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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

DATE: November 22, 1993

REPLY TO  
ATTN OF: James C. Warwick  
Inspector General

SUBJECT: Investigation of Violation of Ex Parte Rule by Mass Media Bureau Personnel.

TO: The Chairman

This memorandum reports the results of an investigation into allegations that personnel from the Mass Media Bureau acted improperly, under the Commission's ex parte rule, by meeting in July 1993 with an attorney and her client to discuss the merits of an action taken by the Mass Media Bureau's Video Services Division. My investigation established that the meeting was prohibited by the Commission's ex parte rule, and that those Commission employees involved demonstrated a careless attitude regarding the applicability of the rule and basic principles of due process and fair play. I also found that the ex parte rule itself is not as clear as it was intended to be, and that the complexity of the rule itself contributed to the violation in this case.

As a result, I recommend that you consider whether administrative action should be taken against certain of the employees involved, and that the Mass Media Bureau be directed to institute procedures to ensure that employees are more sensitive to the requirements of the ex parte rule. In addition, I recommend that the Commission consider amending the ex parte rule to more clearly delineate those proceedings which are restricted and in which ex parte communications are forbidden.

Attached is a summary of this investigation.

Federal Communications Commission	
Docket No. <u>GC 95-172</u>	Exhibit No. <u>1</u>
Presented by <u>Staff</u>	
Disposition	Identified <input checked="" type="checkbox"/>
	Received _____
	Rejected _____
Reporters <u>JS</u>	
Date <u>6-25-96</u>	

This case was initiated as a result of an August 3, 1993, complaint by an individual<sup>1</sup> who alleged that Mass Media Bureau (MMB) personnel, including Roy Stewart and the Chief of the Video Services Division, MMB, had met with representatives of Rainbow Broadcasting Company (hereinafter "Rainbow"), and as a result Mr. Stewart reinstated Rainbow's construction permit for a television station in Orlando, Florida, thereby reversing a previous action by the Chief of the Video Services Division which had canceled the permit.

We interviewed all of the Mass Media Personnel who attended the meeting as well as the attorney who represented Rainbow and the attorney who represented Press Broadcasting Company, (hereinafter "Press") which had opposed the Rainbow construction permit. The interviews of the FCC employees were conducted under oath and were tape-recorded. We also attempted to interview Antoinette Cook, Senior Counsel of the Communications Subcommittee of the Senate Commerce Committee, who had spoken with Mr. Stewart and Clay Pendarvis, Chief of the Television Branch, on behalf of Rainbow. Ms. Cook did not respond to our efforts to contact her.

In addition, we consulted the Office of General Counsel regarding the applicability of the Commission's ex parte rule to the proceeding in question, and read the filings by Rainbow and Press with respect to Mr. Stewart's action. Set forth below are our detailed findings and recommendations.

#### Background.

Rainbow Broadcasting Company filed for a construction permit for station WRBW(TV) in Orlando Florida and was granted a construction permit by the FCC in 1984. The legal process quickly ensnared the construction permit, however, and the FCC extended or reinstated the construction permit five times during the lengthy appellate process. The fifth request for an extension was filed on January 25, 1991, granted on February 5, 1991, and covered the period February 5 to August 5, 1991. In June of 1991 Rainbow filed its sixth request for an extension of its construction permit, and in November 1991 filed a request to reorganize as a limited partnership.

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<sup>1</sup> The individual requested that his/her identity not be revealed. The Inspector General Act provides that the Inspector General shall not disclose the identity of an employee who makes a complaint without that person's consent, unless such disclosure is unavoidable during the course of the investigation. 5 U.S.C. App. 3, § 7(b). This office extends such protection to all complainants. Since the individual in this case requested that his/her identity be protected, we shall refer to the individual as "the complainant" in this report.

Before any action on either request, the Mass Media Bureau's Video Services Division wrote to Rainbow on March 22, 1993, and asked what specific action Rainbow had taken to construct its station since it had filed its November request for reorganization. Rainbow responded that it had taken no action since completing a transmitter building in November 1991 because its funds were tied up pending the FCC's action on Rainbow's assignment application.

On June 18, 1993, Barbara Kreisman, the Chief of the Video Services Division, signed a letter denying Rainbow's application for an extension of its construction permit, cancelling the construction permit, and dismissing Rainbow's application for reorganization as moot.

Sometime in June, 1993, after the FCC letter to Rainbow, Antoinette Bush (nee Cook), Senior Counsel of the Senate Subcommittee on Communications of the FCC's oversight Committee, the Senate Commerce Committee, had telephone conversations with the Chief of the Mass Media Bureau and with Clay Pendarvis, the Chief of the Television Branch of the Video Services Division, MMB. Ms. Bush called at the request of Margot Polivy, the attorney representing Rainbow. Shortly thereafter, on July 1, 1993, Margot Polivy and her client, Joseph Rey, president of Rainbow, met at the FCC with Roy Stewart, Barbara Kreisman, Clay Pendarvis, Paul Gordon (attorney in Television Branch with responsibility for Rainbow matter), and Roy Stewart's Assistant Chief for Law, Robert Ratcliffe. The meeting involved the substance of the June 18, 1993, decision by Ms. Kreisman. The day after the meeting, Rainbow filed a petition for reconsideration of the June 18, 1993, decision.

By letter of July 30, 1993, to Margot Polivy, Roy Stewart reversed the action taken in Ms. Kreisman's June 18, 1993, letter. He reinstated the construction permit for Rainbow, granted Rainbow's application for an extension of the construction permit, and granted Rainbow's application to reorganize as a limited partnership.

Press Broadcasting Company, Inc. ("Press") holds a license for Station WKCF(TV) in Claremont, Florida. Press has its antenna on the same tower specified in Rainbow's construction permit and serves a market which includes the Orlando, Florida area. Press considers itself a potential competitor of Rainbow and sees itself as having standing to oppose the construction of Rainbow's TV station. Since January, 1991, Press has vigorously opposed Rainbow's requests for extensions of its construction permit. Press opposed Rainbow's January 1991 application for a fifth extension of its construction permit, but only did so in February after the application had been granted. Press asserts that the application was granted by the FCC on the same day it gave public notice of the application, and Press was unaware when

it filed an "Informal Objection" on February 15, 1991, that the FCC had acted so quickly. Press therefore filed a Petition for Reconsideration on February 25, 1991. Press also filed an "Informal Objection" to Rainbow's June 1991 application for a sixth extension, and in January 1992 filed an objection to Rainbow's November 1991 request for an assignment of its construction permit.

Ms. Kreisman addressed her June 18, 1993, letter denying Rainbow's June and November, 1991, petitions, to Rainbow and to Press. She purported to resolve Rainbow's two pending applications, and noted in the first paragraph of her letter as follows: "Press Television Corporation . . . has filed informal objections to the applications. The parties have also filed several other responsive pleadings." Thus, Ms. Kreisman's letter appeared to recognize that Press was a "party" to the proceedings and that Press had gone on record through its filings as opposed to Rainbow's applications.

Nevertheless, Press was given no notice of the meeting at the FCC on July 1, 1993, between Rainbow and the MMB personnel. Nor has any effort been made to inform Press of the content of that meeting. Press was served by Rainbow with a copy of its Petition for Reconsideration filed July 2, 1993, and Press filed an opposition to that petition. Press was also copied on Roy Stewart's July 30, 1993, letter granting Rainbow's petition for reconsideration and reversing the June 18, 1993, action by Ms. Kreisman.

On August 13, 1993, Press filed an "Emergency Petition For Immediate Recision, Setting Aside or Vacation of Action Taken Pursuant to Delegated Authority" alleging that Mr. Stewart's July 30, 1993, decision was tainted by an improper *ex parte* contact in violation of the Commission rules. Press also filed a "Contingent Application for Review" on August 26, 1993, challenging Mr. Stewart's decision on substantive grounds. Rainbow has opposed both of the Press filings. Since Press alleged improper taint in Mr. Stewart's decision, the Mass Media Bureau recused itself entirely and action on Press's emergency petition and contingent application for review has been removed from MMB to the Office of General Counsel where it is pending a decision. We have been advised that a decision in the matter is several months away.

The application of the *ex parte* rule.

Central to an analysis of this matter is the question of whether the July 1, 1993, meeting involved a restricted proceeding for the purpose of the Commission's *ex parte* rules. While traditionally the Office of General Counsel renders legal opinions regarding the applicability of the *ex parte* rules in specific cases, to resolve this investigation we have had to

consider this issue after consultation with the Office of General Counsel. In our view, the matter that was the subject of the June 18, 1993 letter from Ms. Kreisman, the meeting on July 1, 1993, and Mr. Stewart's July 30, 1993, letter was a restricted proceeding for the purposes of the *ex parte* rule. The Commission's *ex parte* rule provides that the *ex parte* restrictions in an adjudicative proceeding are triggered by the filing of a formal opposition or formal complaint. 47 CFR 1.1208(c). A formal opposition is any pleading which meets three requirements: (1) the caption and text of the pleading had to make it unmistakably clear that the pleading was intended to be a formal opposition; (2) the pleading had to be served upon the other party to the proceeding; and, (3) the pleading had to be timely filed. 47 CFR 1.1202(e). With the exception of the February 1991 informal opposition by Press, which was not timely filed, all of Press's filings in opposition to the fifth and sixth extension requests by Rainbow, as well as the opposition to Rainbow's transfer application, were sufficient to be deemed formal oppositions under the rule.

The Office of General Counsel (OGC) has informally advised us that its opinion is also that the proceeding was a restricted proceeding after Press filed its Petition for Reconsideration in February 1991. Although Press filed informal objections thereafter which, in OGC's view, were not formal oppositions for the purpose of the *ex parte* rule, 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.

OGC's view that Press's informal objections were not formal oppositions is based on their interpretation of the first requirement of 47 CFR 1.1202(e) that the caption and text of a pleading have to make it unmistakably clear that the pleading was intended to be a formal opposition. OGC reads the words caption and text separately in the rule, and states that the caption and the text each have to separately meet the requirement. This appears to be an unduly restrictive interpretation, and I would read the requirement to be that the caption and text read together must meet the requirement. Under OGC's interpretation, merely using the words "informal objection" in the caption of a pleading makes the opposition informal notwithstanding the formalities of the text and whether the text makes it unmistakably clear that a formal opposition is intended.

OGC advised that they adopted this interpretation in order to make the test as objective as possible and to avoid having to determine the intent of the objector. While there is much to recommend this "bright line" OGC approach, it appears that the test set forth in the rule is fairly easy to apply under my interpretation. If there is any difficulty whatsoever in determining the intent of the objector, then the opposition fails

the test because it is not "unmistakably clear" that a formal opposition was intended. However, it is OGC and not the OIG that interprets the rule for the Commission.

Failure of Mass Media Bureau personnel to treat the proceeding as restricted.

The issue of whether the proceeding involving Press and Rainbow was restricted arose in September, 1991, when an Orlando citizen wrote a letter to the Managing Director concerning the proposed Rainbow Broadcasting TV station. The Managing Director, through Doug Sandifer, wrote back that the proceeding involving Rainbow is considered a restricted proceeding for the purposes of the ex parte rules because of a Petition for Reconsideration filed in February 1991 and an Objection filed in July 1991. Copies of the letter were sent to the attorneys for both Press and Rainbow. Mr. Sandifer advised us that in determining whether the proceeding was restricted, he consulted the Video Services Division (Steve Sewell and Paul Gordon) and his draft letter was sent to OGC for comment and coordination. The letter was routed to Steve Bayley and David Solomon.

Roy Stewart told us that sometime before the July 1, 1993, meeting he had with Rainbow, he received a call from Antoinette Cook about Ms. Kreisman's June 18, 1993, letter. Ms. Cook did not indicate the capacity in which she was calling, but informed Mr. Stewart that Rainbow was a minority broadcaster. She stated that the Commission was supposed to have a minority broadcasting policy, and asked Mr. Stewart if the MMB action was consistent with that policy. Mr. Stewart said he didn't know anything about the matter, and Ms. Cook asked him to look into it. He then called the Chief of the TV Branch in the Video Services Division, Clay Pendarvis, and asked him to call Ms. Cook back.

Mr. Pendarvis told us that prior to the July 1, 1993, meeting, Roy Stewart called him and told him that Antoinette Cook had called Mr. Stewart and had asked about the Rainbow matter. Mr. Pendarvis told Mr. Stewart about the matter and Mr. Stewart asked him to call Ms. Cook at home in New York and tell her about the matter. Mr. Pendarvis did so, and Ms. Cook indicated that her interest stemmed from a contact from Rainbow, and that there were some facts that Rainbow felt hadn't been considered by MMB. Ms. Cook wanted to know the process for Rainbow to make these facts known to the Bureau, and Mr. Pendarvis told her that Rainbow should file a petition for reconsideration. Mr. Pendarvis considered the call a status inquiry.

Margot Polivy, the attorney for Rainbow, told us that she had informed Toni Cook about the FCC's June 18 decision, and asked Toni Cook to check it out for her. She did this because she knows Toni Cook as a former client and as a friend. She contacted Ms. Cook because she knew of Ms. Cook's interest in

minority broadcaster issues. She does not recall if Toni Cook got back to her, but they did not have any substantive discussion about the case. Her contact with Toni Cook was by phone, it was not face to face. Ms. Polivy has no idea who Toni Cook talked to at the FCC, but thinks it would have been Rod Porter.

We interviewed Antoinette Cook by telephone because she was in California. She did not have a good recollection of her telephone conversations with Roy Stewart and Clay Pendarvis. She called Roy Stewart at Margot Polivy's request. She remembered telling Roy Stewart that the Rainbow matter was the case that had gone to the Supreme Court in Metro Broadcasting case. She asked him to give her a status report about what was going on, and Roy Stewart told her he would have Clay Pendarvis call her back. She would not contradict Mr. Stewart if he said she asked him how the June 18 decision in the Rainbow case squared with the Commission's minority broadcasters.

She had no recollection of what Mr. Pendarvis told her except that Rainbow could file a petition for reconsideration. She also recalled that someone told her that the FCC would meet with Rainbow. She added that sometimes when she calls the FCC to inquire 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.

The attorney in the MMB Television Branch with primary operating responsibility for the matter was Paul Gordon. He advised that prior to the June 18, 1993, letter, Margot Polivy, Rainbow's attorney, would call him from time to time and try to discuss the merits of the proceeding. Mr. Gordon believed that the proceeding was restricted and he would cut her off when she got beyond a discussion of the status of the matter and told her he couldn't discuss the merits because it was a restricted proceeding. She believed that it was not a restricted proceeding because Press had no standing to oppose the Rainbow applications.

Knowing that Margot Polivy did not consider the matter to be restricted, Mr. Gordon was concerned when he learned that Roy Stewart and MMB personnel were to meet with her. He discussed these concerns with his Branch Chief, Clay Pendarvis, and the two of them looked up the ex parte rule and agreed that it was restricted. The two of them went to the Division Chief, Barbara Kreisman, and told her that they were concerned that if MMB met with Ms. Polivy without Harry Cole, Press's attorney, it would be a violation of the rule, and that she should let Roy Stewart know. Mr. Gordon stated that Ms. Kreisman didn't indicate whether she agreed or not or whether she would tell Roy Stewart. In any event, the meeting took place without the presence of Press.

Mr. Gordon believed that he knew beforehand that Mr. Stewart was not happy with the decision in the June 18, 1993, letter, and that after the meeting it was Roy Stewart who indicated to him how the July 30, 1993, letter should be written. During the meeting, Margot Polivy addressed the merits of the proceeding. Mr. Gordon felt that her presentation was misleading, and attempted to rebut what she was saying, but Roy Stewart cut off any staff attempt to explain why they had decided the matter the way they had in the June 18, 1993, letter. Mr. Gordon felt that it would have been helpful to have opposing counsel at the meeting to present a more accurate version of the events. Mr. Gordon did not recall any discussion of the *ex parte* rule at the meeting, but Roy Stewart told Ms. Polivy to file a petition for reconsideration and to serve Press with a copy. It was clear to Mr. Gordon that Roy Stewart thought the decision should be reversed, and when he drafted the letter for Mr. Stewart's signature, he based it on what Roy Stewart said during the July 1, 1993, meeting.

Clay Pendarvis's version of these events differed somewhat from Mr. Gordon's. Mr. Pendarvis said that he met with Mr. Gordon prior to the July 1 meeting so that he could get the facts straight and be sure that the June 18 decision had been sound. Mr. Gordon expressed concern about the *ex parte* rule and whether they should notify the other party. Mr. Pendarvis said that he didn't know the answer but his thinking was that it was not restricted because only an informal objection had been filed. In any event, he decided he would raise the *ex parte* issue with Ms. Kreisman. He did mention the issue to Ms. Kreisman but he did not tell her whether the other party should be invited. He merely presented the issue, and her reaction was that she would raise it with Roy Stewart and ask whether the other party should be invited. Mr. Pendarvis does not know if she raised it with Mr. Stewart, but he felt that it was not his meeting and therefore it wasn't his decision whether to invite the other side. Before the meeting with Mr. Stewart there was no discussion with Mr. Stewart about the *ex parte* rule that Mr. Pendarvis recalls.

Mr. Pendarvis contradicted Mr. Gordon as to whether Mr. Stewart took a position on the June 18, 1993, letter. Mr. Pendarvis stated that Mr. Stewart didn't have a view on the merits either way and treated the decision as a staff decision. He described Mr. Stewart as neutral in the meeting, and as not involved in the decision to reverse the staff action in the June 18 letter. Paul Gordon and Clay Pendarvis reversed the decision based on the information and arguments in the petition for reconsideration. The initial decision to reverse was Clay Pendarvis's, and the July 30, 1993, letter was based on his views. Neither Ms. Kreisman nor Roy Stewart expressed any opinion as to how the staff should decide the matter, according to Clay Pendarvis. Ms. Kreisman reviewed the letter before it

went out and made some changes, but the decision to reverse had already been made.

Barbara Kreisman, Chief of the Video Services Division, told us that no one raised an *ex parte* issue with her before the meeting. This contradicts what both Mr. Gordon and Mr. Pendarvis told us. Ms. Kreisman said that no one focused on the *ex parte* issue because there was nothing pending at the time and because there had only been informal objections filed against Rainbow. Also, she thought that no prejudice would occur as a result of the meeting and anything said could be put in a petition for reconsideration. If anyone had raised a possible *ex parte* issue and questioned whether they could have had the meeting, she would have gone to David Solomon in OGC who is the expert on these issues. However, her mindset about the meeting did not focus on any *ex parte* issue partly because it was not her meeting and because there were only informal objections.

Ms. Kreisman indicated that, as a result of the meeting, Roy Stewart had some concerns about the June 18, 1993, letter, and that she was concerned about two things mentioned by Rainbow in the meeting: the time period given Rainbow to construct and the money spent to date by Rainbow. She determined to err on the side of caution in reversing the opinion because they may have been vulnerable regarding whether they had given Rainbow the full two years to construct. She described Roy Stewart as fair-minded, and he did not pressure them to decide it any particular way. She reviewed the outgoing letter and made some minor changes, but the original draft was by Mr. Pendarvis and Mr. Gordon. She had let them know that any decision should be on firm ground. She did not feel that Roy Stewart had pressured them to reach any decision or to do it quickly, but that because he was interested in the matter she was interested in it, and if it was to be a reversal, she wanted to do it quickly. She was also receiving calls from Margot Polivy asking when there would be action, and this was a type of pressure also.

Roy Stewart advised that he doesn't recall if he had a separate meeting with the MMB staff prior to the meeting on July 1, 1993, with Margot Polivy and her client. He stated that he had asked the staff what had been filed and was told that an informal objections had been filed and that indicated to him that the *ex parte* rule did not apply to the meeting. He had conversations with General Counsel in other cases in which he had been told that the *ex parte* rules are not triggered by informal objections. Therefore, he saw no problem in attending the meeting although he knew it was a contested proceeding from reading the June 18 letter. He did not check with General Counsel because of his previous conversations with OGC regarding informal objections in other cases.

Mr. Stewart advised that at the July 1, 1993, meeting, Ms. Polivy argued that the staff had not adequately characterized the permittee's efforts to build the TV station. She told them what efforts had been made, including the expenditure of about 25 thousand dollars a month for the lease of the station. That concerned Mr. Stewart because he did not see any mention in the letter about that expenditure. Mr. Stewart denied that he had any input into the decision of the staff to reverse the decision. He signed the letter as it was presented to him and did not change a word. He had no meeting with the staff on the merits of the letter.

Margot Polivy told us that after receiving Ms. Kreisman's June 18 letter, she decided to meet with Roy Stewart. She called him that day or soon thereafter. She has known Mr. Stewart ever since he came to the FCC (27 years approximately) and knew that he would talk to her. She called him, and told him why she was calling, but he said he didn't know anything about it, and that he would find out about it. She may have asked him in this same conversation if she could meet with him. She had also spoken with Clay Pendarvis and tried to set up a meeting with him for July 1, 1993, but when she spoke with Roy Stewart and told him that she was to meet with Mr. Pendarvis, Roy Stewart said that they should all meet in his office. Clay Pendarvis called her back and Ms. Polivy's law partner, Katrina Renouf, told Clay that they were going to meet in Roy Stewart's office and Clay said okay.

When asked if anyone in all of these conversations mentioned the ex parte rules, Ms. Polivy said that she and Roy Stewart, in one of their telephone conversations, mentioned that there was an "informal objection" and therefore it was alright for them to meet. They were both talking about the ex parte rule, although neither of them mentioned the rule itself. She thinks she also had a similar conversation with Clay Pendarvis where she said it was okay to have the meeting because it was an informal objection. She did not have any conversation with Barbara Kreisman about whether it was okay to have a meeting.

Finally, we interviewed Robert Ratcliffe, the MMB Assistant Chief for Legal, who also attended the meeting on July 1, 1993. He told us that he had no foreknowledge of the July 1, 1993, meeting and did not see the June 18, 1993, letter prior to the meeting. In addition, he did not participate in the process of preparing either the June 18 letter from Ms. Kreisman or the July 30, 1993, letter from Roy Stewart. He came into the July 1 meeting after it had started. Roy Stewart asked him to attend the meeting but didn't give him much information about the purpose of the meeting.

Mr. Ratcliffe remembered that during the meeting Mr. Stewart was surprised that the staff had not taken into account the

amount of money Rainbow had spent. After the meeting Roy Stewart discussed the matter with Clay Pendarvis and Paul Gordon, and gave them the impression that they should look at their decision and be sure it was correct. Mr. Ratcliffe had nothing further to do with the matter after the meeting. Regarding the ex parte rule, Mr. Ratcliffe never considered any ex parte issue because he came into the meeting late and didn't know much about it. Mr. Stewart never asked him anything about the ex parte rule in connection with the meeting.

Propriety of Mass Media Bureau actions in this matter.

The relevant prohibition of the ex parte rule with regard to restricted proceedings is that in such a proceeding no ex parte oral communication directed to the merits or the outcome of a proceeding may be made to or from decision-making FCC personnel without advance notice to all of the parties and without giving them the opportunity to be present. 47 CFR 1.1202 and 1.1208. Moreover, a person may not solicit or encourage others to make any presentation which he or she is prohibited from making under the rules. 47 CFR 1.1210.

Given our interpretation that the proceeding involving Rainbow was a restricted proceeding in June and July, 1993, and given OGC's informal opinion to the same effect, the communications by Ms. Cook and Ms. Polivy were prohibited communications under the rule. Ms. Polivy admitted to us that her communications at the July 1, 1993, meeting were prohibited communications if the matter was deemed to be restricted. All of the persons we interviewed described her arguments at the meeting as going to the merits and the outcome of the proceeding: she argued that the June 18 letter had been wrongly decided and gave at least two specific reasons why it was wrong.

The telephone call by Ms. Cook to Mr. Stewart also addressed the merits and outcome of the proceeding in that she questioned whether the MMB action had been in keeping with the Commission's minority broadcasters policy and asked Mr. Stewart to look into it. The call certainly appears to have had an effect on Mr. Stewart in that it may have been the impetus for his willingness to meet with Ms. Polivy later, and his interest in the outcome of the matter. Although Mr. Pendarvis described his conversation with Ms. Cook more as an innocuous inquiry, Ms. Cook's interest may have prompted Mr. Pendarvis to take a closer look at the June 18, 1993 decision. Unfortunately, since Ms. Cook has not responded to our inquiries, we do not have the benefit of her side of those conversations.

These prohibited communications were violations of the rule by Ms. Polivy, however. Although she appears to be sincere in her belief that the proceeding was not restricted, she violated the rule by soliciting Ms. Cook to call the FCC and by meeting

with the decision-makers herself. In the past the Commission has taken into account whether a violation of the rules is intentional in determining whether to impose sanctions, and OGC should consider Ms. Polivy's state of mind in making any recommendation regarding her violations.

With respect to the MMB personnel, they did not themselves make or solicit any communications in violation of the *ex parte* prohibitions. This is not to say, however, that they acted properly in responding to the communications by Ms. Cook and Ms. Polivy. As public officials, the MMB personnel are obligated to act impartially and not give preferential treatment to any private organization or individual. 5 CFR 2635.101(a)(8).

The purpose of the Commission's *ex parte* rule is ". . . to ensure that the Commission's decisional processes are fair, impartial, and otherwise comport with the concept of due process . . . , " and the rule is designed ". . . to deter improper communications and maintain the utmost public confidence in Commission proceedings." 47 CFR 1.1200(a). Moreover, when the Commission adopted changes in the *ex parte* rules in July, 1987, it stated as follows regarding the purpose of the *ex parte* rules:

[T]he object of the *ex parte* rules is simple -- to assure that the agency's decisions are based upon a publicly available record rather than influenced by off-the-record communications between decision makers and outside persons. This objective is grounded upon basic tenets of 'fair play' and 'due process' that are embodied in the Constitution and other laws and which, we believe, are indispensable to preserving the public's trust and confidence in the integrity of the Commission's processes.<sup>2</sup>

Given the importance of the *ex parte* rule, it should be incumbent on every member of the Commission to ensure that communications with persons outside the Commission about pending matters do not violate the rule. In this matter, the attitude of the Mass Media Bureau personnel towards the rule can at best be described as careless indifference. The line attorney, Paul Gordon, believed that the proceeding was restricted and acted appropriately in bringing the issue to the attention of his Branch Chief when informed that a meeting would take place. Having informed his supervisor and discussed the matter with him, Mr. Gordon appears to us to have been justified in leaving the

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<sup>2</sup> In the Matter of Amendment of Subpart H, Part 1 of the Commission's Rules and regulations Concerning *Ex Parte* Communications and Presentations in Commission Proceedings. Report and Order No. 40-27, July 2, 1987; 62 RR 2d 1755, at 1761-1762.

decision regarding the *ex parte* issue in Mr. Pendarvis's hands. Perhaps Mr. Gordon could have shown more initiative in pursuing the issue, but overall, he acted appropriately in our view.

The Branch Chief, as a supervisor and as a long-time employee of the Commission, acted improperly in merely informing his superior, Ms. Kreisman, and not attempting to resolve the issue himself or ensuring that the issue had been addressed and resolved prior to the meeting. The matter was pending in his Branch and it was his responsibility to see that matter was appropriately addressed by the Commission. As a result of his inaction, the matter has to be reviewed *de novo* by the Office of General Counsel with the result that a final decision, and the construction of the TV station, have been delayed for months. In our view, Mr. Pendarvis was aware of the issue, and was not justified, as Mr. Gordon was, in merely bringing it to Ms. Kreisman's attention. The fact that Ms. Kreisman denies that anyone raised this issue with her indicates that Mr. Pendarvis was not very forceful or effective in raising the issue and apparently did not give it the importance it deserved.

Ms. Kreisman acted improperly in failing to consider the *ex parte* rule on her own, and in failing to have procedures in place within her Division to safeguard against high-level meetings taking place within the Commission that violate the *ex parte* rule. Ms. Kreisman was familiar with the matter from her June 18, 1993, letter, and the fact that she would attend and let her Bureau Chief attend an *ex parte* meeting in a matter as hotly contested as this without assuring herself that the matter was not restricted indicates an indifference towards the rule and the concepts of due process and fair play for which it stands. In a Division responsible for licenses and permits, such indifference appears inexcusable.

Mr. Stewart's inaction is mitigated somewhat by the fact that he was not as familiar with the matter as his staff. On the other hand, Mr. Stewart's long experience with the Commission and with matters of this nature should have caused him to be more cautious in approaching meetings of this type. It is not an adequate excuse to state that since the matter involved informal objections, it was assumed that the matter was not restricted. The matter in fact involved a petition for reconsideration as well as informal objections, and the Commission itself has noted that ". . . an informal objection which meets the criteria for a formal opposition set out in the *ex parte* rules is sufficient to render the proceeding restricted." *In re Kitchen*, FCC 92-255, 71 RR 2d 144, 145 (1992). Similarly, in *Letter to Michael L. Glaser*, 4 FCC Rcd 4557 (1989), the Managing Director determined that the fact that the Mass Media Bureau treated certain Petitions to Deny as informal objections did not affect their

status as formal oppositions under the *ex parte* rules.<sup>3</sup>

Mr. Stewart is familiar with the procedures for consulting OGC on these issues, and he has his own counsel to whom he can address such questions. Perhaps Mr. Stewart was influenced to grant an audience to Ms. Polivy because of the Ms. Cook's interest in the matter. However, as Bureau Chief he should be particularly sensitive to avoiding *ex parte* communications because any appearance of unfairness is magnified when he is personally involved in a decision involving prohibited communications.

We do not see any improper conduct on the part of Mr. Ratcliffe, who had no background on the meeting and whose only involvement in the matter was attending the meeting itself.

The Mass Media Bureau needs to reassess its procedures for complying with the *ex parte* rule, and to reeducate its staff in the rule's requirements.

The *ex parte* rule needs to be simplified.

Throughout this investigation it was apparent that there is confusion both within the FCC and on the part of applicants regarding the applicability of the *ex parte* rule. While Mr. Gordon thought the proceeding was restricted, other MMB personnel assumed that the proceeding was not restricted because it involved informal objections. The attorney for Press has argued at great length in his pleadings that the proceeding was restricted, while the attorney for Rainbow has argued at equal length that the proceeding was not restricted. Also, Rainbow's attorney claims to have not appreciated the meaning of the October 1991 letter from the Managing Director to the citizen in Florida which described the proceeding as restricted. When we consulted the rule for ourselves, we spent a long time trying to understand how it applies to this proceeding.

Any employee can, of course, consult the OGC for an opinion on the applicability of the rule. The OGC drafted the rule and the attorneys there are experts in its application and render thoughtful, sound opinions when consulted. We were informed by the OGC that they don't consider the rule to be unclear, and we agree that it probably isn't unclear to those attorneys who interpret it on a regular basis. However, a rule which governs the communications between hundreds of FCC employees and the public on a regular basis should be far less complex than the *ex*

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<sup>3</sup> In that case, a party was held to have been confused as to whether an informal objection could also constitute a formal opposition for *ex parte* purposes; hence, the violation was not intentional and no sanctions were imposed.

parte rule as now written. For the rule to be useful and to have meaning in the daily life of the Commission, an employee or a private party should be able to ascertain quickly and easily whether a communication is permissible, and the rule shouldn't be subject to such different interpretations as we have seen in this case.

In our view, a rule as important as this should not result, as here, in unintentional violations due to a party misunderstanding its application. We recommend that the Commission consider if the rule is too complex to serve its intended purpose.