

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Applications of)
RAINBOW BROADCASTING COMPANY)
For an extension of time)
to construct)
and)
For an Assignment of its)
construction permit for)
Station WRBW(TV), Orlando, Florida)

GC Docket No. 95-172
File No. BMPCT-910625KP
File No. BMPCT-910125KE
File No. BTCCT-911129KT

TO: The Honorable Joseph Chachkin
Administrative Law Judge

DOCKET FILE COPY ORIGINAL

PRESS BROADCASTING COMPANY, INC.
HEARING EXHIBIT

NO. _____

"Verified Complaint for Specific Performance
and Other Relief" in Rey v. Guy Gannett Publishing Co.
(filed with the Circuit Court of 11th Judicial Circuit
in and for Dade County, Florida)
executed November 2, 1990
(not including Exhibit A)

Federal Communications Commission	
Docket No. <u>GC 95-172</u>	Exhibit No. <u>9</u>
Presented by <u>Press Broadcasting</u>	
Disposition	Identified <input checked="" type="checkbox"/>
	Received <input checked="" type="checkbox"/>
	Rejected <input type="checkbox"/>
Reporter <u>YB</u>	
Date <u>6-27-96</u>	

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT, IN AND
FOR DADE COUNTY, FLORIDA

1

GENERAL JURISDICTION DIVISION

CASE NO.

JOSEPH REY, LETICIA JARAMILLO,
and ESPERANZA REY-MEHR, as General
Partners of RAINBOW BROADCASTING
COMPANY, a Florida Partnership,

90-54033

Plaintiffs,

vs.

GUY GANNETT PUBLISHING CO., Individually,
GUY GANNETT PUBLISHING CO., doing business
as GANNETT TOWER CO., GUY GANNETT PUBLISHING
CO., doing business as BITHLO TOWER COMPANY,
GANNETT TOWER COMPANY, Individually, MPE
TOWER, INC., Individually and GANNETT TOWER
COMPANY and MPE TOWER, INC. as General Partner
and copartners doing business as
BITHLO TOWER COMPANY, a Florida General partnership.

Defendants.

**VERIFIED COMPLAINT
FOR SPECIFIC PERFORMANCE AND OTHER RELIEF**
FBN: 026955

Plaintiffs, JOSEPH REY, LETICIA JARAMILLO and ESPERANZA REY-
MEHR, as General Partners of RAINBOW BROADCASTING COMPANY, a
Florida Partnership, sue Defendants, GUY GANNETT PUBLISHING CO.,
Individually, GUY GANNETT PUBLISHING CO., doing business as GANNETT
TOWER CO., GUY GANNETT PUBLISHING CO., doing business as BITHLO
TOWER COMPANY, GANNETT TOWER COMPANY, Individually, MPE TOWER,
INC., Individually and GANNETT TOWER COMPANY and MPE TOWER, INC.
as General Partners and as copartners doing business as BITHLO
TOWER COMPANY, a Florida General partnership and alleges:

EXHIBIT 1

LAW OFFICES OF FROMBERG, FROMBERG AND LEWIS, P.A.

MIAMI, FLORIDA

HALLANDALE, FLORIDA

1. This is an action for specific performance, temporary and permanent injunction and other relief.

2. At all times material to this action, Defendant, GUY GANNETT PUBLISHING CO. ("GUY GANNETT"), was and is a corporation organized under the laws of the State of Maine doing business in the state of Florida under its own name and as GANNETT TOWER CO. with offices in Miami, Dade County, Florida and having a business agent who resided or transacted business in Miami, Dade County, Florida. On or about September 1989, GUY GANNETT acquired all rights title and interest in the BITHLO TOWER COMPANY and continued to do business in the State of Florida as BITHLO TOWER COMPANY.

3. At all times material, GANNETT TOWER CO. (GANNETT TOWER) was a corporation organized under the State of Maine doing business in the state of Florida with offices in Miami, Dade County, Florida, a registered agent in Miami, Florida, and a business agent who resided or transacted business in Miami, Dade County, Florida. At all times material, GANNETT TOWER CO., was a General Partner and copartner in BITHLO TOWER CO., a Florida general partnership.

4. At all times material, MPE TOWER, INC., was a corporation organized under the State of Florida and a General Partner and copartner of BITHLO TOWER COMPANY ("BITHLO"), a Florida General Partnership, with its registered agent in Broward County, Florida.

5. At all times material to this action, the Plaintiffs, JOSEPH REY, LETICIA JARAMILLO and ESPERANZA REY-MEHR, were General Partners of RAINBOW BROADCASTING COMPANY, a Florida General Partnership ("RAINBOW").

6. At all times material to this action, BITHLO (hereinafter also referred to as "Landlord"), owned a communications transmission tower ("Tower") located in Bithlo, Florida, near Orlando, Florida.

7. At all times material to this action, Plaintiff, RAINBOW (hereinafter also referred to as "Tenant"), was the permittee of television station Channel 65, Orlando, Florida (the "Station"), and desired to place and operate the antenna for the "Station" at a suitable location. The Tenant had been granted a Construction Permit ("Permit") issued by the Federal Communications Commission ("FCC"), and, based upon BITHLO's representations and the execution of a Lease Agreement with the Defendants as set forth herein, filed a site change application and received FCC approval to relocate its antenna to the "Tower" and install its transmitter in the transmitter building on the Landlord's premises.

8. On or about January 6, 1986, the Plaintiff ("Tenant") entered into a Lease Agreement ("Lease") with BITHLO through its General Partners, GANNETT TOWER COMPANY and MPE TOWER, INC. A copy of said Lease Agreement is attached hereto and marked as Exhibit "A", and is incorporated in its entirety by reference.

9. Prior to entering into the Lease, the Plaintiff/Tenant had made it clear to the Defendant/Landlord that Tenant insisted, as a condition precedent to executing a lease, upon obtaining the top television broadcasting antenna space located on the Bithlo Tower for its sole and exclusive use, including the aperture of said slot. It was further clear from the representations made by

the Landlord, that there would only be two slots on the Tower and only two TV stations would be operating from said Tower; to wit, one television antenna in the upper slot of the Tower one below that slot on the Tower.

10. Landlord, in an attempt to obtain an agreement with Tenant, created a situation of real or illusory competition between the Tenant and Channel 52 for the "top slot", and represented that a lease would be signed on a first-come, first-served basis for the top slot, with the other TV station being relegated to the lower of the two slots.

11. The "top slot" is approximately 46 feet in height consisting of a base at 1470 feet above ground, a top at 1516 feet above ground and a radiation center at a height of approximately 1,493 feet above the ground. This 46 foot distance between the top and bottom of the "top slot" and a 360 degree cylinder circling the tower at this level constitutes the top slot's "aperture". Operating from the "top slot" enables the Tenant to transmit its signal to the widest possible audience, including Orlando, Melbourne, and Daytona Beach, have exclusive possession of a highly desirable centrally located transmitter site and satisfy the FCC.

12. In the absence of Tenant receiving the "top slot" and exclusive use of its aperture, Tenant would not have entered into the "Lease" and would have sought space on another tower or would have built its own tower.

13. The aforementioned facts were known to the Defendant/Landlord and was discussed by the parties and became the

subject of communications and agreement between the parties, prior to their entering into the "Lease", and were incorporated into the "Lease".

14. Even though RAINBOW, the Plaintiff/Tenant, was aware that the FCC's grant of the Permit for Channel 65 to RAINBOW was being challenged in the Courts by rejected applicants who sought to obtain the FCC permit for Channel 65, Plaintiff/Tenant nevertheless entered into the "Lease" and continued to make the required lease payments over the course of five years in order to preserve its top antenna slot (including the aperture of that slot) so that it would be available to Tenant at the conclusion of the litigation when Plaintiff was prepared to go forward with the erection of its antenna and the construction of the transmitter building. Defendant accepted said rent knowing that Plaintiff was preserving its exclusive rights to the "top slot" and its aperture.

15. At all times material to this action, the Defendant/Landlord represented to Plaintiff/Tenant that the "Lease" would provide Plaintiff with exclusive use of the top slot and its aperture, and knew that Plaintiff would execute the Lease only with that assurance. After the Lease was executed by the parties, Plaintiff furnished Defendant with an "Engineering Exhibit Application for Modification of Television Construction Permit" filed for RAINBOW by Jules Cohen & Associates dated February 3, 1986, which document was submitted to the FCC and approved by the FCC and specifically referred to the RAINBOW/Channel 65 antenna site as having a radiation center of 1,493 feet above ground level.

This Exhibit reaffirms the agreement between the parties as previously set forth herein.

SPECIFIC PERFORMANCE

16. Plaintiff realleges and reavers paragraphs 1 through 15 as if set forth herein.

17. Defendant/Landlord has advised the Plaintiff/Tenant that it intends to allow a television competitor of Plaintiff to occupy an antenna position within the aperture of Plaintiff/Tenant's slot. On October 31, 1990, Defendant/Landlord gave the Plaintiff/Tenant notice that it would allow Plaintiff to continue to occupy the "top slot" but not on an exclusive basis and that failure to agree would constitute a breach. This action constitutes an anticipatory breach by the Landlord of the "Lease". It means that instead of Plaintiff/Tenant having exclusive use of that top slot on the Tower, multiple antennae will be positioned within a 360 degree cylinder (aperture) of the slot leased to Plaintiff/Tenant.

18. Plaintiff/Tenant has been advised that the Defendant/Landlord intends to allow Press Broadcasting Company ("Press"), to place an antenna on the Tower within the aperture of the top slot previously and currently leased to Plaintiff/Tenant. Press is a direct competitor to the Plaintiff, and currently operates from a different location. From its present location, Press covers a portion of, but not all, of the area to be covered by Plaintiff operating from the Bithlo Tower. If Press is allowed to lease the "top slot" on the Tower, the relocation would enable Press to compete directly with the Plaintiff by now covering the

identical areas of the market which would be covered by Plaintiff.

19. The intended action of the Defendant/Landlord to execute a lease which would permit Press to occupy the same "top slot" within the aperture of that slot together with Plaintiff/Tenant would cause severe and irreparable harm to the Plaintiff for the following reasons: Press operates an established station in the market and by permitting its relocation to the "top slot" on the Bithlo Tower, it would permit Press to shift its coverage of the market into the identical areas as the Plaintiff, in direct competition with the Plaintiff.

20. In 1986 Press offered to buy an option to acquire Plaintiff/Rainbow for a price exceeding \$15 million dollars because of its exclusive occupancy of the top slot on the Bithlo Tower; such offer was unsolicited by Rainbow and rejected by Rainbow.

21. But for Defendant/Landlord's improper action in permitting or intending to permit Press' usage of the top slot on the Bithlo Tower, Plaintiff/Tenant would be the fifth station and the only independent television station transmitting from the center of the market which can presently only accommodate five stations from an economic viability standpoint. Such a position would have assured the viability of Plaintiff's station.

22. There are no remaining vacant allocations of television channels in the Orlando/Melbourne/Daytona Beach area, therefore no additional stations can be licensed. In the absence of a proposed lease on the Bithlo Tower by the Defendant/Landlord to Press, Plaintiff would not have another independent station competing in

its same marketing area. It was because of the allocation and competitive situation that Plaintiff applied for its permit in the first place, leased the top slot and its aperture on the Bithlo Tower, and paid rent for almost five years (said rents paid being approximately \$250,000) while the FCC's decision was being challenged.

23. It is anticipated that the Defendant/Landlord will immediately execute a lease with Press to allow the construction of its antenna within the top slot and its aperture. Thus, the relief sought by the Plaintiff/Tenant is of an emergency nature in order to prevent irreparable harm.

24. Plaintiff/Tenant has complied with all conditions precedent.

25. Plaintiff/Tenant does not have an adequate remedy at law.

WHEREFORE, Plaintiff/Tenant moves this Court to specifically enforce the "Lease" and to preclude the Defendant/Landlord from permitting another TV station from occupying the top slot and its aperture on the Tower, and for such other relief as this Court shall deem just and proper.

TEMPORARY AND PERMANENT INJUNCTION

26. Plaintiff/Tenant realleges and reavers each of the preceding paragraphs, and further alleges:

27. Defendant/Landlord, in an attempt to obtain additional revenue from its Tower and in total violation of Plaintiff's rights, has announced to Plaintiff/Tenant that it intends to place a competitor TV station in a position on its Tower to which

Plaintiff/Tenant claims exclusive use and occupancy. Defendant/Landlord intends to enter into a lease with a competitor of the Plaintiff for the antenna space reserved exclusively for the Plaintiff, and to allow such prospective tenant to immediately erect an antenna and to commence construction of a transmission building. The prospective tenant is Press, an existing independent TV station in the Orlando area which seeks to expand or shift its marketing area so as to compete directly with the marketing area to be covered by the Plaintiff, since both the Plaintiff and Press would be on the same height on the tower and thus would have the identical transmission capabilities. If Press is allowed to transmit from this site, it will render Plaintiff's permit valueless. See Affidavit from Susan Harrison attached hereto and made a part hereof as Exhibit "B". If Press is not allowed on the top slot, it can still transmit from its present location and will suffer no harm.

28. Plaintiff has paid rent for almost five years in order to preserve the exclusive use of the "top slot" on the Tower and assure its viability, even though it was not actually transmitting from said Tower.

29. Plaintiff is now prepared to build and place its antenna on its "top slot" on the Tower and to commence construction of the transmitter building on Defendant's premises in accordance with its Lease. However, Plaintiff's permit for Channel 65 to transmit from the Tower is not a viable business opportunity for Plaintiff if, in fact, Defendant/Landlord is permitted to place additional TV

COMPANY, a Florida Partnership, who being first duly sworn, acknowledged before me that he has reviewed the foregoing and the statements contained therein are true and correct.

WITNESS my hand and seal this 2nd day of ^{November} ~~October~~, 1990, in the County and State aforesaid.

[Handwritten Signature]
NOTARY PUBLIC, State of Florida

My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. FEB. 4, 1992
BONDED THRU GENERAL INS. UND.

FROMBERG, FROMBERG AND LEWIS, P.A.
Attorneys for Plaintiffs
420 South Dixie Highway, 3rd Floor
Coral Gables, Florida 33146
Telephone: (305) 666-6622

[Handwritten Signature]
MALCOLM H. FROMBERG

STATEMENT OF SUSAN D. HARRISON

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Susan D. Harrison, having been duly sworn, upon oath states the following:

I am a Principal in Harrison, Bond & Pecaro ("HB&P"), Washington, DC, a consulting firm specializing in financial and economic analyses for the communications industry.

Since 1974, I have been responsible for the preparation of approximately 1,000 analyses of radio and television stations, cable television systems, and other electronic communications media. In many of those cases, I was called upon to make revenue and expense forecasts for new entities just starting up, and to provide an opinion as to their ultimate economic viability.

I have rendered expert testimony in more than thirty proceedings before the Federal Communications Commission and in United States District Court.

The Engagement

I have been retained by Rainbow Broadcasting Company¹ ("Rainbow"), permittee of television channel 65, Orlando, to prepare an analysis of the effect on Rainbow Broadcasting of Gannett Tower Company ("Gannett") allowing Press Broadcasting Company ("Press") to locate its television transmitting antenna in the top slot and its aperture on the broadcast transmitting tower located at Bithlo, Florida, and owned and operated by Gannett.

Summary of Opinion

It is my opinion that if Gannett takes this action, Rainbow Broadcasting will suffer irreparable harm. Specifically, Rainbow's television station on Channel 65, licensed to Orlando, will be rendered worthless. Rainbow will be unable to secure financing to build and operate the station and will be left holding a Construction Permit that has no value on the open market today or for the foreseeable future.

¹ Neither I, nor Harrison, Bond & Pecaro, nor any other employees thereof, have any personal interests in the outcome of this matter.

EXHIBIT B

Data Sources Relied Upon

In coming to these opinions, I have reviewed and relied upon the following documents: The Broadcasting Yearbook; The Television Factbook; Arbitron Ratings; NAB Financial Data for TV Markets; NAB Financial Data for TV Stations; CACI, Inc., Database; Revenue and Expense Projections for Channel 65 Prepared by Rainbow Management; and a Summary of Costs Incurred by Rainbow Resulting in the Grant of the Television Channel 65, Orlando, Construction Permit by The FCC and the Subsequent U. S. Supreme Court Affirmation of that FCC Decision.

A. Irreparable Harm - The Construction Permit for the Television Station on Channel 65 Will Be Rendered Worthless Both Today and For the Foreseeable Future

If Gannett allows Press to broadcast from the top slot and its aperture on the Bithlo tower, 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.

This opinion is based on the following:

1. There are currently four television stations (all of which are currently affiliated with a network) operating from a centrally-located transmitter site in the Orlando area. That market can only accommodate five television stations, i.e., one additional station. Any more stations would not be economically viable since they would not achieve minimum share levels required for buyers of television advertising time.
2. Rainbow was positioned on the Bithlo tower to be the fifth station operating from that central market location.
3. Press's entry on the same slot on the Bithlo tower as currently leased to Rainbow would create two television stations where only one additional station can economically survive on that site.
4. Rainbow will not generate a sufficient viewing audience to achieve minimum share levels required by buyers of television advertising time;
5. Rainbow's revenues (if Press is in their slot) will not offset its operating expenses, capital expenditures, and financing costs;

6. Rainbow will not have a re-sale value on the open market equal to the original cost of building the station and covering its expense short-falls.
7. Rainbow will no longer be economically viable.
8. No financing will be available to build and operate the station, given that it is not economically viable, and the station will never be built.

B. Investment Criteria in the Broadcasting Industry

Investors in broadcast properties evaluate opportunities presented to them using standard financial analysis techniques. Simply put, the investor considers whether the project can reasonably be expected to return him his required rate of return. If it can, and assuming other basic criteria are met, he is likely to go forward with the investment.

In the case of Rainbow, the material change that will result from Gannett permitting Press to occupy the top slot and its aperture on the Bithlo tower is that Rainbow will not be able to attract a sufficient viewing audience to achieve minimum share levels required by buyers of advertising time.

C. Rainbow/Channel 65's Loss of Fair Market Value

For all practical purposes, if Gannett allows Press to occupy this slot, Rainbow's audience- and revenue-generating capability will be effectively destroyed. Instead of garnering a required minimum (for viability purposes) 4% to 5% audience share, Rainbow will probably attract no more than 2% of the market's audience. As such, it would have no opportunity to sell advertising time to national advertisers.

D. Conclusion

Effectively, if Gannett allows Press to mount its antenna in the top slot and its aperture of the Bithlo tower, Rainbow will have endured eight years of litigation only to find that its television station can never be built since it has no fair market value on the open market today or in the foreseeable future.

Further affiant sayeth not.

Harrison, Bond & Pecaro

By Susan D. Harrison
/Susan D. Harrison

Sworn to and subscribed before me this 2nd day of November, 1990,
in the District of Columbia.

M. Dee English
Notary Public

My Commission expires: My Commission Expires November 30, 1992