

IV. THE INSPECTOR GENERAL'S READING OF THE EX PARTE RULES IS UNSOUND AS A MATTER OF POLICY.

As a policy matter, the Inspector General's reading of the ex parte rules deprives them of the ability to perform their central function of providing clear guidance on when it is permissible and when prohibited to communicate with Commission staff on the merits of a pending proceeding. It was clear to counsel for Rainbow at the time of the interview with the Inspector General's representative that he viewed the overriding purpose of the rules as being to ensure an appearance of propriety in all dealings with the Commission. Under that view, which is reflected as well in the Report, the general rule guiding statutory construction is that whatever is not expressly permitted is prohibited. The rules as written, however, are intended to specify what is prohibited and Rainbow submits that that is as it should be.

Counsel for Rainbow attempted at the time of the interview to make clear the fact that there are important reasons why applicants/licenseses and their representatives should be encouraged to speak to the Commission staff, that providing such assistance is a central function of the Bureau and serves the interest of the public as well as the parties involved. The Report's view of the rules as being essentially concerned with

preventing any appearance of impropriety creates a situation in which their applicability to a given situation is largely subjective and possibly even post hoc. Under such circumstances the primary effect of the rules-- and this appears to be the Inspector General's intention-- would be to discourage the staff from engaging in any ex parte contacts in any case in order to be sure of avoiding what might later be found to have been an improper contact.

Rainbow is able to testify that precisely such an effect has been achieved here. Not only has the entire Bureau recused itself from considering any Rainbow filing, but the permittee has been largely unable even to get its phone calls returned on matters having absolutely nothing to do with the various extension/transfer requests which are the subject of the Inspector General's investigation, notwithstanding the fact that it is required by the terms of its outstanding construction permit to go on the air by the end of this month.

The Commission's legitimate administration of the public's interest in the initiation of new television service by a 100% minority owned applicant has come to a halt. Rainbow has invested \$3 million in the construction of channel 65 and spent or committed well over \$2

million more in programing and other operational areas. It is ready to commence program testing but it cannot do so because the Mass Media Bureau has for no legitimate or legal reason been incapacitated from processing Rainbow's application.^{12/}

If the rules are intended as guidance for the staff and the public, the Commission must write them in a clear manner and enforce them as written. If the Commission believes the *ex parte* rules are unclear, or if it believes that what is now permissible or prohibited behaviour should be modified, then the normal rulemaking process should be followed. It is legally wrong and unfair to depart from the written rules as the Inspector General has done^{13/} and assert wrongdoing on the part of the senior Mass Media Bureau staff and Rainbow.

12/ Even assuming *arguendo* that the proceeding were restricted, the Inspector General admits both that Rainbow's counsel appears "sincere" in her belief that it is not (Report, page 11) and that the rules-- given the Inspector General's interpretation-- are unclear and lead to "unintentional violations" (Report, pages 14-15). The likelihood of sanctions against Rainbow would thus appear remote. Moreover, if the Commission were ultimately to conclude that sanctions were warranted, imposition of such sanctions would not be affected by Rainbow's operational status. By delaying inauguration of service, on the other hand, the Commission unnecessarily injures the public and deprives Rainbow of due process of law.

13/ While the Report suggests at page 5 that the Office of the General Counsel concurred with the interpretation of this proceeding as restricted by Press' February 25, 1991 Petition for Reconsideration, no such

Finally, as a matter of prudent policy and fundamental fairness, Rainbow and Antoinette Bush should have been given the opportunity to review and comment on the Report before it was made public. At the very least, they should not have been required to learn of its release through calls from the press. It is highly prejudicial to Rainbow and injurious to the reputation of people who have done nothing wrong to have such a report released with no notice.^{14/} As evidenced by the factual inaccuracies detailed in Parts I and III above, it is clear that quite apart from considerations of elemental fairness, the Inspector General's investigation would have benefited from that review.

CONCLUSION

Rainbow believes the Inspector General's Report is legally wrong. The proceeding was not restricted and no wrongdoing occurred on the part of the staff of the Mass Media Bureau, Antoinette Bush or Rainbow. It is important that the Commission make this fact unequivocally

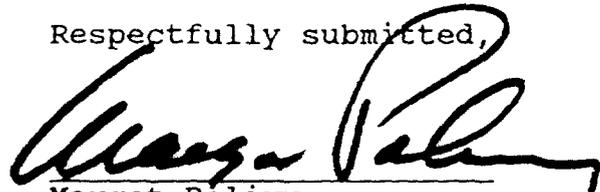
opinion was appended to the Report and Rainbow has had no opportunity to review that opinion. However, for the reason set forth in Part II of these Comments, *supra*, Rainbow believes that that pleading did not constitute a formal objection for purposes of the *ex parte* rules.

14/ Counsel for Rainbow had asked to see the Report at the time the Inspector General's representative interviewed her and was told it was an internal matter and she would not therefore be given an opportunity to comment.

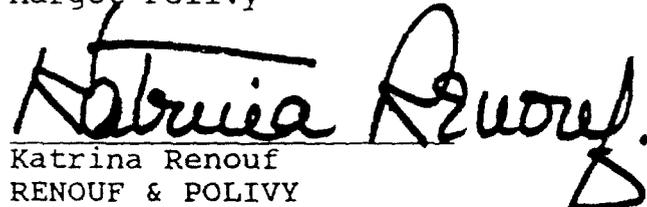
29

clear. Moreover, this whole matter could be brought to a conclusion, along with the various pending court proceedings brought by Press, if the Commission would act on the long pending pleadings and applications to which Press' various objections have been addressed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Comments of Rainbow Broadcasting. Ltd. were sent by first class mail, postage prepaid, this twenty second day of July 1993 on the following:

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