

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

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JUL 11 1996

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. _____

"Comments of Rainbow Broadcasting, Ltd.
on Inspector General's Report"
filed with the Commission
March 22, 1994

Federal Communications Commission	
Docket No. <u>GC 95-172</u>	Exhibit No. <u>3</u>
Presented by <u>Press Broadcasting</u>	
Disposition	Identified <u>X</u>
	Received <u>X</u>
	Rejected _____
Reporter <u>JLH</u>	
Date <u>6-25-96</u>	

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FEDERAL COMMUNICATIONS COMMISSION
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In re Applications of)
)
RAINBOW BROADCASTING, LTD.) File Nos. BMPCT-910625KP
) BTCCT-911129KT
For Extension of Construction)
Permit and for Consent to)
Assignment of Station WRBW(TV))
Orlando, Florida)

To: Office of the General Counsel

COMMENTS OF RAINBOW BROADCASTING, LTD.
ON INSPECTOR GENERAL'S REPORT

Pursuant to the March 8, 1984 letter of Deputy General Counsel Christopher J. Wright, Rainbow Broadcasting, Ltd. submits its comments on the November 22, 1993 Report of the Inspector General, entitled "Investigation of Violation of the Ex Parte Rule by Mass Media Bureau Personnel." Mr. Wright's letter requests comment on the Inspector General's findings "insofar as they relate to disposition of the above-captioned applications of Rainbow Broadcasting Company currently under review before the Commission." Rainbow notes at the outset that since the entire basis for the Inspector General's finding of ex parte violations by the Commission's staff is his erroneous legal conclusion that this is a non-exempt restricted proceeding, correction of that error is

dispositive of his Report, conclusively establishing the absence of any impropriety by anyone.^{1/} Nonetheless, the comments which follow are fully responsive to the Inspector General's Report.

Part I provides relevant historical information omitted from the initial "Background" section of the Inspector General's Report and corrects various misleading implications therein. Part II addresses the legal errors of the reading of the *ex parte* rules proposed in the second and fourth sections of the Inspector General's Report, entitled respectively, "The application of the *ex parte* rule" and "Propriety of Mass Media Bureau actions in this matter." Part III identifies various inaccuracies in the Inspector General's factual recitation concerning the July 1, 1993 meeting and surrounding events, as found in the third section of his Report, entitled "Failure of Mass Media Bureau personnel to treat the proceeding as restricted." Finally, Part IV identifies the serious policy dangers in both the Inspector General's reading of the rules and his proposals for changes

1/ Given the centrality of this legal issue, which the Report concedes is not within the Inspector General's jurisdiction, conduct of this investigation prior to Commission resolution of that issue was at best premature since if the proceeding was exempt there was nothing to investigate.

therein, as discussed in the fifth section of his Report, entitled "The ex parte rule needs to be simplified."

I. THE INSPECTOR GENERAL'S RECITATION OF THE BACKGROUND OF RAINBOW'S EXTENSION REQUEST IS INCOMPLETE AND MISLEADING.

Rainbow Broadcasting Company filed its application for construction permit for a new UHF station on Channel 65, Orlando, Florida in September 1982 (BPCT-820909KF). After an extensive comparative hearing in which Rainbow was ultimately preferred on the basis of its 100% minority ownership, the case was appealed to the United States Court of Appeals for the District of Columbia Circuit (Case No. 85-1755). After the case had been briefed and was awaiting argument, the Commission requested remand based upon the agency's intention to review its minority preference policies. In November 1986, the Commission ordered the Rainbow proceeding held in abeyance pending the outcome of that minority policy review (1 F.C.C. Rcd. 1315 (1986)). That hiatus was terminated by the enactment of Public Law No. 100-202 (1987) and FCC 88-17, released January 14, 1988, reinstating the Commission's minority preference policies.

The reinstatement of the Commission's minority preference policy resulted in return of the Rainbow proceeding to the Court of Appeals in June 1988 where, after

complete rebriefing and argument, Rainbow's grant was affirmed in May 1989. A petition for writ of certiorari was filed in September 1989 and granted in March 1990. Rainbow's grant was finally affirmed by the Supreme Court on August 30, 1990.

Despite the various appellate proceedings and the fact that the Commission itself vacated Rainbow's construction permit during its 1986 to 1988 review of the minority preference policy, Rainbow was nonetheless required to seek construction permit extensions throughout the entire appeal period. Thus before Rainbow's grant and the minority preference policy were confirmed by the Supreme Court, Rainbow had been required to request five Form 701 and 307 extensions of time to construct.^{2/}

The Inspector General's discussion of this history in the "Background" section of his Report (at page 2) is in several respects misleading. First, it is implied that Rainbow procrastinated in going forward with construction and was the beneficiary of extraordinary Commission patience. That implication is both erroneous and highly prejudicial. The only extension requests filed after the completion of judicial review were those filed

^{2/} Rainbow filed its requests on the following dates: July 11, 1988 (Form 701); May 10, 1989 (Form 307); November 17, 1989 (Form 307); May 30, 1990 (Form 307); and July 31, 1990 (Form 307).

by Rainbow on January 25, 1991 and June 25, 1991. Rainbow was never afforded the normal 24 month period to construct its facility that the Commission's Rules (Section 73.3598) permit. Subsequent to the Supreme Court affirmation, Rainbow was given only a six month extension on February 5, 1991.^{3/} Pursuant to the terms of its six month extension, Rainbow filed a second post-appellate Form 307 extension request on June 25, 1991 and Press filed an "Informal Objection" on July 10, 1991. This request was not acted on by the Mass Media Bureau for almost two years. Letter of Barbara Kreisman, Chief Video Services, June 18, 1993. Similarly, Rainbow's November 27, 1991 Form 316 pro forma request to reorganize from a general to a limited partnership,^{4/} which again drew an "Informal Objection" from Press, was not acted on for over a year and a half, until June 18, 1993.

Id.

3/ Press Broadcasting Company, Inc. filed an "Informal Objection" to Rainbow's extension request on February 15, 1991, subsequent to grant. Because of its late filing, Press resubmitted its "Informal Objection" as a Petition for Reconsideration on February 25, 1991, reciting the fact that it was a late filed informal objection.

4/ Rainbow's proposed reorganization to as limited partnership contemplated no change in voting authority. The general partners retained 100% of the voting interest. As Rainbow explained in its Form 316 request, the change was sought to permit equity in lieu of debt financing.

Second, the Report states (at page 3) that in responding to Clay Pendarvis' March 22, 1993 letter request for further information, Rainbow simply said that it had taken no action since construction of its \$60,000 transmitter building in November 1991. That is not the case. Rainbow also informed the Bureau that it had expended some \$500,000 on tower rental and that its limited partnership funds could not be released until it was permitted to assign its permit to the partnership. Letter of Margot Polivy to Clay Pendarvis dated 12 April 1993. Rainbow informed the Bureau that its projected time schedule contemplated timely Commission action on its pro forma 316 assignment, not an 18 month delay, but that it continued ready to adhere to its 6 month construction schedule as soon as the Bureau acted on the application which had been pending for some 18 months. *Ibid.*, attached Statement of Joseph Rey.

Third, the Inspector General's Report omits any recitation of my conversation with Paul Gordon on June 24, 1993. On that date, I telephoned Mr. Gordon to again enquire about the status of Rainbow's pending applications.^{5/} On this occasion he informed me that a letter

^{5/} Since March 1992 I had spoken to Mr. Gordon on several previous occasions. While I did not seek to discuss the merits of the case, I did emphatically seek to ascertain why the Bureau could not act on two straight-

had been sent dated June 18, 1993. Since I had not yet received the letter, I asked what action had been taken. He told me the result and offered to read me the letter. To say the least, I was dumbfounded. The notion that the Bureau could sit on two routine and fundamental applications for two years and then fault the permittee for not going forward with construction dependent on grant of those applications was appalling. The fundamental unfairness led me to believe that a terrible mistake had been made. I expressed my shock and asked Paul Gordon who I could talk to about this and he said Clay Pendarvis. I asked him whether he thought Roy Stewart would meet with me to discuss it. He said he didn't know, I would have to ask Roy. At no time during this conversation did Paul Gordon say or suggest that this was a restricted proceeding or that the *ex parte* rules applied. At no time did he say or suggest that it would be improper to talk to or meet with either Mr. Pendarvis or Mr. Stewart.

Finally, the Inspector General's Report (at page 3) recites that Press has "vigorously opposed Rainbow's

forward pending applications in a period of one to two years. Such enquiries are not considered "presentations" for *ex parte* rule purposes. 47 C.F.R. § 1.1202(a) NOTE. Not once did Mr. Gordon tell me that he thought Rainbow's pending applications were part of a restricted proceeding.

requests . . . " but omits any mention of the fact that Press lacks standing to object to Rainbow's extension and assignment applications. It was because of this lack of standing that Press perforce filed informal objections to those applications and because of the informal nature of the objections and Press' lack of standing that the *ex parte* restrictions did not apply to this proceeding. The Inspector General apparently believes that a pleading is "formal" within the meaning of the *ex parte* rules if it is written in a "vigorous" style.

II. THE INSPECTOR GENERAL'S READING OF THE EX PARTE RULES IS ERRONEOUS AS A MATTER OF LAW.

The Inspector General's reading of the *ex parte* rules is prohibited by the text of the rules themselves. Pursuant to Rule 1.1204(1), Rainbow's applications for extensions of time to construct and for pro forma transfer of control were exempt from the *ex parte* rules. That section provides that such an adjudicative proceeding is exempt "unless it":

(i) is formally opposed or involves a formal complaint (see § 1.1202(e)); or

(ii) involves mutually exclusive applications; or

(iii) has been designated for hearing

47 C.F.R. § 1.1204(1).

Rainbow's subject applications did not involve mutually exclusive applications and were not designated for hearing. They were thus exempt from the *ex parte* rules unless "formally opposed" as defined in Rule 1.1202(e). Rule 1.1202(e)(1) provides that in order to constitute a formal opposition a pleading must meet all three of the following requirements:

(i) The caption and text of the pleading [must] make it unmistakably clear that the pleading is intended to be a formal opposition . . . ;

(ii) The pleading [must be] served upon the other parties . . . ; and

(iii) The pleading [must be] filed within the time period, if any, prescribed for such a pleading

47 C.F.R. § 1.1202(e)(1).

Prior to the July 1, 1993 meeting found by the Inspector General to constitute a violation of the *ex parte* rules, Press had filed opposition pleadings as follows:

1. On February 15, 1991, Press filed a document entitled "Informal Objection," opposing grant of BMPCT-910125KE, a Rainbow request for extension of time to construct. That pleading was denominated in its caption an "Informal Objection" and therefore failed to satisfy Rule 1.1201(e)(1)(i). Moreover, it was not filed until after the Commission had acted and therefore failed to satisfy Rule 1.1201(e)(1)(iii), because informal

objections must be filed "[b]efore FCC action on any application for an instrument of authorization." 47 C.F.R. § 73.3587. Press' first pleading accordingly did not affect the exempt status of the proceeding.

2. On February 25, 1991, Press filed a brief document entitled "Petition for Reconsideration," which recited that since the "Informal Objection" had been untimely, it was being resubmitted under a new title. As resubmitted, then, the "Informal Objection", which had originally failed to satisfy Rule 1.1202(e)(1)(i) because its caption denominated it an "informal objection", now failed to satisfy that rule because its text specifically identified it as an informal objection. Press' second pleading accordingly had no effect on the exempt status of this proceeding.

In fact, however, Press' second filing could not have affected the exempt status of the proceeding, however denominated in either its text or its caption: Rule 1.106 does not provide for the filing of petitions for reconsideration by informal objectors and the Commission has therefore held such petitions to be prohibited. *Redwood Microwave Association, Inc.*, 61 F.C.C.2d 442, 38 R.R.2d 1073 (1976).

Moreover, the Commission requires more of petitioners for reconsideration than for initial objectors to an action, whether their opposition be formal or informal, and Press' filing, even if it had not been facially prohibited, failed to meet those requirements. Under Rule 1.106(b)(1), non-party petitioners for reconsideration must "state with particularity the manner in which [their] interests are adversely affected by the action taken and . . . show good reason why it was not possible for [them] to participate in the earlier stages of the proceeding." Press failed on both of these independently dispositive grounds to justify its petition: it conceded in its petition that it had simply failed to file on time; and it neither attempted to nor could have made the requisite showing of injury from grant of the requested extension of time to construct. Press' only potential injury is inauguration of a competing service, not a cognizable injury.^{6/}

Notwithstanding the formality of its title, then, Press' second pleading was in fact both facially unauthorized and substantively defective without regard to the ex parte rules. It was thus a legal nullity which

^{6/} Indeed, since the action it opposed was one whose only effect was delaying the inauguration of that competing service, it was effectively benefited by the Commission's action.

could have had no effect of any kind on the proceeding even if it had not also failed to satisfy the formality requirements of the *ex parte* rules.

3. On July 10, 1991, Press filed a document entitled "Informal Objection" ("reincorporating by reference" the first "Informal Objection"), opposing grant of BMPCT-910625KP, a Rainbow request for extension of time to construct. Like the original opposition, this pleading was denominated in its caption an "informal objection" and therefore failed to satisfy the requirements of Rule 1.1202(e)(1)(i). Press' third pleading accordingly did not affect the exempt status of the proceeding.

4. On January 7, 1992, Press filed a document entitled "Informal Objection and Request to Hold Application in Abeyance," opposing BTCCT-911129KT, a Rainbow application for pro forma transfer of control. Once again, this document's denomination in its caption as an "informal objection" failed to satisfy the requirements of Rule 1.1202(e)(1)(i). Press' fourth pleading accordingly did not affect the exempt status of the proceeding.

5. Finally, on April 30, 1993, Press filed a document entitled "Supplement to Informal Objections," in which it responded to an April 12, 1993 filing by Rainbow providing information requested by letter of March 22,

1993 from Clay Pendarvis (Ref. 1800EI-PRG) in conjunction with Rainbow's then pending extension request. Necessarily, that document's denomination as a supplement to informal objections defined it too as, at most, an informal objection, even assuming that a supplement to a previously filed document can itself constitute an objection within the meaning of the rules. Press' fifth and last pleading prior to the meeting of July 1, 1993, like all the others, accordingly did not affect the exempt status of the proceeding

The Inspector General's Report offers several reasons for rejecting the plain meaning of the rules as outlined above. None bears scrutiny. First, it is contended (Report, page 5) that in informal discussions with unnamed personnel in the Office of the General Counsel the Inspector General was advised that the General Counsel believed the February 25, 1991 Petition for Reconsideration, which related to an earlier extension request than the one at issue in the July 1, 1993 meeting, to be a formal opposition within the meaning of the rules.

According to the Report, it is the General Counsel's view that the filing of that pleading restricted the extension of time proceeding to which it related and that all subsequent proceedings remained restricted despite

the fact that Press' filings in those proceedings were not formal because "the issues involved were the same or so intertwined with the issues raised by the Petition for Reconsideration that was still pending, that the matter remained restricted." Report, page 5. Even this explanation, however, does not account for restricting the 316 proceeding.

Without knowing what the anonymous source in the General Counsel's office was told or exactly what s/he said, it is difficult to comment on this opinion. However, Rainbow is inclined to suspect that the opinion in fact given was that a petition for reconsideration is a formal pleading sufficient to restrict a proceeding. Rainbow does not disagree with that general proposition. However, as explained above, this particular petition for reconsideration did not fit within that general rule because it failed to meet the requirements of the *ex parte* rules for a formal pleading or even the general requirements of Rule 1.106 for filing in the first place: It was inadequate under the *ex parte* rules because its text conceded that it was an informal objection; it was a prohibited pleading because reconsideration of informal objections does not lie; and it would in any event have been ineligible for consideration because Press failed to

show either that it could have participated at an earlier stage or that it was injured by grant of the extension of time to construct. To find, as the Inspector General does, that a pleading which is both inadequate under the ex parte rules and ineligible for filing or consideration under requirements applicable to all petitions for reconsideration, can nonetheless have the effect of transforming an exempt proceeding into a nonexempt one would make a mockery of the Commission's unambiguous rules and precedent.^{7/}

As a separate matter, the notion that different proceedings become one for purposes of the ex parte rules if they involve similar issues is without authority and contrary to the text of the ex parte rules and the dictates of common sense. Rule 1.1202(d), which defines an adjudicative proceeding, makes clear the fact that each application or petition constitutes such a proceeding for purposes of the rules. Since the gist of Press' allegations against Rainbow is that Rainbow is not a fit licensee, the Inspector General's reasoning would lead to the bizarre result that for so long as Rainbow operates its

^{7/} It is particularly irksome that the only reason this argument is even available to the Inspector General is that the Commission failed for some three years, despite Rainbow's vigorous urgings, to dismiss this prohibited filing and it therefore still reposes in the record.

station any authorization it may hereafter seek, including all renewals, will be restricted.

Even if the Report means to suggest that all proceedings involving Rainbow remain restricted only for so long as the Commission fails to act on the 1991 petition, the result is different but no less bizarre in its implications. Such a ruling means that the applicability of the *ex parte* restrictions to a proceeding is determined not by the rules and the facts of that proceeding but by the diligence of the Commission's staff in ruling on outstanding pleadings in earlier separate proceedings involving similar issues. The legal and logical inadequacies of such a theory are self evident.

The Inspector General's opinion that this was a restricted proceeding does not rest solely on the 1991 reconsideration petition. The Report concludes (at pages 5-6), contrary to the reported view of the General Counsel, that all other Press filings also qualified as formal notwithstanding their own denomination as "informal." This view derives from the Inspector General's reading of the text of Rule 1.1202(e)(1)(i). While the Rule provides that "the caption and text" of a pleading must "make it unmistakably clear" that it is intended as a formal opposition, the Inspector General finds it

sufficient that the caption or the text so indicate. It is not at all clear to Rainbow how the text of a pleading whose author voluntarily denominated it as "informal" in its caption can be so read as not simply to override that specific self description but also to do so with the requisite unmistakable clarity. Nor, apparently, was it clear to the Office of the General Counsel, since the Report concedes that interpretation of the rules is for the General Counsel, who does not share the Inspector General's view that the Rule should be read disjunctively rather than conjunctively.

Press made a conscious decision to file informal objections because it lacked standing to file formal objections. If the Inspector General's view were to prevail, an objector with no legal right to become a party to a proceeding could nonetheless achieve the benefits of that status by manipulation of the *ex parte* rules, rules which neither in terms nor intent are designed to permit circumvention of the statutory and regulatory rules of standing.^{8/}

8/ Rainbow has several times addressed the matter of Press' standing. It suffices to say that because none of the post-grant authorizations which have here been challenged can have the effect of aggrieving Press, which did not seek intervention in the licensing proceeding, it cannot establish standing either before the Commission, see *Tele-visual Corp.*, 33 F.C.C.2d 418 (1971); *Coronado Communications Company*, 8 F.C.C. Rcd. 159, 160 (BB 1992),

The Inspector General also relies on a 1991 letter from the Managing Director advising an Orlando citizen that the proceeding was a restricted one. Report, page 6. However, that correct ruling had no effect on the exempt status of the proceeding under Rule 1.1204(a)(1) and it is that status which made the July 1, 1993 meeting entirely proper under the Rules. As the NOTE to Rule 1.1204(a)(1) specifically sets out:

In proceedings exempted by Rule 1.1204(a)(1) . . . , oral ex parte communications are permissible, but only between the Commission and the formal party involved or his representative. Any informal objectors (whether their objections are oral or written) are subject to ex parte procedure set forth in Rule 1.1208 barring oral ex parte contacts except where confidentiality is necessary to protect these persons from possible reprisals. . . .

In other words, both the citizen from Orlando and Press were prohibited from making ex parte contacts with the staff in this case but Rainbow was not. The Inspector General seems to have believed that once the Managing Director described the proceeding as restricted, the

or before the courts, see *California Association of Physically Handicapped v. F.C.C.*, 778 F.2d 823 (D.C. Cir. 1985). Moreover, apart from the standing problem, consideration of Press' filings would be barred by Section 309(d)(1) of the Act because all rest on speculation, surmise and innuendo and none has ever been accompanied by affidavits of persons with personal knowledge. The fact that pleadings are informal does not exempt them from the normal evidentiary requirements. See *Christian Broadcasting Association*, 77 F.C.C.2d 858 (1980); *KHVC, Inc.*, 77 F.C.C.2d 890 (1980).

matter was at an end and all persons, including the applicant and the staff were prohibited from communicating *ex parte*. That is not the case, however. If, as here, a proceeding is exempt, then the applicant may speak to the staff *ex parte*, but objectors may not.

III. THE INSPECTOR GENERAL'S REPORT IMPROPERLY FAULTS BUREAU STAFF FOR NOT TREATING THE PROCEEDING AS RESTRICTED.

The Inspector General's recitation of the events leading up to the July 1, 1993 meeting between Bureau staff and Rainbow's counsel and president is highly prejudicial by implication. Before addressing the specific unfair implications, Rainbow notes that the individuals with collective F.C.C. experience of over 80 years, Roy Stewart, Clay Pendarvis and Margot Polivy, independently concurred in their understanding that the proceeding was not restricted and that an informal objection cannot be the basis for restricting an otherwise exempt proceeding. See Report, pages 8, 9, 11. Nonetheless, the Inspector General adhered to his erroneous conclusion that an informal objection becomes a "formal objection" if it appears that formal opposition was the subjective intent of the objector. Report, pages 5-6.

Moreover that apparent subjective intent is deemed to control even the expressed intent of the objector

since it was here unmistakably clear and explicit that "informal oppositions" were intended by Press. And in arriving at his finding of such intent here, it is apparently the Inspector General's understanding that the "formal opposition" definition provided in Commission Rule 1.1202(3)(1)(i) may appropriately be abandoned, at least in this case and "formal opposition" be taken to mean simply "serious opposition." This abandonment of both the Rule and an objective, universally applicable legal standard is admittedly not the view of the Office of General Counsel, but the Inspector General apparently thinks his interpretation is easier to apply than the Rule as written, Report, page 5. Nonetheless, he also recognizes that "it is OGC not OIG that interprets the rule for the Commission," Report, page 6.^{9/}

The Report (at page 6) suggests wrongdoing on the part of Antoinette Bush, notwithstanding the innocuous nature of her conversation with Roy Stewart, in which she asked him what was going on and the opinion of Clay Pendarvis that her telephone enquiry to him was a status

^{9/} While the question of the effect of Press' Petition for Reconsideration has already been addressed, it is particularly difficult to comprehend how, after admitting that OIG's interpretation of the ex parte rules is in conflict with OGC's and that OGC's interpretation controls as a matter of law, the Inspector General can have no hesitation in finding a clear violation of that rule by the Bureau's senior staff.

enquiry, appropriate regardless of the status of the proceeding. Apparently, the Inspector General found her calls sinister because Rainbow's counsel informed Ms. Bush of the Bureau's letter denying Rainbow's extension. The Report's conclusion (at page 11) that Ms. Bush was precluded from making a status enquiry if the proceeding was restricted-- which in any event it was not^{10/}-- is wrong. Status enquiries are never precluded. See Rule 1.1202(a) NOTE.

It is unfortunate that in an apparent effort to buttress his fundamentally flawed opinion that any ex parte transgression occurred, the Inspector General has gratuitously impugned the reputation of Antoinette Bush, then Counsel to the Senate Subcommittee on Communications, who did nothing more than initiate a routine enquiry in a matter in which she had no cognizable interest. At the very least this review should remove that unnecessary and inappropriate stain.

One other respect in which the Report is both wrong and misleading is its apparently unalloyed acceptance of the self serving and in some respects ascertainably

^{10/} Nor had Ms. Bush any reason to believe otherwise. As the Inspector General found, she noted that "sometimes when she calls the FCC about a particular matter she is informed that the proceeding is restricted and that they can't talk about it. In this case, however, no one said that to her." Report, page 7.

erroneous statements of Paul Gordon. Mr. Gordon is quoted as having recited several "facts" which did not occur:

1. Mr. Gordon stated (Report, page 7) that Clay Pendarvis concurred with his rendition of the applicability of the *ex parte* rules prior to the meeting on July 1, 1993. Mr. Pendarvis (Report, page 8) and Margot Polivy (Report, page 10) say that Pendarvis saw no *ex parte* problem.

2. Mr. Gordon claims to have previously told counsel for Rainbow that the proceeding was restricted (Report, page 7). This statement is not correct. No such statement or suggestion was ever made to me by Mr. Gordon. In fact, his response to my June 24, 1993 question about meeting with Messers Pendarvis and Stewart would suggest that he held a contrary view at the time.

3. Mr. Gordon claims that he knew before the meeting that Roy Stewart "was not happy with the decision" denying Rainbow's extension request and that after the meeting Stewart "indicated to him how the [reconsideration] letter should be written" (Report, page 8). Neither Mr. Stewart nor anyone else on the Bureau staff other than Mr. Gordon believes Roy Stewart directed an outcome favourable to Rainbow on reconsideration.

4. Finally, Mr. Gordon stated (Report, page 8) that he believed Margot Polivy's presentation in the July 1, 1993 meeting was misleading in some unspecified respects but was cut off by Roy Stewart when he tried to say so. This statement is uncorroborated by the other staff attendees, Clay Pendarvis (Report, page 8) and Barbara Kreisman (Report, page 9). Roy Stewart himself was apparently never even asked. Since I too was present, I can say of my own personal knowledge that it did not happen. Rainbow knows of no error in the information presented at the meeting. Moreover, Rainbow is likewise unaware of any information presented at the meeting that was not subsequently submitted under oath as part of its July 2, 1993 reconsideration petition. And the Commission's opinion granting the Petition, which was written by Mr. Gordon himself (Report, page 9), identifies no such error or misrepresentation as Mr. Gordon now claims to have recognized.

The likeliest explanation for Mr. Gordon's recollection by animus is that he made a bad decision in denying Rainbow's application and was embarrassed when it came to the attention of his superiors. The same thing has happened no doubt to every young staffer. That is not, however, a justification for fantastical post hoc

recollections and accusations designed to justify the error.^{11/}

In short, the factual recitations of every person involved other than Paul Gordon-- Roy Stewart, Barbara Kreisman, Clay Pendarvis, Antoinette Bush and Margot Polivy-- are in every significant respect consistent. The only person whose factual recitation is at odds with that of any of the others is Paul Gordon. No one but Mr. Gordon had any doubt that no *ex parte* restriction applied to this proceeding. Indeed, no one, except possibly Mr. Pendarvis on the day of the scheduled meeting, has any recollection that Mr. Gordon ever previously expressed his after the fact contention of an *ex parte* violation.

^{11/} Rainbow views the Inspector General's decision to include this statement in his Report without requiring Mr. Gordon to identify the relevant falsehood and without raising the allegation in his interviews with any of the other staff members or counsel for Rainbow as unprofessional and irresponsible, particularly in the context of these rules and in light of his indulgence of so fine a punctilio about them as to ignore their plain meaning and revise their scope to prohibit any lawful contact that anyone unfamiliar with the *ex parte* rules might find questionable. In presenting to the Commission (even assuming he had no idea that his Report might also be publicly circulated and become the object of extensive media discussion) what amounts to no more than spiteful gossip and innuendo, the Inspector General does gratuitous injury to the reputation of Rainbow's counsel and casts a shadow on what is perhaps the most important aspect of the basic qualifications of a permittee-- his candor and truthfulness to the Commission.