

Rambow Exh. —

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

JOSEPH REY; LETICIA JARAMILLO;
and ESPERANZA REY-MEHR, as general
partners of RAINBOW BROADCASTING
COMPANY, a Florida partnership,

Plaintiffs,

vs.

Case No. 90-2554-Civ-Marcus

GUY GANNETT PUBLISHING COMPANY;
MPE TOWER, INC.; and GUY GANNETT
PUBLISHING COMPANY and MPE TOWER,
INC., as general partners of BITHLO TOWER
COMPANY, a Florida partnership,

Defendants.

AMENDED COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF

Plaintiffs Joseph Rey, Leticia Jaramillo and Esperanza Rey-Mehr, as general partners of Rainbow Broadcasting Company, a Florida partnership, sue Defendants Guy Gannett Publishing Company, MPE Tower, Inc. and Guy Gannett Publishing Company and MPE Tower, Inc., as general partners of Bithlo Tower Company, a Florida general partnership, and for their Amended Complaint allege as follows:

1. This is an action for specific performance and compensatory damages in excess of \$50,000.00, exclusive of interest and costs.
2. Defendant Guy Gannett Publishing Company ("Gannett") is a corporation organized and existing under the laws of the State of Maine and having its principal place of business in Portland, Maine. Gannett does business in the State of Florida under its own name and as Gannett Tower Company and has offices in Dade County, Florida. In or about September



Federal Communications Commission

Docket No. GC 95-172 Exhibit No. 9

Presented by Rainbow Broadcasting

Disposition { Identified X
Received _____
Rejected X

Reporter JL

Date 6-28-96

1989, Gannett acquired the interest of its partner, Defendant MPE Tower, Inc., in Bithlo Tower Company and has continued to do business in Florida as Bithlo Tower Company.

3. Defendant MPE Tower, Inc. ("MPE") is a corporation organized and existing under the laws of the State of Florida and having its principal place of business in Providence, Rhode Island. Prior to September 1989, MPE was a general partner of Defendant Gannett in Bithlo Tower Company ("Bithlo"), a Florida general partnership.

4. Plaintiffs Joseph Rey, Leticia Jaramillo and Esperanza Rey-Mehr are the general partners of Rainbow Broadcasting Company ("Rainbow"), a Florida general partnership. Plaintiffs are residents and citizens of the State of Florida.

5. Bithlo owns a communications transmission tower located in Bithlo, Florida, a community located approximately 20 miles east of Orlando, Florida. The Bithlo tower is 1609 feet in height. The tower is capable of accommodating various types of broadcast antennas, but as currently designed will accommodate only two television antennas.

6. In October 1985, Rainbow was granted a construction permit by the Federal Communications Commission ("FCC") to operate a new UHF television station, Channel 65, in Orlando, Florida. Under the terms of the FCC permit, Orlando, Florida is the city of license for Channel 65. In its application to the FCC, Rainbow stated that it intended to build its own tower to support its broadcasting antenna.

7. After Rainbow received its construction permit, Bithlo approached Rainbow seeking to secure Rainbow as a tenant for antenna space on its tower.

8. In an attempt to obtain an agreement with Rainbow, Bithlo created a situation of real or illusory competition between Rainbow and other potential television lessees for the "top slot" on the Bithlo tower. In so doing, Bithlo represented to Rainbow that the "top slot" available for a television broadcasting antenna would be leased on a "first come, first served" basis



and that any television broadcaster who failed to reserve the "top slot" would be relegated to a lower position on the Bithlo tower. On October 21, 1985, Bithlo advised Rainbow by letter that the top slot on the Bithlo tower would be leased "momentarily" to another broadcaster and implicitly urged Rainbow to hurry if it wanted to obtain the top position for itself. A copy of Bithlo's October 21, 1985 letter is attached as Exhibit 1.

9. On or about January 6, 1986, Rainbow entered into a Lease Agreement ("Lease") with Bithlo through its general partners, Defendants Gannett and MPE, whereby Rainbow leased the top slot on the Bithlo tower. A copy of the January 6, 1986 Lease Agreement between Rainbow and Bithlo is attached to this Amended Complaint as Exhibit 2.

10. The Lease contains four exhibits which were incorporated into and formed part of the agreement between Rainbow and Bithlo. Exhibit C to the January 6, 1986 Lease is a drawing of the Bithlo tower. In accordance with the representations made to Rainbow during the course of negotiation and the consistent understanding of the parties, Exhibit C to the Lease depicts two available slots for television antennas on the tower, one above the other, with a measurable space between the top and bottom slots.

11. The January 6, 1986 Lease between Bithlo and Rainbow provides that Rainbow has leased the top television antenna slot as depicted on Exhibit C to the Lease. By selecting the upper position, Rainbow assured itself that any other television antenna on the Bithlo tower would be below the Rainbow antenna.

12. Rainbow's decision to enter into the January 6, 1986 Lease was dependent upon its understanding that the Bithlo tower was configured in such a way that there were only two available positions for television antennas, one above the other, and that the two positions did not overlap in any way. That understanding was based on representations made by Bithlo during and after the negotiations leading up to the execution of the lease and was specifically confirmed

in Exhibit C to the Lease. Because of the configuration of the tower, Rainbow made the decision that it was worthwhile to lease the top slot on the tower in early 1986, even though actual operation of its television station was several years away, in order to obtain the benefits of the top slot for itself and to prevent those benefits from being obtained by a potential competitor. Had the Bithlo tower been configured in such a way that there were two available television antenna positions at the same level of the tower, there would have been no need for Rainbow to lease either position until the other position was taken, and no competitive advantage to be derived from doing so.

13. Since entering into the January 6, 1986 Lease, Rainbow has paid Bithlo and Gannett more than \$300,000 in rent. Because various legal challenges to Rainbow's construction permit were only recently resolved in the United States Supreme Court, Rainbow has yet to broadcast its first television program.

14. Based upon Bithlo's representations and the January 6, 1986 Lease Agreement, Rainbow filed a site change application requesting leave to relocate its antenna to the Bithlo tower and install its transmitter in the transmitter building adjacent to the tower. Rainbow's site change application was approved by the FCC.

15. As explicitly confirmed in a January 14, 1986 letter to Rainbow's engineering consultant, attached as Exhibit 3, the top slot leased by Rainbow is slightly more than 46 feet in height, beginning at a height of 1470 feet above ground and ending at a height of 1516.7 feet above ground. This 46.7-foot interval forms the center of a 360-degree cylinder which constitutes the "aperture" of the Rainbow antenna slot. The radiation center of the top slot is approximately 1493 feet above ground. Operating from the top slot of the Bithlo tower enables the broadcaster to transmit its signal to the widest possible television audience, an audience which includes Orlando, Melbourne and Daytona Beach. A leasehold conferring possession of this space is a valuable asset.

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16. Had Rainbow been unable to lease the top slot on the Bithlo tower, it would not have entered into the January 6, 1986 Lease. Under those circumstances, Rainbow would have leased space on another tower, built its own tower or simply waited until an antenna location was actually needed before leasing tower space.

17. In October of 1990, Gannett informed Rainbow that it intended to allow Press Broadcasting Company ("Press"), a competitor of Rainbow's, to place a television antenna on the Bithlo tower within the aperture previously leased to Rainbow. On July 9, 1991, Gannett advised Rainbow by letter that it had entered into a lease with Press which permits Press to place a television antenna on the Bithlo tower at approximately 1502 feet above ground. A copy of Gannett's July 9, 1991 letter is attached as Exhibit 4. Gannett's execution of such a lease with Press is a breach of Rainbow's January 6, 1986 Lease.

18. Press is a commercial television broadcaster in the Orlando market and a competitor of Rainbow. Press currently broadcasts from Orange City, Florida, approximately 20 miles north of Orlando, as Channel 68. From its present location, Press covers a portion, but not all, of the market area Rainbow intends to cover. Press has obtained approval from the FCC to swap its license with Brevard Community College, which owns a license to broadcast on Channel 18. (That decision is on appeal.) The FCC has given its approval to Press' proposed license swap based on Press' representation that it intends to place its antenna within the top slot of the Bithlo tower. If Press is allowed to share Rainbow's top slot on the tower, the relocation will enable Press to compete directly with Rainbow and to serve exactly the same market area to be served by Rainbow.

19. The greater Orlando market is now served by four major commercial television stations. Rainbow believes that the market can accommodate a fifth commercial station, but does not believe the market can accommodate six stations. The presence of a sixth commercial



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station in the market which begins broadcasting ahead of or at the same time as Rainbow's Channel 65 will substantially reduce Rainbow's viewing audience and may prevent Rainbow from achieving the minimum viewing audience required by television advertisers. If Rainbow is unable to achieve that minimum viewing audience, it will cease to be an economically viable commercial enterprise. Substantial doubt concerning Rainbow's future economic viability will in turn prevent it from obtaining the long-term financing it needs to operate the station successfully over the long term. Even if Rainbow is able to proceed and begin operation of its station, it will generate substantially less revenue than would have been generated in the absence of Defendants' breach. It was the recognition that obtaining the top slot on the Bithlo tower could be a significant factor in Rainbow's future economic success which led Rainbow to lease that slot well in advance of its need for antenna space, and which has led it to pay more than \$300,000 in rent to Defendants since the Lease was executed.

20. Press' ability to enter the greater Orlando television market simultaneously with or ahead of Rainbow by securing space on the Bithlo tower which was already leased to Rainbow will cause severe and irreparable harm to Rainbow. Without the ability to secure a significant share of the viewing audience, Rainbow will lose millions of dollars of future profits and the market value of the station will decline substantially.

21. The January 6, 1986 Lease between Rainbow and Bithlo attached as Exhibit 2 is a valid and enforceable contract.

22. Rainbow has performed all of its obligations under the January 6, 1986 Lease and has satisfied all conditions imposed by that Lease.

23. Defendants' execution of a lease with Press which permits Press to occupy space already leased to Rainbow is a breach of the January 6, 1986 Lease between Rainbow and Defendants.



Count I
Specific Performance

24. Rainbow incorporates by reference the allegations contained in paragraphs 1 through 23 above.

25. Because Defendants' breach of the January 6, 1986 Lease is likely to result in the destruction of Rainbow's business, and because the subject matter of the Lease is unique, Rainbow can be made whole only through specific performance of the January 6, 1986 Lease. Rainbow has no adequate remedy at law.

Count II
Breach of Contract (Compensatory Damages)

26. Rainbow incorporates by reference the allegations contained in paragraphs 1 through 23 above.

27. As a direct and proximate result of Defendants' breach, Plaintiffs have suffered and will continue to suffer substantial damages, including but not limited to:

- a. loss of the expenditures made by Rainbow in reliance on the January 6, 1986 Lease, including but not limited to rent payments, engineering fees and the expenses of litigating legal challenges to Rainbow's construction permit;
- b. loss of prospective profits from operation of Rainbow's television station;
- c. diminution in the market value of Rainbow's television station; and
- d. damage to Plaintiffs' professional reputation.

28. Each of the elements of damage enumerated in the preceding paragraph was within the contemplation of the parties at the time they entered into the January 6, 1986 Lease as the probable result of a breach by Defendants.

Count III
Fraud/Negligent Misrepresentation

29. Rainbow incorporates by reference the allegations contained in paragraphs 1 through 20 above.

30. Before, during and after the execution of the January 6, 1986 Lease, Defendants represented to Rainbow that the Bithlo tower was configured in such a way that there were only two non-overlapping positions for television antennas, one above the other, and that the two positions would be allocated to potential tenants on a "first come, first served" basis. That representation was contained in an October 21, 1985 letter written by Charles Sanford, Vice President of Defendant Gannett, attached as Exhibit 1, in a January 14, 1986 letter written by Richard Edwards, Gannett's Director of Engineering, attached as Exhibit 3, and in numerous oral communications between Rainbow and Defendants during meetings and telephone conversations leading up to and following the execution of the Lease.

31. The representations described in paragraph 30 above were false.

32. Rainbow discovered the falsity of the representations described in paragraph 30 above in October 1990, when Defendants informed Rainbow that it intended to lease space to another television broadcaster at the same level of the Bithlo tower as the space previously leased to Rainbow. Rainbow could not have discovered the falsity of those representations, by the exercise of reasonable diligence, prior to October 1990.

33. The facts misrepresented to Rainbow by means of the representations described in paragraph 30 above were material.

34. At the time they made the representations described in paragraph 30 above, Defendants knew that those representations were false, made the representations without knowledge as to their truth or falsity, or made the representations under circumstances in which Defendants should have known of their falsity.

35. Defendants intended the misrepresentations described in paragraph 30 above to induce Rainbow to take action or forbear from acting in reliance on those misrepresentations, including but not limited to Rainbow's act of entering into the January 6, 1986 Lease.

36. Rainbow relied on the representations described in paragraph 30 above and was justified in so relying. Had Rainbow known that there were two available positions for television antennas at the same level of the Bithlo tower, as it discovered in October 1990, it would not have entered into the January 6, 1986 Lease and would not have paid Defendants the more than \$300,000 in rent it has paid since the Lease was executed.

37. As a direct and proximate result of Rainbow's justifiable reliance on the representations described in paragraph 30 above, Rainbow has suffered substantial damage, including damage which is distinct from the damage sustained as a result of Defendants' breach of the January 6, 1986 Lease.

38. The conduct alleged in this Count constitutes an independent tort.

WHEREFORE, Plaintiffs pray for judgment against Defendants, jointly and severally, and for the following relief:

A. with respect to Count I, a permanent injunction which prohibits Defendants from performing or proceeding with the lease agreement between Gannett and Press, which prohibits Defendants from leasing space on the Bithlo tower within Rainbow's aperture to any other broadcaster for the term of Rainbow's January 6, 1986 Lease, and which requires Defendants otherwise to comply with their obligations under that Lease;

B. with respect to Count II, judgment for the amount of Plaintiffs' compensatory damages, as determined by a jury, and interest as allowable by law;

C. with respect to Count III, judgment for the amount of Plaintiffs' compensatory damages, as determined by a jury, and interest as allowable by law;

- D. the costs of this suit; and
- E. such other and further relief as the Court deems just and proper.

Jury Trial Demand

Plaintiffs hereby demand a trial by jury of all issues so triable.

Respectfully submitted,

Margot Polivy
 RENOUF & POLIVY
 1532 Sixteenth Street, N.W.
 Washington, D.C. 20036

- and -

Malcolm Fromberg
 Elsa Alvarez
 FROMBERG, FROMBERG & LEWIS, P.A.
 20801 Biscayne Boulevard, Suite 505
 North Miami Beach, Florida 33180

- and -

Michael Nachwalter
 Richard Alan Arnold
 Kevin J. Murray
 Scott E. Perwin
 KENNY NACHWALTER SEYMOUR ARNOLD
 & CRITCHLOW, P.A.
 400 Miami Center
 201 South Biscayne Boulevard
 Miami, Florida 33131-2305
 Telephone: (305) 373-1000

Dated: July ____, 1991
 Miami, Florida

By: _____
 Michael Nachwalter
 Florida Bar No. 099989

Attorneys for Plaintiffs

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served by U.S.

mail this _____ day of July, 1991, upon the following:

Richard J. Suarez, Esq.
Corlett, Killian, Ober, McIntosh & Levi, P.A.
116 West Flagler Street
Miami, Florida 33130

Donald W. Hardeman, Jr., Esq.
Law Offices of Donald W. Hardeman, Jr.
2 Datan Center, Suite 1215
9130 South Dadeland Boulevard
Miami, Florida 33156

Scott E. Perwin

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GUY GANNETT BROADCASTING SERVICES

NORTHPORT PLAZA, 10 FORT ST. PORTLAND, MAINE 04104 603-787-1100

Charles R. Sanford
Vice President

October 21, 1985

Mr. Joe Ray
Rainbow Communications
1525 South Ocean Drive
Ft. Lauderdale, FL 33316

Dear Joe:

Good to hear that you are back in the ball game with Channel 65 and want space on our tower at Bithlo. I must call your attention to the fact that we are negotiating at the present time with 52 and should have a signed contract momentarily with them. It is first come, first served. We do have room for two, but the height position will be dictated by who has the signed contract first.

I also would like to call your attention to the possibility that you might work with Channel 52 and combine space on an antenna and save yourselves some money. It is possible to transmit as I understand 65's signal and 52's signal from one antenna. You might want to have your engineers check that out. Your contact for Channel 52 is Robert D'Andrea, President, WTGL, Channel 52, 26 Forest Ave., Cocoa, Florida 32922. He also runs Channel 22 outside of Tampa, Florida too.

Regards,



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LEASE AGREEMENT

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This Lease Agreement is made and entered into this 6th day of January 1986 by and among BITHLO TOWER COMPANY, a Florida general partnership with principal offices in Portland, Maine, ("Landlord"), and RAINBOW BROADCASTING, CHANNEL 65, a Florida partnership, with principal offices at Orlando, Florida, ("Tenant").

THE PARTIES HERETO EXPRESSLY AGREE THAT THE TERMS AND CONDITIONS OF THIS LEASE SHALL BE BINDING ONLY AS THEY RELATE TO THE TOP TELEVISION BROADCASTING ANTENNA SPACE LOCATED ON THE BITHLO TOWER. IF THE TOP TELEVISION BROADCASTING ANTENNA SPACE ON THE BITHLO TOWER IS OTHERWISE OCCUPIED THIS LEASE SHALL BE NULL AND VOID.

WITNESSETH

WHEREAS, Landlord is the owner of certain real property ("Premises") located at Bithlo, Florida; and

WHEREAS, Landlord has erected on the Premises a communications transmission tower ("Tower") substantially as described in Exhibit A hereto, and further, Landlord proposes to build on behalf of Tenant, at Tenants' cost, an addition to the existing transmitter building (the transmitter building as so enlarged being the "Transmitter Building") for Tenant's transmitting equipment, substantially as described in Exhibit B hereto; and

WHEREAS, Tenant is the permittee of Television Station Channel 65, Orlando, Florida (the "Station") and desires to place and operate the antenna for the Station at a location on the Tower, said location being described in Exhibit C hereto (the "Antenna Space"), to install and maintain, at Tenant's expense, certain transmission lines from the Station's transmitter equipment in the Transmitter Building across or under portions of the Premises and through or upon the Tower to the Antenna Space and to occupy an area within the Transmitter Building (the "Tenant's Space") in which to locate the Station's transmitter and related equipment; and

WHEREAS, Tenant has been granted a construction permit issued by the Federal Communications Commission ("FCC") and has filed a site change application to relocate its antenna to the Tower and to install its transmitter in the Transmitter Building; and

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Guy Gannett Publishing Co.

James E. Baker
Vice President-Finance
Treasurer
(207) 780-9332

One City Center
P.O. Box 15277
Portland, Maine 04101
(207) 780-9000

July 9, 1991

Mr. Joseph Rey, Partner
RAINBOW BROADCASTING CO.
c/o Joseph Rey
151 Crandon Boulevard #110
Key Biscayne, FL 33149

Re: Bithlo Tower Co./ Rainbow Broadcasting Co. Lease Agreement

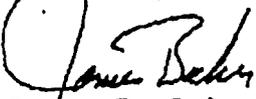
Dear Mr. Rey:

Gannett has executed a lease with Press Broadcasting Co. providing for the lease of space on the Bithlo Tower at approximately the height of 1,502 feet. We have, up to this point, consistently indicated to you, as well as to Channel 18, that Channel 65 would have the first choice as to its antenna location on the tower. On November 26, 1990, we requested that you complete Exhibit C to the Lease indicating the exact description and location of your antenna. We have not received any reply to that request.

In order for us to continue to provide you first choice of location for your antenna, we must insist that we receive your selection for the location of your antenna on or before July 24, 1991. If we have not heard from you by then, you will leave us no alternative but to allow Press Broadcasting Co. to have first choice of location for its antenna. If we do not hear from you, we will assume that Rainbow intends to locate its antenna on the tower so that it will be compatible with Press' choice of location.

Thank you.

Sincerely,


James E. Baker

JEB:dln
cc: M. Bock
J. Flaherty
S. LoGiudice
K. Edwards

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GUY GANNETT BROADCASTING SERVICES

NORTHPORT PLAZA, PO BOX 1771, PORTLAND, MAINE 04107-0771-330

Richard L. Edwards
Director of Engineering

P.O. Box 2128
Miami, Florida 33101
MS 604-0001

January 14, 1986

Mr. Leonard Spragg
73 N.E. 108th Street
Miami Shores, Florida 33161

RE: Channel 65, Orlando

Dear Leonard:

I have checked our records on the tower and found the top UHF position is listed as 1470 feet to 1516.7 feet above ground. This would relate to 1494 feet to 1540.7 feet HAAT. I also need to print out that this position was reserved for a Bogner BU132 antenna @ 2,685 lbs. windload and 3,600 lbs. deadweight. The lower antenna (1402 feet - 1465.5 feet above ground) was predesignated as an RCA TFU antenna.

Enclosed is a copy of the 301 filed for all FM stations (this one list WHOO). You should find the necessary terrain data to be helpful.

Let me know at your earliest date what I can do to help.

Sincerely,



Richard L. Edwards
Director of Engineering

RLE/cc
Enclosure

cc: Mr. Robert L. Gilbertson w/o enclosure
Mr. Charles R. Sanford

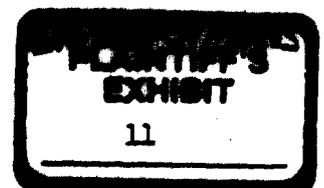


Exhibit 4



Guy Gannett Publishing Co.

James E. Baker
Vice President-Finance
Treasurer
(207) 780-9332

One City Center
P.O. Box 15277
Portland, Maine 04101
(207) 780-9000

July 9, 1991

Mr. Joseph Rey, Partner
RAINBOW BROADCASTING CO.
c/o Joseph Rey
151 Crandon Boulevard #110
Key Biscayne, FL 33149

Re: Bithlo Tower Co. / Rainbow Broadcasting Co. Lease Agreement

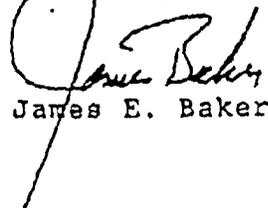
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Thank you.

Sincerely,



James E. Baker

JEB:dln
cc: M. Bock
J. Flaherty
S. LoGiudice
K. Edwards