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

In re Applications of	)	
	)	
RAINBOW BROADCASTING COMPANY	)	GC Docket No. 95-172
	)	File No. BMPCT-910625KP
For an extension of time	)	File No. BMPCT-910125KE
to construct	)	File No. BTCCT-911129KT
	)	
and	)	
	)	
For an Assignment of its	)	
construction permit for	)	
Station WRBW(TV), Orlando, Florida	)	

TO: The Honorable Joseph Chachkin
Administrative Law Judge

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REPLY OF PRESS BROADCASTING COMPANY, INC.
TO "RAINBOW OPPOSITION TO STATEMENT FOR THE RECORD"

1. Press Broadcasting Company, Inc. ("Press") hereby submits its Reply to the Opposition filed jointly by Rainbow Broadcasting Company ("RBC") and Rainbow Broadcasting, Limited ("RBL") in response to Press' "Statement for the Record, Invitation for Response from [RBC and RBL], or, In the Alternative, Petition to Enlarge Issues" ("Statement"). As set forth in detail below, the RBC/RBL Opposition confirms the validity of Press' Statement and provides still further basis for the position set forth in that Statement. [1/]

[1/] To the extent that Press' Statement is treated as a petition to enlarge issues, Press is entitled to submit a reply pleading. See Section 1.229(d) of the Commission's rules. To the extent that Press' Statement is not so treated, Press hereby specifically requests leave to file the instant reply. As set forth herein, the joint Opposition itself provides further support for Press' position; the instant Reply is intended to demonstrate that.

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2. As an initial matter, it is noteworthy what RBC/RBL do not do in their Opposition. Notwithstanding Press' express invitation to provide detailed information about a number of serious questions which have arisen here, and notwithstanding the Comments of the Separate Trial Staff ("STS") specifically echoing Press' concern [2/], RBC/RBL have offered no new information in their Opposition: no explanations, no excuses, no justifications, no nothing. Instead, they have continued the pattern of stonewalling which has been apparent since the very earliest days of this proceeding. The only "new" document included in the Opposition is a Declaration of RBC/RBL principal Joseph Rey. But that Declaration merely states Mr. Rey's confirmation of the earlier statement of RBC's counsel (contained in a June 18, 1996 letter to the STS). By merely parrotting the earlier non-response of RBC's counsel, Mr. Rey's declaration reconfirms the stonewall approach to which Press' Statement was, in large measure, directed. [3/]

3. RBC/RBL's continued disingenuous stonewalling is amply illustrated by one aspect of RBC/RBL's own Opposition. Recall that, from its earliest discovery efforts, Press sought to obtain

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[2/] The STS placed RBC/RBL on clear notice that the information which RBC/RBL have previously provided has, in the STS's view, been inadequate. See the STS' Comments in support of Press' Statement at, e.g., 2-3 ("[RBC/RBL] should submit a detailed statement under oath responding to Press' specific allegations and queries.").

[3/] The inclusion of Mr. Rey's statement is, however, still significant, for that inclusion ties Mr. Rey, and RBC/RBL, more conclusively to the pattern of abusive, uninformative stonewalling.

from RBC/RBL documents from the Miami Tower Litigation. Recall also that, in opposition to those requests, RBC/RBL stonewalled Press. They succeeded in that approach by repeatedly advising the Presiding Judge that the documents sought by Press were not readily available to RBC/RBL's current communications counsel (including particularly counsel for RBL) because those current communications counsel were not counsel and "did not participate" in the Miami Tower Litigation. Tr. 274-276, 949-961.

4. Press then submitted with its Statement documentary evidence conclusively establishing that RBL's communications counsel did in fact "participate" as counsel in the Miami Tower Litigation: a notice of appearance reflecting her role as counsel was filed, her name appeared on pleadings filed on behalf of RBC, she attended hearing sessions, she conducted direct examination and cross-examination of witnesses, she argued evidentiary points, and she even appeared as a witness. [4/]

5. So we have flat-out statements, made on the record, plainly designed to communicate to the Presiding Judge that RBL's communications counsel was completely uninvolved in the Miami Tower Litigation (most succinctly stated, in the words of RBL's own counsel, as "we did not participate", Tr. 961). And we have

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[4/] The materials submitted with Press' Statement included excerpts from transcripts of the hearing in the Miami Tower Litigation. Review of those materials indicates that an excerpt demonstrating Ms. Polivy's appearance as a witness in that case may have been inadvertently omitted from the materials originally submitted. While her appearance as a witness has not been denied, for the sake of completeness Press is including, as Attachment A hereto, an excerpt from the transcript reflecting that appearance.

absolute, documentary contradiction of those statements. How do RBC/RBL respond to this? They characterize their statements to the Presiding Judge as "alleged understatement[s]". See RBC/RBL Opposition at 12-13.

6. Understatement? Understatement? Contrary to the plain representation that "we did not participate", it has been shown (and RBC/RBL have effectively conceded) that RBL counsel did participate in multiple substantive respects in the Miami Tower Litigation. The representation that "we did not participate" was not an "understatement" in any valid sense of that term; rather, it was an untruthful, completely non-candid assertion made in a context in which RBC/RBL plainly had a motive to withhold the truth. It was a representation made to the Presiding Judge in the presence of Mr. Rey, the dominant principal of both RBC and RBL, who knew or should have known that the representation was not accurate; Mr. Rey declined to correct the misstatement.

7. In further demonstration of the disingenuousness of their position, at the tail end of their Opposition, RBC/RBL concede that RBL's communications counsel did participate in the Miami Tower Litigation -- but supposedly only on an "ancillary and tangential" basis. That concession is buried in a footnote which offers no explanation as to how participation which includes the filing of a separate notice of appearance, attendance at hearing sessions, examination of witnesses, argument to the Court, and even appearance as a witness, might be deemed to be only "ancillary and tangential". More importantly, that concession does not explain why, if counsel did participate

in some "ancillary and tangential" way, the Presiding Judge was told that counsel "did not participate", Tr. 961 (emphasis added). [5]

8. Rather than trouble themselves with the facts, RBC/RBL choose instead to misconstrue Press' legal position, and then to engage in argument concerning that position as misconstrued. [6] The RBC/RBL strategy is to discuss each particular factual incident as a separate and discrete matter to be addressed independently of every other particular factual incident. Thus, RBC/RBL see only a series of unconnected episodes, each amounting to a minimal, non-injurious trifle.

9. But Press has not argued that particular instances of

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[5] Along the same lines, Footnote 3 to RBC/RBL's Opposition includes the following categorical denial: "Rainbow's counsel does not and never has had those files", referring to materials from the Miami Tower Litigation. The problem with this denial is that it is contradicted by at least two facts. First, the notice of appearance (copy included as Attachment G to Press' Statement) clearly instructed that copies of all pleadings directed to the plaintiffs in that case should be sent to RBL's current counsel. Assuming that parties to the Miami Tower Litigation complied with that instruction, it would appear unlikely that RBL's counsel "never" has had any such files.

Second and more conclusive is the fact that, contrary to the categorical denial quoted above, RBL's counsel did find at least one item from the Miami Tower Litigation in her files, an item RBC/RBL offered into evidence. See Tr. 949-961. If, as RBC/RBL assert, their counsel has "never" had any such files, how did that particular item happen to find its way into their files? RBC/RBL have provided no explanation.

[6] Since the underlying facts as set forth in Press' Statement have not been contested to any significant degree by RBC/RBL, Press submits that it should not be necessary in any event to enlarge the issues herein to address the matters which Press has raised in its Statement. Rather, the parties may simply rely on the information already available in the record in the formulation of their respective proposed findings of fact and conclusions of law.

non-compliance with discovery rules, taken individually, are what is at issue here. Rather, Press has argued that RBC/RBL's repeated failure to comply in good faith with the discovery rules, and the circumstances surrounding that repeated failure, reflect a willingness to engage in misrepresentation or lack of candor which should be considered in the ultimate resolution of the designated misrepresentation/lack of candor issues in this proceeding. That is, it is not any individual instance, taken by itself, that would justify disqualification. Instead, it is the pattern of on-going misconduct, in the very context of the hearing, which reflects RBC/RBL's propensity to shave the truth and to lack candor. That propensity, in turn, is consistent with evidence adduced under the already-designated misrepresentation and candor issues herein; considered in connection with that evidence, it should lead to disqualification.

10. In their effort to compartmentalize each instance of non-compliance with discovery from the other such instances, RBC/RBL claim that no harm really occurred in any of those individual matters:

-- Ms. Jaramillo says she doesn't have any documents, so it doesn't really matter that nobody asked her to look for documents to begin with. Opposition at 3-5.

-- with respect to the correspondence produced after the close of discovery, that correspondence was ultimately produced (better late than never), so where's the harm? Opposition at 5-10.

-- with respect to the letter from the Guy Gannett Publishing Company official to Mr. Rey which popped up as an attachment to an exhibit tendered by RBC/RBL -- despite the fact that RBC/RBL claimed they didn't have that document -- RBC/RBL note that Press had already managed to locate its own copy of that document, so it

> is "incomprehensible" that Press should be concerned. Opposition at 10.

The trouble with these claims is that they reflect a complete lack of appreciation for the purpose of the discovery process. Indeed, if they are to be taken seriously, these claims demonstrate RBC/RBL's obvious willingness to play fast and loose with the Commission's processes.

11. The point of discovery is to assure that all parties have a reasonable opportunity to determine what the facts are in an orderly manner well in advance of the hearing. The discovery process is not a game of hide-and-seek, with one party attempting to withhold for as long as possible -- and possibly forever -- any and all information which might possibly harm the withholding party's case. Here, the failure to turn up relevant documents until the very eve of the hearing, after the close of discovery, runs directly counter to the goal of the discovery process.

12. The fact that some documents may have ultimately been produced does not, and cannot, relieve RBC/RBL of the consequences of their conduct. The production of documents well after the close of discovery is not a valid substitute for timely production. For example, had the documents produced on June 11 been made available in, say, March or April (when they should have been produced), Press and the STS would have been able to undertake further timely discovery based on those documents. The opportunity to do so one week before the hearing, after the formal close of discovery, did not present an equivalent opportunity, and it was only through good fortune and the

cooperation of Guy Gannett Publishing Co. that Press was able to locate two particular documents (Press Exhibits 6 and 7) in time for the hearing.

13. It is especially surprising to hear RBC/RBL assert that the production, on the last day of their direct case presentation, of a letter which should have been produced months earlier is excusable because Press had already obtained the letter from other sources. Again, it was only through good fortune that Press was able to do so, and that occurred on the eve of the hearing. But even more aggravating is the fact that the STS had specifically asked for the production of that very letter, and RBC/RBL had advised the STS that that letter was not available. And yet, it somehow turned up in their files and they were willing to produce it when it appeared to be to their advantage to do so. See also Footnote 5, supra.

14. The overriding impression that is left is that RBC/RBL have engaged in a disdainful effort to ignore their obligations under the discovery rules, to withhold (or to simply not make any good faith effort to find) relevant and responsive documents. Such misconduct is nothing less than an abuse of process, an abuse which undermines the integrity of the hearing proceeding and, ultimately, the Commission's regulatory authority. In this broader sense, the mere fact that some of the withheld documents ultimately surfaced is immaterial: the real damage was done when

the documents were not produced in the first place. [7]

15. An important, if not the central, purpose of the instant hearing has been to determine whether RBC/RBL have been truthful and candid with the Commission. To the extent that, in the course of the hearing, RBC/RBL have demonstrated a pattern of conduct which reflects their unwillingness or inability to be fully honest and candid with the Commission (or the Presiding Judge), that pattern can and should be considered in the evaluation of the evidence under the various designated issues. Obviously, evidence of dishonesty and lack of candor by a party before agency officials and offices is strongly, if not conclusively, reinforced if that party demonstrates dishonesty and lack of candor before the presiding administrative law judge.

16. The RBC/RBL Opposition does nothing to rebut Press' showing (contained in its Statement) that RBC/RBL have failed to comply with discovery requirements in good faith. Nor does the Opposition provide any explanation (credible or otherwise) for that failure. Moreover, the Opposition underscores RBC/RBL's inherent dishonesty and lack of candor when the Opposition characterizes an obvious "misstatement" as an "alleged understatement".

17. In view of all of these considerations, Press restates

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[7] It should also be pointed out that it is far clear that <u>all</u> responsive documents have been produced even now. This case is somewhat unusual in that virtually all of the documents relevant to the issues are in the possession and control of RBC/RBL, the parties against which the issues have been designated. As a result, RBC/RBL have had a clear incentive to maintain close control over what documents are produced.

its position that the matters discussed in Press' Statement can and should be considered in connection with the ultimate disposition of this case without the need for the addition of any further issues herein.

Respectfully submitted,

/s/ Harry F. Cole
Harry F. Cole

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Counsel for Press Broadcasting
Company, Inc.

August 6, 1996

ATTACHMENT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

JOSEPH REY, LETICIA JARAMILLO, and ESPERANZA REY-MEHR, as General Partners of RAINBOW BROADCASTING COMPANY, a Florida Partnership, Plaintiffs, vs. GUY GANNETT PUBLISHING CO., Individually, GUY GANNETT PUBLISHING CO., doing business as GANNETT TOWER CO., GUY GANNETT PUBLISHING CO., doing businss as BITHLO TOWER COMPANY, GANNET TOWER COMPANY, Individually, MPE TOWER, INC., Individually, and GANNETT TOWER COMPANY and MPE TOWER, INC., as General Partner and copartners doing business as BITHLO TOWER COMPANY, a Florida General partnership, Defendants.	CASE NO. 90-2554-CIV-Marcus

Miami, Florida
January 23, 1991
7:50 a.m.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE STANLEY MARCUS

APPEARANCES:

PLAINTIFFS: MALCOLM H. FROMBERG, ESQ.
ELSA ALVAREZ, ESQ.
420 South Dixie Highway
Third Floor
Coral Gables, Florida 33146

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MSA

1 these locations would not be approved by the F.A.A. if
2 someone wanted to build a broadcast antenna tower on any of
3 those locations similar to the Bithlo Tower?
4 A In my opinion, that's correct. It would pass F.A.A.
5 muster.
6 MS. ALVAREZ: Okay. Those are all my questions,
7 Your Honor.
8 THE COURT: All right. Thank you.
9 Cross.
10 MR. HARDEMAN: No questions.
11 THE COURT: Thank you. You may step down.
12 MR. FROMBERG: I call Ms. Polivy.
13 THE COURT: I take it there is no objection to
14 counsel being called, Mr. Hardeman?
15 MR. HARDEMAN: I would like to, Judge, but I don't
16 think it would be worthwhile.
17 THE COURT: All right. If you would be kind enough
18 to raise your right hand, we will have you sworn.
19 MARGOT POLIVY, PLAINTIFFS' REBUTTAL WITNESS, SWORN.
20 THE COURT: Have a seat.
21 State your name and spell your name for the record,
22 please.
23 THE WITNESS: My name is Margot Polivy,
24 P-o-l-i-v-y.
25 THE COURT: Thank you.

CERTIFICATE OF SERVICE

I, Harry F. Cole, hereby certify that on this 6th day of August, 1996, I have caused copies of the foregoing "Reply of Press Broadcasting Company, Inc. to 'Rainbow Opposition to Statement for the Record'" to be hand delivered (as indicated below) or placed in the United States mail, first class postage prepaid, addressed to the following individuals:

The Honorable Joseph Chachkin
Administrative Law Judge
Federal Communications Commission
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Harry F. Cole