

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) GC Docket No. 95-172
For an extension of time) File No. BMPCT-910625KP
to construct) File No. BMPCT-910125KE
and) File No. BTCCT-911129KT
For an Assignment of its)
construction permit for)
Station WRBW(TV), Orlando, Florida)
TO: The Honorable Joseph Chachkin
Administrative Law Judge

PRESS BROADCASTING COMPANY, INC.
HEARING EXHIBIT

NO. _____

Excerpts of Transcript of
Testimony of Joseph Rey
in Rey v. Guy Gannett Publishing Co.,
Case No. 90-2554 Civ (SM) (U.S.D.C. S.D. Fl.)
January 11, 1991

<u>Federal Communications Commission</u>	
Docket No. <u>GC 95-172</u>	Exhibit No. <u>10</u>
Presented by <u>Press Broadcasting</u>	
Disposition	Identified <u>X</u>
	Received <u>X</u>
	Rejected _____
Reporter <u>JS</u>	
Date <u>6-27-96</u>	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

JOSEPH REY, LETICIA JARAMILLO,) CASE NO. 90-2554-CIV-
and ESPERANZA REY-MEHR, as) Marcus
General Partners of RAINBOW)
BROADCASTING COMPANY, a Florida)
Partnership,)

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.)

Miami, Florida
January 11, 1991
9:50 a.m.

EXCERPT
TRANSCRIPT OF HEARING
BEFORE THE HONORABLE STANLEY MARCUS

APPEARANCES:

PLAINTIFFS: MALCOLM H. FROMBERG, ESQ.
ELSA ALVAREZ, ESQ.
420 South Dixie Highway
Third Floor
Coral Gables, Florida 33146

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APPEARANCES:

PLAINTIFFS:

MARGOT POLIVY, ESQ.
1532 Sixteenth Street, N.W.
Washington, D.C. 20036

DEFENDANTS:

DONALD W. HARDEMAN, JR., ESQ.
RICHARD J. SUAREZ, ESQ.
116 West Flagler Street
Miami, Florida 33130

REPORTER:

ROBERT A. RYCKOFF
Fifth Floor
301 North Miami Avenue
Miami, Florida 33128

1 (Call to order of the Court.)

2

* * * * *

3

THE COURT: Be seated, please, folks.

4

You may proceed with your next witness.

5

6

We might as well get started with Mr. Rey. When you want to take a break for lunch, I am happy to do that,

7

but let's get him started. Maybe we can finish him on

8

direct and then break or something like that.

9

10

If you would raise your right hand, sir, we will have you sworn.

11

JOSEPH REY, PLAINTIFFS, SWORN.

12

THE COURT: Have a seat.

13

State your name, and spell your last name, please.

14

THE WITNESS: Joseph Rey, R-e-y.

15

16

THE COURT: And you can speak right into that microphone. If you would just hold that to your -- thank you much.

17

18

DIRECT EXAMINATION

19

BY. MR. FROMBERG:

20

Q Mr. Rey, are you one of the principals of the plaintiff Rainbow Broadcasting?

21

22

A I am.

23

Q Could you tell the Court briefly what your background is in radio and television?

24

25

A I have been involved in the broadcasting industry since

1 construction financing of a T.V. station where the
2 competitor is on the same tower (phonetic). That's --

3 THE COURT: Why don't you put the question as
4 directly as that, what opinion, if any, he may have as to
5 his ability to obtain financing depending on A or B or C?

6 We will take that. So we are clear, we are taking
7 it simply as lay opinion, Mr. Hardeman, under 702 of the
8 Federal Rules Of Evidence. We are not taking it as expert
9 testimony here, but to the extent that he has an opinion, it
10 may be of some relevance to the issues and lawsuit or, at
11 least, insofar as it may bear upon the issue of irreparable
12 harm. Perhaps it bears on the balancing of the equities.

13 You may proceed.

14 MR. FROMBERG: Thank you, Judge.

15 Q Mr. Rey, have you had reasonable assurances of financing
16 all the way up to the point of this litigation?

17 A Yes.

18 Q How does the presence of the issues raised in this
19 litigation affect those reasonable assurances of financing
20 that you have had up to date?

21 MR. HARDEMAN: I object, Your Honor.

22 It's an opinion based on hearsay entirely.

23 THE COURT: We will take it.

24 You may proceed.

25 THE WITNESS: Should I answer, your Honor?

1 A Depending on the timing I said earlier, sir.

2 Q No matter if they are next door, if they have the lower
3 slot, as you described, on this tower --

4 A Correct. Depending on the timing.

5 Q -- your business is dead?

6 MR. FROMBERG: Your Honor, objection.

7 It's repetitious. We have been through this
8 several times.

9 THE COURT: We will take the answer.

10 Let's proceed and move on, if we can, Mr. Hardeman.

11 MR. HARDEMAN: Yes, Your Honor.

12 Q Is that correct?

13 A Depending on the timing.

14 Q Sir, as things stand right now, you don't have any
15 contracts to purchase an antenna, do you?

16 A I have not signed a purchase order for an antenna, no,
17 sir.

18 Q You have no contracts to purchase the waveguide, which
19 is the main connecting link between your transmitter --

20 A I have not signed a purchase order for a waveguide, no,
21 sir.

22 Q You have not purchased or have a contract to purchase
23 your transmitting equipment?

24 A I have not signed a purchase order for a transmitter,
25 no, sir.

1 Q You don't have your building plans for your transmitter
2 area?

3 A I have been trying to get Gannett to give me information
4 on the bidders. We had meetings, we were under way.
5 Gannett happens to have a drawing of an addition. They are
6 holding back the information required for Rainbow to have
7 continued --

8 Q You understand you can't design a transmitter room
9 without knowing what your equipment is?

10 A The transmitter room -- we had a meeting on this, Mr.
11 Hardeman. I think it was either August or September before
12 this mess started. The transmitter room that's been
13 designed is functional for Rainbow, and we were on track
14 back in August and September to start construction on that
15 building.

16 Q The only asset that Rainbow has right now is your
17 construction permit, the piece of paper?

18 A And the lease. This is an asset, too.

19 Q Now, you also do not have any written loan agreements
20 with anybody to finance your venture --

21 A Written, no.

22 Q Who is your financier? Who is loaning you the money for
23 this --

24 A Rainbow has an agreement with an investor to build and
25 operate this station. It has not been reduced to writing

1 because of this.

2 Q Is this a person you are referring to?

3 A Yes, sir.

4 Q Who is it?

5 A By the name of Howard Conant.

6 Q Is he representing a group of investigators or just
7 himself?

8 A I believe it's just himself.

9 Q So he has not affirmatively loaned you any money?

10 A Pardon?

11 Q He has not actually given you some money and taken a
12 promissory note, for example?

13 A I said it has not been reduced to writing because of
14 this. There is an agreement for the financing of the
15 station, and then this hit and everything was put on hold.
16 You asked me that in a deposition. I said that everything
17 had been put on hold because of this.

18 Q Have you advised the F.C.C. of the fact that your
19 financing has been put on hold?

20 MR. FROMBERG: Objection, Your Honor.

21 That's not a legal requirement. That's not a
22 proper question.

23 THE COURT: What relevance does it have?

24 MR. HARDEMAN: Your Honor, it goes to whether or
25 not this gentleman has met the legal requirements to

1 continue going on the air.

2 THE COURT: What obligation, though, did he have to
3 notify them of that fact?

4 MR. HARDEMAN: The evidence is going to be through
5 Mr. Hummers, that once the application for a construction
6 permit is made -- and in that application the applicant has
7 to attest to the fact that he has the financial wherewithal
8 to construct and operate his business for a period of three
9 months without any revenues, and if there is any material
10 change in that circumstance, it's my understanding that the
11 F.C.C. requires continual update of that information, a
12 reverification of that information, or (unintelligible)
13 their construction permit expires January 31st of this year,
14 I believe. They were to have filed an extension December
15 31st of 1990. I am not aware that they have done it. But
16 if they filed for the extension, they have to reassert that
17 they have the financial wherewithal to continue, which he
18 does not have (phonetic).

19 THE COURT: We will take it subject to connection
20 at a later point.

21 Q Has this gentleman told you he will no longer loan you
22 the money?

23 A It's pending, the resolution of this matter.

24 Q Has he told you that if your space is not exclusive on
25 there, that he won't finance you?

1 A He has told me if Channel 18 gets on that tower, the
2 likelihood is that he will not finance the station.

3 Q Have you talked to anybody else about loaning you money?

4 A As of late, he is the only person I was talking to.

5 I would like to clarify something for the Court, too.

6 THE COURT: All right.

7 A It is Rainbow's understanding that Rainbow has two years
8 to construct the station from September, 1990, when the
9 litigation against the F.C.C. was terminated in the Supreme
10 Court.

11 MR. HARDEMAN: Your Honor, can I have a moment,
12 please?

13 THE COURT: Yes.

14 (Pause.)

15 Q Mr. Rey, you have a copy of the final lease, do you not?

16 A Plaintiffs' Exhibit 9.

17 Q Would you look at page 20, please, an article called --
18 entitled "Interference"?

19 A Yes.

20 Q The first paragraph, "Interference," and it says: That
21 tenant understands that landlord intends to grant to other
22 tenants facilities and/or rights which are the same as or
23 similar to those granted herein to the tenant.

24 Do you understand what that meant when you signed this?

25 A That meant the lower slot, as far as I was concerned.

1 Q That's what it meant to you?

2 A Yes, sir.

3 Q It goes on to say that you are to cooperate with other
4 tenants and potential tenants so as to anticipate and
5 prevent interference.

6 A My interpretation of this paragraph was that when
7 Rainbow went out it caused interference to existing tenants
8 on that tower such as the FM stations, et cetera, then this
9 would be apropos, or if other tenants further, in the
10 future, were to come in, et cetera, but it meant lower slot
11 as far as I was concerned.

12 Q Mr. Rey, what is the name of the person who has got the
13 loan commitment for you again?

14 A Howard Conant.

15 Q How to you spell that?

16 MR. FROMBERG: Your Honor, objection.

17 It's been asked and answered.

18 MR. HARDEMAN: I am trying to do it for
19 clarification, Judge.

20 MR. FROMBERG: I think it's a concern that I have
21 in terms of the revealing of somebody else that is not -- we
22 are talking about a tower that is leasing space to a tenant.
23 This is not a T.V. station, it's not a competitor. I have
24 no problem to this person on, but I do have a problem with
25 two competitors (unintelligible) knowing about --

1 THE COURT: The objection is overruled. To the
2 extent that you are seeking that I put a confidentiality
3 order around the question and the answer concerning a
4 hearing conducted in open court as to this preliminary
5 injunction, that application is denied. I do not see a
6 sufficient basis. I understand the reason and the
7 rationale, but I am not prepared to close this Court in an
8 open hearing as to this matter.

9 MR. FROMBERG: In our view, Your Honor, we are not
10 here before the F.C.C. and arguing about rights, which they
11 can always object to if they feel it's appropriate for the
12 F.C.C. We are talking about a lease. We are talking about
13 a right to a certain area on a lease. I think that this is
14 not relevant to --

15 THE COURT: I understand. You will recall that I
16 said earlier to the extent that we had discussed this
17 matter, to the extent you wanted to explore this area when
18 an objection was made, I said that I would permit him to
19 properly explore it on cross. That application is denied.

20 You may proceed.

21 Q Mr. Rey, how do you spell Mr. Conant's name?

22 A C-o-n-a-n-t.

23 Q Is he located in Miami?

24 A No, he is not.

25 Q Where is he located?

1 A Chicago, Illinois.

2 Q How much is his loan commitment?

3 MR. FROMBERG: Objection.

4 THE COURT: Isn't this relevant as to bearing
5 specifically and directly on the claimed irreparable injury
6 and the balancing of hardships?

7 MR. HARDEMAN: It absolutely is, Judge.

8 THE COURT: I mean, your claim here is that unless
9 we go ahead and enjoin join them, basically your client is
10 out of business, he can't function, or, at least, perhaps
11 put more artfully, he isn't able to get the business off the
12 ground. And presumably that's because of the difficulty in
13 obtaining financing, and so on, and so forth.

14 It seems to me that being part of the factual
15 predicate for your claim that, A, he would sustain
16 irreparable injury, and, B, that the balance of equity is
17 the hardship tips in favor of your clients against the
18 defendant, that he ought to be permitted to explore
19 precisely that issue, and doesn't this question go to that
20 issue?

21 MR. FROMBERG: The question of irreparable harm is
22 basically handled by virtue of expert testimony as to what
23 this market will bear in terms of advertising. And upon the
24 testimony of experts, that the introduction of a competitor
25 in this T.V. market would reduce the rating to a two or

1 less, and, therefore, not attract any advertisers. That is
2 what would affect the financing --

3 THE COURT: Did I not hear you to say earlier that
4 one of the concerns that your client had was that his
5 ability to obtain financing was very much at issue here?

6 MR. FROMBERG: Yes, but it's --

7 THE COURT: Wasn't that part of it? I mean, you
8 may want to put in evidence in the form of expert testimony
9 as to that, but I am hard pressed to see if it's relevant
10 why he can't ask your client the question.

11 Overruled.

12 You may proceed.

13 Q How much of a loan commitment do you have from Mr.
14 Conant?

15 A In the neighborhood of \$4,000,000.

16 Q And this is just a handshake agreement?

17 A It's an agreement that we have that has not been reduced
18 to writing, sir. We plan to reduce it to writing and make
19 it formal in that sense.

20 Q Is there any security that you have given or collateral
21 for this loan?

22 A Yes. A minority participation on the station.

23 Q I am sorry?

24 A A minority participation in the station.

25 Q Mr. Conant is a minority member?

1 A No. By that I mean --

2 Q Or do you mean a minority shareholder?

3 A Shareholder, yes. That's what I mean.

4 Q The reason I was confused is because I understand that
5 one of the reasons that you were granted the construction
6 permit in the first instance had to do with some sort of
7 minority preference, the fact that you were --

8 A That was the issue in front of the Supreme Court.

9 Q You are using "minority" now in a different sense, that
10 he wants to be a minority shareholder of your partnership?

11 A Correct.

12 THE COURT: Any further questions on cross?

13 MR. HARDEMAN: No other questions, Your Honor.

14 Could I remind Your Honor of the time?

15 THE COURT: Yes. I understand.

16 Is there any redirect for Mr. Rey, Mr. Fromberg?

17 MR. FROMBERG: Your Honor, just a couple.

18 REDIRECT EXAMINATION

19 BY MR. FROMBERG:

20 Q Mr. Rey, do you know whether if this Court determines
21 that Rainbow has an exclusive right to the top space on the
22 tower, whether the F.C.C. will review the swap and
23 reconsider the granting of the swap?

24 A I am sorry?

25 Q If this Court determines that Press cannot be on this

1 tower in Rainbow's slot, will the F.C.C. review the swap?

2 A I believe they will.

3 Q I refer you to Exhibit -- I believe it was 6 (phonetic)
4 was introduced into evidence -- does this letter refer to
5 the -- make reference to the fact that your tower may be
6 heavier than the RCA, and that Bithlo will pick up the cost
7 of the strengthening of the tower if that's the case?

8 A Yes, it does.

9 MR. HARDEMAN: Your Honor, may I have one quick
10 question on redirect?

11 THE COURT: I am not sure Mr. Fromberg was done.

12 MR. HARDEMAN: I am sorry. I thought he said he
13 was.

14 MR. FROMBERG: I have no further questions.

15 THE COURT: All right. Any recross?

16 MR. HARDEMAN: Very briefly, Your Honor.

17 RECCROSS EXAMINATION

18 BY MR. HARDEMAN:

19 Q Mr. Rey, what was the date of that financial commitment
20 from Mr. Conant?

21 MR. FROMBERG: Your Honor, this is not recross.
22 It's not in response to my one question.

23 THE COURT: I will take the answer to that
24 question.

25 A What is the date of what, sir?

1 Q The financial commitment from Mr. Conant?

2 A I have had ongoing conversations with Mr. Conant for a
3 number of years. I don't know if I can give you an exact
4 date.

5 Q Did he tell you that he would give you \$4,000,000?

6 A This has been an ongoing conversation. I said obviously
7 when the litigation ended with the Supreme Court, but pick
8 your date in the last few months.

9 Q Any time within the last few months would be fairly
10 accurate?

11 A Well, since June of 1990. You know, we -- Rainbow
12 suspected that the Supreme Court would not review its own
13 decision. It officially was made -- the denial of review
14 was made official in September, so --

15 MR. HARDEMAN: Your Honor, I have a question of Mr.
16 Fromberg relating to an exhibit. I am not sure that he
17 introduced it into evidence.

18 The Asbury Park Press I, \$15,000,000 --

19 MR. FROMBERG: I think it is in evidence as Exhibit
20 18.

21 THE COURT: I think we had received 18.

22 Was there an objection to that?

23 MR. HARDEMAN: No, there was not. I just wanted to
24 be sure that it was in.

25 THE COURT: So the record is clear, we have

1 received Plaintiffs' 18 in evidence.

2 Q Mr. Rey, this \$15,000,000 offer you referred from Press
3 back in September of 1986, you had the information about the
4 economic viability of your station to evaluate your station
5 at that time, did you not?

6 MR. FROMBERG: Judge, outside the scope.

7 THE COURT: Sustained.

8 MR. HARDEMAN: I don't have any other questions.

9 THE COURT: Thank you, sir. You may step down.

10 THE WITNESS: Thank you.

11 (Witness complies.)

12 THE COURT: Well, we got started, but we didn't get
13 as far as counsel had hoped and expected. We still have Mr.
14 Spragg, Mr. Harrison, Mr. Holland, Mr. Edwards, maybe Mr.
15 Ruiz (phonetic) for the plaintiffs; Mr. Baker, Mr. Edwards
16 and Mr. Hummers for the defense by my count.

17 Having said that, you tell me as to timing, and
18 then let's put our heads together and see if we can put a
19 couple of afternoons together to complete the task. The
20 reason I raise it with you is I will show you this calendar
21 here at sidebar, and you will be able to see the problem we
22 have as to scheduling with criminal cases coming up.

23 (Sidebar discussion off the record.)

24 (Proceedings concluded at 4:23 p.m.)

25