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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Application of)
RAINBOW BROADCASTING COMPANY)
For Extension of)
Construction Permit)

File No. BMPCT-910125KE

TO: Roy J. Stewart, Chief
Mass Media Bureau

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**REPLY OF PRESS TELEVISION CORPORATION
TO "OPPOSITION TO PRESS PETITION FOR RECONSIDERATION"**

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1. Press Television Corporation ("Press") hereby submits its Reply to the "Opposition to Press Petition for Reconsideration" submitted by Rainbow Broadcasting Company ("Rainbow") in connection with the above-captioned application. As set forth below, far from resolving any of the serious issues raised in Press' Petition, Rainbow's Opposition tends to aggravate those issues by failing to address them.

2. As a threshold matter, Rainbow challenges Press' standing to file a petition for reconsideration. This bizarre argument borders on the frivolous. It is well-established that parties which compete, or which would compete, for audience and revenues have standing to challenge one another's applications. *E.g.*, *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940). Rainbow itself demonstrated this by filing a petition for reconsideration with respect to an application (File No. BMPCT-900413KI) for modification of Press' facilities.^{1/} In its Petition for Reconsideration, Press specifically incorporated by reference, in its entirety, Press' Informal Objection. As Rainbow itself acknowledges, in its Objection Press expressly addressed the question of standing in Footnote 2. Press's statement of standing included a specific assertion that Press and Rainbow would compete for audiences and revenues. Press was not required to do any more.^{2/}

3. With respect to the "merits" (such as they are) of Rainbow's Opposition, it is clear

^{1/} In its own petition for reconsideration of the grant of Press' application, Rainbow apparently felt so confident of its right to file that it did not even bother to include *any* reference to the question of standing. Rainbow's sudden interest in the question of standing is merely one more demonstration of Rainbow's unwillingness or inability to present consistent positions on factual or legal matters.

^{2/} Although not required to do so, Press also noted in this connection that Rainbow is engaged in a multifaceted program designed to interfere with Press' legitimate and reasonable business activities. Rainbow's activities in that respect are clear on the face of Rainbow's own statements. *See* Press' Informal Objection at 17-21. Because of Rainbow's continued efforts to prevent Press from relocating as authorized, it is clear that the expiration (or non-extension) of Rainbow's permit would have a salutary effect for Press, and that, conversely, further extension of the permit would have an obviously direct, detrimental effect on Press. There can be no serious question but that Press has standing to object to the grant of Rainbow's application. *See, e.g., Naguabo Broadcasting Company* FCC 91R-10 (Rev. Bd.), released February 19, 1991 at ¶36 ("the potential of economic injury is a prime basis for legal standing to take a position in a broadcast proceeding, and profoundly legitimate."). Oddly enough, the language quoted from *Naguabo* was quoted by Rainbow in its Opposition.

that Rainbow has elected simply not to respond to *any* of the serious charges which Press has advanced. Instead, Rainbow offers nothing more than conclusory statements which are not only unsupported, but which are also completely contradicted by the factual record which Rainbow itself has created. For example, it is clear from Rainbow's extension application that Rainbow was attempting therein to suggest to the Commission that the dispute between Rainbow and its tower owner had somehow prevented Rainbow from proceeding with construction. As Press demonstrated in its Petition, any such suggestion was *totally false*. In fact, to the extent that any "dispute" exists between Rainbow and its tower owner, that dispute does *not* involve Rainbow's right to install its transmission equipment and commence operation immediately. To the contrary, the tower owner has consistently acknowledged that Rainbow does now have, and has for several years had, complete access to the tower for purposes of installation.^{3/} Thus, the suggestion which Rainbow has sought to convey in its application is demonstrably false. Rainbow declines to address this point, presumably because there is no conceivable exculpatory explanation available to it.

4. In its Petition, Press also noted that, despite the fact that Rainbow has held its construction permit for at least three years -- and, as a practical matter, since 1984^{4/} -- Rainbow has

^{3/} Rainbow's principal, Joseph Rey, has specifically acknowledged the current availability of Rainbow's tower. Mr. Rey testified under oath that he understood that he could indeed put Rainbow's antenna up now. Press pointed this out in its Petition. See Attachment B to Press' Petition (quoted in Press' Informal Objection at 8, n.7). Rainbow has not denied it.

^{4/} In its Opposition Rainbow again suggests that it was somehow prevented from constructing its station during the seven years since it was first awarded the construction permit. Opposition at 5-6. Again, nothing could be further from the truth. Rainbow has at all times been able to construct; Rainbow has simply elected not to construct. That, in and of itself, is bad enough. But even if the pendency of appeals might be deemed to accord Rainbow some leeway on this point, the pendency of those appeals should not have prevented Rainbow from making at least preliminary decisions regarding equipment and other construction-related matters. And yet, it appears that no such decisions have yet been made (even though the appeals to which Rainbow points were completed more than six months ago).

Rainbow's position in this regard is especially outrageous because, far from proceeding diligently with construction following completion of the appellate process, Rainbow has since then instructed its consultants *not* to proceed. In other words, Rainbow did not take any steps during the appellate process, and it has not taken any steps since.

failed to take even the most basic steps toward construction. Far from installing any equipment, it has not even *ordered* any equipment. Indeed, far from ordering any equipment, it has not even *selected* any equipment. In its Opposition Rainbow does not dispute these facts. And yet, Rainbow attempts to suggest in its Opposition that Rainbow has proceeded in some sense with construction efforts. *See* Opposition at 5 ("Rainbow immediately undertook preparation for construction: a construction engineer was hired; the site owner was informed of Rainbow's intention to proceed with construction").

5. In fact, Press understands from the testimony of Rainbow's principal in its civil suit in Florida that whatever instructions Rainbow may have given its consulting engineer have since been countermanded, and that engineer has been told by Rainbow to stop all work. In light of the facts, Rainbow's wholly unsupported assertions that it has "diligently pursued construction", Opposition at 6, do not help Rainbow. To the contrary, under the circumstances they amount to a lack of candor, if not outright misrepresentation. How, after all, can Rainbow claim, boldly and repeatedly, that it has "diligently pursued" construction when, despite repeated opportunities to do so, it can point to absolutely no efforts it has made in that regard, and when Rainbow's own principal has provided sworn testimony indicating that, in fact, nothing has been done?

6. Rainbow next attempts to sidestep a series of serious charges by claiming that they are merely an effort to "reopen Rainbow's Channel 65 authorization." Opposition at 6. While Press' allegations do relate to a certain degree to matters involving Rainbow's initial construction permit application, the fact of the matter is that, in the very extension application which is the subject of Press' Petition, Rainbow has affirmatively and unequivocally stated that all of the representations contained in its original construction permit application are still accurate. *See* Rainbow Application at ¶8. By so stating, Rainbow itself has effectively "reopened" those matters.

7. One such matter is Rainbow's financial qualifications. Of course, Rainbow has

consistently advised the Commission that it is financially qualified to construct its station. And yet, in its litigation against its tower owner, Rainbow has proffered the following testimony:

[if the tower owner permits Press to install its antenna as presently authorized], Rainbow's television station on Channel 65 . . . will be rendered worthless. *Rainbow will be unable to secure financing to build and operate the station. . . .*

* * *

If [the tower owner] allows Press to broadcast [as authorized by the Commission], Rainbow's ability to compete in the Orlando television market will be obstructed to the point that *it will not be able to secure the financing to build a television station for Channel 65 on the Bithlo tower or any other tower in the area.*

See Attachment A to Press' Informal Objection (Rainbow Civil Complaint, with attached Statement of Susan D. Harrison, at 1-3 (emphases added)). Rainbow's position in its civil litigation, as demonstrated by the italicized passages quoted above, is that it is *not* financially qualified to construct. This blatant discrepancy is the basis for Press' charge that some obvious questions exist about Rainbow's financial qualifications.

8. Rainbow's response is to claim that Press is engaging in speculation. Opposition at 7. But Press has not engaged in speculation; Press has engaged in quotation, quotation of Rainbow's own sworn pleadings submitted to the court in Florida. It is Rainbow itself which has, under oath, effectively conceded that it is not financially qualified.

9. Again, Rainbow does not dispute the accuracy of Press' quotations or even the validity of the conclusions which Press draws therefrom. Instead, Rainbow first claims without explanation that Press' showing "falls woefully short of the standard for prima facie showing". *Id.* The basis for that claim cannot be determined from Rainbow's Opposition, since no further discussion of the point is offered. As discussed above, though, Press' arguments concerning Rainbow's financial qualifications are based on the sworn statements filed by Rainbow in its civil litigation. That certainly satisfies any conceivable "standard for prima facie showing" which Rainbow might seek to apply.

10. Rainbow's second response as to its financial qualifications is the following guarded statement:

Nothing precludes Rainbow from availing itself of alternative financing, a common occurrence for new stations.

Id. This statement is significant for what it seems to say and for what it does not say. First, it is clear that Rainbow is attempting to create the impression that Rainbow is, in fact, financially qualified as a result of some "alternative financing".^{2/} But that is *not* what that sentence actually says. Rather, that sentence merely notes that Rainbow might be able to arrange for "alternative financing"; it stops well short of asserting that any such "alternative financing" is in fact in place.

11. This is not an insignificant semantic distinction. Recall that, in its Florida litigation, Rainbow is arguing that, absent the injunction which Rainbow has requested, Rainbow will not be able to finance construction of the station and will thus suffer irreparable harm. But if Rainbow does have some "alternative financing" available to it, then the entire basis of its civil litigation disintegrates, since Rainbow will clearly *not* suffer the alleged irreparable harm. In other words, Rainbow is telling the Court in Florida that it definitely is *not* financially qualified (absent matters wholly unrelated to Rainbow's ability to construct and operate), while Rainbow is telling the Commission that it definitely *is* financially qualified.

12. But Rainbow cannot maintain this dramatic inconsistency. Rainbow is either lying to the Court, or it is lying to the Commission. The underlying factual predicate for this was fully set forth in Press' petition, thus giving Rainbow a clear opportunity, in its Opposition, to set the record straight. All that Rainbow has to say about it is that

^{2/} As discussed above, Rainbow maintained in its construction permit application that it was financially qualified and, in its extension application at issue here, it has stated unequivocally that the representations included in its construction permit application remain accurate. As a result, Rainbow has already asserted, albeit indirectly, that it is financially qualified. Its obvious unwillingness to do so directly and expressly now is more than a little curious.

[n]othing precludes Rainbow from availing itself of alternative financing, a common occurrence for new stations.

Id. Press submits that Rainbow's unwillingness or inability to state unequivocally that it is financially qualified represents an admission that it is *not* financially qualified.^{6/} Moreover, Rainbow's obvious, duplicitous effort to conceal the truth from the Commission reinforces the need for a full inquiry into Rainbow's truthfulness and candor.

13. Similar observations are equally valid with respect to the question of Rainbow's ownership structure. While Rainbow at least categorically denies that there has been any change "in its comparative posture or ownership structure", Opposition at 8, Rainbow does not explain Mr. Rey's testimony before the court in Florida. There Mr. Rey testified that Rainbow was relying on financing arrangements (which, as recently as January, 1991, had apparently not been reduced to writing) with an individual named Conant who was said to be willing to advance Rainbow some \$4,000,000 in return for an ownership interest.

14. In its Opposition Rainbow does not deny that Mr. Rey so testified, and Rainbow does not deny the substance of that testimony. Thus, it may be assumed that, in fact, there is a Mr. Conant who has informally agreed to provide \$4,000,000 in return for an ownership position in Rainbow.^{7/} It may also be assumed that any such arrangement has not yet been consummated, which would permit Rainbow to state categorically that there has not yet been any change of ownership. But the mere existence of such a relationship would ordinarily necessitate an amendment

^{6/} Press is not suggesting that Rainbow should necessarily have disclosed in its Opposition the full details of its financial situation (although such disclosure would not have been inappropriate or undesirable). At an absolute minimum, though, Rainbow could and should have stated clearly and unequivocally that it is financially qualified (if, of course, Rainbow does believe itself to be financially qualified). Having failed to so state, and having also failed to explain its own statements clearly indicating to the Court that it is *not* financially qualified, Rainbow cannot seriously claim that it may be presumed to be so qualified.

^{7/} In fact, Rainbow seems to confirm that some such arrangement exists when it refers to "the equity financing available to [Rainbow]", Opposition at 8.

to Rainbow's construction permit application. After all, FCC Form 301 generally requires the disclosure of all agreements or understandings relating to future ownership interests. Thus, Rainbow's facile claim in its application that all representations in its construction application remain accurate appears to be false.

15. The existence of this "equity financing" (to use Rainbow's own terminology) is important because of Rainbow's extremely narrow comparative superiority. As discussed in Press' Petition, that superiority would likely be eliminated if a new principal were to acquire a significant equity interest in Rainbow.^{8/} See Press' Informal Objection at 14-17. Importantly, Rainbow does not specifically or expressly deny in its Opposition Press' assertion that the "equity financing" would likely have a major effect on Rainbow's ownership. Instead, Rainbow coyly suggests that Rainbow may or may not "utilize the equity financing available to it", Opposition at 8, thereby hedging not only on the ownership issue, but also (again) on the question of its financial qualifications.

16. It is significant that Rainbow again attempts to hedge as to whether its "equity financing" is its sole source of financing. Obviously, it is in Rainbow's interest to have the Commission believe that there is some "alternative financing" available over and above the "equity financing", because then Rainbow might legitimately argue that it is not relying on the "equity financing" and that, therefore, the terms of such financing would arguably be irrelevant here.

17. The trouble with that approach is that it flies in the face of Rainbow's claims before the court. There, in order to maintain its claim of irreparable harm, Rainbow has asserted that it is depending on the \$4,000,000 "equity financing" and that that financing will not be available unless the court issues the injunction Rainbow has requested. But if Rainbow has "alternative

^{8/} Press admits that the precise effect on Rainbow's comparative position is somewhat speculative -- but that is only because Rainbow has refused to disclose any of the terms of its understanding with Mr. Conant. Nevertheless, Press believes that it is conservative to assume that an individual contributing \$4,000,000 to Rainbow -- an enterprise whose expenses to date have probably not exceeded \$500,000 -- would reasonably expect to obtain a significant equity position.

financing" (as it clearly suggests it has in its Opposition), then the fundamental premise of its court action is invalid. Conversely, if Rainbow is telling the truth to the court, *i.e.*, that Rainbow's sole source of construction financing at this time is Mr. Conant, then Rainbow is again concealing the truth from the Commission. Either way, Rainbow's Opposition on this point raises undeniably serious questions concerning, *inter alia*, its truthfulness and candor.

18. Rainbow's final point is that Press is nothing more than a thin-skinned competitor unable to stand the hard knocks of a truly competitive environment. Press stands by the discussion set forth in its Petition and Informal Objection at 17-21. Press also notes that the sole authority quoted by Rainbow does not help Rainbow here. In that case -- *Naguabo Broadcasting Company, supra* -- one party argued that the mere fact that an adversary's action might have an economic effect on the first party's interests was sufficient to support a conclusion that the adversary had an "improper motive". The Review Board properly rejected that contention, since the existence of a financial interest is not in and of itself enough to establish that a party is acting to suppress competition.

19. But that case is clearly inapposite here, where Rainbow's principal has eliminated the need for inferring his "motive" for invoking the processes of the Commission and the courts. Mr. Rey has clearly, expressly and unequivocally testified that his motive in opposing Press has been to prevent or avoid competition. *See* Press' Informal Objection at, *e.g.*, 19. That being the case, the Review Board's remarks in *Naguabo* are immaterial here.

CONCLUSION

20. Despite Rainbow's best efforts to misdirect the Commission, the essential question now before the Commission is whether or not Rainbow is entitled to an extension of its construction permit. The Commission expects its permittees to proceed diligently with construction -- indeed, that is one of the required showings in an application for extension of a permit. Rainbow has

not shown that it has proceeded diligently, nor could it make such a showing. It has not installed any equipment; indeed, it has not even ordered any equipment; indeed, it has not even selected any equipment. And, contrary to the misimpression Rainbow attempts to create, *absolutely nothing* has prevented Rainbow from constructing its station at any time prior to today -- it has an available antenna site and it has a construction permit and it is (and has been for several years) in a position to build its station.

21. One point about which Rainbow is dramatically silent is the reason for its failure to build. Here again Rainbow's own statements to the court fill in the blanks which Rainbow has elected to leave in its filings with the Commission. As demonstrated in Press' Petition, Rainbow has submitted to the court multiple sworn statements indicating that Rainbow has not constructed its station and will not construct its station *because of the threat of competition from Press*. See Press' Informal Objection at 9-11. Of course, Rainbow has not bothered to advise the Commission of that position, because that excuse falls far short of what is needed to justify an extension.^{9/}

22. In summary, then, Rainbow failed to make the necessary showing for an extension in its application. It has failed to improve its situation with its Opposition. To the contrary, Rainbow's response -- long on indirection and misdirection, short on specific information -- seriously aggravates Rainbow's position, for it concedes (either explicitly or implicitly) the accuracy

^{9/} Indeed, in yet another case which Rainbow relies on but which in fact supports Press, the Commission rejected the notion that a permittee is entitled to any particular competitive situation. To the contrary, according to the Commission,

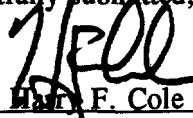
The Commission . . . is not the guarantor of the financial success of its licensees. That is a judgment to be made by the applicants and the marketplace. As we stated in *Triangle Publications, Inc.*:

we are not generally concerned with the competitive status of licensees and are not insurers of lucrative operations. . . .

Triangle Publications, Inc., 29 F.C.C.2d 315, 318 (1960) [subsequent history omitted]

of Press' factual claims but fails to resolve any of the questions which those claims clearly raise. And, in so doing, Rainbow effectively confirms the need for an inquiry into Rainbow's own truthfulness and candor before the Commission. Such an inquiry need not be undertaken, however, before the first order of business can and should be addressed: at a bare minimum, Rainbow's application for extension of its permit should be denied.

Respectfully submitted,


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March 21, 1991

CERTIFICATE OF SERVICE

I, Harry F. Cole, hereby certify that on this 21st day of March, 1991, I have caused copies of the foregoing "Reply to 'Opposition to Press Petition for Reconsideration'" to be placed in the United States mail, first class postage prepaid, addressed to the following individuals:

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