

impediment to the completion of construction is the lack of favorable Commission action on your pro forma assignment application, grant of which would release the funds required for construction. Moreover, you assert that you have selected equipment and concluded an agreement for equipment financing. Finally, you state that you will be able to commence regular operation within 200-220 days of reinstatement of the construction permit and grant of the pro forma assignment application.

Press argues that Section 73.3534(b) does not support a grant of Rainbow's extension application. Press also asserts that the lack of favorable Commission action on Rainbow's pro forma application is irrelevant. According to Press, because that application was not filed until several months after the end of the extension period, it could not have an effect on the permittee's ability to construct during the relevant period of time.

Based on the information before us, we find that grant of your petition for reconsideration is warranted, and we shall afford you an eight-month extension of time within which to construct. When you submitted the extension and assignment applications, you had not yet had two years to complete construction.<sup>3</sup> Thus, Rainbow should not have been required to make the showings requisite for an extension of time beyond two years, when it had, in effect, only 10 months within which to construct the station following the finality of the Commission's decision granting the permit. We believe that the requested eight months should provide you with enough time to complete construction. We emphasize that this action is extremely narrow, based on our issuing a construction permit before finality.

We next address Press's assertion that Rainbow is not qualified to be a Commission licensee. In that regard, Press contends that Rainbow knowingly made a false assertion when it stated in its extension request that a "dispute with the tower owner" had delayed construction. Subsequent pleadings revealed that the permittee had itself initiated a lawsuit against the tower owner to prevent it from renting space to Press. Before Rainbow filed the extension application now before us, the court denied its motion for a preliminary injunction, and Rainbow then notified the tower owner of its intention to commence construction and requested that the lease provisions regarding construction bids be effectuated. Under the circumstances set forth by Rainbow, we conclude that the dispute with the WRBW(TV) tower owner was a factor, albeit not the principal one, that contributed to the delay in construction and that the cited language was, therefore, not a misstatement.

Press also argues that Rainbow is not financially qualified (and that its claims to the contrary are therefore misrepresentations), citing the permittee's stated need for grant of the pro forma assignment application to complete construction. We disagree. Projected expenditures and sources of funds relied upon by applicants in establishing their financial qualifications frequently change and initial proposals are rarely carried out as planned. See KRPL, Inc., 5 FCC Rcd 2823, n. 1 (1990), citing Revision of Form 301, 50

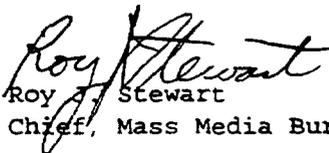
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<sup>3</sup> The permit was issued and several extensions were granted before the grant became final.

RR 2d 381, 382 (1981). Finally, Press alleges that Rainbow engaged in anti-competitive behavior and abuse of Commission processes, by initiating the lawsuit against the WRBW(TV) tower owner and by challenging the channel exchange that allowed Press to operate station WKCF(TV).<sup>4</sup> We find that those allegations are without merit.

Accordingly, your petition for reconsideration IS GRANTED, the construction permit for station WRBW(TV), Orlando, Florida, IS REINSTATED, the call sign WRBW(TV) IS REINSTATED, and the application of Rainbow Broadcasting Company for an extension of time within which to construct station WRBW(TV) IS GRANTED for eight months from the date of this letter. Further, upon our finding that the assignee is fully qualified to operate the station in the public interest, the application of Rainbow Broadcasting Company to assign the construction permit for station WRBW(TV) to Rainbow Broadcasting, Ltd. IS GRANTED.

Sincerely,

  
Roy J. Stewart  
Chief, Mass Media Bureau

Harry F. Cole, Esq.

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<sup>4</sup> Amendment of Section 606(b), Table of Allotments, Television Broadcast Stations (Clermont and Cocoa, Florida), 4 FCC Rcd 8320 (MMB 1989), review denied, 5 FCC Rcd 6566 (1990), aff'd, Rainbow Broadcasting Company v. F.C.C., Case No. 90-1591 (D.C. Cir. 1991).

**JOINT HEARING EXHIBIT NO. 10**

**Commission Memorandum Opinion & Order,  
FCC 94-122, released May 23, 1994**



Before the  
Federal Communications Commission  
Washington, D.C. 20554

In re Applications of

Rainbow	File No. BMPCT-910625KP
Broadcasting	File No. BMPCT-910125KE
Company	File No. BTCCT-911129KT

For an Extension of Time  
to Construct

and

For an Assignment of its  
Construction Permit for  
Station WRBW(TV),  
Orlando, Florida

**MEMORANDUM OPINION AND ORDER**

Adopted: May 20, 1994;

Released: May 23, 1994

By the Commission: Commissioner Barrett issuing a statement.

1. By this Order, we conclude that reinstatement of the construction permit and the call sign of Rainbow Broadcasting Company ("Rainbow") and grant of Rainbow's application for an extension of time within which to construct station WRBW(TV), Orlando, Florida, serve the public interest. We also conclude that grant of Rainbow's application for a *pro forma* assignment of its construction permit also serves the public interest.<sup>1</sup> In so doing, we deny a contingent application for review filed by Press Broadcasting Company, Inc., ("Press") on August 26, 1993, and dismiss an emergency petition for extraordinary relief filed by Press on December 10, 1993.

**I. BACKGROUND**

2. On September 9, 1982, Rainbow filed its application for a new UHF television station in Orlando, Florida. In a comparative hearing, Rainbow received a substantial enhancement based on its minority ownership and integration proposal. The Review Board granted Rainbow a permit to construct in 1984, and the Commission affirmed the grant on review in 1985. Challenges were made to the Commission's minority preference policies, and thus Rainbow's grant did not become final until August 30, 1990

when the Supreme Court denied rehearing in the *Metro Broadcasting* case.<sup>3</sup> During the appeal process, Rainbow requested and received from the Mass Media Bureau several reinstatements and extensions of time in which to construct.

3. On July 3, 1990, one month before the appellate process ended, Rainbow requested a fourth extension of time to construct its facilities. Rainbow claimed that because of the intervening appellate process its grant was not final, and thus sought a "normal" construction period of 24 months, to begin after completion of the judicial review. Instead, the Video Services Division granted Rainbow only a six-month extension of time to construct, from July 31, 1990, to January 31, 1991.

4. Prior to the expiration of the fourth extension period, on January 25, 1991, Rainbow requested its fifth extension. In addition to reciting the lengthy appellate process, Rainbow stated further that its actual construction efforts had been delayed as a result of a dispute with the tower owner. However, Rainbow represented that it was ready, willing, and able to initiate and complete construction within two years, by December 31, 1992. The Video Services Division, however, granted Rainbow only another six-month extension, until August 5, 1991. After the grant of Rainbow's fifth extension, Press filed an "Informal Objection" and a "Petition for Reconsideration." Press contended that Rainbow had itself initiated the tower litigation, in which Rainbow sought a preliminary injunction to prevent Press from co-locating on Rainbow's specified tower, and that the tower dispute did not preclude Rainbow in any way from commencing construction. Press also alleged that Rainbow had made misrepresentations before the Commission, engaged in anti-competitive behavior that constituted an abuse of process, and lacked the requisite financing. Rainbow responded to Press's opposition, and both parties filed further related pleadings.

5. On June 21, 1991, shortly before expiration of the fifth construction period extension and while Press's petition for reconsideration was still pending, Rainbow filed its sixth application for an extension of time to construct. Rainbow again recited the litigious history surrounding its permit and stated that a district court had denied the preliminary injunction that Rainbow had sought in connection with the tower dispute.<sup>4</sup> Rainbow represented that it had since notified the tower owner of its intent to proceed with construction, and that it still anticipated completing construction by December 31, 1992. On November 27, 1991, Rainbow filed a supplement to its sixth extension application, notifying the Commission that it had completed construction of its transmitter building. Also on November 27, 1991, Rainbow filed a *pro forma* assignment application, for the purpose of restructuring its organization to admit non-voting, limited equity partners, which would thereby "reduce its reliance on debt" and enable it to complete construction and commence operations by December 31, 1992. Press filed "Informal Objections"

<sup>1</sup> As discussed in nn.10 & 34, *infra*, our decision is based on an independent review of the record in this proceeding and has been undertaken without participation by the Chief, Mass Media Bureau, or his staff, who are recused from this matter.

<sup>2</sup> By this action, we also dismiss as moot Press's emergency petition to vacate the Bureau's action, filed August 13, 1993, as well as Rainbow's "Request for Immediate Action" filed April 22, 1994.

<sup>3</sup> See *Metro Broadcasting, Inc.*, 99 FCC 2d 688 (Rev. Bd. 1984); *rev. denied*, FCC 85-558 (released October 18, 1985), *held in abeyance*, 2 FCC Rcd 1474 (1987), *reaff'd*, 3 FCC Rcd 866 (1988), *aff'd*, *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (1989), *aff'd*, *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990), *petition for rehearing denied*, 111 S. Ct. 15 (1990).

<sup>4</sup> The tower dispute has since been remanded to state court for disposition.

Federal Communications Commission

Docket No. GC 95-172 Exhibit No. 10

Presented by Joint

Disposition } Identified X  
                  } Received X  
                  } Rejected \_\_\_\_\_

Reporter JS

Date 6-25-96

against Rainbow's sixth extension application and assignment application, and included a copy of the district court's order denying the preliminary injunction. Rainbow responded, and both parties filed further related pleadings.

6. In early 1993, the Video Services Division had not yet acted on Press's petition for reconsideration of Rainbow's fifth extension or on Rainbow's request for a sixth extension. On March 22, 1993, more than one and a half years after Rainbow's fifth extension had expired, the Video Services Division requested that Rainbow address what steps, if any, it had taken toward construction of its facilities since the November 27, 1991, filings. On April 12, 1993, Rainbow responded by stating that it had completed construction of its transmitter building at a cost of \$60,000, that it had maintained its lease for tower space since 1986 at an approximate cost of \$500,000, and that it had selected equipment. However, Rainbow asserted that its efforts to proceed with construction were stymied by the Division's failure to act on its sixth extension application and its assignment application. Again, Press filed oppositions, and Rainbow filed responsive pleadings.

7. On June 18, 1993, the Chief, Video Services Division, denied Rainbow's sixth extension application, which then had been pending for two years. The Division cancelled Rainbow's construction permit, deleted its call sign, and dismissed as moot its assignment application and Press's petition for reconsideration of the fifth extension. *Station WRBW(TV)* (Video Serv. Div. June 18, 1993). According to the Division, Rainbow had "held a valid permit for a total of 32 months since the grant became final" with the termination of the appellate process in August of 1990. The Division determined that Rainbow had failed to establish the showing required to obtain an extension under 47 C.F.R. §73.3534. Specifically, the Division determined that Rainbow had not shown that it had made substantial progress toward construction or that circumstances beyond its control prevented construction, either during the entire 32-month period since *Metro Broadcasting* was decided or, more importantly, during the six-month construction period authorized by the grant of the fifth extension. The Division found that the tower dispute was not over whether Rainbow could proceed with construction, but rather whether Rainbow's asserted claim of exclusivity for certain leased space prevented its competitor, Press, from co-locating on the same tower. As such, according to the Division, the decision not to proceed with construction reflected a business decision on Rainbow's part, a circumstance within its control. Since it denied Rainbow's extension request, the Division did not find it necessary to address Press's arguments regarding Rainbow's qualifications to be a Commission licensee. Rainbow filed a petition for reconsideration of the Division's decision, which Press opposed.

8. On July 30, 1993, the Chief, Mass Media Bureau, granted Rainbow's petition for reconsideration. The Bureau reinstated Rainbow's construction permit and call sign, granted its assignment application, and granted its extension application, providing Rainbow with an additional eight-month period in which to construct its facilities based on Rainbow's estimated 220-day construction schedule. *WRBW(TV)* (Mass Media Bur. July 30, 1993). The Bureau concluded that Rainbow should not have been held to the

showing required under 47 C.F.R. §73.3534, which applies to extensions of time beyond the normal two-year construction period. At the time Rainbow requested its sixth extension, the Bureau emphasized, only ten months had passed since *Metro Broadcasting* was decided. The Bureau granted an eight-month extension of time from July 30, 1993. The Bureau also denied Press's allegations regarding Rainbow's character and finances.

## II. PLEADINGS

9. On August 13, 1993, Press filed an emergency petition to rescind the Bureau's grant of Rainbow's extension and *pro forma* assignment, asserting that the Bureau's action was impermissibly tainted as a result of *ex parte* communications that occurred between Rainbow's counsel and the Bureau Chief and members of his staff prior to the Bureau's action. See "Emergency Petition for Immediate Rescission, Setting Aside or Vacation of Action Taken Pursuant to Delegated Authority." Press stated, *inter alia*, that its petition for reconsideration of Rainbow's fifth extension constituted a formal opposition and rendered the proceeding restricted under section 1.1208 of the Commission's *ex parte* rules. *Id.* at 4. Indeed, Press attached a letter dated October 8, 1991, from the Commission's Managing Director, which had been served on Press and Rainbow, noting that the proceeding was classified as "restricted" under the Commission's *ex parte* rules and that *ex parte* contacts were prohibited. *Id.* at 5 & Attachment C. Press also urged the Chief, Mass Media Bureau, to recuse himself from further participation in the proceeding.<sup>5</sup> *Id.* at 8-9.

10. In response to Press's emergency petition, Rainbow did not deny that it had made an *ex parte* presentation, but argued that the *ex parte* presentation was permissible. See "Rainbow Opposition to Press Emergency Petition." Rainbow acknowledged the Managing Director's indication that *ex parte* contacts were prohibited in the proceeding, but argued that the proceeding was informally, not formally, opposed, and thus seemed to argue that the Managing Director had improperly classified the proceeding as restricted. *Id.* at 3. In support of its position, Rainbow cited the note to section 1.1204(a)(1)(i) and argued that the *ex parte* rules did not bar the applicant, but rather barred only Press as an informal objector, from communicating *ex parte* with the Commission staff. *Id.* at 4.

11. In reply, Press contended that Rainbow had misstated and misapplied the Commission's rules, which explicitly prohibit *ex parte* communications in adjudicatory proceedings that are "formally opposed." See "Reply of Press Broadcasting, Inc. to Rainbow Opposition to Press Emergency Petition." As it previously asserted, Press maintained, *inter alia*, that its petition for reconsideration, as well as its informal objection, constituted a formal opposition, and as such the proceeding was restricted under the Commission's *ex parte* rules. *Id.* at 4-5.

12. In addition to filing the emergency petition, on August 26, 1993, Press filed a "Contingent Application for Review." Press argued that the Bureau erred in granting Rainbow's extension application. Contrary to the Bureau's finding that Rainbow had never had two years in which to construct, Press claimed that Rainbow had held a valid

<sup>5</sup> In August of 1993, the Mass Media Bureau and its staff voluntarily recused itself from further participation in this proceeding. Press was promptly advised of that recusal, although it has

noted that the recusal was not "formally disclosed" until February or 1994. Petitioner's Reply to "Opposition to Petition for Mandamus" at 2 n.2 (Feb. 10, 1994).

permit for a total of eight years, including three years following the completion of the appellate process. *Id.* at 9. Press maintained that the Bureau's grant of Rainbow's extension application was inconsistent with the requirements of section 73.3534 and Commission precedent, citing *Community Service Telecasters, Inc.*, 6 FCC Rcd 6026 (1991); *Panavideo Broadcasting, Inc.*, 6 FCC Rcd 5259 (1991); *High Point Community Television, Inc.*, 2 FCC Rcd 2506 (1987); *Metrovision, Inc.*, 3 FCC Rcd 598 (Video Serv. Div. 1988). See "Contingent Application for Review" at 10-11. Accordingly, Press argued that Rainbow's extension application should have been denied because Rainbow failed to demonstrate that it had made any substantial progress in its construction efforts or that circumstances beyond its control prevented it from constructing. *Id.* at 12-13.

13. Press also claimed that the Bureau erred in granting Rainbow's extension and assignment applications without first conducting a full evidentiary hearing to determine Rainbow's basic qualifications to be a Commission licensee. *Id.* at 13. Specifically, Press asserted that Rainbow had made misrepresentations to the Commission as to the nature of the tower dispute, and had falsely ascribed its failure to construct to the existence of the tower dispute. *Id.* at 14-15. Press maintained that the tower dispute did not prevent Rainbow from constructing; rather, Rainbow chose not to proceed with construction. *Id.* Press also contended that Rainbow had engaged in an abuse of process by aggressively challenging Press's request that the Commission permit Press to exchange its television channel.<sup>6</sup> *Id.* at 18-19. In addition, Press alleged that Rainbow had engaged in abuse of process by initiating the tower litigation, which Press alleged was for the sole purpose of quelling competition while its own construction permit sat idle. *Id.* Finally, Press also asserted that Rainbow was not financially qualified, since Rainbow was unable to proceed with construction absent approval of the assignment application and an additional infusion of capital. *Id.* at 15-16.

14. Rainbow filed an opposition to Press's contingent application for review. See "Rainbow Opposition to Press Contingent Application for Review." Rainbow stated that the Bureau's grant of the extension was justifiable and consistent with the Commission's rules, which afford applicants 24 months to construct. *Id.* at 8-11. Contrary to Press's assertions, Rainbow stated that the Bureau had correctly found that Rainbow never had a full 24-month construction period. *Id.* In that connection, Rainbow claimed that it could not have been expected to proceed

with construction while the validity of its authorization was subject to the five-year appellate process or during the two-year period its sixth extension application was pending. Rainbow also claimed that the Bureau's grant of its assignment application was consistent with Commission precedent and policy, which recognizes that financing plans are rarely effectuated as planned. *Id.* at 12-13. It cited in support *Urban Telecommunications Corp.*, 7 FCC Rcd 3867 (1992). Finally, Rainbow denied that it made any misrepresentations to the Commission, claiming that it had accurately reported the status of the tower dispute, as well as its financial qualifications. Rainbow maintained that it was ready to proceed, and that it had ordered its equipment following the Bureau's decision. See "Rainbow Opposition" at 13.

15. In reply, Press reiterated its previous arguments and emphasized that while Rainbow might not have been required to construct during the five-year appellate process, it *could* have done so and should have at least made "plans for construction" during that period. See "Reply of Press to Rainbow Opposition to Press Contingent Application for Review" at 3. Instead, Press argued, Rainbow had made *no* progress during that period, and virtually "no progress during the three years following finality of its permit." *Id.* (emphasis in original). According to Press, Rainbow's lack of diligence militates against a further extension of time to construct. *Id.*

### III. INSPECTOR GENERAL'S REPORT

16. Subsequent to the filing of those pleadings, the Commission's Inspector General, on November 22, 1993, concluded an investigation into the allegations of improper *ex parte* communications. See *Report by Inspector General of Investigation of Violation of Ex Parte Rule by Mass Media Bureau Personnel to the Chairman ("Report")*.<sup>8</sup> In his Report, the Inspector General concluded that Rainbow had violated the Commission's *ex parte* rules by soliciting a third party to call the Commission on Rainbow's behalf and by meeting and discussing the merits of Rainbow's application proceedings with Mass Media Bureau officials.<sup>9</sup> Pursuant to a Freedom of Information Act request filed by Press on January 14, 1994, this Report was made publicly available on February 18, 1994. On March 8, 1994, Press and Rainbow were invited to file initial and reply comments on the findings in the Report insofar as they related to disposition by the Commission of Rainbow's applications.<sup>10</sup>

<sup>6</sup> See *Amendment of Section 606(b), Table of Allotments, Television Broadcast Stations (Clermont and Cocoa, Florida)*, 4 FCC Rcd 8320 (MMB 1989), review denied, 5 FCC Rcd 6566 (1990), *aff'd sub nom., Rainbow Broadcasting Company v. FCC*, 949 F.2d 405 (D.C. Cir. 1991). In that proceeding, Press, as permittee of Channel 68, Clermont, Florida, sought and was granted a channel exchange with the noncommercial licensee of Channel 18, Cocoa, Florida.

The investigation was undertaken by the Inspector General based upon an August 3, 1993, complaint about the meeting held between Mass Media Bureau officials and representatives of Rainbow.

<sup>8</sup> The Report was submitted to Acting Chairman Quello, pursuant to section 4(a)(5) of the Inspector General Act of 1978, as amended, and 47 C.F.R. §0.13.

<sup>9</sup> The Inspector General acknowledged, however, that "traditionally the Office of General Counsel renders legal opinions

regarding the applicability of the *ex parte* rules in specific cases" and, elsewhere, that "it is OGC and not the OIG that interprets the rule for the Commission." Report at 5-6.

<sup>10</sup> On December 10, 1993, Press had also filed an "Emergency Petition for Extraordinary Relief to Require Compliance with Administrative Procedure Act and the Commission's Ex Parte Rules." In it, Press requested (1) full disclosure of *ex parte* contacts relevant to Rainbow's applications or any pleadings related thereto; (2) an opportunity to review those communications, comment upon them, and seek such further disclosure as may appear warranted based upon its review. Press further requested from the Commission an acknowledgement that the Commission was aware of and committed to providing the protections afforded by the Administrative Procedure Act against the possibility of taint by *ex parte* presentations. Press's requests have been met *inter alia*, by release of the Report of the Inspector General in response to Press's Freedom of Information Act request; compliance with an order by the United States

17. Rainbow, in its comments, states that the Inspector General's finding of *ex parte* violations is based upon his erroneous legal conclusion that the proceeding is a restricted proceeding. In Rainbow's view, the proceeding was exempted from the *ex parte* rules, so that the *ex parte* contacts were permissible.<sup>11</sup> See "Comments of Rainbow Broadcasting, Ltd. on Inspector General's Report" at 1-2.

18. Rainbow also takes issue with the Inspector General's statement that Press "vigorously opposed Rainbow's requests." *Id.* at 7. Rainbow contends that Press lacked standing to oppose its extension and assignment applications and, therefore, because of the informal nature of Press's objections and its lack of standing to oppose the applications, the *ex parte* restrictions did not apply. *Id.* at 7-8. Similarly, because Press denominated the caption of its February 15, 1991, filing as an "Informal Objection," and because Press's filing occurred after grant of the extension request, Rainbow contends that Press's filing did not, contrary to the Inspector General's Report, change the exempt status of the application proceedings.<sup>12</sup> *Id.* at 9-10. Rainbow further states that Press's subsequent filing of a petition for reconsideration did not change the status of the proceeding from exempt to restricted since, according to Rainbow, section 1.106 of the Commission's Rules does not confer standing for the filing of such petitions by informal objectors. *Id.* at 10. In this regard, Rainbow cites *Redwood Microwave Association, Inc.*, 61 FCC 2d 442 (1976). Even if section 1.106 did permit such a filing, Rainbow maintains that Press failed to meet that section's requirements as to how its interests were adversely affected or why it could not have participated earlier in the proceeding. See Rainbow Comments at 10.

19. Nor, in Rainbow's view, did Press's petition for reconsideration qualify as a "formal opposition" that made Rainbow's application proceedings "restricted." According to Rainbow, because the text of Press's petition allegedly conceded that it was an informal objection, the petition could not be properly construed as a "formal opposition." *Id.* at 10-12. Along the same lines, Rainbow states that Press's subsequent filings suffered from this same defect and thus did not meet the requirements of section 1.1202(e)(1)(i).<sup>13</sup> *Id.* at 13. In addition, notwithstanding the Inspector General's reliance on the letter from the Office

of Managing Director (OMD) describing the application proceeding as "restricted," Rainbow contends that the proceeding was not restricted with respect to Rainbow, but only with respect to other parties. *Id.* at 18-19. In support of that contention, Rainbow relies on the note to section 1.1204(a)(1), which states that oral *ex parte* communications are permissible in unopposed adjudications, but only between the Commission and the formal party to the proceeding. *Id.*

20. In addition, Rainbow notes that its attorney and the Mass Media Bureau Chief and Television Branch Chief had collective FCC experience of more than 80 years and contends that each independently concurred that the proceeding was not restricted by Press's informal objection.<sup>14</sup> *Id.* at 19. Finally, Rainbow states that it should have been given an opportunity to review and comment on the Report before it was made public, and that it was highly prejudicial to Rainbow and injurious to those who did nothing wrong to have such a report released with no notice. *Id.* at 28. Rainbow asserts that the Commission should make unequivocally clear that no wrongdoing occurred under the *ex parte* rules. *Id.* at 28-29.

21. Press, in its comments, agrees with the Inspector General's conclusion that there were "multiple violations of the *ex parte* rules by and on behalf of Rainbow." See "Comments of Press Broadcasting Company, Inc. on Report of the Office of the Inspector General" at 4. According to Press, the Managing Director's letter put Press and Rainbow on notice that Press's pleadings were deemed to be formal oppositions which triggered the *ex parte* rules. *Id.* As the Report indicated, Press emphasizes, Bureau staff counsel had informed Rainbow of the Managing Director's conclusion, so Rainbow should not have been confused or unsure about the *ex parte* status of the proceeding. *Id.* at 4-5. Press further speculates that the Office of General Counsel and the Commissioners' offices may be tainted by the improper *ex parte* status of the proceeding. Press suggests that the Commission should instruct the Inspector General to continue his investigation with specific reference to the agency's overall course of conduct in this matter.<sup>15</sup> *Id.* at 6. On April 6, 1994, reply comments were filed by Press and Rainbow.

Court of Appeals for the District of Columbia Circuit dated March 4, 1994, granting in part Press's request for issuance of subpoenas to particular Mass Media Bureau officials; the March 8 letter from the Office of General Counsel requesting initial and reply comments from Press and Rainbow on the Inspector General's Report; and, finally, by our independent review of the record, which ensures that the Commission's decision-making process in this proceeding is impartial.

<sup>11</sup> Rainbow states when it learned on June 18, 1993, that its applications had been denied, not once during the conversation did Commission staff say that the proceeding was restricted or that the *ex parte* rules applied or that it would be improper to talk to or meet with the Television Branch Chief or Mass Media Bureau Chief. See Rainbow Comments at 7.

<sup>12</sup> Under section 1.1202(e) of the Rules, a pleading must, among other things, be timely filed to qualify as a "formal opposition."

<sup>13</sup> Rainbow also maintains that each application was a separate proceeding under section 1.1202(d) of the Commission's Rules and thus, the different application proceedings did not become one for purposes of the *ex parte* rules. See Rainbow Comments at 15.

<sup>14</sup> Rainbow also disagrees with the Inspector General's

suggestion that it should not have solicited an *ex parte* presentation from a third party. Rainbow states that the Report's conclusion that the outside party was precluded from making a status inquiry is wrong since status inquiries are never precluded. See Rainbow Comments at 21.

<sup>15</sup> Press has also requested the U.S. Court of Appeals for the District of Columbia Circuit to (1) rescind the Bureau's order granting Rainbow's extension of time; (2) authorize Press to issue subpoenas to Commission officials; and (3) relieve the Commission "of any authority to influence the disposition of Rainbow's permit." Motion for Extraordinary Relief at 16-17 (filed Feb. 22, 1994). In response, the court authorized Press to issue subpoenas to three Mass Media Bureau officials. The affidavits from those officials state that, contrary to Press's theory, neither any Commissioner nor any member of a Commissioner's staff contacted the Bureau concerning Rainbow's extension request. Affidavits of Chief, Mass Media Bureau at 3 ¶10, Chief, Video Services Division at 5 ¶16, Chief, Television Branch at 5 ¶12. The court also held oral argument on Press's request for extraordinary relief on April 18, 1994. The Commis-

#### IV. DISCUSSION

22. We conclude that Rainbow violated the Commission's *ex parte* rules. However, recognizing that Rainbow's counsel apparently sincerely believed that the proceeding was not restricted and has advanced a plausible argument in support of that belief, we conclude that no sanction should be imposed. We further conclude based on an independent review of the record without participation of the Mass Media Bureau that Rainbow's sixth extension application should be granted. Finally, we reject Press's other arguments in support of its contention that Rainbow's construction permit should be cancelled.<sup>16</sup> *Ex Parte Allegations*

23. At the heart of this dispute are two *ex parte* contacts. The first was a telephone call made in late June of 1993 by Antoinette Cook, who then was the Senior Counsel to the Senate Subcommittee on Communications, to the Chief of the Mass Media Bureau. The call was made at the request of Rainbow's attorney. In that call, the Subcommittee Counsel asked whether the staff's June 18 decision cancelling Rainbow's construction permit was consistent with Commission policies encouraging minority ownership of broadcast stations. Affidavit of Chief, Mass Media Bureau at 1 ¶ 2. The second *ex parte* contact was the July 1, 1993 meeting between the Mass Media Bureau staff, Rainbow's attorney, and one of Rainbow's principals at which Rainbow's applications were discussed.<sup>17</sup> Press has also speculated that Rainbow, or the Subcommittee Counsel at Rainbow's request, may have contacted a Commissioner or a member of a Commissioner's immediate staff last Summer, which, in Press's view, would taint the Commission.<sup>18</sup> The Commission is not tainted.<sup>19</sup>

24. At the outset, we note that the Administrative Procedure Act's provisions regarding *ex parte* presentations relate only to on-the-record hearings, and thus are not relevant to this proceeding. See 5 U.S.C. §557(d). Turning to our *ex parte* rules and the allegations before us, we conclude, contrary to Rainbow's contentions, that the application proceedings plainly were interrelated. That is, for example, the fifth and sixth extension requests should not be regarded as separate proceedings, and an *ex parte* presentation prohibited in the one was also prohibited in the other related application proceedings. Press's filings confirm that the matters were interrelated. For example, in its February 15, 1991, informal objection and in its February 25, 1991,

petition for reconsideration, Press clearly raised the question of Rainbow's fitness to be a Commission permittee. This same issue pertained to and was also raised by Press in its later filings in the context of Rainbow's June 21, 1991, extension and subsequent assignment applications. Because this and other issues raised by Press in its petition for reconsideration of the Bureau's February 10, 1993, extension grant to Rainbow were incorporated by Press in its later filings against Rainbow's other applications, they were clearly interrelated. We therefore disagree with Rainbow's assertions that each Rainbow application constituted a separate and different proceeding for purposes of the *ex parte* rules. Instead, we hold that if an *ex parte* presentation was prohibited in the earlier application proceeding, it was also prohibited in the other related application proceedings.

25. Having concluded that the proceedings were interrelated, we must next determine whether the proceedings were "restricted" for *ex parte* purposes. At the outset, we agree with Rainbow that Press's February 15, 1991, "informal objection" to Rainbow's January 25, 1991, extension application did not meet the requirements of a "formal opposition" under section 1.1202(e) of our Rules. Therefore, the informal objection did not make that or the subsequent proceedings "restricted" for purposes of the *ex parte* rules. Section 1.1202(e)(1) explicitly requires that "[t]he caption and text of a pleading make it unmistakably clear that the pleading is intended to be a formal opposition or formal complaint." It is not unmistakably clear from the caption that a formal opposition was intended because Press's February 15, 1991, pleading was captioned "informal objection."

26. Press points to the Commission's decision in *William J. Kitchen*, 71 RR 2d 144 (1992), for the proposition that its "informal objection" was nevertheless a "formal opposition." In *William J. Kitchen*, we did state 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." *Id.* at 146. However, in that case, the Commission rejected the petitioner's argument that its opposition, which was captioned "Informal Objection," made a proceeding restricted. *Id.* That conclusion was consistent with the Commission's intent to establish a "bright

sion argued that extraordinary relief was not warranted for numerous reasons, including the fact that this order, once released, will be subject to judicial review.

<sup>16</sup> On December 13, 1993, Rainbow filed a minor modification application. Also, on January 28, 1994, Press filed a "Complaint Concerning Unauthorized Installation of Broadcast Equipment" against Rainbow. As stated in a March 25, 1994, letter in response to Rainbow's request for immediate consideration of that application and request for special temporary authority to commence program tests, action would be deferred "until the Commission resolve[d] the underlying validity of Rainbow's construction permit." Now that we have resolved that question, we direct the Mass Media Bureau to resume processing of Rainbow's requests and to review the merits of Press's complaint. Of course, the Bureau's decisions on those technical matters will be subject to review by the Commission.

<sup>17</sup> Rainbow is alleged by Press to have violated the *ex parte* rules on two other occasions: (1) by failing to serve Press with a copy of the minor modification application filed December 13, 1993 (file no. BMPCT-931213KE) and (2) by failing to serve Press with a copy of an April 12, 1993, response to the Video

Services Division's March 18, 1993, request for information. Rainbow was required to file an FCC Form 301 to modify its construction permit under 47 C.F.R. §73.1690(b)(1) and because the application constituted an authorized *ex parte* presentation under section 1.1204(b)(1) of the Rules, it was not required to be served on Press. See 47 C.F.R. §1.1204(b)(1); *Daily Telegraph Printing Co.*, 59 FCC 2d 185, 194-95, *recon. denied*, 38 RR 2d 1545 (1976); and *George L. Lyon, Esq.*, 5 FCC Rcd 4672 (Man. Dir., 1990). As to Rainbow's failure to serve Press with a copy of its April 12, 1993, response, resolution of that issue turns on whether Rainbow's application proceedings were exempt or restricted. Since we conclude that the proceeding was restricted, we conclude that Rainbow should have served a copy of its response on Press. However, for the reasons explained *infra*, no sanction is warranted for that minor violation.

<sup>18</sup> See Motion for Extraordinary Relief at 13.

<sup>19</sup> Chairman Hundt did not join the Commission until November of 1993, and therefore is not tainted. Neither Commissioner Quello nor Commissioner Barrett nor their staffs were contacted by Rainbow or by anyone acting of Rainbow's behalf concerning this case.

line" test.<sup>20</sup> A pleading captioned "Informal Objection" fails to meet this bright line test because what is unmistakably clear from the caption is that an informal opposition is intended. As we stated in *Report and Order in Gen Docket 86-225*, 3 FCC Rcd at 3015

If a person filing an objection considers it serious enough to warrant according a "restricted" status to the proceeding, then it is not unreasonable to require that person to *formally denominate the pleading a formal complaint, formal opposition or petition to deny.* . . ."

(Emphasis added). At the least, under *William J. Kuchen*, the objection must be captioned "objection" rather than "informal objection" if it is intended to restrict a proceeding.<sup>21</sup>

27. Even though the February 15, 1991, informal objection did not cause these proceedings to become restricted, we do find that the filing of Press's petition for reconsideration on February 25, 1991, restricted Rainbow's application proceedings for purposes of the *ex parte* rules. In *Catherine L. Waddill*, 8 FCC Rcd 2169, 2171 (1993), we expressly held that a proceeding becomes restricted upon the filing of a petition for reconsideration under section 1.1208. In a similar vein, in *Baltimore County*, 5 FCC Rcd 5615, 5618 (1990), we held that the filing of an application for review in a proceeding previously exempt for *ex parte* purposes causes the proceeding to become restricted. Although not expressly articulated in those decisions, implicit was a finding that the pleading in issue met the requirements of a formal opposition as required by section 1.1202(e) of the Rules.<sup>22</sup>

28. Press's petition for reconsideration meets the "bright line" test for a formal opposition. It is captioned as a "Petition for Reconsideration," which does not suggest informal opposition. The text of the petition makes it unmistakably clear that a formal opposition is intended since

Press explicitly stated that it "hereby formally seeks reconsideration" and addressed the requirements of section 1.106 for the filing of a petition for reconsideration.<sup>23</sup> Thus, the filing of the petition for reconsideration restricted the proceeding under our *ex parte* rules.

29. Rainbow contends that the petition for reconsideration did not restrict the proceeding because Press lacked standing to file a petition for reconsideration. Nothing in our precedents would support such a conclusion, even if Press lacked standing to seek reconsideration.<sup>24</sup> Rainbow, therefore, could not ignore Press's petition for reconsideration while it was pending. Rainbow could have sought to have the petition for reconsideration dismissed for lack of standing, but it did not. Thus, for purposes of this order, what is important is that a petition for reconsideration, the text of which clearly indicated Press's intent to formally oppose, was pending in June and July of 1993 when Rainbow contacted the Mass Media Bureau. While the petition for reconsideration was pending and the proceeding was subject to further Commission or court review, Rainbow was obliged to treat the matter as a restricted proceeding. See 47 C.F.R. §1.1208(a).

30. We see more potential merit in Rainbow's contention that Press's petition for reconsideration should not be considered a formal opposition because it reiterated the arguments contained in Press's informal objection. Moreover, although we have held that petitions for reconsideration render a proceeding restricted, we have not previously addressed the precise question whether a petition seeking reconsideration of an informal opposition may be considered a formal opposition. However, we think our prior decisions, the text of our *ex parte* rule, and the goal of setting a bright-line rule support the conclusion that the filing of the petition for reconsideration restricted the proceeding even where there had previously been an untimely non-formal opposition. A "petition for reconsideration" suggests formal opposition, and the petition plainly stated that it was intended to be a formal opposition. Rainbow's suggestion that we consider the relationship of the filing to

<sup>20</sup> See *Report in Gen. Docket No. 86-225 Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings*, 2 FCC Rcd 3011, 3015 (1987) ("it is essential that we have clear guidelines in this area")

<sup>21</sup> Because the *William J. Kuchen* case diametrically opposes, rather than supports, Press's argument that a pleading captioned "Informal Objection" can make a proceeding restricted for *ex parte* purposes, we find no merit in Press's related argument that, if the Bureau was aware of or involved in the *William J. Kuchen* case, it should have deduced or been aware that the Rainbow proceeding was restricted.

<sup>22</sup> See also *Report in Gen. Docket No. 86-225*, 2 FCC Rcd at 3015 ("... an objector, merely by conforming to minimal procedural requirements, has it within his power to render the proceeding restricted' and thereby prevent *ex parte* presentations by the applicant" (footnote omitted)).

<sup>23</sup> What may have additionally clouded a correct perception of Press's petition for reconsideration for *ex parte* purposes is the fact that, in its filing, Press requested reconsideration "for all of the reasons set forth in its [Informal] Objection" which it incorporated by reference into its petition for reconsideration. An additional factor may have been Press's statement in the petition that its "concern is not with the particular procedural vehicle by which the issues might be raised" but rather that "the issues be substantively considered and resolved." See Press's Petition for Reconsideration at 2 & n.2

<sup>24</sup> We conclude that Press had standing to file its petition for

reconsideration. Under section 405 of the Communications Act, a petition for reconsideration may be filed by (1) a party to a proceeding or (2) "any other person aggrieved or whose interests are adversely affected by" the underlying decision. 47 U.S.C. §405(a). Under the Commission's rules, to qualify under the second test, an entity must also show good cause why it was not possible for it to participate earlier. 47 C.F.R. §1.106(b)(1). Because Press did not (and indeed could not) file a procedurally proper petition to deny against the extension request, it does not have standing to file a petition for reconsideration *as a party*. See, e.g., *Dick Broadcasting Co.*, 8 FCC Rcd 3897 (1993); *Montgomery County Broadcasting Corp.*, 65 FCC 2d 876, 877 & n.2 (1977); *Redwood Microwave Association, Inc.*, 61 FCC 2d 442, 443 (1976). As an existing station in the market, however, Press does have standing to file a petition for reconsideration under the aggrieved/adversely affected test. See *FCC v. Sanders Bros.*, 309 U.S. 470 (1940). Moreover, since no formal pleading schedule was established for the fifth extension request and the request was granted before Press filed an opposition, Press has demonstrated good cause why it was unable to participate earlier. See H.R. Rep. No. 1800, 86th Cong., 2d Sess (1960), reprinted in 1960 U.S. CODE CONG. & ADMIN. NEWS 3516, 3519 (in justifying exceptions to 30-day notice period in section 309 to permit the filing of petitions to deny, House Interstate and Foreign Commerce Committee indicated that petitions for reconsideration could nevertheless be filed: "The remedy afforded by Section 405 of the Act would, however, be available in the event the Commission erred.")

prior filings requires more analysis than we consider appropriate, keeping in mind that the rules are intended to be as easy to apply as possible and that the effect of concluding that a proceeding is restricted merely means that another party must be served with filings or invited to meetings. Nevertheless, we understand why, in the absence of a clear ruling on this point, Rainbow may have concluded that the petition for reconsideration had no more effect on the character of the proceeding than did the informal objection Press asked the Commission to reconsider.

31. Because these proceedings were and continue to be "restricted" for *ex parte* purposes, we must examine each of the alleged instances of *ex parte* violations to determine whether in fact impermissible "presentations," *i.e.*, communications addressing the merits or outcome of these proceedings, were made to decision-making personnel. Based upon the information in the Inspector General's *Report*, it is clear that the communications at the July 1 meeting did in fact address the merits or outcome of Rainbow's applications.<sup>25</sup> Indeed, Rainbow concedes that if in fact the proceeding was restricted, the substance of the discussions at that meeting were prohibited under the Commission's *ex parte* rules. See *Report* at 11.

32. While it appears clear that the discussions at the July 1 meeting addressed the merits of Rainbow's applications, there does appear to be some dispute as to whether the telephone call from Senate Subcommittee Counsel to the Mass Media Bureau Chief shortly after the June 18 denial of Rainbow's applications was merely a status inquiry or constituted a "presentation" which addressed the merits or outcome of Rainbow's applications.<sup>26</sup> In her call, Senate Subcommittee Counsel pointed out to the Mass Media Bureau Chief that Rainbow was a minority broadcaster and raised the question whether the Bureau's action was consistent with the Commission's minority broadcasting policy.<sup>27</sup> Rainbow takes the position that the telephone call was merely a status inquiry. If that were so, the call was not prohibited by the *ex parte* rules, which prohibit "presentations" only.

33. Upon review of the available evidence, we conclude that a presentation did occur in the telephone call made to the Mass Media Bureau Chief.<sup>28</sup> In our *Report and Order in Gen. Docket 86-225*, 2 FCC Rcd 3013, we stated that a status inquiry is "generally a request for information that is solely related to the status of a proceeding." It appears that

the conversation exceeded the boundaries of a permissible status inquiry under Section 1.1202(a) of the Rules even though only brief reference, in the form of a question, was made to the Bureau's action and its consistency with the Commission's minority broadcasting policy. Accordingly, that call violated the *ex parte* rules.<sup>29</sup> Even though we conclude that the telephone call constituted a "presentation" in violation of the *ex parte* rules, it is not clear from the record that Rainbow specifically requested the caller to make a "presentation," as opposed to a permissible status inquiry.

34. Although Rainbow's July 1 meeting with the Bureau staff clearly constituted a violation of our *ex parte* rules, the Inspector General in his *Report* noted that Rainbow appeared to be "sincere" in its belief that the proceeding was not restricted.<sup>30</sup> While this does not in any way excuse Rainbow's violation of the rules, it is a mitigating factor in addressing whether sanctions should be imposed.<sup>31</sup> Assuming that Rainbow also solicited the presentation made by Subcommittee Counsel, that violation also would be mitigated by Rainbow's sincere belief that the contact was permissible. In *Centel Corp.*, 8 FCC Rcd 6162, 6164 (1993), *petition for review dismissed sub nom. American Message Centers v. FCC*, No. 93-1550 (D.C. Cir. Feb. 28, 1994), *pet. for rehearing filed* April 14, 1994, we declined to disqualify a carrier despite multiple *ex parte* violations, where the carrier "reasonably believed" that it had not engaged in impermissible contacts. We found, in those circumstances, that the violations did not raise a substantial question regarding the carrier's candor.<sup>32</sup> The Inspector General's finding regarding the sincerity of Rainbow's belief that its contacts were permissible is analogous to the situation in *Centel*. Finally, we have previously indicated that "isolated" *ex parte* violations, such as those here, are not a basis for disqualification. See *Pepper Schultz*, 4 FCC Rcd 6393 at 6403 and cases cited therein. In fact, in *Pepper Schultz* the Review Board noted that "no recent applicant had been found wholly unqualified to be a licensee, including those cases involving willful and repeated violations of the *ex parte* rules." *Id.* at 6404. It declined to disqualify a licensee that committed a "palpable" *ex parte* violation -- soliciting a Senator to write a letter to an administrative law judge concerning a contested license application. *Id.* at 6403

<sup>25</sup> See *Report* at 11 ("All of the persons . . . described [Rainbow's] arguments at the meeting as going to the merits and the outcome of the proceeding; [Rainbow] argued that the June 18 letter had been wrongly decided and gave at least two specific reasons why it was wrong").

<sup>26</sup> Under section 1.1202(a) of our rules, a "presentation" is a "communication directed to the merits or outcome of a proceeding."

<sup>27</sup> Affidavit of Chief, Mass Media Bureau at ¶ 2. Although the person is described in the Inspector General's *Report* as Senior Counsel of the Subcommittee on Communications of the H&O<sup>1</sup> Senate Commerce Committee, the evidence is unclear as to whether she called in that capacity or in her individual capacity. On this point, Press, in reply comments, notes that the caller had previously represented Rainbow in private practice and further notes that, at the time at issue, she was on leave from her staff position with the Subcommittee.

<sup>28</sup> There does not appear to be any serious dispute that the subsequent follow-up telephone call from the Television Branch Chief to the same person did not involve a presentation.

<sup>29</sup> If the call had merely been a status inquiry, it would not have been contrary to our *ex parte* rules, even though it was solicited. 47 C.F.R. §§1.1202 and 1.1210. Because the call included a presentation regarding a restricted matter, it should not have occurred *ex parte*. However, once it occurred, a summary of the call should have been prepared and made available to the public. 47 C.F.R. §1.1212.

<sup>30</sup> *Report* at 11.

<sup>31</sup> See *Pepper Schultz*, 4 FCC Rcd 6393, 6403 (Rev. Bd. 1989), *rev. denied*, 5 FCC Rcd 3273 (1990) ("In considering what [sanction] may be appropriate, we point out that intent, while not a factor in determining whether a presentation has been made, is pertinent in weighing whether (and what) sanction is called for"); see also *Voice of Reason, Inc.*, 37 FCC 2d 686, 709 (Rev. Bd. 1972) *recon. denied*, 39 FCC 2d 847, *rev. denied*, FCC 74-476, released May 8, 1974 ("not established on this record that [applicant's] repeated violation of the *ex parte* rules was accompanied by inadvertence, good faith or overall innocent intentions").

<sup>32</sup> 8 FCC Rcd at 6165.

Consistent with this prior case law, we decline to find that Rainbow's violation is disqualifying or raises a substantial and material question of fact.<sup>33</sup>

35. We do believe, however, that the Managing Director's letter, as well as our prior decisions in *Waddill* and *Baltimore County*, should have raised a question sufficient to cause Rainbow to raise the issue with the Chief of the Mass Media Bureau before discussing the merits of the case with him. Under our precedents, an admonishment is warranted for its negligent failure to comply with the *ex parte* rules. See *Catherine L. Waddill*, 2 FCC Rcd at 2172 and *Centex Corporation*, 8 FCC Rcd at 6165. It should now be clear to counsel, parties, and their authorized agents that they have to inform relevant decision-makers as to the *ex parte* status of a proceeding and whether there are any questions or ambiguities in this connection and that they have a duty to raise potential *ex parte* issues if they are unsure as to the status of a proceeding.<sup>34</sup>

#### Extension and Assignment Applications

36. While we conclude that the *ex parte* violations should not be cause for Rainbow's disqualification, we must still decide whether to grant its extension request and assignment application.<sup>35</sup> Section 73.3598 of the Commission's rules affords permittees 24 months in which to construct new television stations. The Commission in 1985 lengthened the construction period from 18 to 24 months "in recognition of the substantial changes in the complexity and amount of the equipment needed and the growing multiplicity of business decisions involved in establishing a station." *Amendment of Section 73.3598 and Associated Rules Concerning the Construction of Broadcast Stations*, 102 FCC 2d 1054, 1055 (1985). At the same time, the Commission revised section 73.3534 of the Commission's rules to adopt strict standards for evaluating applications for extensions beyond the authorized two-year construction period. *Id.* at 1055-1056. Specifically, in order to obtain an extension beyond two years, a permittee must show either that it has completed construction and that testing is underway, that it has made substantial progress toward construction, or that circumstances beyond its control prevented its construction efforts. The Commission also added section 73.3535, which requires a permittee to make the same showing if it finds it necessary to file an assignment or a transfer application during the last twelve months of its authorized, two-year construction period. *Id.* at 1056.

37. We conclude that Rainbow was not afforded the normal 24-month construction period allowed under section 73.3535 and thus that its extension requests should have been granted. It would have been unreasonable to have required or expected Rainbow to proceed with construction while faced with the uncertainties resulting from the appellate challenges to its construction permit. Those judicial proceedings did not conclude until the Supreme Court denied a rehearing petition in August of 1990. Only

five months had passed at the time Rainbow filed its fifth extension application in January of 1991. Similarly, only ten months had passed at the time Rainbow filed its sixth extension application in June of 1991. Because Rainbow effectively had less than 24 months in which to construct, we conclude that Rainbow should not have been required to make the showing specified under sections 73.3534 and 73.3535, which was intended to apply to permittees who already have been afforded a full 24-month construction period. Rather, Rainbow was in the position of a permittee that had not had 24 months to construct, and those permittees should not be subject to the same hurdles as those who have been accorded a full 24 months to construct.

38. Press maintains, however, that Commission policy, precedent, and practice has been to limit the grant of extension requests to six-month periods, notwithstanding the pending litigation over the underlying construction permit, and that no authority or precedent exists for the July 30 Bureau action which granted Rainbow an additional eight months to construct. While it is true that, in general, Commission practice has been to limit the grant of extension requests to six months, it is also true that Commission practice has been not to deny further extensions requests where applicants, in circumstances similar to Rainbow's, have had less than the initial 24 months to construct. It is also true that, in these circumstances, we have not required applicants to make the showings normally required of permittees which have already had a full, unencumbered 24 months to construct. In short, we believe that it is irrelevant whether previous grants in such circumstances were limited to six-month intervals as long as, in their totality, such grants afforded applicants no less than the full 24 months provided in section 73.3598. Accordingly, we conclude that Rainbow was entitled to additional time in which to construct its facilities, regardless of its previous lack of progress in construction or whether its decision not to proceed due to the tower dispute was a circumstance within its control.<sup>36</sup> We thus conclude that Rainbow was entitled to two years from August 30, 1990, to construct its station and that requests for extensions to allow Rainbow the permissible two-year period should have been granted.

39. In addition, the period during which Rainbow's sixth extension application was pending should not be counted as part of its two-year construction period. Such an approach would be both unfair and inconsistent with well-established precedent. In order to discourage permittees from remaining idle and not proceeding with construction until their permit is about to expire or has expired, permittees are not entitled to rely on construction occurring after the expiration of their authorized construction period. See *High Point Community Television, Inc.*, 2 FCC Rcd 2506, 2507 (1987); *TV-8, Inc.*, 2 FCC Rcd 1218, 1220 (1987); *Michael C. Gelfand, M.D.*, 2 FCC Rcd 6522, 6523 (Mass Media Bur. 1987); *L.E.O. Broadcasting*, 2 FCC Rcd

<sup>33</sup> We include here the minor infraction by Rainbow in not serving Press a copy of its April 12, 1993, pleading.

<sup>34</sup> In a future proceeding, we may consider whether forfeitures should be imposed where counsel, parties, or their authorized agents have reason to believe that an *ex parte* issue is presented but do not alert Commission officials to the issue before going forward with presentations.

<sup>35</sup> As noted at the outset, our decision is based on our own

independent review of the record. We have not relied upon the findings of the Mass Media Bureau Chief or his staff, who have not assisted us in reaching our decision.

<sup>36</sup> Cf. *TV-8, Inc.*, 2 FCC Rcd 1218, 1220 (1987) (where the Commission reinstated a permittee's grant in order to afford the permittee a full construction period of two years, irrespective of the permittee's lack of prior progress).

1810, 1811 (Mass Media Bur. 1987); *Cidra Broadcasters, Inc.*, 2 FCC Rcd 230, 231 (Mass Media Bur. 1987); cf. *Miami MDS Company v. FCC*, 14 F.3d 658 (D.C. Cir. 1994). Therefore, it would have been unreasonable to have required Rainbow to make further expenditures and proceed with construction efforts before the Commission granted its sixth extension request. Cf. *Channel 16 of Rhode Island, Inc. v. FCC*, 440 F.2d 266, 275-76 (D.C. Cir. 1971)(it is unfair and unreasonable to require construction while relevant FCC policy "remains in limbo")

40. We thus conclude that both the fifth and sixth extension applications should have been granted.<sup>37</sup> Indeed, as we believe Rainbow was entitled to a full two-year period after the decision regarding its grant became final, it could have requested an additional twelve, rather than eight, months to construct.<sup>38</sup> Thus, even though Rainbow in its recent submissions did not request a 12-month extension, we will nevertheless authorize a 12-month extension in order to give Rainbow the full 24-month period that initial construction permittees are ordinarily accorded.<sup>39</sup>

#### Misrepresentation/ Lack of Candor

41. The Commission necessarily must rely upon the truthfulness and accuracy of submissions by its applicants, and thus it holds its applicants to a high standard of integrity and honesty. See *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1139 (1985); *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1183, 1210-1211 (1986), *recon. denied*, 1 FCC Rcd 421 (1986). The Commission will not tolerate applicants' deliberate misrepresentations or omissions. See *Fox River Broadcasting, Inc.*, 93 FCC 2d 127 (1983).

42. We do not find that a substantial and material question of fact has been raised as to whether Rainbow made misrepresentations to the Commission regarding the nature of the tower dispute.<sup>40</sup> In its fifth extension application, Rainbow accurately described the tower dispute in terms of its asserted right of exclusivity to certain tower space. Moreover, Rainbow accurately reported that the realization of its right of exclusivity would have forced Press to abandon certain space on the tower.<sup>41</sup>

43. We also do not find that a substantial and material question of fact has been raised as to whether Rainbow made misrepresentations to the Commission by falsely ascribing its inability to complete construction to the tower dispute. Both in Rainbow's fifth extension application, which was filed while its requested preliminary injunction in connection with the tower dispute was pending, and in its sixth extension application, which was filed after the preliminary injunction was denied, Rainbow recited the five-year appellate process, which effectively prevented it from constructing.<sup>42</sup> Rainbow did not, however, represent to the Commission that the tower dispute precluded it from constructing. Indeed, in both its fifth and sixth extension applications, Rainbow consistently stated that, irrespective of the tower dispute, it would complete construction by December 31, 1992. Accordingly, a substantial and material question has not been raised that Rainbow made misrepresentations to the Commission, as Press claims.

#### Abuse of Process

44. Where a party files pleadings and takes other obstructive actions for the primary purpose of delaying or harassing its opponents, such actions undermine the Commission's processes and adversely reflect on the party's character to be a Commission licensee. See *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d at 1211; see also *Viacom International, Inc.*, 2 FCC Rcd 3259, 3260 (1987); *Radio Carrollton*, 69 FCC 2d 1139, 1150-51 *clarified*, 69 FCC 2d 424 (1978), *aff'd sub nom.*, *Faulkner Radio, Inc. v. FCC*, No. 79-1749 (D.C. Cir. October 25, 1980), *cert. denied*, 450 U.S. 1041 (1981). In evaluating Press's charge of abuse of process regarding Rainbow's oppositions to the television exchange proceeding involving Press,<sup>43</sup> the factors to be considered are whether: (1) Rainbow's principal or officer admitted that the actions were taken for obstructive purposes; (2) Rainbow withheld relevant information from the Commission in that proceeding; (3) Rainbow had established a reasonable basis for its objections; (4) Rainbow had an economic motivation to delay the proceeding; (5) Rainbow's other

<sup>37</sup> We note that the cases cited by Press are inapposite. See, e.g., *Community Service Telecasters, Inc.*; *Panavideo Broadcasting, Inc.*; *High Point Community Television, Inc.*; *Metrovision*. Unlike Rainbow, which had only ten months in which to construct at the time it filed its sixth extension request, the permittees or the assignees of the permit in each of the cited cases had received the full authorized construction periods to which they were entitled under sections 73.3548 and 73.3534(d), respectively. We also believe that Press's reliance on *Jamestown TV Associates*, 2 FCC 2d 4279 (Video Ser. Div. 1987), is misplaced. In that decision, the initial permittee had been accorded a full 18 months under the prior rule and, subsequent to the rule change, had also been granted an automatic extension (albeit not for a total of the full 24 months normally accorded initial permittees under the modified rule). The Bureau initially denied the permittee's extension request. Upon further review, however, the Bureau reconsidered its action and granted a further six-month extension to the permittee. *Jamestown TV Associates* should not be read to indicate that a permittee may rely upon the post-expiration period to complete construction as long as the construction permit has not been officially cancelled by the Commission, a conclusion that would be at odds

with the cases cited above. Rather, it applied to peculiar circumstances arising when the normal construction period was extended beyond 18 months.

<sup>38</sup> Rainbow's fifth extension request had been granted by the Video Services Division, giving it until August of 1991 to complete construction. As we have explained, the 24-month period in which to construct extended to August of 1992.

<sup>39</sup> According to Rainbow's recent filings, however, including a Petition for Special Relief Pendente Lite filed with the D.C. Circuit on April 1, 1994, Rainbow is ready to commence broadcast service.

<sup>40</sup> See *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988); *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985).

<sup>41</sup> Rainbow's Opposition to Press' Petition for Reconsideration to the grant of the fifth extension (March 12, 1991) at 4-5.

<sup>42</sup> As Rainbow has stated previously, "The foregoing chronology [the five-year appellate process] demonstrates that Rainbow has never been in a position to undertake construction on Channel 65, Orlando, absent the threat of judicial reversal of the license award." Rainbow's fourth extension application, File No. BPCT 820809KF, Exhibit 1.

<sup>43</sup> See *id.*, *supra*.

conduct otherwise indicates that its purpose was primarily obstructive. See *Viacom International, Inc.*, 2 FCC Rcd at 3260-61; *Radio Carrollton*, 69 FCC 2d at 1150-51.

45. In this case, Rainbow's principals or officers have not admitted that they opposed Press's exchange of Channel 68 for Channel 18 for obstructive purposes.<sup>44</sup> Nor do we have any evidence that Rainbow withheld vital information in that proceeding. We also have no evidence that Rainbow lacked a reasonable basis for its opposition to the exchange proceeding. Rather, it appears that Rainbow grounded its opposition to Press's exchange on relevant statutory and regulatory provisions and policies, and therefore, while unsuccessful, had legitimate bases for its allegations.<sup>45</sup> We have no evidence that Rainbow's economic motivation to oppose the exchange was the primary purpose of its opposition. Indeed, we note that other licensees opposed the exchange as well. In these circumstances, we conclude that Press has not made a *prima facie* case that Rainbow engaged in an abuse of the Commission's processes.

#### Financial Qualifications

46. The Commission recognizes that projected costs and financing proposals are not necessarily effectuated as proposed. See *Revision of FCC Form 301*, 50 RR 2d 381, 382 (1981); see also *KRPL, Inc.*, 5 FCC Rcd 2823, 2824 (1990). Given the fact that Rainbow filed its application in 1982, it is not remarkable that almost ten years later Rainbow found it necessary to consider new financing sources and consequently filed its *pro forma* assignment application. See *George E. Cameron Jr. Communications*, 93 FCC 2d 789, 830-831 (Rev. Bd. 1983). The substitution or other rearrangement of financing "does not constitute the kind of change that would give rise to questions of misrepresentation," which would warrant a hearing. See *Urban Telecommunications Corp.*, 7 FCC Rcd at 3869-70.

47. Similarly, we conclude that certain statements made in the federal court litigation over the tower space do not call into question Rainbow's financial qualifications. In arguing to the contrary, Press points to expert testimony presented on Rainbow's behalf predicting that if Press were afforded access to the tower site and allowed to compete in the same market, Rainbow would be unable to secure financing and its license would become worthless. See Press's "Contingent Application for Review" at 16 and its February 15, 1991 "Informal Objection" at 8, 12-14. Press also refers to statements in the federal district judge's order which, in dismissing Rainbow's irreparable injury argument and denying its request for a preliminary injunction, stated that Rainbow appeared to lack sufficient financial backing. "Contingent Application for Review" at 16 n.18. While expert testimony presented on behalf of Rainbow included statements that it would be extremely difficult, if not impossible, in such circumstances for Rainbow to compete in the marketplace or secure financing for the station,

they represented predictive judgments -- not factual statements -- as to obstacles Rainbow would face. More importantly, as predictive judgments, rather than factual statements, neither they nor the court's order were intended to address the entirely different question of whether Rainbow continued to meet our financial qualifications standard. That standard provides that applicants must demonstrate sufficient capital to construct the station and then operate for 90 days without advertising or other broadcast revenue.<sup>46</sup> On this point, Rainbow has not represented that sufficient funds are not available for the construction and operation of the station as required by the Commission's Rules. Indeed, to the contrary, Rainbow's completion of construction would appear to belie the assertion that its financial qualifications under our rules is in question. Under the circumstances, we conclude that Press has not made a *prima facie* case that Rainbow lacked the requisite assurance of financing at the time it filed its construction permit application in 1982, that Rainbow's new financing strategy as evidenced by its *pro forma* application rendered Rainbow unqualified, or that Rainbow otherwise misrepresented its financial status. See *Urban Telecommunications Corp. KRPL, Inc.*

#### V. CONCLUSION

48. For the reasons stated above, based upon our independent review of the record, we conclude that the grant of an extension of time in which to construct, as well as the grant of Rainbow's *pro forma* assignment application, would serve the public interest, convenience, and necessity. Moreover, we find that there are no substantial and material questions of fact suggesting that Rainbow made misrepresentations to the Commission. We also find that Press has failed to make a *prima facie* case that Rainbow engaged in abuse of the Commission's processes, or that Rainbow was financially unqualified. Finally, we find that Rainbow, based upon its mistaken belief that the proceedings were exempt, violated the Commission's *ex parte* rules. In light of the plausibility and apparent sincerity of Rainbow's belief, we do not find its violations disqualifying, but admonish Rainbow and its counsel. We also indicate that, in the future, parties should alert Commission officials to questions regarding the status of a proceeding before engaging in *ex parte* contacts.

49. Accordingly, IT IS ORDERED THAT Rainbow IS HEREBY GRANTED a 12 month extension from the release date of this Memorandum Opinion and Order in which to construct its television station.

50. IT IS FURTHER ORDERED THAT Rainbow's application for *pro forma* assignment of its construction permit IS GRANTED.

51. IT IS FURTHER ORDERED THAT Press's Contingent Application for Review IS DENIED.

<sup>44</sup> As evidence of Rainbow's anticompetitive motive, Press points to the testimony in the federal court litigation of a Rainbow principal who, in response to a question regarding Rainbow's involvement in the television exchange proceeding, stated that the "[n]umber one reason is that they were proposing the same lease space that I have with Gannett" and that "[o]ther reasons are that they would become a competitor in my own marketplace." See Press's "Informal Objection" at 18-21 & Attachment B (Feb. 15, 1991). However, Rainbow did not suggest that it did not believe that its legal position was sound. In that regard, it is similar to Press in this proceeding -- Press

apparently believes that its legal position is sound, but it is undoubtedly motivated to challenge Rainbow's construction permit because Rainbow is a potential competitor.

<sup>45</sup> Rainbow asserted that the positioning of Press's antenna on the same tower would cause unacceptable interference, that Press violated 47 U.S.C. §310(d) by effecting an unauthorized transfer of control, and that Press's exchange violated 47 C.F.R. §1.420(h) because the participating stations were not in the same market.

<sup>46</sup> See 47 C.F.R. §73.4101 and Public Notice "Financial Qualifications Standards," 72 FCC 2d 784 (1979).

52. IT IS FURTHER ORDERED THAT Press's Emergency Petition for Immediate Rescission, Setting Aside or Vacation of Action Taken Pursuant to Delegated Authority IS DISMISSED AS MOOT.

53. IT IS FURTHER ORDERED THAT Press's Emergency Petition for Extraordinary Relief IS DISMISSED AS MOOT.

54. IT IS FURTHER ORDERED THAT Rainbow's Request for Immediate Action IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton  
Acting Secretary

SEPARATE STATEMENT  
OF  
COMMISSIONER ANDREW C. BARRETT

**In Re: Applications of Rainbow Broadcasting Company for an Extension of Time to Construct and for Assignment of its Construction Permit for Station WRBW(TV), Orlando, Florida (File Nos. BMPCT-91062SKP, BMCPT-910125KE, BTCCT-911129KT)**

In today's action, we granted Rainbow Broadcasting Company's application for an extension of time to construct facilities in Orlando, Florida, granted its application for *pro forma* assignment and have determined that Rainbow acted improperly when it violated the Commission's *ex parte* rules.

The Commission also emphasizes the responsibility for parties as well as their representatives to apprise Commission decision-makers as to the *ex parte* status of a proceeding and to raise any potential *ex parte* issues if they are uncertain about the status of an action. Further, the Commission advises that it will, through a future general proceeding, consider the imposition of sanctions where parties, their counsel or authorized representatives fail to alert Commission officials to the existence of an *ex parte* prior to a presentation about the merits of a matter.

While I support this general approach to *ex parte* issues, the Commission must bear the onus of making certain that its rules and regulations with regard to *ex parte* issues are explicit.<sup>1</sup> Along these same lines, the Commission must also establish a definitive general process for *ex parte* challenges that incorporates standards for determining who bears the burden of establishing the existence of an alleged *ex parte* infraction as well as procedures for reviewing *ex parte* issues that arise during the course of the proceeding.

<sup>1</sup> I support the Office of Inspector General's (OIG) conclusions with respect to the complexity of our *ex parte* rules. In OIG's Report concerning this matter, it concluded that the rules need to be simplified and added that "[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 parte* rule as now written." See, Office of Inspector General's Report dated November 23, 1993, p. 14.