authorization could be issued to Rainbow. Moreover, since the arrangement almost certainly raises more questions than it answers, Rainbow's decision to withhold disclosure strongly suggests that Rainbow was trying to conceal information which would clearly have been harmful to it. Now that Mr. Rey has acknowledged -- under oath before a Federal judge -- the existence of some such arrangements, the Commission cannot ignore the possible impact that those arrangements will likely have on Rainbow's comparative qualifications.

21. This is especially true in view of the narrowness of Rainbow's supposed comparative superiority and the overriding significance therein of Rainbow's ownership and integration structure. The Commission itself has emphasized in its rules and policies that applicants obtaining a permit as a result of the minority preference policy must build the station and operate it for at least a year. See, e.g., Section 73.3597(a)(1) of the Commission's Rules; Washington Christian Television Outreach, Inc., 94 FCC2d 1360, 56 R.R.2d 1539 (Rev. Bd. 1983); Tidewater Teleradio, Inc., 24 R.R. 653, 657 (1962). The Commission has recently reaffirmed its interest in assuring that proposals which result in dispositive comparative superiority are, in fact, accomplished, and not simply ignored as inconvenient or impractical. Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, Gen. Docket No. 90-264, FCC 90-410, Mimeo No. 38069, released December 21,

Commission should carefully investigate Rainbow's multi-million dollar "handshake" arrangement to determine precisely how that arrangement will affect Rainbow's comparative qualifications and whether, in light of that, Rainbow can be permitted to retain the permit.

C. Rainbow's Anti-Competitive Conduct

22. Since the earliest days of broadcast regulation, and with increased fervor during the last decade, the Commission has sought to assure maximum competition within the broadcast industry. See, e.g., Section 313 of the Communications Act of 1934, as amended, 47 U.S.C. §313; Policies Regarding Detrimental Effects of New Broadcast Stations, 3 FCC Rcd 638, 640-641, ¶¶15-22 (1990). The Commission and Congress have clearly assigned to free marketplace competition a prominent position in the firmament of public interest values. And yet Rainbow, by its own admission, has made consistent, repeated efforts to stifle competition with Press. Such conduct raises serious questions as to Rainbow's basic qualifications to be a licensee.

23. Rainbow's anti-competitive campaign began in 1989, when it opposed Press' proposal to undertake an intraband UHF channel "swap" which would permit Press to operate on Channel 18. In Comments and Reply Comments filed in Docket No. 89-68, Rainbow presented a series of meritless claims in opposition to Press' proposal. Both the Mass Media Bureau and the full Commission have concluded Rainbow's claims to have been without substance. Report and Order, 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). [12] Having lost with respect to the rule making, Rainbow has since sought to block Press' minor modification application (File No. BPCT-900413KI) filed in compliance with the Bureau's order in the "swap" proceeding. See 4 FCC Rcd 8320, 8323, ¶26. Although Rainbow elected, for undisclosed reasons, not to oppose that application prior to its grant, it has filed a petition for reconsideration of that grant. That petition is pending. For the reasons fully set forth in Press' opposition to that petition, it is clear that that petition has absolutely no factual or legal merit. And on yet another front, there can be no question but that Rainbow's litigation against its tower owner is nothing more than a blatant attempt to block Press' ability to implement the terms of the construction permit which the Commission has issued to Press. [13]

24. Rainbow will no doubt claim that its various unsuccessful efforts to derail Press' upgrade have been based on

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[12] Rainbow has appealed those decisions to the United States Court of Appeals for the District of Columbia Circuit sub nom. Rainbow Broadcasting Company v. FCC, Case No. 90-1591. That case is presently pending.

[13] As Press has noted in its Opposition to Rainbow's petition for reconsideration, the Commission's Rules expressly and unequivocally prohibit a licensee from barring a competitor from access to a uniquely situated antenna site. See Section 73.635 of the Commission's Rules. Certainly Rainbow's selfish and anti-competitive effort, in the civil courts, to prevent Press from using the antenna site which the Commission has authorized it to use (and which the tower owner has agreed to make available) constitutes a blatant violation of the intent, if not the specific letter, of the Commission's Rule.

legitimate arguments which were advanced in good faith. As it turns out, though, Rainbow's principal, Mr. Rey, has testified in the Florida lawsuit that Rainbow's primary purpose in opposing Press was to prevent Press from competing with Rainbow. The following colloquy occurred during Mr. Rey's deposition:

> Q: Why did Rainbow oppose the swap of Channel 68 with 18?
>
> Rey: On what basis was it opposed? I mean, what are you asking?
>
> Q: What was your reason, personal or otherwise, for getting involved in that swap?
>
> Rey: Number one reason is that they were proposing the same lease space that I have with [the tower owner].
>
> Other reasons are that they would become a competitor in my own marketplace.
>
> Other reasons are, of legal nature on how the swap was proposed, that I -- I'm not a lawyer, so I can't really tell you those things.
>
> Q: Well, I understand that the lawyer can figure out the legal way of taking an application, but as far as your personal reasons or your business are concerned -- the first two you mentioned, were that --
>
> Rey: The business reasons are that they were proposing to put their antenna right smack in my space, at the Bithlo tower, and also by doing that, they would become a direct competitor.
>
> Q: With you?
>
> Rey: Correct.

Rey Deposition Transcript at 106-107 (included herewith as Attachment D). It appears from these unequivocal statements that, while the arguments which Rainbow ultimately presented to the Commission made no mention of Rainbow's wish to avoid

competition, in fact that wish has been the primary basis for each element in Rainbow's persistent opposition.

25. In view of Mr. Rey's refreshingly (and uncharacteristically) candid admissions of Rainbow's anti-competitive behavior, the Commission must seriously question whether Rainbow is fit to remain a permittee. Rainbow has demonstrated, with its own words and deeds, that it is unwilling or unable to join in the full, free and robust competition of the marketplace. Instead, Rainbow has demonstrated an invidious inclination to avail itself of virtually any conceivable mechanism in order to avert or stifle competition. Such an approach is inimical to the deregulated, market-based broadcast industry which the Commission has sought to foster. Rainbow's proclivity for anti-competition is yet another factor seriously undermining Rainbow's basic qualifications, a factor which would have to be considered in detail before the Commission could legitimately extend any authorization to Rainbow. See Character Qualifications in Broadcast Licensing, 67 R.R.2d 1107, 1108 (1990).

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

26. As discussed in the preceding section, Rainbow has acknowledged, in the context of its Florida lawsuit, that it has undertaken a campaign in opposition to Press' upgrade, a campaign whose purpose is to avert competition. That campaign, which has involved the filing of multiple pleadings with the Commission, is clearly inappropriate. Indeed, it represents nothing less than

an effort to utilize the Commission's processes for the purposes of delay and harassment in order to advance Rainbow's private (as opposed to any valid public) interest. Press should not be forced to suffer from such abuse of the Commission's processes, and the Commission should not tolerate such abuse. Certainly Rainbow's demonstrated willingness to engage in such deplorable misuse of the Commission's resources weighs heavily against the granting to Rainbow of <u>any</u> authorization now or in the future.

E. Rainbow's Misrepresentation and Lack of Candor

27. Finally, an overview of all of the foregoing reveals that Rainbow has engaged in repeated instances of misrepresentation and/or lack of candor in order to accomplish its nefarious purposes. For example, Rainbow has filed repeated pleadings in opposition to Press' upgrade without once advising the Commission that Rainbow's true purpose in so doing was the mere avoidance of threatened competition from Press. Similarly, lacking any valid substantive basis on which to challenge the Commission's proper grant of Press' modification application, Rainbow alleged in its petition for reconsideration that Press did not have reasonable assurance of the availability of its site. <u>See</u> Rainbow's Petition for Reconsideration and Stay at 1. But that allegation was directly contradicted by statements which Rainbow itself had made to the court in Florida. [14/] And, most

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[14/] According to Rainbow's Complaint, "[i]t is anticipated that [the tower owner] will immediately execute a lease with Press to allow the construction of its antenna within the top slot and its (continued...)

recently, Rainbow has sought an extension of its construction permit based on an obviously misleading assertion, i.e., that a "dispute" between Rainbow and its tower owner has somehow prevented Rainbow from constructing. As shown above, any such assertion is absolutely false.

28. Additionally, there are the matters of Rainbow's financial qualifications and its mysterious $4,000,000 benefactor, matters as to which Rainbow has been totally silent before the Commission. These are matters which strike at the heart of Rainbow's basic and comparative qualifications. Rainbow's total failure voluntarily to advise the Commission of such matters reflects a non-candid, misrepresentative bent just as surely as do the overt falsehoods of which Rainbow is equally guilty. The consistent impression of Rainbow created by all of these circumstances is one of an entity on which the Commission simply cannot rely for truthfulness or candor. Exhaustive inquiry into this question would have to be undertaken before any further permit could be granted to Rainbow. [15]

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[14] (...continued)
aperture." Rainbow Complaint at 8. This, of course, is an unequivocal concession that Press does have reasonable assurance of the availability of its site -- contrary to the claim advanced by Rainbow in its Petition for Reconsideration.

[15] It should be noted that the Commission was forewarned about Rainbow's tendency to be less than forthright and candid. The Presiding Administrative Law Judge disqualified Rainbow for misrepresentation. See Metro Broadcasting, Inc., 57 R.R.2d 440, 443 (Rev. Bd. 1984). While that ruling was reversed by the Review Board, id., the Board was hardly unanimous in that decision. Concurring "dubitante", Board Member Blumenthal specifically noted that Rainbow, a "peripatetic applicant", had only "narrowly eluded" a "fatal lack of candor finding". 57 R.R.2d at 454.

III. Conclusion

29. For more than five years Rainbow has been a Commission permittee whose primary obligation has been to construct and operate a television station. Rainbow has failed to meet that obligation. Indeed, it has not even attempted to meet that obligation. Instead, while studiously avoiding any activity which might have led to the prompt initiation of service to the public, Rainbow has spent considerable time and energy trying to interfere with Press' legitimate, diligent efforts to improve the service provided to the public by not one, but two stations. Rainbow has thus disserved the public by depriving it of three separate opportunities for new or improved service. In so doing, Rainbow has been guilty of misrepresentation (or, at the very least, serious and obvious lack of candor), abuse of process and anti-competitive activity.

30. Now Rainbow is asking for more time in which to construct its station. But if past is prologue, all Rainbow is really seeking is additional time in which to interfere with Press' legitimate (and Commission-authorized) efforts to assure better, more diverse programming service to the public. Rainbow has not made, and cannot make, the well-established threshold showing required of applicants for construction permit extensions. But more importantly, even if some such showing had been made (or even attempted), so many serious questions exist concerning Rainbow's basic and comparative qualifications that the Commission could not, in any event, properly grant Rainbow's

application without first considering and resolving those multiple questions. [16] Accordingly, Rainbow's application should be denied or, at a minimum, designated for hearing, in order to assure that Rainbow, an obviously unqualified applicant, is not permitted to further waste the valuable public resource which is Channel 65 in Orlando.

Respectfully submitted,

/s/ Harry F. Cole
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February 15, 1991

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[16] Such inquiry would most likely require a full hearing. At a minimum, as a preliminary matter, the Commission should require Rainbow to provide full and forthright disclosures concerning Rainbow's financial qualifications and Rainbow's arrangements or understandings with any person(s) or entities committed to providing substantial funding to Rainbow. While Rainbow would normally be expected to have provided such disclosures voluntarily, and may even be expected to provide them in response to this objection, Rainbow's track record with respect to truth and candor is not especially good. Accordingly, Press specifically requests that, absent any reasonably detailed disclosures from Rainbow in its response to this complaint, the Commission compel Rainbow to provide all relevant information concerning these matters.

CERTIFICATE OF SERVICE

I, Harry F. Cole, hereby certify that on this 15th day of February, 1991, I have caused copies of the foregoing "Informal Objection" to be placed in the United States mail, first class postage prepaid, addressed to the following individuals:

The Honorable Alfred C. Sikes (By Hand)
Chairman
Federal Communications Commission
1919 M Street, N.W. - Room 814
Washington, D.C. 20554

The Honorable James H. Quello (By Hand)
Commissioner
Federal Communications Commission
1919 M Street, N.W. - Room 802
Washington, D.C. 20554

The Honorable Sherrie P. Marshall (By Hand)
Commissioner
Federal Communications Commission
1919 M Street, N.W. - Room 826
Washington, D.C. 20554

The Honorable Andrew C. Barrett (By Hand)
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The Honorable Ervin S. Duggan (By Hand)
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