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Before the
Federal Communications Commission **FCC 95-468**
Wshington, D.C. 20554

In re Applications of	)	
	)	
Rainbow Broadcasting Company	)	GC Docket No. 95-172
	)	File No. BMPCT-910625KP
	)	File No. BMPCT-910125KE
	)	File No. BTCCT-911129KT
	)	
For an Extension of Time	)	
to Construct	)	
	)	
and	)	
	)	
For an Assignment of its	)	
Construction Permit for	)	
Station WRBW(TV),	)	
Orlando, Florida	)	

MEMORANDUM OPINION AND
HEARING DESIGNATION ORDER

Adopted: November 20, 1995; Released: November 22, 1995

By the Commission:

1. By Memorandum Opinion and Order ("Order"), released May 23, 1994, the Commission reinstated the construction permit and the call sign of Rainbow Broadcasting Company ("Rainbow"), granted Rainbow's application for an extension of time within which to construct station WRBW(TV), Orlando, Florida, and granted Rainbow's application for a pro forma assignment of its construction permit.[1] By the same Order, the Commission denied a contingent application for review and an emergency petition for extraordinary relief filed by Press Broadcasting, Inc. ("Press"). Press appealed to the United States Court of Appeals for the District of Columbia Circuit. On July 21, 1995, based on the record before it, the court stated "[t]he record establishes that Rainbow could not reasonably have believed" its ex parte presentations were permitted, thereby disagreeing with the

[1] Order, 9 FCC Rcd 2839 (1994).

Commission's decision declining to disqualify or sanction Rainbow for ex parte violations.[2] In addition, the court found that substantial and material questions of fact exist regarding Rainbow's representations concerning its financial qualifications and its failure to construct.[3] The court thus ordered the Commission to conduct further proceedings to resolve these questions. Accordingly, this Order designates for hearing these issues pursuant to the court's decision.

2. The court also stated that the Commission's grant of Rainbow's sixth extension application was "based on a faulty foundation."[4] Specifically, the court faulted the Commission for not considering the period following the expiration of Rainbow's construction permit, during which Rainbow's sixth extension application was pending, as being part of the two year period during which Rainbow was required to complete construction. The court stated that the record established that, during the post-authorization period, Rainbow engaged in construction efforts and "did not suspend its [construction] efforts in the belief that Commission action on its extension application was necessary for it to proceed."[5] The court thus assumed that the Commission's decision not to count the post-authorization period was dependent upon the Commission's factual finding that Rainbow believed it could not engage in construction efforts after the expiration of its existing permit. The court therefore directed the Commission to address this point in its further proceedings.[6]

3. We clarify herein that our decision not to consider the post-authorization time period when considering the extension request was not premised either upon whether in fact Rainbow believed it could not construct during this period, or upon whether Rainbow in fact did engage in such construction. Our decision was based on our established policy that in determining whether to grant an extension request, applicants are not entitled to credit for, and thus we will not consider, construction efforts or any other actions that occur after the expiration of an authorized construction period.[7] In deciding that Rainbow had over 32

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[2] Press Broadcasting Company, Inc. v. FCC, 59 F. 3d 1365, 1370 (D.C. Cir. 1995).

[3] Id. at 1371.

[4] Id. at 1372.

[5] Id.

[6] Id.

[7] See Order, 9 FCC Rcd at 2846-47; Michael C. Gelfand, M.D., 2 FCC Rcd 6522, 6523 (Mass Media Bur. 1987); L.E.O. Broadcasting, 2 FCC Rcd 1810, 1811 (Mass Media Bur. 1987); Cidra Broadcasters, Inc., 2 FCC Rcd 230, 231 (Mass Media Bur. 1987); Sunrise Broadcasting, 100 FCC 2d 1565 (MMB 1985), app. for review granted on other grounds sub nom. Susan K. Ludka (released January 13, 1986); see generally Miami MDS Company v. FCC, 14 F. 3d 658, 660-61 (D.C. Cir. 1994)(reviewing case law and holding that FCC's refusal to consider post-authorization construction efforts is consistent with FCC precedent).

months following the termination of judicial challenges to its license in which to construct its station, the June 1993 decision of the Video Services Division, in contrast, took into account this post-authorization period as part of the time during which Rainbow was expected, and indeed was required, to have engaged in construction efforts to satisfy our requirements. In all, 22 of the 32 months that had passed since the conclusion of litigation concerning Rainbow's license occurred after the expiration of its construction permit. Accordingly, because the Video Services Division's conclusions regarding whether to grant the extension request were based in part upon construction efforts that the Division believed should have occurred during the post-authorization period, we concluded that its decision was contrary to our established policy.

4. Our policy regarding post-authorization construction is expressly designed to discourage applicants from attempting to rely on such efforts as a means to persuade the agency to grant extension requests. See Sunrise Broadcasting, Inc., 100 FCC 2d at 1567; Cidra Broadcasters, Inc., 2 FCC Rcd at 231. Therefore, effective implementation of the policy requires that we neither accord applicants credit, nor sanction them, for the adequacy or inadequacy of any construction efforts that occur during this time period. Any progress toward the construction of a station that occurs after expiration of a construction permit simply is not considered at all in making our decisions whether to grant an extension of time. See, e.g., Michael C. Gelfand, M.D., 2 FCC Rcd at 6523 (permittee's expenditures of substantial sums as well as the preparation of assignment application after the expiration of its construction period were not considered); Sunrise Broadcasting, 100 FCC 2d at 1567 (permittee's ordering of equipment and entering into a lease for a main studio building with an option to lease a transmitter site after the expiration of the construction period were not considered). Therefore, what Rainbow believed and what Rainbow did during this time period simply was not germane to our decision.

5. Our conclusion that post-authorization construction efforts should not be considered was also grounded on a second policy consideration. We believed, and continue to believe, that it is unreasonable to require applicants to make further expenditures and continue construction efforts while their extension requests are pending.[8] We made this policy determination knowing full well that some applicants (like Rainbow) may, at their own risk, voluntarily choose to construct while the Commission is deciding whether to grant their extension requests. In contrast, the Video Services Division, by taking into account the post-authorization period as part of the time counted against Rainbow, effectively imposed

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[8] Cf. Channel 16 of Rhode Island, Inc. v. FCC, 440 F.2d 266, 275-76 (D.C. Cir. 1971)(it is unfair and unreasonable to require construction while relevant FCC policy "remains in limbo"); TV-8, Inc., 2 FCC Rcd 1218, 1220 (1987)(it is unfair to expect an applicant to proceed with construction during the pendency of its appeal of staff's denial of its petition to reinstate its construction permit and to grant its extension).

a requirement that Rainbow continue to construct during this period.[9] We thus set aside that aspect of the Video Services Division's ruling as in conflict with our general policy against imposing such requirements.

6. Our decision not to count the post-authorization period in evaluating the sufficiency of Rainbow's construction efforts thus was based solely on the two policy considerations discussed above. It did not rely upon the actual facts of Rainbow's beliefs or efforts during that time period. Accordingly, we clarify and reaffirm here the basis for our decision not to consider the post-authorization time period in evaluating Rainbow's extension application.

7. The court also directed the Commission to address whether Rainbow had made the requisite showing under 47 C.F.R. Section 73.3534 to justify the grant of Rainbow's sixth extension application.[10] Specifically, we had interpreted our rules as not requiring Rainbow to make the showing ordinarily required under Section 73.3534 for extensions beyond the normal 24-month construction period afforded permittees by Section 73.3598,[11] because we believed that "it would have been unreasonable to have required or expected Rainbow to proceed with construction while faced with the uncertainties resulting from the appellate challenges to its construction permit."[12] We thus concluded that the 24-month construction period should have run from the time when the appellate litigation concluded in August of 1990.[13] The court, however, pointed out that the "plain language" of Section 73.3598 required that construction occur 24 months "from the date of issuance of the original construction permit."[14] It thus concluded that the Commission must address whether Rainbow has made "the required showing of progress" under Section 73.3534 that would have justified the grant of the extension of time to construct.[15] We will designate an issue to determine whether there is any factual basis to support either a grant of a waiver of

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[9] The Supreme Court's final decision in Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990), petition for rehearing denied, 111 S. Ct. 15 (1990) was issued August 30, 1990. Rainbow filed its sixth extension request in June 1991, one month before the expiration of its fifth and last authorized construction extension period. Rainbow's sixth extension request was pending and was not acted upon until the Video Services denied the request two years later, in June of 1993.

[10] Press Broadcasting Company, Inc. v. FCC, 59 F. 3d at 1372.

[11] 47 C.F.R. Section 73.3598(a).

[12] Order, 9 FCC Rcd at 2846.

[13] Id.

[14] Press Broadcasting Company, Inc., v. FCC, 59 F. 3d at 1372.

[15] Id.

Section 73.3598 or a grant of an extension request based on the hardship provision of Section 73.3534. Cf. Channel 16 of Rhode Island, Inc. v. FCC, 440 F.2d at 275-76 (permittee's uncertainty due to Commission's inaction is sufficient basis to warrant grant of extension of time to construct on equitable or waiver theory). We ordinarily would not designate an issue concerning extension periods. However, since we must designate this case in any event, we believe that a hearing on the extension issue may assist our resolution of the matter.

9. We note that Rainbow is currently providing service to the public pursuant to program test authority. See 47 C.F.R. Section 73. 1620. Disruption of such service pending the outcome of the hearing would not serve the public interest. Moreover, we note that the court remanded this case to the Commission without purporting to vacate the Commission's earlier order. Accordingly, IT IS ORDERED, That the Commission's Order, 9 FCC Rcd 2839 (1994), SHALL REMAIN IN EFFECT and Rainbow may continue to operate until the hearing is concluded and all issues are finally resolved.

10. IT IS FURTHER ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. Section 309(e), the above-captioned applications ARE DESIGNATED FOR HEARING at a time and place to be specified in a subsequent Order, upon the following issues:

(1) To determine whether Rainbow intentionally violated Sections 1.1208 and 1.1210 of the Commission's ex parte rules by soliciting a third party to call the Commission on Rainbow's behalf, and by meeting with Commission staff to discuss the merits of Rainbow's application proceedings.

(2) To determine whether Rainbow made misrepresentations of fact or was lacking in candor with respect to its financial qualifications regarding its ability to construct and initially operate its station, in violation of Section 74.1232(a) of the Commission's rules or otherwise.

(3) To determine whether Rainbow made misrepresentations of fact or was lacking in candor regarding the nature of the tower litigation in terms of its failure to construct in connection with its fifth and sixth extension applications, in violation of Section 73.3534(b) of the Commission's rules or otherwise.

(4) To determine whether Rainbow has demonstrated that under the circumstances either grant of a waiver of Section 73.3598(a) or grant of an extension under Section 73.3534(b) is justified.

(5) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Rainbow is qualified to be a Commission licensee and whether grant of the subject applications serves the public interest, convenience and necessity.

11. IT IS FURTHER ORDERED, That Press is made party to the hearing ordered herein, and That, a separate trial staff shall be designated by the Office of General Counsel to represent the Commission, in light of the Mass Media Bureau's recusal from this proceeding.

12. IT IS FURTHER ORDERED, That, in accordance with Section 309(e) of the Communications Act of 1934, as amended, the burden of proceeding with the introduction of evidence upon issues (1) through (5) and the burden of proof with respect to all issues shall be upon Rainbow.

13. IT IS FURTHER ORDERED, That, the Administrative Law Judge shall render a determination on each designated issue.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the parties respondent herein, pursuant to Section 1.221 of the Commission's Rules, in person or by attorney, shall file with the Commission, within twenty (20) days of the mailing of this Order, a written appearance in triplicate, stating an intention to appear on the date filed for the hearing and present evidence on the issues specified in this Order.

15. It IS FURTHER ORDERED, That Rainbow shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in that rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

16. IT IS FURTHER ORDERED, That the Secretary send by Certified Mail-Return Receipt Requested, one copy of this Order to each of the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary