RECEIVED

JUL 1 1 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

In re Applications of	)	
	)	
RAINBOW BROADCASTING COMPANY	)	GC Docket No. 95-172
	)	File No. BMPCT-910625KP
For an extension of time	)	File No. BMPCT-910125KE
to construct	)	File No. BTCCT-911129KT
	)	
and	)	
	)	
For an Assignment of its	)	
construction permit for	)	
Station WRBW(TV), Orlando, Florida	)	

TO: The Honorable Joseph Chachkin
Administrative Law Judge

DOCKET FILE COPY ORIGINAL

PRESS BROADCASTING COMPANY, INC.
HEARING EXHIBIT

NO. ____

"Petition for Reconsideration"
filed with the Commission
by Press Television Corporation
February 25, 1991

Federal Communications Commission
Docket No. GC 95-172 Exhibit No. 13
Presented by ~~Rainbow~~ Broadcasting Press
GS 6-27-96
Dispostion { Identified X
Received X
Rejected ____
Reporter GS
Date 6-27-96

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

BECHTEL & COLE
FILE COPY

In re Application of	)	
	)	
RAINBOW BROADCASTING COMPANY	)	File No. BMPCT-910125KE
	)	
For Extension of Construction Permit	)	

RECEIVED
FEB 25 1991
Federal Communications Commission
Office of the Secretary

TO: Roy J. Stewart, Chief
Mass Media Bureau

PETITION FOR RECONSIDERATION

1. Press Television Corporation ("Press") hereby seeks reconsideration of the grant of above-captioned application of Rainbow Broadcasting Company ("Rainbow"). That grant was reflected in a public notice, Broadcast Actions, Report No. 21047, Mimeo No. 11731, released February 12, 1991.

2. Rainbow's application was filed on January 25, 1991. Acceptance of Rainbow's application for filing was reflected in a public notice, Broadcast Applications, Report No. 14919, Mimeo No. 11606, released February 5, 1991. On February 15, 1991, Press -- unaware that the Rainbow application had already been granted on February 5, 1991, the day on which notice of the filing of the application was first given [1/] -- filed an Informal Objection to that application. Now, in light of the fact that Rainbow's application had been granted prior to the filing of Press' Objection, Press hereby formally seeks

---

[1/] Press inadvertently failed to notice the February 12 public notice of the grant. As a practical matter Press did not expect such a notice only one week after the application first appeared on public notice as having been filed.

reconsideration of the grant for all of the reasons set forth in its Objection. For the convenience of the Commission's staff a copy of Press' Informal Objection is appended hereto and incorporated by reference herein. [2/]

3. The instant petition fully complies with Section 1.106, which governs the filing of petitions for reconsideration. It is being filed within 30 days of the public notice of the action of which reconsideration is sought. See Section 1.106(f). While the matters raised were not presented to the Bureau prior to its action, Press certainly attempted to raise them in an appropriately timely manner: Press' Informal Objection was filed just ten days after public notice of the acceptance of Rainbow's application. [3/]

4. Finally, the matters raised in Press' Informal Objection clearly fall within the range of matters which justify reconsideration. See Section 1.106(c). The Objection raises substantial and material questions concerning Rainbow's basic and

---

[2/] To the extent that the Commission may deem it administratively efficient or otherwise appropriate, Press will withdraw its Informal Objection, subject to the understanding that the issues raised therein will be substantively considered in connection with the instant Petition for Reconsideration. That is, Press' concern is not with the particular procedural vehicle by which the issues might be raised; rather, Press' concern is that the issues be substantively considered and resolved by the Commission at the earliest possible time.

[3/] In view of the fact that notice of the acceptance of Rainbow's application was released the same day that Rainbow's application was granted, it would in any event have been impossible for Press to learn of the filing of Rainbow's application from the Commission's releases, prepare an objection, and file it prior to grant.

comparative qualifications to remain a permittee. The factual predicate for those questions has arisen (or at least Press has learned of them) over the course of the last six months -- i.e., well after Rainbow's previous application for extension of its permit and, thus, well after the last opportunity for raising these questions. See Section 1.106(c)(1). Moreover, the questions raised by Press are of overriding importance from a public interest perspective. See Section 1.106(c)(2).

5. Rather than burden the Commission with a restatement of the questions at issue, Press hereby incorporates by reference herein its Informal Objection. On the basis of all of the factual and legal arguments presented therein, it is clear that Rainbow's application should not have been granted. Accordingly, Press submits that that grant should be reconsidered and rescinded and, further, that Rainbow's application should be denied or, at a minimum, designated for hearing on the issues described in the appended Informal Objection.

Respectfully submitted,

/s/ Harry F. Cole
Harry F. Cole

Bechtel & Cole, Chartered
2101 L Street, N.W.
Suite 502
Washington, D.C. 20037
(202) 833-4190

Counsel for Press Television Corporation

February 25, 1991

APPENDIX

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

In re Application of	)	
	)	
RAINBOW BROADCASTING COMPANY	)	File No. BMPCT-910125KE
	)	
For Extension of	)	
Construction Permit	)	

TO: The Commission

INFORMAL OBJECTION

Harry F. Cole

Bechtel & Cole, Chartered
2101 L Street, N.W.
Suite 502
Washington, D.C. 20037
(202) 833-4190

Counsel for Press Television Corporation

February 15, 1991

TABLE OF CONTENTS

Summary ii

Background 2

Argument 6

I. Rainbow has failed to make any of the showings required of an applicant for an extension of a construction permit. 6

II. Rainbow's application and lawsuit raise serious questions about Rainbow's basic and comparative qualifications which would have to be examined in hearing before any extension could properly be granted. 11

A. Rainbow's Financial Qualifications 12

B. Rainbow's Comparative Qualifications 14

C. Rainbow's Anti-Competitive Conduct 17

D. Rainbow's Abuse of the Commission's Processes . . 20

E. Rainbow's Misrepresentation and Lack of Candor . . 21

III. Conclusion 23

Summary

Rainbow Broadcasting Company ("Rainbow") is seeking an extension of its permit to construct a television station on Channel 65 in Orlando, Florida. Rainbow was first awarded that permit in 1984. Since that time it has not ordered, or even selected, any equipment. In seeking previous reinstatements of its permit, Rainbow has claimed that it had not previously initiated construction because of the pendency of appellate litigation challenging the initial grant of the permit. That litigation was resolved in June, 1990. Since that time, however, Rainbow has still taken absolutely no steps toward construction.

In its instant application, Rainbow asserts that a "dispute" with its tower owner has prevented it from constructing. But that "dispute" -- which Rainbow has chosen not to describe for the Commission's benefit -- does not preclude Rainbow from using the tower. To the contrary, the tower owner agrees that Rainbow has a lease and can mount its antenna when it wishes. The "dispute" consists of an effort by Rainbow to prevent the tower owner from leasing certain space on the tower to Press Television Corporation ("Press") for its use in connection with Station WKCF(TV), Clermont, Florida. (The Commission has already authorized Press to locate its antenna on the tower and at the height which Rainbow is seeking to prevent.)

In its litigation against the tower owner, Rainbow has stated clearly and unequivocally that Rainbow will not construct

its station if Press is permitted to mount its antenna on the tower as authorized by the Commission. This position is based on Rainbow's view that it would not be able to compete effectively with Press under those circumstances. It is therefore clear that Rainbow's failure to construct its station is attributable solely to Rainbow's purely unilateral and voluntary decision that the competitive environment will not justify construction. But such a private motivation has been repeatedly found by the Commission not to justify a permit extension. Since it has failed to make a case in support of an extension, Rainbow's application must be denied.

But even if Rainbow's application is not denied, it cannot be granted until a number of important questions -- raised by Rainbow itself in its own words and conduct -- are resolved. For example, Rainbow has consistently certified to the Commission that it is financially qualified to construct its station; and yet, before a Federal judge in the civil litigation in Florida, Rainbow has asserted that its financial qualifications are extremely precarious. Similarly, Rainbow has repeatedly certified to the Commission that its ownership structure has a certain composition; and yet, in the civil litigation, Rainbow has indicated the presence of a previously undisclosed individual who apparently has a present (or at least imminent) ownership interest never before revealed to the Commission. Rainbow's failure to disclose this present (or potential) interest is especially important in view of the fact that Rainbow acquired the permit by virtue of a very narrow comparative preference based on the Commission's minority

preference policy.

Rainbow's multi-faceted campaign against Press' efforts to upgrade the facilities of Station WKCF(TV) reflect an anti-competitive inclination and a willingness to indulge in abuse of the Commission's processes. Finally, the totality of Rainbow's conduct raises substantial and material questions as to whether Rainbow has misrepresented or lacked candor before the Commission.

All of these questions would have to be addressed in detail and resolved favorably to Rainbow before its application could properly be granted. In view of the fact that Rainbow has, in the civil litigation, already established a record which contradicts the positions it has taken at the Commission, it is virtually impossible that these questions could be resolved in Rainbow's favor. Accordingly, its application must be denied.

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

In re Application of	)	
	)	
RAINBOW BROADCASTING COMPANY	)	File No. BMPCT-910125KE
	)	
For Extension of	)	
Construction Permit	)	

TO: The Commission

INFORMAL OBJECTION

1. Pursuant to Section 73.3587 of the Commission's Rules [1], Press Television Corporation ("Press") [2] hereby objects to the above-captioned application of Rainbow Broadcasting Company ("Rainbow"). In its application Rainbow seeks yet more time to implement a construction permit first awarded in 1984. Metro Broadcasting, Inc., 99 FCC2d 688, 57 R.R.2d 440 (Rev. Bd. 1984). The application is based on the claim that an otherwise undescribed "dispute" with a tower owner has supposedly "delayed" construction. See Rainbow Application,

---

[1] Under ordinary circumstances, Press would have styled this pleading a "Petition to Deny". However, it does not appear that Section 73.3584 of the Commission's Rules contemplates that such pleadings will be filed in connection with applications for extensions of construction permits.

[2] Press is the permittee of Station WKCF(TV), Clermont, Florida. As an informal objector, Press is not required to make a specific showing of standing. Nevertheless, since Press is a television operator in the Orlando area which would compete for audiences and revenues with Rainbow if Rainbow were ever to commence operation, it is clear that Press has standing in any event. Moreover, as is developed in the text above, it is clear that Rainbow has undertaken an elaborate, multi-faceted program designed explicitly to interfere with Press' reasonable and proper business activities. This, also, provides a legitimate basis for Press' involvement herein.

Exhibit 1 at 1. For the reasons set forth below, it is clear that no such extension is warranted.

2. In fact, the "dispute" referred to so obliquely (but relied on so centrally) by Rainbow has in no way interfered with Rainbow's ability to construct and operate its station. To the contrary, Rainbow's failure to construct has been purely voluntary. Moreover, Rainbow's failure to apprise the Commission of important information concerning Rainbow, Rainbow's financial arrangements, the full nature of Rainbow's "dispute" with the tower owner, and the basis for Rainbow's persistent opposition to Press' various efforts to upgrade its own operation, raises serious questions concerning Rainbow's honesty, candor and qualifications to remain a Commission permittee. Indeed, if Rainbow's extension application is not denied for failure to satisfy the Commission's routine standards governing such applications, the Commission will in any event have to undertake substantial inquiry into Rainbow's basic and comparative qualifications.

Background

3. Rainbow was granted its permit in 1984, following a comparative proceeding. See Metro Broadcasting, Inc., supra. While various appeals have been heard and resolved since that time, even Rainbow admits that Rainbow has held the construction permit -- and could, therefore, have built and operated the station -- at a mimimum since June, 1988, almost three years ago. See Metro Broadcasting, Inc., 3 FCC Rcd 866 (1988). But to date

Rainbow has declined to build and operate the station. Instead, it has repeatedly and cavalierly allowed its permit to lapse and has then sought reinstatement, citing supposed uncertainties arising from on-going appellate litigation. See, e.g., Files Nos. BMPCT-880711KE and BMPCT-890510KG. [3/]

4. Whether or not those alleged uncertainties were, in fact, sufficient to justify reinstatement, each of Rainbow's applications was granted. Most recently, Rainbow's permit was to expire on January 31, 1991. See File No. BPCT-900702KK. The appeals on which Rainbow relied, consistently and exclusively, for its reinstatements were effectively concluded in June, 1990. Thus, Rainbow has had some seven months in which to construct -- or at least to start to construct -- its station. During that time, however, it has failed even to commence that process.

5. It must be noted that Rainbow already has -- and for several years has had -- a lease for space on an existing tower structure. Thus, Rainbow does not need either to acquire land or to build a new tower for its antenna; rather, all it needs to do is to acquire the necessary transmission equipment, construct a small building in which to house it, and install the equipment at the existing tower site. Despite this, by Rainbow's

---

[3/] The appellate litigation on which Rainbow has consistently relied arose from the fact that Rainbow's extremely narrow margin of victory on the comparative issues was based on Rainbow's supposedly superior "integration" proposal. That issue was appealed to the United States Court of Appeals for the District of Columbia Circuit and, ultimately, to the Supreme Court of the United States. In June, 1990, the Supreme Court affirmed the grant of the permit to Rainbow. Metro Broadcasting, Inc. v. FCC, ___ U.S. ___ (1990).

own admission in its application and elsewhere, Rainbow has not yet even selected, much less ordered, any equipment.

6. In its application Rainbow does not explain its failure to undertake even the most preliminary steps toward construction. All that it offers by way of explanation is the following cryptic sentence:

> Actual construction has been delayed by a dispute with the tower owner which is the subject of legal action in the United States District Court for the Southern District of Florida (Case No. 90-2554 CIV MARCUS).

Rainbow Application, Exhibit No. 1 at 2. Certainly that sentence is intended to suggest (if not to expressly assert) to the Commission that that "dispute" has somehow prevented Rainbow from commencing construction despite Rainbow's best efforts. Nothing, however, could be further from the truth: as clearly reflected in Rainbow's own statements to the Court in the very "dispute" which Rainbow references, Rainbow's failure to construct has been wholly voluntary on the part of Rainbow.

7. The lawsuit on which Rainbow relies is captioned Joseph Rey et al. v. Guy Gannett Publishing Co., et al. It was initiated in state court by Mr. Rey, a Rainbow principal, on behalf of himself, Rainbow, and Rainbow's other principals. [4] It was removed to Federal court at the request of the defendant, which is the owner of the tower. A copy of Rainbow's initial complaint (complete with exhibits) in that suit is included as

---

[4] The suit was first filed on or about November 2, 1990 by Mr. Rey et al. in the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida, General Jurisdiction Division. Its case number in that court was No. 90-54033.

Attachment A hereto. As is clear from an examination of that complaint, Rainbow does not allege that it is prohibited in any way from installing an antenna (and related transmitting equipment) on the tower as presently specified in Rainbow's construction permit. To the contrary, it appears that both Rainbow and the tower owner agree that Rainbow has a lease to use the tower space specified in Rainbow's construction permit.

8. The sole point of argument in the suit is whether the tower owner has agreed to assure Rainbow exclusive use of what Rainbow describes as a particular "aperture". [5] The tower owner disputes Rainbow's claim of "aperture exclusivity" and, indeed, is now (and has, for several years, consistently been) prepared to lease to Press space at the 1502-foot level (i.e., within that area of the tower which would be included in Rainbow's notion of Rainbow's "aperture") for its use in connection with the operation of Press' Station WKCF(TV). [6] In

---

[5] The term "aperture" does not appear in the lease itself (a copy of which appeared as an exhibit to Rainbow's Complaint and is thus included in Attachment A hereto), nor does it appear to be defined in this context by the Commission's rules. As Rainbow appears to define the term "aperture", it means all of the space 360° around the tower for the entire length of the antenna. Thus, Rainbow believes that, if it is leasing space on one face or on one leg of the tower at the 1529-foot level, no other antenna can intrude on the "aperture" of Rainbow's antenna, i.e., no other antenna may overlap any part of Rainbow's even though it may be mounted on a different leg or face of the tower.

[6] For its part, the Commission has already granted Press authority to construct and operate from that particular height on that particular tower. See File No. BPCT-900413KI. The Commission's Rules, of course, do not recognize the notion of any "exclusive aperture" akin to that which Rainbow has claimed; to the contrary, Press is aware of multiple situations directly analogous

(continued...)

seeking to enjoin the tower owner from leasing space to Press, Rainbow has repeatedly asserted that it will be unable to obtain the financing necessary to construct and operate its station if Press is permitted to commence its operation on the tower prior to Rainbow's commencement of operation. Rainbow's goal in its lawsuit is thus not to attain access to the tower, for Rainbow already has such access; rather, Rainbow's goal is simply to keep Press from also getting on the tower at the height authorized by the Commission.

9. It is against this backdrop -- a far more complete backdrop than that offered by Rainbow -- that Rainbow's application must be assessed.

Argument

I. Rainbow has failed to make any of the showings required of an applicant for an extension of a construction permit.

10. It is well-established that a permittee seeking extension of its permit must demonstrate either that:

---

[6] (...continued)
to the instant one, i.e., situations in which more than one UHF television antenna have been authorized to operate on the same tower with overlapping apertures (to use Rainbow's terminology). Such situations include Miami (Channels 69 and 51), Atlanta (Channels 36 and 45), Chicago (Channels 32 and 44) and Phoenix (Channels 15 and 33) among others. It should be noted in this connection that, while Rainbow has vigorously asserted its unsupported claim to an "exclusive aperture", Rainbow has nowhere even attempted to demonstrate that any significant level of interference would result if it were denied that exclusivity. In any event, though, Rainbow's lease includes a provision which assures tenants protection from interference caused by one another. Moreover, Press recognizes that the owner of the later-mounted antenna will generally be expected to correct any interference it may cause to antennas which had been mounted previously.

(a) construction is complete and testing is underway; or

(b) substantial progress in constructing the station has been made; or

(c) circumstances beyond the permittee's control prevented construction and the permittee has nevertheless taken all possible steps to resolve the problem and proceed with construction.

See, e.g., Section 73.3534(b) of the Commission's Rules. It is clear that Rainbow has satisfied none of these standards. Certainly it cannot claim that construction is complete, or even that any progress (much less any "substantial" progress) has been made: by its own admission Rainbow has not even ordered any equipment, and it has ordered its consultants to stop all services necessary even for the selection of equipment.

11. And Rainbow cannot avail itself of the third standard, for there are (and have been) no circumstances beyond Rainbow's control which have prevented Rainbow's construction. In its application Rainbow suggests that the "dispute" between Rainbow and the tower owner is such a circumstance. But that "dispute" (which Rainbow assiduously avoids describing) has nothing to do with Rainbow's access to its tower location. The suit seeks only to enjoin the tower owner from leasing antenna space to Press. There appears never to have been any dispute as to Rainbow's right to place its antenna on the tower as specified in its permit: if Rainbow had, at any time in the five years since it first received its permit, simply obtained the necessary

equipment, Rainbow could be operating from that tower today. [7] Rainbow has voluntarily failed to take that course, and it cannot escape the consequences of its inaction.

12. Rainbow's lawsuit against the tower owner is replete with repeated admissions demonstrating that Rainbow's refusal to construct arises from its own economic judgments, and not any technical or practical impediment. In the words of Rainbow's own complaint:

> If Press is allowed to transmit from this site [i.e., the tower in question at the height authorized by the Commission], it will render [Rainbow's] permit valueless. . . . [Rainbow's] permit for Channel 65 to transmit from the Tower is not a viable business opportunity for [Rainbow] if, in fact, Defendant/Landlord is permitted to place additional TV antennas within the "top slot" [of the tower] . . . .

See Attachment A hereto (Rainbow Complaint at 9-10). This theme is echoed in the Statement of Susan D. Harrison, a consultant retained by Rainbow. Ms. Harrison's Statement was included as an attachment to Rainbow's Complaint and is specifically incorporated by reference therein. [8] According to Ms. Harrison, if the tower owner were to permit Press to mount its antenna as

---

[7] Rainbow's principal, Mr. Rey, explicitly confirmed this during a deposition taken in connection with Rainbow's civil suit:

> Q: Is it your understanding as you sit there right now, if you want to put the antenna up top, that you could put it up at that height on the tower?
>
> Rey: I could put it up at that height, but I have to share it, is what they are telling me.

Rey Dep. Tr. 130 (Attachment B hereto).

[8] A copy of Ms. Harrison's Statement is also included in Attachment A hereto.

authorized by the Commission,

> Rainbow's television station on Channel 65 . . . 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.
>
> * * *
>
> If [the tower owner] 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.
>
> * * *
>
> [I]f [the tower owner] 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.

See Attachment A hereto (Rainbow Complaint, attached Statement of Susan D. Harrison, at 1-3 (emphases added)).

13. The consistent, express, unmistakable theme of Rainbow's lawsuit is thus not that Rainbow cannot construct. Rather, it is that Rainbow has elected not to construct so long as doing so would require it to compete with Press. But that is precisely the type of voluntary determination which the Commission has repeatedly found to be insufficient to justify an extension of a construction permit: where a permittee's failure to build is based on its own determination of various possible economic effects, no extension is granted. See, e.g., New Orleans Channel 20, Inc., 100 FCC2d 1401 (Mass Media Bureau

1985), application for review denied, 104 FCC2d 304, 313 (1986), aff'd sub nom. New Orleans Channel 20, Inc. v. FCC, 830 F.2d 361 (D.C. Cir. 1987); Community Service Telecasters, Inc., Ref. No. 8940-AG, December 28, 1990 (copy included as Attachment C hereto).

14. Here, by its own admission Rainbow has chosen not to build unless it can do so in a particular competitive setting of Rainbow's own choosing. But Rainbow's permit is not limited to any particular competitive situation: indeed, since Rainbow was on notice of the allotment of television channels in the Orlando area, it could and should have recognized the potential competitive environment(s) it might face. Moreover, Rainbow has long been aware of Press' intent to locate its antenna at this site and height: Press disclosed that intent in its initial proposal to "swap" channels in 1988, and it has maintained that proposal consistently since. If Rainbow was unwilling to confront such competition, it should not have accepted the permit. Having accepted the permit, Rainbow cannot now legitimately claim that that permit should be extended ad infinitum solely because Rainbow is not yet comfortable with its competitive situation. The threat of effective competition has been completely rejected as a basis for a permit extension. See New Orleans Channel 20, Inc., supra. Rainbow's is precisely the type of dilatory performance which disserves the public by delaying the initiation of new broadcast service. See Broadcast Construction Periods, 59 R.R.2d 595, 597 (1985). Rainbow's

conduct is doubly (if not triply) offensive because its effect is to deprive the public of three services: first, the public is deprived of Rainbow's proposed service, and, second, it is deprived of improved service on Channels 18 and 68, both of which would be able to reach significantly greater audiences with their programming were it not for Rainbow's obstructionist tactics. See Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations (Clermont and Cocoa, Florida), 4 FCC Rcd 8320 (Mass Media Bureau 1989), affirmed, 5 FCC Rcd 6566 (1990). In view of all of these considerations, Rainbow's application can and should be denied.

II. Rainbow's application and lawsuit raise serious questions about Rainbow's basic and comparative qualifications which would have to be examined in hearing before any extension could properly be granted.

15. As discussed above, Rainbow's application falls far short of the minimal standards required of such applications. But perhaps more importantly, Rainbow has demonstrated itself -- in its application, its lawsuit and its general conduct vis-à-vis the Commission -- to be of highly dubious qualifications. Indeed, the record is now so clear that, even if Rainbow had arguably made the showing necessary for an extension of its permit, no such extension could properly be granted without full inquiry into Rainbow's financial qualifications, comparative qualifications, anti-competitive activities, willingness to abuse the Commission's processes to advance Rainbow's own private interests, and Rainbow's truthfulness and candor before the

Commission and the courts.

A. Rainbow's Financial Qualifications

16. Perhaps the clearest question which Rainbow has raised against itself involves its financial qualifications. In its application Rainbow certified that it was financially qualified to construct and operate the station. In the more than five years since its permit was first awarded Rainbow has not advised the Commission of any change in that representation. To the contrary, it has certified in each of its applications for reinstatement/extension of its permit that all representations contained in its original construction permit application remain accurate. And yet, in its civil lawsuit, Rainbow now repeatedly asserts that its financial situation is, at best, extremely precarious; in fact, a fair reading of Rainbow's claims leads to the conclusion that Rainbow admits that it is not financially qualified. See, e.g., ¶12, supra. Thus Rainbow's previous claims of financial qualification are completely undermined. As a result, complete inquiry into Rainbow's present financial qualifications is imperative.

17. It bears repeating that this is not a situation where a permittee has made substantial progress in the construction process but, for whatever reason, has fallen short of funds in the final stages of construction. If that were the case, Rainbow's latest admissions of financial inability might conceivably be entitled to some sympathy. But Rainbow has thus far made no construction progress at all: it has not even

selected, much less ordered or taken delivery of, any equipment. In effect, Rainbow is still at square one, right where it was more than five years ago when it first received its permit and signed its lease for tower space. If, under these circumstances, Rainbow itself doubts its continued financial ability, then the Commission can and must re-evaluate the grant of Rainbow's permit, since a material element essential to that grant -- i.e., the notion that Rainbow was and would remain financially qualified -- has obviously been eliminated. [9] Again, it bears repeating that any doubts as to Rainbow's financial qualifications are not mere speculation: it is Rainbow itself which has advised the court in Florida, under oath, of the

---

[9] To the extent that Rainbow might claim that it has made recent arrangements for the necessary financing, that claim would raise more questions than it answers. It appears that Rainbow is now relying on a "handshake" financing agreement with a Mr. Conant, pursuant to which Mr. Conant proposes to provide Rainbow with $4,000,000 in return for an ownership interest in Rainbow, on terms which have not been reduced to writing (if they have been agreed to at all). That arrangement appears to be of relatively recent vintage, and almost certainly post-dates the filing of Rainbow's application by a number of years. Before Rainbow could be permitted to rely on such an arrangement, the Commission would have to satisfy itself that: Rainbow was financially qualified at the time its application was filed; at such time as Rainbow lost its financial qualifications (thereby necessitating reliance on Mr. Conant), it was reasonably diligent in making alternative arrangements; those alternative arrangements satisfy current standards governing financial qualifications (i.e., that Mr. Conant is himself financially qualified, that the terms of the financing are appropriate, etc.). See, e.g., Mableton Broadcasting Company, Inc., 5 FCC Rcd 6314 (Rev. Bd. 1990) and cases cited therein; Albert E. Gary, 5 FCC Rcd 6235 (Rev. Bd. 1990) and cases cited therein. Moreover, to the extent that Rainbow did in fact lose the source of funds on which it originally relied, Rainbow will have to explain why it failed to acknowledge that important change of circumstances in any of its multiple reinstatement/extension applications. See also ¶¶18-21, supra, concerning the impact of this financing arrangement on Rainbow's comparative qualifications.

tenuousness of Rainbow's financial qualifications. Having placed those qualifications so squarely in question in the Florida litigation, Rainbow cannot claim to the Commission that no such question in fact exists. [10]

B. Rainbow's Comparative Qualifications

18. The lawsuit which Rainbow itself initiated in Florida also raises questions about Rainbow's comparative qualifications. As noted above, Rainbow obtained its permit on the basis of the perceived (albeit narrow) superiority of Rainbow's integration proposal. See Metro Broadcasting, Inc., 62 R.R.2d 902, 905 (1987). Any significant change in Rainbow's ownership structure would alter its integration proposal and, thus, undermine the validity of the decisional basis of the grant itself. But in the civil litigation, Mr. Rey's testimony clearly reveals that some change in Rainbow's ownership structure may be imminent, if it has not occurred already. That is, Rainbow is now apparently relying on a financial commitment which creates an ownership interest for a previously undisclosed

---

[10] Of course, if Rainbow were now to advise the Commission that its financial qualifications are solid, Rainbow would be effectively admitting that it has made material misrepresentations to the court in Florida. Rainbow is thus damned if it does and damned if it doesn't: if Rainbow adheres to its claim that its financial qualifications are dubious (a claim on which it relies heavily in the Florida litigation), Rainbow will be conceding that it is not financially qualified and there would exist no justification for extending its construction permit; but if Rainbow attempts to move off that claim now, Rainbow will be conceding that it has, in effect, lied to the court. Such behavior in and of itself raises serious questions as to an applicant's basic qualifications. See, e.g., Character Qualifications in Broadcast Licensing, 59 R.R.2d 801 (1986).

principal. Any such interest would seriously diminish, and probably eliminate, Rainbow's already razor-thin integration superiority.

19. As discussed above, in its civil litigation Rainbow has claimed that, if Press is allowed to place its antenna where the Commission has authorized it, Rainbow will be "unable to secure financing." See Attachment A hereto. During Mr. Rey's testimony, counsel for the tower owner cross-examined him concerning that assertion. Only then did he reveal the arrangement with Mr. Conant (see n.9, supra), which would apparently provide Mr. Conant with an ownership interest in return for a $4,000,000 investment. [11/] Such an arrangement is not unreasonable: anyone investing $4,000,000 into an enterprise would normally be expected to seek something more secure than a mere handshake in return.

20. Admittedly, the precise terms (if any) of Rainbow's financial arrangements remain unclear before the Commission. But that is because Rainbow has chosen not to disclose any of this information to the Commission. And it is the resulting lack of clarity in Rainbow's ownership structure that demands full inquiry by the Commission before any further

---

[11/] Counsel for Press has been advised that the transcript of Mr. Rey's testimony in the civil suit will not be available for several weeks. Copies of the relevant portions of that transcript will be provided when it is available. Representations contained herein relative to the substance of Mr. Rey's testimony are based on information provided by two individuals who attended the trial and personally observed Mr. Rey's testimony. Of course, the transcript of that testimony, when available, will speak for itself.