-TV), Pittsburgh, Pa.; WSCO-TV (now WXIX), Newport, Ky.; and WBMO-TV (now WATL), Atlanta, Ga.

²The then permittee of KJDO-TV, Rosenberg, Texas.

³The original stock purchase agreement between Overmyer and the AVC Corp. was entered into on March 28, 1967. All rights under the agreement were assigned by AVC to its wholly owned subsidiary, U.S. Co., on June 6, 1967, prior to the filing of the transfer applications on June 30, 1967.

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

⁵Overmyer held 80% of the stock of the permittee of KEMO-TV, and an irrevocable option to purchase the remaining 20%.

⁶Stock Purchase Agreement submitted with applications, reprinted in Hearings, *supra*, at p. 440.

2. On June 30, 1967, Overmyer submitted the applications for transfer of control of the five television companies, including the sale and loan agreements between Overmyer and AVC. Overmyer's portion of the applications stated that the proposed transfer would enable Overmyer to "get back part of his overall investment in UHF."⁷ Overmyer represented to the Commission that his out-of-pocket expenses for the five construction permits had been \$1,331,900. Upon that basis the \$1 million received by Overmyer under the sales agreement was reimbursement for out-of-pocket expenses covering 80% of the stock in the television companies, and the applications complied with the Commission's policy allowing no more than out-of-pocket expenses to transferors of permits.⁸ The Commission in granting Overmyer's applications accepted the factual accuracy of the representations made as to Overmyer's expenses.

3. Between December 15, 1967 and August 1, 1968, the House Special Subcommittee held extensive hearings and investigations into the transfer. It issued its Report on May 19, 1969. The information and allegations developed by the Subcommittee raise serious questions as to the accuracy of the representations made to the Commission regarding Overmyer's out-of-pocket expenses. The transferor's portion of the transfer applications represented the transferor's reimbursable out-of-pocket expenses to total \$1,331,900, as follows:⁹

1. Net worth (paid in common stock) of the 5 TV companies----	\$53, 500
2. Cancelled debts of the 5 TV companies to other Overmyer affiliates -----	253, 046
3. Assets donated by other Overmyer affiliates-----	358, 840
4. Charges for services performed for the TV companies by employees of other Overmyer affiliates-----	666, 514

The investigation and Report of the Special Subcommittee raise, among others, the following issues: as to whether Overmyer claimed charges for services under group 4, *supra*, which were not in fact performed; whether services to Overmyer's Toledo and Dallas stations and his networks were charged to the five transferred companies; and whether charges were claimed for time periods in which no services were rendered the five companies. The existing information and allegations are detailed in the Special Subcommittee's Report, pp. 44-56. Further relevant allegations are found in the Special Subcommittee's Hearings, pp. 499-539, 546, 549-50, 556-64 and 567-590.¹⁰ Responses by Overmyer to the allegations and analysis of the Special Subcommittee staff are found at Hearings, pp. 834-35 and 868-69.

4. Although the transfer of the permits has been consummated, Overmyer retains a 20% interest in the stations, and there is still outstanding the unexercised option which will permit AVC to acquire Overmyer's remaining 20% interest for a further \$3,000,000. That interest was retained on the premise that the \$1,000,000 received by Overmyer did not reimburse him for his total expenses of over \$1,300,000. The Congressional hearings having raised substantial ques-

⁷ Exhibit 1, reprinted in Hearings at pp. 803-804.

⁸ See, *Bernard Rappaport, et al.*, 8 F.C.C. 2d 982 (1968), rev'd on other grounds. *MG-TV v. F.C.C.*, 408 F. 2d 1257 (D.C. Cir., 1968).

⁹ See also, Hearings, pt. 2, pp. 329-30.

¹⁰ See also, deposition of George Kinsley at Hearings, pt. 2, pp. 291-95 and testimony of Thomas J. Byrnes at Hearings, pt. 1, pp. 76-91.

tions concerning the representations of out-of-pocket expenses, the Commission has the duty to determine whether the expenses were as claimed and whether Overmyer has retained a 20% stock interest which is in fact supported by his actual expenses. If Overmyer misrepresented his expenses substantially and if his actual expenses did not exceed the \$1,000,000 he has already been paid, his retention of a 20% interest and the accompanying option were not justified.

5. Accordingly, **IT IS ORDERED**, That there be a hearing at a time and place to be specified in a subsequent Order, upon the following issues:

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

2. To determine, whether, in 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.

6. **IT IS FURTHER ORDERED**, That D. H. Overmyer, AVC Corporation, U.S. Communications Corporation and its subsidiary holders of the five construction permits, and the Commission's Broadcast Bureau are made parties to this proceeding.

7. **IT IS FURTHER ORDERED**, That the burdens of going forward with the evidence and of proof shall be on D. H. Overmyer.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary*.