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September 26, 1996

William F. Caton  
Acting Secretary  
Federal Communications Commission  
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Washington, D.C. 20554

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SEP 26 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Re: Rainbow Broadcasting Company  
GC Docket No. 95-172

Dear Mr. Caton:

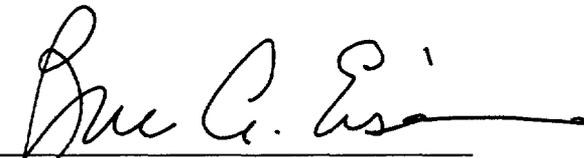
On behalf of Rainbow Broadcasting Company, there is transmitted herewith and filed an original and six (6) copies of its "Proposed Findings of Fact and Conclusions of Law".

Should any questions arise with respect to this matter, please contact the undersigned counsel.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS  
& HANDLER, LLP

By:

  
Bruce A. Eisen

Enclosure

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BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

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SEP 26 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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

**RAINBOW BROADCASTING COMPANY**

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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September 26, 1996

## SUMMARY

Three basic qualifying issues have been specified against Rainbow Broadcasting Company (RBC"). The record evidence adduced at hearing demonstrates that each issue must be resolved favorably to RBC and that -- under a fourth issue -- RBC should either be granted a waiver of §73.3598(a) of the Commission's rules or its application for an extension of its construction permit should be granted under §73.3534(b) of the Commission's rules.

If it is assumed that RBC had violated the Commission's ex parte rules, there can nevertheless be no doubt that RBC's counsel, Margot Polivy, did not intend to do so. Polivy had a reasonable and an honest belief that her contacts with the Commission's staff were permitted by the rules, and her request to counsel to the United States Senate Commerce Committee to contact the Commission to inquire into the RBC proceeding did not reflect any intentional wrongdoing.

During the period of time covered by a financial misrepresentation issue, RBC properly relied upon the commitment from its lender to meet costs of construction and operation. Although the loan agreement was oral, it remained in place and undiminished. Testimony given by RBC's partner in a tower lawsuit did not reflect a misrepresentation of RBC's financial qualifications, and a finding of the district court judge, upon which the Court of Appeals partially relied in remanding this case back to the Commission, was not intended to determine whether or not RBC was financially qualified pursuant to Commission law.

A third issue designated to determine whether or not RBC had misrepresented the nature of the tower litigation in order to delay construction, must also be resolved in favor of the permittee. RBC's applications for extension of its construction permit cited the tower litigation as a reason that RBC could not complete construction, and the record facts showed that RBC's principal honestly believed that the district court had imposed a status quo order which effectively precluded further construction until the lawsuit was resolved.

Finally, because RBC never received a full 24 months in which to construct its facility after judicial review had been completed, and, further, because it made substantial progress in construction although impeded by reasons beyond its control, RBC should receive either an equitable waiver of the Commission's rules, or else have its extension application granted for meeting the requirements of the rules.

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In re Applications of	)	
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and	)	
	)	
For an Assignment of its	)	
Construction Permit for	)	
Station WRBW(TV), Orlando, Florida	)	
TO: The Honorable Joseph Chachkin		
Administrative Law Judge		

**RAINBOW BROADCASTING COMPANY**

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Rainbow Broadcasting Company ("RBC"), by its attorney, hereby submits its Proposed Findings of Fact and Conclusions of Law with regard to the issues specified in the above-captioned proceeding. In support thereof, the following is shown:

**I. BACKGROUND**

1. By Memorandum Opinion and Hearing Designation Order, 61 Fed. Reg. 34282, January 31, 1996 ("HDO"), the Commission designated for hearing RBC's application for an extension of time in which to construct its television station as well as its application for assignment of its construction permit. The HDO followed a remand of the proceeding from the United States Court of Appeals for the District of Columbia Circuit. See, Press Broadcasting Company, Inc. v. FCC, 59 F.3d 1365 (D.C. Cir. 1995). The HDO specified the following issues:

(1) To determine whether Rainbow intentionally violated Sections 1.1208 and 1.1210 of the Commission's ex parte rules by soliciting a third party to call the Commission on Rainbow's behalf, and by meeting Commission staff to discuss the merits of Rainbow's application proceedings.

(2) To determine whether Rainbow made misrepresentations of fact or was lacking in candor with respect to its financial qualifications regarding its ability to construct and initially operate its station, in violation of §1.17 and §73.1015 of the Commission's rules or otherwise.

(3) To determine whether Rainbow made misrepresentations of fact or was lacking in candor regarding the nature of the tower litigation in terms of its failure to construct in connection with its fifth and sixth extension applications, in violation of §1.17 and §73.1015 of the Commission's rules or otherwise.<sup>1</sup>

(4) To determine whether Rainbow has demonstrated that under the circumstances either grant of a waiver of §73.3598(a) or grant of an extension under §73.3534(b) is justified.

(5) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Rainbow is qualified to be a Commission licensee and whether grant of the subject applications serves the public interest, convenience and necessity.

2. RBC filed its application for a new UHF television station at Orlando, Florida on September 9, 1982. After a comparative hearing and attendant agency appeals, the Commission affirmed RBC's construction permit grant. See, Metro Broadcasting, Inc., 99 FCC 2d 688 (Rev. Bd. 1984); rev. denied, FCC 85-558 (released October 18, 1985). The Commission's decision was appealed, in particular with regard to certain minority preference policies, and RBC's grant became final only after the United States Supreme Court had affirmed the constitutionality of the implicated minority preference policies and had denied rehearing on August 30, 1990. See, Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990), petition for rehearing denied, 111 S. Ct. 15 (1990).

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<sup>1</sup> The first two issues reflect the Commission's corrections as set forth in its Erratum, DA 96-156, released February 12, 1996.

3. During the pendency of the hearing litigation, the Commission canceled RBC's construction permit in June, 1988, but reinstated the permit when RBC alerted the Commission to the continuing court appeals. Thereafter, RBC filed applications for extensions of time in which to construct its television facility at roughly six month intervals.

4. Approximately two months after the Supreme Court had denied rehearing, RBC filed a lawsuit against the owner of the transmitting tower upon which it had leased antenna space. In its fifth extension application, RBC cited the tower litigation as a reason for its delay in construction. Press Broadcasting Company, Inc. ("Press") filed an informal objection against the extension request, but the Commission had already granted the extension on February 5, 1991. Press thereupon filed a petition for reconsideration.

5. The Florida district court denied RBC's motion for an injunction in June, 1991. The judge in that proceeding had found that RBC had failed to obtain financing, and he used that factor to conclude that RBC had not demonstrated irreparable harm, a necessary element for an injunction. RBC filed its sixth extension application several weeks later confirming, as it had in its fifth request, that it would commence operation prior to December 31, 1992.

6. In November, 1991, RBC filed a pro forma application to assign its construction permit to a limited partnership. Press filed another informal objection, alleging that RBC had misrepresented the nature of the tower litigation and was financially unqualified.

7. On June 18, 1993, the Video Services Division canceled RBC's construction permit finding that construction of the station had not been prevented by causes beyond RBC's control. RBC filed a petition for reconsideration, and on July 30, 1993, the Chief, Mass Media

Bureau, reinstated the construction permit, granted the assignment application and provided RBC with an additional eight months in which to construct.

8. Press filed a petition to rescind the grants arguing that the Bureau's action was tainted by ex parte contacts between RBC's counsel and the Bureau. Press contended that its petition for reconsideration of RBC's fifth extension grant constituted a formal opposition thereby restricting the proceeding. RBC filed an opposition showing that the ex parte rules did not bar RBC from contacting the staff, but did bar third parties. Press also filed a contingent application for review in which it contended that RBC's extension application had not demonstrated substantial progress or that circumstances beyond its control prevented it from constructing.

9. Subsequent to the filing of these pleadings, the Commission's Inspector General conducted an investigation after which he concluded that RBC had violated the ex parte rules. Both RBC and Press filed initial and reply comments.

10. The Commission concluded that RBC had violated the ex parte rules, but that RBC's counsel "apparently sincerely believed that the proceeding was not restricted;" that both RBC's fifth and sixth extension applications should have been granted since it had not been provided with a full 24-month period after its grant had become final; that RBC had not misrepresented the nature of the tower litigation; and that it had not misrepresented its financial qualifications. RBC was granted a 12-month extension to construct, and the assignment application was granted. Rainbow Broadcasting Co., 9 FCC Rcd 2839 (1994).

11. Press appealed, and the Court of Appeals remanded the case to the Commission for further inquiry.

## **II. PROPOSED FINDINGS OF FACT**

### **A. EX PARTE ISSUE**

12. Margot Polivy, a partner in the law firm of Renouf & Polivy, began representing RBC in 1987 (Tr. 375-376). Polivy's practice has consisted of various federal court and appellate litigation, and since she first became a partner at the law firm, a substantial component of her practice has been devoted to communications broadcasting (Tr. 375). From 1964 to 1970, Polivy was employed at the Federal Communications Commission, first as an attorney-advisor for the Commission's Review Board, next as a trial attorney with the Broadcast Bureau's Hearing Division, and finally in the office of the General Counsel (Tr. 376).

13. After RBC's fifth extension application had been granted on February 5, 1991, Polivy received a service copy of Press' February 15, 1991 objection which she believed to be "informal" because of its title<sup>2</sup> and the fact that a formal petition would not have been permitted against a request for an extension of time (Tr. 377-378, 404). She addressed the pleading with RBC partner, Joseph Rey (Tr. 378).

14. Subsequently, Polivy received Press' February 25, 1991 Petition for Reconsideration of the Commission's grant of RBC's fifth extension request (Tr. 378-379). She filed an opposition on RBC's behalf, believing the petition to be another informal opposition since it simply resubmitted Press' late-filed informal objection (Tr. 377, 412, 414, 465). Although the petition recited that Press was seeking "formal review", Polivy noted that the pleading was unauthorized because Commission precedent does not contemplate a petition for

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<sup>2</sup> The pleading was styled "Informal Objection" (Stipulation No. 15). It included a footnote which conceded that a formal petition was not contemplated by the Commission's rules (Tr. 404).

reconsideration of a denial of an informal objection and, further, because it included a footnote confirming that Press had missed the Commission's February 12, 1991 Public Notice of RBC's grant (Tr. 531-532).

15. RBC filed a sixth request for an extension of its construction permit on June 25, 1991 (File No. BMPCT-910625KP) (Stipulation No. 17, Joint Hearing Exhibit 3, Tr. 381), and Press filed an informal objection on July 10, 1991 (Stipulation No. 18). The pleadings remained unresolved until the Video Services Division of the Mass Media Bureau acted on June 18, 1993 (Stipulation No. 24).

16. In October, 1991, the Commission's Office of Managing Director sent Polivy a copy of its response to a letter that had been written by one George Daniels (Stipulation No. 19, Joint Exhibit No. 4). The letter was signed by Douglas A. Sandifer, for the Managing Director, and although Polivy reviewed the letter, she had no recollection of discussing it or sending it to any RBC principal (Tr. 382, 406). She believed that the letter had no applicability to RBC, a formal party (Tr. 382-384). Rather, Polivy construed the letter to inform Mr. Daniels, a third party, that the proceeding was restricted with regard to any contact that he made to the Commission, so that the ex parte rules applied to him (Tr. 383, 406).<sup>3</sup> She testified that Section 1.1204(a) of the Rules controlled the proceeding, and she referenced a footnote to the rule which permits oral ex parte communications, but only between the Commission and the formal party involved or its representative (Tr. 383, 477, Rainbow Exhibit No. 1, page 2). Polivy concluded that under the rule any informal objector, such as Press or Mr. Daniels, would have been subject to the ex parte procedures set forth in Section 1.1208, thus barring oral ex parte contacts between

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<sup>3</sup> The Sandifer letter referred to RBC's extension application as a "restricted proceeding" because a petition for reconsideration had been filed (Joint Exhibit No. 4, page 1).

each of them and the Commission (Tr. 383-384). She believed that the very restriction to which the Managing Director referred was not relevant to RBC as the formal party (Tr. 384).

17. Paul R. Gordon was employed as an attorney in the Television Branch of the Video Services Division during the period April 1991 through August 1993 (Tr. 1015). Gordon was the staff person with lead responsibility to review the RBC extension requests, assignment application<sup>4</sup> and the pleadings surrounding those filings (Tr. 1016-1017). Clay Pendarvis, Chief of the Television Branch, had assigned the application to him (Tr. 1032).

18. Gordon recalled that he had had at least three telephone discussions which Polivy had initiated over approximately a one year period before the Commission released a decision in the proceeding (Tr. 1018-1021). Gordon claimed that during their conversations Polivy would inquire as to the status of the applications, begin discussing the merits and, when he informed her that the proceeding was restricted and subject to the ex parte rules, she told him that he was incorrect because the objections were informal (Tr. 1019-1039). Gordon testified that he would then terminate the discussion, refusing to listen to anything having to do with the merits because Press had opposed the applications (Tr. 1020, 1037). He wasn't sure whether the proceeding became restricted when the original objection was filed or when Press filed its petition for reconsideration (Tr. 1038). He testified that he told Pendarvis that Polivy did not believe that contacts with him were ex parte violations (Tr. 1032).

19. Polivy learned that the Video Services Division had issued a decision when Gordon returned her telephone inquiry on or about June 24, 1993, about one week after he had told her that a decision would soon be released (Tr. 385-386). Gordon read her the decision

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<sup>4</sup> On November 29, 1991, RBC had filed an application for consent to a pro forma assignment of its construction permit to Rainbow Broadcasting, Ltd. (Stipulation No. 21).

which was embodied in a June 18, 1993 letter signed by Barbara Kreisman, Chief of the Video Services Division (Tr. 384, 1022). Gordon, himself, had drafted the letter (Tr. 1043). The Division had granted Press' informal objections, denied RBC's sixth extension request, deleted RBC's call sign WRBW(TV) and dismissed as moot the assignment application (Joint Exhibit No. 8). Gordon maintained that he cut off Polivy when she began to discuss the merits of the decision (Tr. 1022).

20. Polivy testified that at no time, in any contact with Gordon prior to the decision, did he state to her that they could not discuss the merits of the proceeding because of the ex parte rules (Tr. 397, 418, 469). Polivy was aware that Gordon claimed that he had discussed ex parte restrictions with her, but she believed that his recollection was wrong, and she testified that his story comported with no one else's recollections (Tr. 429-430). Polivy testified that her discussions with Gordon concerned the age of the proceeding and where it was in the review process, not with the merits which had already been addressed in the filed pleadings (Tr. 506-507). She characterized the telephone calls to Gordon as "aggressive status calls", meant to impress him that all the pleadings were in and that no reason existed not to issue a decision (Tr. 508-509). She asserted that her contacts never suggested what the outcome should be, because Gordon was already aware of RBC's position from its pleadings (Tr. 510).

21. Gordon had no recollection as to what merits Polivy had discussed (Tr. 1023). He claimed that the calls had occurred more than three years before his testimony and that, since he had "cut her off each time", he could not recall exactly what Polivy had said (Tr. 1023-1024). He had made no contemporaneous notes of their conversations, kept no telephone logs, and made no diary entries of the contacts (Tr. 1025, 1026, 1027). Moreover, Gordon had made no

report to any Commission personnel concerning the alleged ex parte contacts, and he testified that he had been unaware of any requirement to do so (Tr. 1040). Gordon learned after disposition of the application that Section 1.1212 of the Rules did require the filing of such a report (Tr. 1041).

22. After Gordon had informed Polivy of the decision, she requested him to schedule a meeting with Kreisman, but Gordon told her that she would have to arrange for such a meeting herself (Tr. 1034). He did not raise with Polivy any question concerning whether or not a meeting with Kreisman would be appropriate (Tr. 1034).

23. Polivy telephoned Pendarvis as well as Roy Stewart, Chief of the Mass Media Bureau, to schedule a meeting in order to discuss the decision (Tr. 387). Pendarvis asked her if any objections had been filed, and she told him that Press had opposed the extension requests through informal objections (Tr. 388, 462-463). She did not reference the Managing Director's letter (Tr. 467). Polivy believed that the proceeding was restricted to Daniels and to Press, but not to RBC, the formal party, so that RBC was not precluded from discussing its application with the staff (Tr. 474). After her discussion with Pendarvis, she checked the Commission's rules to satisfy herself that a meeting would be appropriate (Rainbow Exhibit No. 1, Tr. 393-394).<sup>5</sup> The meeting was scheduled for July 1, 1993 (Stipulation No. 27).

24. Antoinette Cook Bush is Polivy's longtime friend, former client and colleague who, in June of 1993, was employed as counsel to the United States Senate Commerce Committee (Tr. 389, 557). In that capacity, she had occasion to contact FCC staff persons on a

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<sup>5</sup> At hearing, Polivy testified that the Commission had ultimately decided that, while it was a close case, the ex parte rules had been violated by her contacts; however, she emphasized that at the time she believed in the reasonableness of her position and would not have intentionally violated the rules (Tr. 515).

wide range of matters, and at times was told that a particular proceeding about which she inquired was restricted (Tr. 555-556, 578). Prior to working for the Senate, Bush had been an associate in the firm of Wiley, Rein & Fielding, and in that capacity had been one of the associate junior people who represented RBC in the original comparative hearing (Tr. 389, 554). After she left the law firm, she remained a social friend of RBC principal, Rey (Tr. 555).

25. After Polivy had received the adverse RBC decision, she telephoned Bush who lived in New York and was on maternity leave, although she was still accomplishing work for the Senate Commerce Committee (Tr. 391, 444, 568). Polivy asked her to call the Commission to find out how the staff could have released a decision denying the extension request even though RBC had never been provided with the requisite two years in which to complete construction (Tr. 391, 438, 557). Polivy asked Bush to inquire because the Senate Committee reviewed the Commission, and Bush was the appropriate person to ask (Tr. 391-392). In Polivy's opinion, the Commission staff was holding against RBC the time that its construction permit was "in limbo", so that RBC had been given only from August 30, 1990 until June 25, 1991, i.e., approximately ten months to construct (Tr. 445-446). Bush recalled that Polivy was also upset that certain pleadings had been pending for a very long time without Commission action (Tr. 571).

26. Polivy did not ask Bush to contact any particular person at the agency (Tr. 447). Bush made no independent inquiry regarding the RBC proceeding and agreed to make the contact, subsequently speaking to Pendarvis and Stewart, who told her he would look into the matter (Tr. 392, 448, 457-458, 579). Bush had told Stewart that she was calling about RBC's extension request, and in order to identify RBC further, she had told him that it had been the

applicant who had defended the Commission's minority ownership policy in the Supreme Court (Tr. 560, 582). Bush considered the contact to be a routine status inquiry, and she did not request Stewart or Pendarvis to take any particular action (Tr. 572). It was not unusual for her to attempt to ascertain the rationale for a decision (Tr. 590). Pendarvis telephoned Bush within 24 hours and told her that the extension had been denied, but that RBC could file for reconsideration (Tr. 562, 572). Neither Stewart nor Pendarvis indicated to Bush that there was anything improper about her call, and she had no further staff discussions (Tr. 562-563).

27. Polivy did not discuss the ex parte rules or the Managing Director's letter with Bush (Tr. 448). Bush testified that Polivy did not mention any petition for reconsideration or informal objection (Tr. 589). Polivy did not think that Bush could necessarily influence the decision, but she did believe that Bush's contact could move the proceeding along more swiftly and cause the senior staff to review the matters raised (Tr. 520). Polivy believed that the proceeding was not restricted as to Bush, because the latter was placing a Congressional status call (Tr. 522). Bush discussed the matter with no RBC principal and felt that Polivy's request was like many calls she received from people upset with a Commission decision who would ask her to inquire as to what, if any, action could be taken (Tr. 558-559).

28. On July 1, 1993, Polivy and RBC's principal, Rey, met in Stewart's office at Commission headquarters with Stewart, Kreisman, Pendarvis, Gordon, and Bureau Assistant Chief for Law, Robert Radcliffe (Stipulation No. 26). Neither Press nor any of its principals nor Harry Cole, Press' counsel, attended the July 1 meeting (Stipulation No. 27).

29. The meeting in Stewart's office lasted between 15 and 20 minutes and addressed the merits of RBC's applications for extension of time to construct (Stipulation No. 28, Tr. 394).

In particular, Polivy went through the background of the RBC applications and the chronology of events that had transpired, pointing out that RBC had not had an opportunity after the Supreme Court decision to have two years to construct, and that the applicant had expended over a half million dollars on tower rental alone (Tr. 394). Polivy testified that some of the staff seemed surprised by the one half million dollars RBC had spent on tower rental, although that fact had been previously reported, and Stewart recommended that RBC file a petition for reconsideration, although no one at the meeting provided any assurances that such a petition would be favorably acted upon (Joint Exhibit No. 7, page 2, Tr. 394-396). Polivy testified that the meeting was not necessary for RBC to have filed a petition for reconsideration, but she felt it was important to bring the facts to the senior staff because the law had been misapplied and, further, because she did not want to have to wait two more years for a ruling on any RBC petition for reconsideration (Tr. 513-514).

30. Rey and Polivy returned to her office following the meeting, worked on the petition for reconsideration, and Polivy filed the pleading the following day (Tr. 396). Polivy waited two weeks and then began calling every day to see when the Commission would release a decision (Tr. 396-397).

31. Rey was aware that Press had informally opposed RBC's fifth and sixth applications for extension of its broadcast construction permit (Tr. 715). Polivy telephoned him in June, 1993, to tell him that the Commission had canceled the construction permit and denied the application for assignment of permit to the limited partnership (Tr. 716). During that discussion, Polivy told Rey that RBC should file a petition for reconsideration (Tr. 716-717).

32. Rey had never seen the Managing Director's letter (Joint Exhibit No. 4) prior to July 1, 1993; nor did he have any information of its existence before he met with Polivy in Stewart's office (Tr. 717). Polivy never told Rey that she had talked with Bush about the denial of RBC's applications (Tr. 717-718). He never personally contacted Bush about the Commission's action, nor did his partner, Leticia Jaramillo (Tr. 718). In fact, Rey testified that he had only learned that Bush had contacted the FCC when Polivy had told him in the second half of 1993 that Press had filed allegations raising the possibility of an improper meeting (Tr. 718-719). Polivy was very upset, and kept referring to Commission rules which she felt made it clear that there had been no impropriety (Tr. 726).

33. Polivy had called Rey to ask him to attend the meeting in Washington on very short notice, but she did not tell him how the meeting had come to be scheduled in Stewart's office (Tr. 719-720). Rey recalled that at the start of the meeting, Polivy handed out a two or three page chronology of the RBC applications, and that she went on to explain how RBC had been deprived of its two years to construct and how it had expended close to a million dollars (Tr. 721). During the discussion of the chronology, the fact that Press had opposed RBC's applications was mentioned several times (Tr. 721). Rainbow Exhibit No. 8, Appendix A, was the document that was circulated to the attendees at the July 1, 1993 meeting in Stewart's office (Tr. 723-724). That document, inter alia, makes specific reference to the following:

02-15-91	Press files informal objection to Rainbow CP extension request.
02-25-91	Press seeks reconsideration of Rainbow's CP extension.
01-07-92	Press objects to Rainbow transfer request and seeks to hold it in abeyance; Rainbow responds 01-30-92.

04-30-93 Press files "informal objections" to Rainbow's authorization.

05-13-93 Rainbow responds to Press 04-30-93 filing.

34. No one at the meeting stated anything with regard to the propriety of discussing the RBC applications, and towards the end of the meeting when Rey asked Stewart why RBC had not received its two years to construct after its grant had become final, Stewart told him that he could address that matter in a petition for reconsideration (Tr. 721).

35. On July 30, 1993, Stewart signed a letter granting RBC's Petition for Reconsideration, reinstating the construction permit and the call sign WRBW(TV), granting an eight month extension of time and further granting the assignment of the construction permit to Rainbow Broadcasting, Ltd. (Joint Exhibit No. 9).

#### **B. FINANCIAL MISREPRESENTATION ISSUE**

36. Joseph Rey is presently the general manager of Station WRBW(TV) at Orlando, Florida, and President of Rainbow Broadcasting Company, Inc., the general partner of Rainbow Broadcasting, Ltd. (Tr. 710). RBC, the general partnership that sought the television construction permit, initially consisted of Rey (85%); his mother (5%); and Leticia Jaramillo (10%) (Tr. 711). Ultimately, Rey's mother transferred her ownership interest to him, so that as of June, 1993, Rey was the 90% general partner and Jaramillo was the 10% general partner of RBC which received its construction permit in the spring of 1986 (Tr. 711-712).

37. Rey first met Howard Conant in Chicago in late 1978 while the former was employed by Storer Broadcasting Company as national sales manager of Storer's Miami, Florida radio stations (Tr. 744). They became social friends, and when he became the general manager

of two Miami radio stations in 1980, Rey continued to meet Conant when he occasionally traveled to Chicago on behalf of the stations (Tr. 745).

38. In 1982, Rey became Vice President of Sales for television station WDZL(TV) at Miami where he worked closely with the general manager in all facets of station operation and had an opportunity to meet frequently with Conant who was a 49% limited partner of the WDZL(TV) licensee (Tr. 746). Rey brought Conant up to date by providing him with frequent station status reports in both Chicago and Miami (Tr. 746-747; 783). In 1983, he reported to Conant monthly, and at other times at least once each quarter (Tr. 979). While at WDZL(TV), Rey supervised approximately twenty staff persons (Tr. 978).

39. Conant did not directly provide his personal financial information to any RBC principal (Tr. 783). However, during his employment at station WDZL(TV), and until the station was sold in June, 1984, Rey became familiar with Conant's financial status by having access to the latter's financial statements (Tr. 747-748). He saw the Conant financial statement which had been appended to the 1979 WDZL(TV) construction permit application, and he further reviewed 1982-1984 Conant financial information relevant to a loan guarantee (Tr. 784). In particular, he viewed documents that showed Conant's net worth to be in excess of \$10 million (Tr. 748-749). He also knew that Conant owned Interstate Steel, that he had sold a family business paint company, and that he maintained real estate holdings as well as his interest in the television station (Tr. 749).

40. In late 1983, Rey and Conant initially discussed the possibility of Conant serving as RBC's financial source, and in mid-1984 they met in Conant's Chicago office where they discussed a business plan, audience and sales projections, expenses, and the Orlando market in

general (Rainbow Exhibit No. 4, page 2, Tr. 749-750), . At that time, they also finalized negotiations and entered into an oral agreement whereby Conant agreed to lend RBC up to \$4 million based upon the financial needs to construct and operate the station for approximately one year (Tr. 749-750). It was agreed that Conant would lend the funds at an interest rate of 2% above the prime rate as charged by the Continental Bank, and payable over five years in monthly installments (Tr. 750). The loan was to be junior to any equipment lender (Tr. 758). Conant was to receive 50% of the positive cash flow for the first five years, 25% thereafter, and upon sale of the station he was to receive 10% of the net sales price (Tr. 750). Conant also required the personal guarantees of both RBC partners, and they agreed to provide the guarantees ((Tr. 751-752). Conant confirmed the aforementioned terms in his testimony (Rainbow Exhibit No. 5, page 5, par. 2).

41. At the time that Rey and Conant reached the RBC financing agreement, the Orlando television hearing remained pending at the Commission, and they mutually decided to defer a written agreement until the litigation had ended and it was time to commence construction (Tr. 751, 758). Rey did not provide Conant with documents regarding his or Jaramillo's personal finances (Tr. 785). He believed that Conant had asked for the personal guarantees fully aware that he and Jaramillo could not personally repay the money, but that they would work hard to insure that the project turned out well (Tr. 751-752). Conant similarly testified with regard to the guarantees (Tr. 653-654).

42. On or about November 2, 1990, RBC brought an action for injunctive relief against the owner of the transmission tower that RBC had planned to utilize (Stipulation No. 12), and Rey informed Conant of that lawsuit in late 1990 (Tr. 752, 789). Specifically, Rey told

Conant that Press was attempting to move its WKCF-TV transmitting facilities to RBC's Bithlo, Florida tower site, and that he was concerned that RBC might become valueless if, as an expert witness had stated in the lawsuit, it were to begin operations as the sixth station in the Orlando market, rather than as the fifth (Tr. 752-753). Rey believed that if Press relocated to the tower site, it would place its signal into three major population centers of the market rather than the two which WKCF-TV was able to reach from its existing site (Tr. 791). In addition, Rey explained pessimistically to Conant that 1990 had been a recession year so that advertising budgets projected for 1991 were already lower (Tr. 753).

43. Rey testified that, notwithstanding this gloomy outlook, Conant told him that he was projecting too far into the future and that they should simply wait to see how matters developed (Tr. 753-754). Rey further testified that Conant did not in any way attempt to alter the financial agreement and, on the contrary, remained committed to the terms (Tr. 754). In Rey's mind, Conant intended to rely upon the former's opinion as a broadcaster, so that if at some point Rey were to have told Conant that the project were not worth pursuing, Conant as a business man would have backed out of the agreement (Tr. 754).

44. In the summer of 1991, Rey told Conant that the federal district court had denied RBC's request for a preliminary injunction; however, Rey believed that events had significantly changed over the prior seven months so that he was nowhere near as pessimistic as he had previously been about the television project (Tr. 754-755). In particular, Rey testified that there was a "big uplift" after the Gulf war, talk about a possible new network emerging in the future, and -- most importantly -- the knowledge that the Nielsen Company was to meter the Orlando market in the second half of 1992, bringing with it the promise that ratings would improve

dramatically for a new Orlando television station (Tr. 755-756; 799). Rey first learned about the Nielsen meters in late May or early June of 1991, but he could not recall whether the knowledge was gained before or just after the court's decision to deny the preliminary injunction (Tr. 756). He felt that there was now "a light at the end of the tunnel", and that although a sixth Orlando market station might take longer to "break even", it could nevertheless achieve long term success (Tr. 797, 990).

45. Press Exhibit No. 9 consists of the "Verified Complaint for Specific Performance and Other Relief" in Rey v. Guy Gannett Publishing Company. Rey, himself, signed page 10 of the complaint and swore to its accuracy (Tr. 775, 778-779). The statement of expert witness Susan Harrison is appended to the Verified Complaint as Exhibit B (Press Exhibit No. 9, page 12). Harrison's Summary of Opinion recites that RBC would suffer irreparable harm if Gannett were to lease space on the top of its tower to Press since RBC would be unable to secure financing to build and operate the station and would be left holding a construction permit that had no value in the open market or for the foreseeable future. Harrison observed that "if Gannett allows Press to broadcast from the top slot and its aperture on the Bithlo tower, RBC's ability to compete in the Orlando television market will be obstructed to the point that it will not be able to secure the financing to build a television station for Channel 65 on the Bithlo tower or any other tower in the area" (Press Exhibit No. 9, page 13). Harrison further opined that no financing would be available to build and operate the station since it would not be economically viable "and the station will never be built" (Press Exhibit No. 9, page 14). Rey testified that at the time he had verified the complaint, he had agreed with Harrison's conclusions and believed that a sixth station in the market would have been worthless because of insufficient market revenues

(Tr. 780-782, 936-937). Accordingly, he did not expect anyone to put money into an enterprise that could not pay for itself (Tr. 781-782; 916).

46. Rey testified in the tower lawsuit in January 1991 (Tr. 787). Press Exhibit No. 10 is comprised of excerpts of his testimony before the district court. At one point, Rey was asked to provide the dates of Conant's financial commitment (Tr. 788). He testified as follows at Press Exhibit No. 10, page 16:

A: I have had ongoing conversations with Mr. Conant for a number of years. I don't know if I can give you an exact date.

Q: Did he tell you that he would give you \$4,000,000?

A: This has been an ongoing conversation. I said obviously when the litigation ended with the Supreme Court, but pick your date in the last few months.

Q: Anytime within the last few months would be fairly accurate?

A: Well, since June of 1990. You know we -- Rainbow suspected that the Supreme Court would not review its own decision. It officially was made -- the denial of review was made official in September, so....

Elsewhere, Rey testified as follows:

Q: He [Conant] has not actually given you some money and taken a promissory note, for example?

A: I said it has not been reduced to writing because of this. There is an agreement for the financing of the station, and then this hit and everything was put on hold. You asked me that in a deposition. I said that everything had been put on hold because of this (Press Exhibit No. 10, page 7).

47. With regard to the answers cited above, Rey testified that his reference to a financial commitment having been put on hold addressed the reduction of the agreement to writing, an action which he believed was to have been accomplished after the construction permit was “free and clear” and which would have been meaningless if it developed that the station would have been worthless. Rey asserted that Conant never retracted the agreement, but that Conant stated he would not finance the project if its potential was worthless (Tr. 789).

48. Rey testified in the district court proceeding that the collateral for the loan was “a minority participation on the station” so that Conant would have been a “minority shareholder” (Press Exhibit No. 10, pp 13-14, Tr. 791-792). Rey explained that he had used the phrases “minority participation” and “minority shareholder” to reflect that Conant would receive a 10% share of the net sales proceeds and that he would receive 50% of the positive cash flow for the first five years and 25% of the positive cash flow after five years (Tr. 792). He pointed out that RBC had no “shareholders” since it was a general partnership (Tr. 979). Rey testified that Conant would hold shares of the positive cash flow and a share of the net sales proceeds, but that he would have no “partner’s share” (Tr. 979). Conant affirmed his own understanding that he was not to be provided with equity in RBC (Tr. 663).

49. During the district court proceeding, Rey had testified that Conant had told him that “if Channel 18 gets on that tower the likelihood is that he will not finance the station” (Press Exhibit No. 10, page 9, Tr. 795). Rey believed that Conant was relying upon his advice as to whether or not the project was viable, and that if the Judge had denied the injunction on the date of his district court testimony (January 11, 1991), he would have told Conant that the project was worthless (Tr. 795; 913). In reviewing his prior testimony, Rey acknowledged that Conant