

Rainbow Ex 2

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

**Affidavit of Barbara A. Kreisman
in Response to Subpoena**

<u>Federal Communications Commission</u>	
Docket No. <u>GC 95-172</u>	Exhibit No. <u>2</u>
Presented by <u>Rainbow Broadcasting</u>	
Disposition	Identified <u>X</u>
	Received _____
	Rejected <u>X</u> <u>YB 6-26-96</u>
Reporter <u>YB</u>	
Date <u>6-26-96</u>	

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re)	
)	
PRESS BROADCASTING COMPANY, INC.)	No. 93-1867
Petitioner.)	

United States of America
District of Columbia, ss

AFFIDAVIT OF BARBARA A. KREISMAN IN RESPONSE TO SUBPOENA

Barbara A. Kreisman, being first duly sworn, deposes and says:

1. I am the Chief of the Video Services Division of the Mass Media Bureau of the Federal Communications Commission, and that I held that position during the dates relevant to the matter set out herein.¹

2. I am submitting this affidavit pursuant to an order dated March 4, 1994, entered by a panel of the United States Court of Appeals for the District of Columbia Circuit in the matter related to the construction permit extension application of Rainbow Broadcasting Company.

3. On the late afternoon of August 16, 1993, I was interviewed regarding this matter by a representative of the Inspector General's (IG) Office. At the outset of this half hour interview, I informed the IG investigator that I had just returned from a two-week European trip, having completed long intercontinental flights the night before, and that I was feeling the effect of the six-hour time difference and the fourteen hours of travel by car and planes. I also stated that I had not had an opportunity to either review the file in the proceeding or to think about the matter to refresh my recollection. Since that time, I have reviewed the file and have been better able to focus my recollection of the events in question.

4. On June 18, 1993, on the recommendation of my staff, I signed a letter denying the application of Rainbow Broadcasting Company for an extension of time within which to construct station WRBW(TV), Orlando, Florida and cancelling the construction permit for the station. The letter was prepared by

¹ The information presented herein is limited in accordance with the March 4 Order. I have not responded to those questions proposed by Press Broadcasting that are outside the scope of that order.

a staff attorney in the Television Branch, Paul Gordon, who was in charge of the matter, and reviewed by the Branch Chief, Clay Pendarvis. In essence, the letter stated that the permittee's lack of progress toward construction was not due to circumstances beyond its control and that substantial progress had not been made in accordance with the requirements for obtaining an extension of a construction permit. The letter also noted that the informal objections of Press Television Corporation had been granted. When I signed the letter, I had not read the case file, but I recall having discussed the staff's extension denial recommendation with Mr. Pendarvis. As a general rule, I am reluctant to cancel construction permits. However, Mr. Pendarvis informed me that the record of the case disclosed that a long period of time had elapsed with numerous extensions, and that substantial progress toward construction had not been accomplished. I viewed this action as a routine matter that could be acted upon by the Video Services Division without the notification or consent of the Mass Media Bureau or the Commission.

5. Sometime after I signed the letter, I received a telephone call from Roy Stewart, Chief of the Mass Media Bureau, asking for a copy of the letter. Mr. Stewart told me that he had received a status inquiry from Ms. Antoinette (Toni) Cook and that he wanted to see the letter since he was not familiar with the facts of the case. Mr. Stewart did not express any opinion to me with respect to the matter and, specifically, did not indicate in any way that he wanted the staff to reverse its action of June 18th. I provided him a copy of the letter. At some point thereafter, Mr. Stewart called me again and asked me to attend a meeting on July 1 with the attorney for Rainbow Broadcasting Company, Margot Polivy, and a principal of the permittee.

6. Clarifying my statement to the IG based on my review of the file and closer focus on the matter, I recall that Mr. Pendarvis had related to me Mr. Gordon's query as to whether the proceeding may have been restricted and that Mr. Stewart should be so advised. While both Mr. Pendarvis and I believed that the filing of informal objections by Press Broadcasting Company did not bring this proceeding within the Commission's ex parte restrictions, I nonetheless informed Mr. Stewart that there was an informal objector involved in this proceeding. In a brief telephone conversation, I told Mr. Stewart that Press Broadcasting Company had filed a number of informal objections against the extension of time applications of Rainbow Broadcasting Company. We concluded that such submissions would not render the proceeding "restricted," and that it would, therefore, not be inappropriate to permit the scheduled meeting to occur. I also now recall that just before the meeting on July 1, Messrs. Pendarvis and Gordon stopped by my office and inquired whether the attorney for Press Broadcasting Company would attend

the meeting. I replied that I did not know and, thereupon, we all left to attend the meeting in Mr. Stewart's office.

7. The above-referenced conversation I had with Messrs. Gordon and Pendarvis lasted ten seconds or so and did not involve any "presentation" as to why the ex parte restrictions applied as intimated by Mr. Gordon in his statement to the IG. Neither Mr. Pendarvis nor Mr. Gordon informed me that there were any protests other than informal objections filed in this proceeding. It was my understanding at the time that Press Broadcasting Company's opposition pleadings were all in the form of informal objections.

8. The meeting in Mr. Stewart's office was held on July 1, 1993. At the meeting, Ms. Polivy disagreed with the denial of the extension. She described the staff's action as unfair because the staff had not considered the substantial amount of money that the permittee had spent in connection with the construction of the station. Mr. Stewart appeared troubled by the fact that the staff's June 18, 1993 letter had not mentioned the \$950,000 that the permittee had paid as rent on the tower site and for other construction-related expenses. Indeed, neither had I been informed of that fact. I can also remember a passing reference at the meeting to the fact that the station had not been given a full two-year period to build after court appeals had been terminated. The meeting did not last long and, at its conclusion, Mr. Stewart suggested to Ms. Polivy that she file a petition for reconsideration and serve Press Broadcasting Company with a copy. He explained that the staff would then review its decision once the pleadings were filed.

9. In my view, the fact that Mr. Stewart had told Rainbow Broadcasting Company's attorney to serve a copy of the petition for reconsideration on Press Broadcasting Company, in no way suggests that the ex parte rules applied to the matter at the time. Instead, I viewed it as a sincere desire on his part to have all views presented if the petition for reconsideration was going to be submitted. Indeed, when we later reviewed the matter, we welcomed and fully considered the comments of Press Broadcasting Company, and acted in what we considered to be the public interest.

10. My recollection is that, during the meeting, the Video Services Division staff attendees--Paul Gordon, Clay Pendarvis, and I--said little. I do not recall Paul Gordon trying to speak or Mr. Stewart cutting him off, as reported by the IG. Nor did Mr. Stewart direct us either during or subsequent to that meeting to reverse the June 18, 1993 decision. Furthermore, I had no subsequent meeting with Mr. Stewart--nor am I aware of any such meeting that Mr. Stewart had with my staff--during which reversal of the June 18, 1993 action was discussed, or directed by Mr. Stewart.

11. On July 2, 1993, Rainbow Broadcasting Company filed a petition for reconsideration and reinstatement and grant of application for assignment of construction permit. The pleading among other things emphasized the permittee's expenditure of nearly one million dollars in connection with the construction permit, and proposed a specific construction schedule. The pleading and the case file were initially reviewed by Messrs. Gordon and Pendarvis.

12. During the days that followed the filing of the petition for reconsideration and later the comments of Press Broadcasting Company, I recall having some discussions with Messrs. Pendarvis and Gordon. I remember being convinced that, as far as a substantial progress analysis is concerned, the June 18, 1993 staff letter was correct. The Commission requires that a permittee show substantial progress from the date of its last extension. In my opinion, the continued payment of rent over the course of the life of the construction permit, even if substantial amounts of money were involved, was not sufficient, absent other indicia of progress, to warrant continuation of the permit. I did recognize that other factors were involved here, however, including our failure to grant a pending 316 pro forma application that would have authorized a reorganization of Rainbow Broadcasting Company and could have resulted in an influx of funds to finance additional construction.

13. During this review process, however, Mr. Pendarvis advised me that he had concluded that the staff had made an error. Mr. Pendarvis told me that at the time Rainbow had filed its extension application, it had not had a full two-year period, without being under a pending appeal, in which to construct the station. Mr. Pendarvis said that he had specifically questioned Mr. Gordon with respect to this matter when he was reviewing the June 18, 1993 letter terminating the construction permit, and that Mr. Gordon had either miscalculated or misunderstood that the two-year period is determined by looking at the amount of time that has elapsed at the time the extension application is filed, not when the extension is considered and acted upon by the staff.

14. Where the underlying grant of a construction permit is appealed, the Video Services Division allows the permittee at least a two-year period in which to construct after the appeal is exhausted. The appeals of the grant of a construction permit to Rainbow Broadcasting Company, which went to the heart of the authorization, were protracted and were not exhausted until the United States Supreme Court denied a request for rehearing on August 30, 1990. The construction permit extension application that was the subject of the June 18, 1993 letter had been filed by Rainbow Broadcasting Company on June 25, 1991, less than nine months after completion of judicial review. The fact that two years passed from the termination of the judicial appeal process

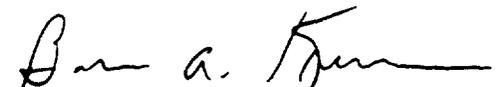
before the staff acted on the pending extension application should thus not have inured to the detriment of Rainbow Broadcasting Company. I, therefore, concluded that it would be unreasonable to expect Rainbow Broadcasting Company, under these circumstances, to build during the appeal period or to continue to construct the permit before the staff had acted on its June 25, 1991 construction permit extension application. In concluding that the June 18, 1993 decision had to be reversed, I also took into consideration the staff's inaction on the pending pro forma application, the grant of which could have resulted in the influx of additional funds to Rainbow Broadcasting Company that could have been used for construction.

15. These factors led me to the inescapable conclusion that the letter of June 18, 1993 was in error and had to be reversed on the above-mentioned grounds. Accordingly, I recommended that Mr. Stewart sign a letter to that effect, and he did so on July 30, 1993.

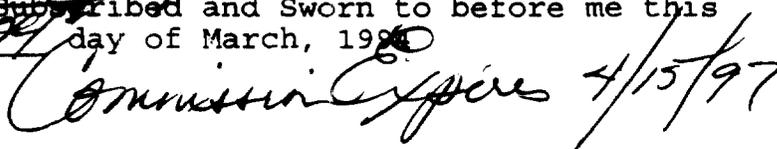
16. In conclusion, (1) neither Mr. Stewart nor any Commissioner, Commissioner staff, or other Commission personnel, other than as set out above, ever instructed or suggested to me that I reverse the June 18, 1993 decision; (2) aside from the meeting held in Mr. Stewart's office on July 1, 1993, I did not have any conversation about substantive issues with Ms. Polivy; (3) I have never discussed this matter with Ms. Cook; (4) I did not consider the proceeding at the time of the meeting in Mr. Stewart's office to be subject to the Commission's ex parte restrictions, since it had originally been initiated by Press Broadcasting Company's filing of an informal objection on February 15, 1991 and a similar informal objection had been lodged against the current extension of time application; and (5) I decided the merits of the construction permit extension application based on the factual and legal arguments set forth in Rainbow's July 2, 1993 petition for reconsideration and in the responsive comments filed by Press Broadcasting Company.

17. I swear that the foregoing information is true and correct to the best of my recollection.




Barbara A. Kreisman

Subscribed and Sworn to before me this
day of March, 1997


Commissioner Expires 4/15/97

**Affidavit of Clay Pendarvis
in Response to Subpoena**

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re)	
)	
PRESS BROADCASTING COMPANY, INC.)	No. 93-1867
Petitioner.)	

United States of America
District of Columbia, ss

AFFIDAVIT OF CLAY PENDARVIS IN RESPONSE TO SUBPOENA

Clay Pendarvis, being first duly sworn, deposes and says:

1. I am the Chief of the Television Branch and Acting Chief of the Distribution Services Branch of the Video Services Division, Mass Media Bureau, Federal Communications Commission. I have been Chief of the Television Branch since 1982. I provide the following information pursuant to the March 4 Order of the D.C. Circuit Court of Appeals in the captioned case.¹

2. A few preliminary background facts regarding this case puts it in proper context. In addition to personnel-related administrative duties each month, I sign and approve or review, and note to be forwarded to the Chief, Video Services Division, hundreds of letters, rulings, orders and applications. Rarely do I read the respective files or pleadings of routine matters in detail; instead, due to the enormous number of such matters, I rely upon the staff attorney or paralegal generating the case and/or his or her supervisor to provide me with factual summaries of the case and to provide me with answers to any questions I may have regarding the facts of a case. The only exception to this practice is with respect to nonroutine cases involving highly complex, difficult and/or novel issues. The Rainbow Broadcasting case is a routine, minor, single-issue case that, under ordinary circumstances, would not have prompted me to review the files and pleadings personally.

3. As to the Rainbow case, the Commission granted Rainbow a permit to construct a new television station in Orlando, Florida in 1984, after a comparative hearing. The Commission's award of a minority preference in this case was challenged in federal court and eventually affirmed by the United States Supreme Court in August 1990, approximately six years after the initial grant. In general, a permittee has 24 months within which to construct.

¹ The information presented herein is limited in accordance with the March 4 Order. I have not responded to those questions proposed by Press Broadcasting that are outside the scope of that order.

However, Rainbow's construction permit had been issued with the required construction time running during the appeal process. Over the years Rainbow had received multiple extensions of time to construct, based primarily on the fact that Rainbow could not be expected to risk capital and enter into construction-related contracts and agreements while the validity of its construction permit was being litigated at the highest level of the federal judiciary.² Thus, on June 25, 1991, when Rainbow filed what was its sixth request for extension of time to construct, it had only 10 months within which to construct the station following final judicial review of the Commission's grant. In reviewing Rainbow's request, the staff noted that Rainbow's construction permit had been outstanding for 32 months since the grant became final. However, that analysis was flawed and did not take in consideration that for 22 of those months Rainbow had been awaiting Commission action on its sixth request for extension of time to construct. Finding that no substantial progress had occurred during the 32 month period, the staff denied Rainbow's application on June 18, 1993.

4. Some time shortly after the release of the June 18, 1993 letter denying Rainbow's extension application, I recall that Roy Stewart, Chief of the Mass Media Bureau, told me that he received a call from Antoinette (Toni) Cook, then Senior Counsel to the United States Senate Commerce Committee, regarding the Rainbow extension application. He contacted me since he was unfamiliar with the matter, and requested that I call Ms. Cook back on his behalf. Thus, I did place a call to Ms. Cook. Our telephone conversation was very brief; she asked me about the procedural posture of the case and inquired about the most expeditious manner to get additional, significant facts to the staff that might have a bearing on the decision. My recollection is that she did not share this new or additional evidence with me. I told Ms. Cook that the matter was not final and that any new facts could be presented, pursuant to the Commission rules, in a petition for reconsideration. Also, I indicated to Ms. Cook that any points Rainbow believed the staff might have overlooked or did not give the appropriate relevance could also be revisited in a petition for reconsideration. Ms. Cook did not discuss the merits of the case with me at any time.

5. Around this same time, I received a telephone call from Margot Polivy, counsel for Rainbow, requesting a meeting to discuss the decision. My recollection is that I told her that my schedule was very tight but maybe I could set something up within the next few days. I believe it was later that day that I

² In such a case, until the grant of the construction permit becomes "final," *i.e.*, not subject to further appeal, a permittee may proceed toward construction, but does so at the risk that the initial grant could be reversed.

received another call from Ms. Polivy's office in which she or her law partner, Katrina Renouf, indicated to me that a meeting had already been scheduled in the Mass Media Bureau Chief's Office for 2:00 p.m. on July 1, 1993. It was requested that I attend. That information was subsequently confirmed by the Bureau Chief's Office.

6. In preparation for the July 1, 1993 meeting, I met with Paul Gordon, the staff attorney who had prepared the June 18, 1993 letter, to go over the facts in the case and the basis for our decision. I am aware that Mr. Gordon has stated that I told him during this meeting that Mr. Stewart thought the June 18 letter was wrongly decided and should be reversed. I have no recollection of telling him anything of the sort. In fact, at that time, Mr. Stewart had almost no knowledge of the facts of this case. Based on my years of experience in dealing with Mr. Stewart, I know that he would not have formed an opinion without knowing the facts. In any event, Mr. Stewart had not expressed any opinion to me about the case at that time.

7. Mr. Gordon discussed the case with me and indicated that he thought the matter might be restricted and that a meeting without the presence of all parties could be an ex parte violation. In routine cases such as these, extensive reliance is placed on the staff attorney most familiar with the facts of the specific case. Based upon Mr. Gordon's briefing and after a brief discussion of the matter with him, I voiced my opinion that the matter was not restricted due to the fact that only an informal objection had been filed. However, I did indicate to him that I would bring the matter to the attention of Barbara Kreisman, who is the Chief of the Video Services Division and my supervisor. At that time, Mr. Gordon did not indicate to me that other pleadings, rulings or facts might exist which would make the matter restricted.

8. Sometime thereafter, in a meeting with Barbara Kreisman, I did mention Mr. Gordon's concerns about whether or not the Rainbow matter was restricted. I opined to Ms. Kreisman that in my judgement the matter was not restricted since only an informal objection had been filed. My recollection is that she agreed with me. However, Ms. Kreisman stated that she would raise the question with the Bureau Chief.

9. On the day of the July 1, 1993 meeting in the office of Roy Stewart, Paul Gordon inquired of me whether counsel for Press Broadcasting would be attending the meeting, and I again mentioned his concerns regarding the question of whether or not the Rainbow matter was restricted to Ms. Kreisman. My recollection is that both Ms. Kreisman and I were of the same opinion that because only an informal objection had been filed against the Rainbow application, the matter was not restricted and that a meeting on the matter with Rainbow's attorney would

not be inconsistent with the Commission's ex parte rules. Mr. Gordon was a party to my brief conversation with Ms. Kreisman.³ Once again, Mr. Gordon did not mention that any other pleadings, rulings, facts or circumstances existed supporting an opinion that the Rainbow case was a restricted proceeding.⁴ Upon reflection, I believe that it is factual and accurate to state that at this point, both Ms. Kreisman and I had resolved in our own minds that the Rainbow matter was not anything other than a routine matter subject to an informal objection and not a restricted proceeding.

10. The July 1, 1993 meeting was held in the Bureau's Chief's office with Ms. Polivy and her client, a Rainbow principal, in attendance. Also in attendance were Paul Gordon, Barbara Kreisman, Robert Ratcliff and myself. The meeting was brief, with Ms. Polivy doing most of the talking. She stated that the staff had not considered pertinent facts in its June 18, 1993 decision. Specifically, she mentioned that Rainbow had expended a large sum of money on the case. She may also have mentioned that Rainbow had not had a full two years to construct, due to the pendency of the federal court appeal during that time. The Rainbow principal also made a very brief statement. However, I have no recollection of the content of his brief statement. Roy Stewart told Ms. Polivy that if she believed the staff's decision was inconsistent with Commission precedent or the record facts, she should file a petition for reconsideration. The meeting ended on that point having lasted approximately 20 minutes. I do not recall anyone else speaking at the meeting except the individuals noted above.

³ In fact, this meeting took place immediately before the three of us departed for the meeting in the Bureau Chief's office.

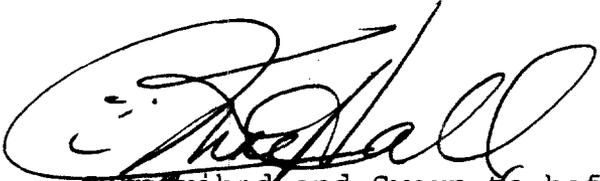
⁴ In this regard, it should be noted that Mr. Gordon did not advise me or Ms. Kreisman of the existence of a 1991 letter issued by the Managing Director's Office, which opined that the Rainbow proceeding was restricted. Nor did Mr. Gordon tell us about conversations he purportedly had with Ms. Polivy concerning the applicability of the ex parte rules to this proceeding. It is also important to note that, merely on the basis of the informal objection, i.e., the only fact known to either me or Ms. Kreisman, the General Counsel's Office concluded that this proceeding would not have been restricted at the time of the meeting in question. See Inspector General Report at Page 5. Thus, on the basis of the information known to me at the time, there was no reason to assume that the Rainbow matter was anything other than a routine, non-restricted proceeding, a fact with which the Office of General Counsel, responsible for and familiar with the subtle application of the ex parte rules, concurs.

11. I do not recall that Mr. Stewart gave any instructions to the staff on how to handle the petition for reconsideration either before it was filed or after. After Ms. Polivy departed the July 1 meeting, as the staff was standing outside Mr. Stewart's door, Mr. Stewart's only comments were something to the effect that we would wait for the petition for reconsideration and make sure that any disposition is supported by the record. He did express some concerns about the amount of money that had been expended by Rainbow. However, he gave no directions to reverse the decision. Thereafter, I had no other communications with Mr. Stewart regarding this matter, nor am I aware of any communications between Mr. Stewart and anyone else regarding the disposition of the case.

12. Rainbow's petition for reconsideration was filed on July 2, 1994. My recollection is that I had a discussion with Paul Gordon regarding the petition for reconsideration. Our discussion focused on the question of whether or not Rainbow had been given a full two years to construct. It was during this discussion that I discovered that Mr. Gordon had miscalculated the time within which Rainbow had been afforded to construct after the grant of its construction permit had become final. My recollection is that I immediately pointed out this error to Ms. Kreisman and recommended to her that our decision of June 18 should be reversed on those grounds. Both Ms. Kreisman and I agreed that, apart from any arguments raised in the reconsideration pleadings, Rainbow was entitled, under Commission precedent, to additional time within which to construct. I instructed Mr. Gordon to focus on the construction time in reversing the June 18 letter. Ms. Kreisman and I were both anxious to correct this erroneous ruling. Mr. Gordon drafted a decision reversing the June 18, 1993 decision reinstating Rainbow permit. No Commissioner or anyone from their offices, or any other FCC personnel, except as noted herein, ever suggested in any manner that I reverse the June 18, 1993 decision.

13. That decision was signed by Roy Stewart on July 30, 1993. Although I had been given a draft of the July 30, 1993 decision, due to other commitments, I did not get an opportunity to read or review it before the decision was forwarded to the Bureau Chief's front office. The July 30, 1993 decision, however, was reviewed and edited by Barbara Kreisman and her deputy James Brown. I was aware that the July 30 decision reversed the June 18 decision and I was in total agreement with the result. I believed then, and now, that Rainbow was entitled to a full two years after judicial finality to complete construction. Based upon the factual information I had at the time, my actions in this matter were at all times consistent with the Commission's rules and with the principles of fundamental fairness in the administrative process.

14. I swear that the foregoing information is true and correct to the best of my recollection.



Clay Pendarvis
Clay Pendarvis

Subscribed and Sworn to before me this
29th day of March, 1964

Commission Expire 11/15/97

**Affidavit of Roy J. Stewart
in Response to Subpoena**

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re)
)
PRESS BROADCASTING COMPANY, INC.) No. 93-1867
Petitioner.)

United States of America
District of Columbia, ss

AFFIDAVIT OF ROY J. STEWART IN RESPONSE TO SUBPOENA

Roy J. Stewart, being first duly sworn, deposes and says:

1. I am the Chief of the Mass Media Bureau of the Federal Communications Commission. I have held that position since October 1989. I provide the following information pursuant to the March 4 Order of the D.C. Circuit Court of Appeals in the captioned case.¹

2. Sometime in late June 1993, I received a telephone call from Antoinette (Toni) Cook (now Bush) who indicated that the Mass Media Bureau had issued a letter cancelling a television construction permit held by Rainbow Broadcasting Company (Rainbow). It is common in my job to have members of the bar contact me concerning matters pending in the Bureau. She asked if that letter action was consistent with the Commission's policies intended to encourage minority ownership of broadcast stations. I told her that I was not aware of the letter or the basis for the decision, but that I would look into the matter.

3. That same day I called Clay Pendarvis, Chief of the Television Branch in the Video Services Division, and asked him for a copy of the Rainbow letter. He sent me a copy of the letter, which was dated June 18, 1993 and signed by Barbara Kreisman, Chief of the Video Services Division, and I read it.

4. I did not speak with Ms. Cook on this matter again. Because I was tied up on other Commission business, after reading the letter, I asked Clay to call Ms. Cook and simply advise her that I now had the letter and had read it. I did not indicate to Clay, or suggest that he indicate to Ms. Cook, any opinion regarding the decision contained in the letter.

5. Sometime thereafter, Margot Polivy, counsel for Rainbow

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Broadcasting Company, called me and asked if I would meet with her concerning the Rainbow matter. I had been advised by either Barbara or Clay that informal objections had been filed against Rainbow's construction permit extension request and its pro forma assignment application that were the subject of the June 18th letter. Based upon my prior experience in such proceedings and my discussions over time with the Commission's Office of General Counsel concerning the application of the ex parte rules, I concluded that the Rainbow proceeding was not subject to ex parte restrictions. My conclusion in this regard came directly from my understanding that only informal objections had been filed. I had no knowledge at that time, or at any time prior to August 10, 1993, of the letter written by Mr. Doug Sandifer on behalf of the Managing Director's office, dated October 8, 1991, that described the Rainbow proceedings as restricted. I therefore agreed to have the proposed meeting.

6. On July 1, 1993, I met with Ms. Polivy and her client - a representative of Rainbow - in my office. Barbara Kreisman, Clay Pendarvis and Paul Gordon, the staff attorney responsible for the Rainbow case, were present. Sometime after the meeting began, Bob Ratcliffe, my legal assistant, also joined the meeting.

7. Ms. Polivy made a brief presentation as to why she believed the action taken in the Division's letter of June 18th cancelling Rainbow's construction permit was incorrect. In this regard, Ms. Polivy pointed to two principal considerations that she believed had been improperly disregarded in the staff's decision. First, she stated that during the pendency of its construction permit Rainbow had made substantial monthly payments to preserve a transmitter site lease. Second, she asserted her belief that Rainbow had not been afforded the full 24 months to construct that all television permittees are ordinarily given. In this connection, she noted that substantial portions of Rainbow's construction period had been interrupted by court appeals of the underlying construction permit grant.

8. I did not express any view to Ms. Polivy or her client as to the ultimate correctness of the staff's letter. Rather, I said to Ms. Polivy that she could file a request for reconsideration of the staff's June 18th letter raising the points she had addressed in the meeting and that she should serve a copy on the informal objector. I did express some surprise during the meeting that the factors that Ms. Polivy raised had not been addressed in the staff's decision. The meeting lasted approximately 10-15 minutes.

9. Immediately after the meeting, I expressed my concern to Barbara that there was no reference in the June 18th letter to the factors that Ms. Polivy had raised in the meeting. My concern derived not from any strong inclination as to the proper

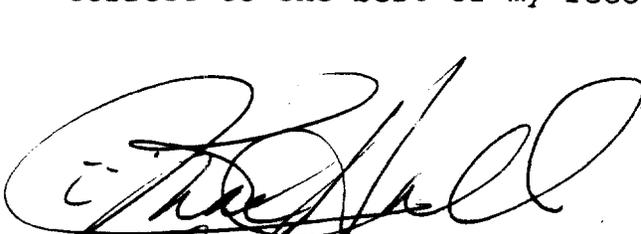
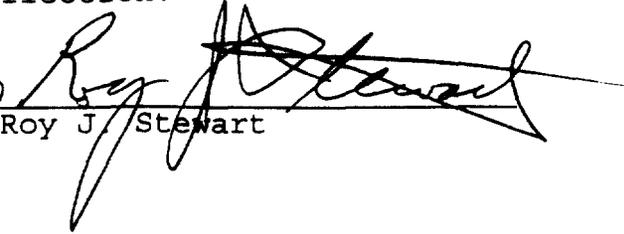
result in Ms. Polivy's case, but from the apparent failure of the Division's decisionmaking process to consider what seemed to me to be relevant factors in disposing of an extension request. I did not instruct Barbara, or any other member of the Video Services Division, to take any particular action or reach any particular result if reconsideration were filed by Rainbow.

10. Reconsideration was subsequently filed by Rainbow and opposed by the informal objector. I had no further contact with my staff as to what the disposition of Rainbow's request should be. Moreover, I had no contact with the Commissioners or their offices or any office within the Commission concerning the disposition of this matter at any time. I did not have any further contact with Ms. Cook or Ms. Polivy on this matter.

11. Subsequently, I received a letter drafted by the Video Services Division deciding Rainbow's request for reconsideration. The letter reversed the decision in the staff's June 18th letter, but it did so based on a factor not considered in the earlier letter, i.e., the fact that Rainbow had not been afforded a clear 24 months in which to build its television station. Under this analysis, an evaluation of substantial progress is not relevant because no permittee is required to demonstrate such progress as a basis for a permit extension when the permittee has not had a full 2 years in which to build. The letter granted an 8 month extension. I signed the letter and it was sent to the parties.

12. Any violation of the ex parte rules that may be found to have occurred as a result of my meeting with Ms. Polivy was entirely unintentional. I was convinced, based upon the facts of which I was aware at the time, that any such meeting was permitted under the rules. To the extent that this is not the case, I believe that these important rules should be reviewed and revised with a view to clarifying and simplifying them. Any such review should also include consideration of a process by which ex parte determinations by the Managing Director's office, such as Mr. Sandifer's letter of October 8, 1991, are clearly and unerringly made known to decisionmaking personnel in the operating bureaus. One possible approach would be to require outside counsel or parties, who would have direct knowledge of such determinations, to affirmatively inform, in writing, decisionmaking personnel in the bureaus of any such determinations prior to meeting with them about any case that is contested in any manner.

13. I swear that the foregoing information is true and correct to the best of my recollection.

Roy J. Stewart

Subscribed and Sworn to before me this
24th day of March, 1994

Commission Expires 4/15/97