

had not specifically told him that he would withdraw from the financing agreement if the injunction were denied but, rather, that Rey had put himself into Conant's position and testified to what he believed Conant would have told him under the circumstances (Tr. 795-796). If Rey had told Conant that the station would not succeed, Rey was certain that the latter would have refused to lend the necessary funds (Tr. 918). Rey viewed his court testimony as responses to what "could happen" as a result of Conant's reliance upon Rey's broadcasting judgment (Tr. 920-921). He testified that he had mixed Conant's comments with his own state of mind (Tr. 922).

50. In 1991, Rey and Conant discussed the possibility of a "bridge loan", wherein Conant would lend up to \$4,000,000 to get the station up and operating, with repayment of the loan in its entirety after 90 days of operation (Tr. 899-900). That concept was, however, never implemented and was conceived only for a possible situation where RBC would seek and obtain equity financing subsequent to Commission approval on a transfer to Rainbow Broadcasting Ltd. (Tr. 900). Between 1991 and 1993, Rey had spoken to others who might loan money to RBC (Tr. 903). However, Rey believed that Conant would still lend the money for construction and operation of the television station even if the assignment application proposing a limited partnership were not granted (Tr. 907-908). This, too, was confirmed by Conant's testimony (Rainbow Exhibit No. 5, page 2, par. 3).

51. RBC advised the Commission that there had been a delay in construction because of the tower litigation, but Rey believed that RBC had not advised the Commission that if Press were to relocate its facilities to the Bithlo tower, there was a likelihood that Conant would not finance the station (Tr. 929). Neither did RBC inform the Commission of Harrison's conclusions

(Tr. 935). The ultimate denial of the preliminary injunction had nothing to do with Rey's decision to move forward toward construction because, as Rey testified, by that time he had reason to be far more optimistic about the television project (Tr. 994).

52. Howard Conant is a resident of Chicago, Illinois, who has known Rey and Jaramillo for over fifteen years, and who had already become well acquainted with Rey's abilities while the latter was an employee of Storer Broadcasting Company (Rainbow Exhibit No. 5, page 1, par. 1). Conant testified that he had had an oral agreement with RBC to provide financing for the construction and operation of its station and that his commitment remained constant throughout the 1991-1993 time period and beyond (Rainbow Exhibit No. 5, page 1, par. 2). He was content with an oral agreement because of his satisfactory past experiences with the RBC principals, and he noted that he had entered into other agreements for significant amounts of money notwithstanding the absence of a written agreement (Rainbow Exhibit No. 5, page 1, par. 5, Tr. 652-653). Prior to reaching the agreement, Conant recalled that Rey had given him an analysis of start-up expenses, a projection of income and ratings, a cash flow projection and the figures that pertained to making a reasonable decision as to an investment (Tr. 658).

53. Conant stated that Rey had come to his office in Chicago in late 1990 to discuss RBC's progress, that in Rey's opinion the project had become riskier because of the dispute over tower space and the possibility that there would be an additional television signal in the market. Furthermore, Rey questioned whether or not it would be advisable for RBC to seek a form of equity financing in light of the national economic downturn. Conant became concerned about the problems that Rey discussed and in particular the prospect of another market television station, but Conant told Rey that they should take a "wait and see attitude", and he never stated

that he would retract his financial commitment to the company despite the fact that they both shared some skepticism. Later, in the summer of 1991, Conant learned from Rey that conditions in the Orlando television market had improved dramatically, largely because the Nielsen Company planned to meter the market. At the time, Conant reiterated his pledge to finance the station (Rainbow Exhibit No. 5, page 1, par. 3). In late 1992, when Conant became ill with Hodgkins disease, he and Rey agreed that limited partners would be enlisted to provide financing for the station, but notwithstanding his preoccupation with beating the disease and regaining his health, Conant told Rey that he would still follow through on the agreement if needed (Rainbow Exhibit No. 5, page 1, par. 4).

54. Conant testified that he was willing to finance the station when RBC had obtained complete authorization to “go ahead with the station”, and he did not want to get involved in any of the lawsuits, i.e., those proceedings which went to the Supreme Court as well as the tower dispute (Tr. 669-670). He only wanted to finance the station once RBC got the proper authority to proceed (Tr. 670). Conant was aware of the tower dispute, but the resolution of that dispute was not necessary for him to loan the funds to RBC, and although he was concerned about the project of a sixth market station, he did not view the possibility as a major obstacle (Tr. 671, 656). He asserted that he was interested in financing the station after receipt of a construction permit (Tr. 673-674). Conant emphasized that he was always ready to finance the station upon learning that RBC had full authority to proceed to build it (Tr. 684). When Conant had stated to Rey that he would take a “wait and see attitude”, he was referring to the delay that was likely to occur before final authority was given to construct the station (Tr. 687).

55. Conant relied upon Rey to tell him when RBC was free to construct the facility (Tr. 703). He testified that Rey never told him that the tower litigation legally prevented RBC from moving forward, and if Rey had explained to him that although the tower litigation was continuing, the Commission had authorized RBC to construct, Conant would have provided the money pursuant to the agreement upon RBC's election to move forward (Tr. 701-702).

**C. FAILURE TO CONSTRUCT/WAIVER OF RULES**

56. RBC's original construction permit was issued by the Commission on April 22, 1986 (Stipulation No. 4). In 1986, prior to a decision by the Court of Appeals in Case Nos. 85-1755 and 85-1756, the Court of Appeals remanded the cases at the request of the Commission (Stipulation No. 5). Between November, 1986 and February, 1988, RBC's construction permit was held in abeyance pending the outcome of the Commission's review of its minority ownership policies. See, Metro Broadcasting, Inc., 2 FCC Rcd 1474 (1987) and 3 FCC Rcd 866 (1988) (Stipulation No. 6). The consolidated cases (Nos. 85-1755 and 85-1756) were returned to the Court of Appeals in June, 1988 (Stipulation No. 7). RBC filed applications for extensions of time to construct on July 11, 1988; May 10, 1989; November 17, 1989; and July 2, 1990 (Stipulation No. 8). In April, 1989, the Court of Appeals affirmed the Commission's decision to grant RBC's application and to award the construction permit to RBC. Winter Park Communications, Inc. v. FCC, 873 F2d 347 (D.C. Cir. 1989) (Stipulation No. 9). The Supreme Court affirmed the construction permit grant to RBC on June 27, 1990 and denied rehearing on August 30, 1990. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), Petition for Rehearing Denied, 497 U.S. 1050 (1990) (Stipulation No. 10). The grant of the construction permit to RBC

became “final”, i.e., no longer subject to administrative or judicial review, on August 30, 1990 (Stipulation No. 11).

57. On or about November 2, 1990, RBC brought an action for injunctive relief against Guy Gannett Publishing Company (“Gannett”), the owner of the transmission tower RBC planned to use. Joseph Rey, et al., v Guy Gannett Publishing, et al., (No. 90-2554-CIV, United States District Court, S.D. Florida) (Stipulation No. 12). On January 25, 1991, RBC filed an application for extension of its construction permit (File No. BMPCT-910125KE) in which it asked the Commission for a fifth extension of its construction permit (Stipulation No. 13). Rey signed the extension application (Tr. 714, Joint Exhibit No. 2). The Commission, on February 5, 1991, granted RBC’s application (File No. BMPCT-910125KE) for an extension of its construction permit through August 5, 1991 (Stipulation No. 14).

58. After the Commission granted RBC an extension of its construction permit, Press filed an “Informal Objection” to RBC’s fifth extension application on February 15, 1991 (Stipulation No. 15). The district court denied RBC’s motion for a preliminary injunction in Rey v. Gannett on June 6, 1991. Rey v. Guy Gannett Publishing Company, 766 F.Supp. 1142 (S.D. Fla. 1991) (Stipulation No. 16).

59. RBC filed an application for a sixth extension of its construction permit (File No. BMPCT-910625KP) on June 25, 1991 (Stipulation No. 17). Rey signed the extension application (Tr. 715, Joint Exhibit No. 3). On July 10, 1991, Press filed an “Informal Objection” to RBC’s sixth extension application (Stipulation No. 18). On November 27, 1991, RBC filed a “Supplement” to its sixth extension application (Stipulation No. 20). The Commission did not

act on the extension request until it reinstated the WRBW(TV) construction permit and granted an extension in May, 1994 (Joint Exhibit No. 10, Tr. 715).

60. On November 29, 1991, RBC filed an application for the consent to the pro forma assignment of construction permit to Rainbow Broadcasting, Ltd. (Stipulation No. 21). By letter dated March 22, 1993, the Video Services Division of the Mass Media Bureau wrote RBC to inquire as to the status of the project (Stipulation No. 22). RBC responded to the VSD's inquiry by letter dated April 12, 1993 (Stipulation No. 23).

61. Rey was aware that August 30, 1990, was the date upon which the Supreme Court's decision to grant RBC's application had become final (Tr. 726). Prior to that date, RBC had not undertaken any physical construction of the television station, but it had become involved in pre-construction planning of the transmitter building, in the selection of equipment and, since 1986, had made rental payments under its lease with Gannett (Tr. 726, 947).

62. On January 30, 1990, Rey had sent a letter to Richard Edwards, an executive employee of Gannett who had charge of their towers (Tr. 727, Rainbow Exhibit No. 7, page 1). Edwards had, himself, sent Rey a letter in late 1989 or early January of 1990 in which he solicited specific information from RBC regarding proposed transmitter room dimensions and antenna mounting information, and Rey's letter asked for additional information to enable RBC to fully respond (Tr. 727). The RBC-Gannett lease was dated January 6, 1986 (Rainbow Exhibit No. 6). Gannett had proposed a three transmitter room single construction, i.e., three rooms were to be constructed all at once, one for a future FM tenant, another for a future TV tenant, and a third for RBC (Tr. 727-728). Rey's correspondence with Edwards was intended to inform the landlord that RBC would designate its own contractor according to the provisions of the lease as

well as its own engineer architect to enable RBC to move forward to build its transmitter room (Tr. 728).

63. On August 10, 1990, Rey wrote a second letter to Edwards stating that RBC “now has a clear path to construct the facility and it is our desire to proceed as quickly as possible” (Rainbow Exhibit No. 7, page 2). Rey testified that his statement resulted from a belief that the Supreme Court’s decision would shortly become final, and he anticipated starting construction directly thereafter (Tr. 729). Rey acknowledged that RBC did not begin construction before the Supreme Court decision had become final because he could not draw on Conant’s funds until the permit was “free and clear” (Tr. 730).

64. In 1988 and 1989, Edwards had asked Rey for consent to lease tower space to Press, and RBC had declined (Tr. 766). Rey believed that Edwards had not been completely honest with him, because RBC eventually secured blueprints indicating that one of the rooms had already been preplanned, and Edwards finally disclosed to Rey that Gannett expected to enter into a lease with Press in the aperture of RBC’s previously leased antenna space (Tr. 731). As a result, RBC filed its November, 1990 lawsuit which was thereafter removed by Gannett to federal district court (Tr. 731-732).

65. Judge Harold Marcus was the presiding United States District Judge in Rey v. Gannett (Rainbow Exhibit No. 5, Tr. 732). Rey testified that he had attended a November 27, 1990 prehearing conference where Judge Marcus had ordered that the status quo be preserved, and Rey understood that pursuant to the RBC-Gannett lease, RBC could not construct its transmission facilities without the cooperation of the landlord (Press Exhibit No. 14, Tr. 732-733, 835). Although he could not recall the precise language used, Rey believed that the Judge

had stated “no construction” and that this resulted in his conclusion that the court wanted to preserve the status quo (Tr. 804-805, 831, 833, 836). Rey had not seen a transcript of the prehearing conference until his Commission testimony, and upon reviewing the transcript he did find a reference to “construction” (Tr. 976-977). Rey believed that RBC was precluded from construction because of the litigation and the status quo order from November, 1990 through June 1991 (Tr. 981).

66. In his Order Re-Setting Preliminary Injunction Hearing, the Judge recited that the defendants had agreed to continue to preserve the status quo until January 11, 1990, and that the court had ordered the defendants to preserve the status quo until the outcome was determined (Rainbow Exhibit No. 5, page 1, Tr. 733, 832). Rey believed that the order referred to the prehearing conference of November, 1990, in which Judge Marcus had raised the issue of status quo preservation (Tr. 733). In particular, he understood that Article III and Article IV of the lease provided that the defendant had to become involved in the construction of the transmitter building (Rainbow Exhibit No. 6, pp. 4, 6, Tr. 734). Hence, it was clear to Rey that RBC could not enter onto the property and construct the transmitter building on its own, while Gannett, the defendant landlord, was prohibited by Judge Marcus from construction (Tr. 735). Rainbow Exhibit No. 6, page 17, is a letter from Edwards to Robert McAllan, President of Press Broadcasting. The letter states that “I have been told in clear language that if Bithlo Tower Company proceeds in any way with Press, that we will be in violation of a court order. I understand that this is most unfair, but that is the law.”

67. Rey testified that RBC was unable to construct without the landlord’s cooperation, and even if Judge Marcus had specifically addressed the status quo with reference to

the defendants, since the landlord would not discuss matters with Rey, RBC could not have built the facility (Press Exhibit No. 16, Tr. 839-840).

68. Rey testified that when Judge Marcus ultimately denied RBC's request for injunctive relief six months later in June, 1991, RBC picked up where it had left off and looked to build its transmitter room in the three-room addition that the landlord proposed (Tr. 740, 862-863). In fact, after RBC filed its fifth extension request with the Commission, it constructed its transmitter room, completing that job in approximately November, 1991 (Tr. 741). In addition, RBC constructed its transmitter building, expending \$60,000 of its own funds rather than relying upon Conant, since the construction permit extension application remained pending and had been challenged by Press (Tr. 741-742). When the Commission ultimately granted the extension request, RBC bought equipment, installed the equipment and eventually went on the air in June, 1994 (Tr. 742-743).

69. Rey had believed that the Commission had provided RBC with two years from a final grant, i.e., August 30, 1990, in which to construct the station, but that, in fact, RBC had received only a portion of that time (Tr. 744). In the Spring of 1988, the Commission wrote RBC and stated that it was canceling the permit for lack of construction, but Polivy explained to Rey that the Commission did not realize that the comparative proceeding was still pending in the Court of Appeals (Tr. 806). RBC so informed the Commission, the construction permit was reinstated, and Rey recalled learning that the "two year clock" should have begun after the Supreme Court decision had become final, rather than in 1986 (Tr. 807). Polivy told Rey that Commission staff person Gordon Oppenheimer had stated that RBC would receive its requisite two years, but that they would have to seek six month extensions, and Rey was extremely

surprised that, unlike the other extension requests which were swiftly granted, the fifth extension application took two years to be resolved (Tr. 807-808).

70. Rey testified that the purpose of the lawsuit had been to preserve RBC's rights under the 1986 lease agreement (Tr. 763). He observed that the litigation dealt with a specific, unique spot on the Bithlo tower at the 1500 foot level which he believed RBC had leased and for which it had paid rent, but it was not his intent to preclude Gannett from leasing space to anyone at a lower position on the tower (Tr. 765). Rey acknowledged that the lawsuit was meant to prevent Press from leasing a 1500 foot spot on the tower (Tr. 766).

71. RBC's fifth extension application includes a supporting exhibit which states that "actual construction has been delayed by a dispute with the tower owner, which is the subject of a legal action in the United States District Court for the Southern District of Florida" (Joint Exhibit No. 2, page 3). Rey testified that the delay to which the exhibit referred was caused by the fact that RBC could not have constructed in light of Judge Marcus's order to preserve the status quo and RBC's need to have gone through the landlord in order to accomplish a single construction building i.e., a three room transmitter building which would house the transmitters for all three broadcast tenants on the tower (Joint Exhibit No. 2, page 3, Tr. 803-804, 859). The parties stipulated that the RBC fifth and sixth extension applications referenced the delay in construction occasioned by the tower litigation in general, but not by the Marcus prehearing conference specifically (Tr. 830).

72. Rey testified that he had entered into the lease with Gannett at a time when the landlord represented to him that there was a unique spot at 1500 feet, and he believed that the landlord did preclude RBC from constructing because the landlord wanted to accomplish a

proposed addition of three rooms to an existing transmitter building at the base of the tower (Tr. 849-850). When Judge Marcus ordered the defendants not to do anything to change the status quo, RBC was prevented from its transmitter building construction, and Rey asserted that the construction of a television station must begin with a transmitter building before questions of an antenna at any location on a tower can be addressed (Tr. 850-851). Rey observed that the landlord could not go forward, so RBC could not engage its contractor and request him to begin construction (Tr. 857-858).

73. Rey testified that the lease specifically obligated RBC to go through the landlord, that the landlord would accomplish the contracting and the invoicing, and would then invoice RBC for the same dollar amount (Tr. 858). In Rey's opinion, therefore, it was impossible to construct at a time that the landlord was prohibited from breaking the status quo. The Judge's order clearly stated that Gannett could not build for Press, and RBC was involved in that same single construction (Tr. 858). As a result, Rey asserted that RBC was truthful when it represented in the fifth and sixth extension applications that construction was delayed by the tower litigation (Tr. 858). In fact, Rey testified that the litigation caused a delay in RBC's construction from November, 1990 to early June, 1991 (Tr. 862-863).

74. RBC's fifth extension application stated that RBC would commence operation prior to December 31, 1992 (Joint Exhibit No. 4, page 2), but that schedule was contingent on the Commission granting the extension request so that RBC had a valid permit in order to draw upon Conant's funds (Tr. 874-875). Rey further testified that RBC's supplement to its extension application (Joint Exhibit No. 5) also assumed that the December 31, 1992 projected operation date was premised upon a Commission grant of the extension request (Tr. 876, 878-879). Rey

believed that no one could build a television facility without a valid construction permit, that RBC's construction permit had expired in July, 1991, and that until the authorization was extended the station could not be constructed (Tr. 885-886, 988).

75. Between 1986 and 1993, RBC paid approximately one-half million dollars to Gannett pursuant to the tower lease (Tr. 947). Rey testified that RBC had been willing to make such a significant expenditure without its initial authorization because the landlord had represented that there were only two television antenna slots available, that it was negotiating with others, and that space would be leased at the 1500 foot slot on a first-come, first-serve basis (Tr. 947). Rey observed that he had paid rent to Gannett each month, thereby making it impossible to utilize those funds for other purposes of construction (Tr. 987-988).

### **III. PROPOSED CONCLUSIONS OF LAW**

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

76. The ex parte issue must be resolved in RBC's favor. No RBC principal intended to violate the ex parte rules, and the record clearly demonstrates that Margot Polivy, RBC's counsel, did not believe that her contacts with Commission staff persons placed her or her client in violation of any rule. Polivy had an honest belief that Section 1.1204(a) of the Rules allowed RBC representatives to contact Commission staff persons and to discuss the merits of the applications that had been filed notwithstanding Press' informal objections, its petition for reconsideration, and the letter to George Daniels from the Managing Director.

76. Even the Commission's May 23, 1994 Memorandum Opinion and Order which reinstated RBC's construction permit but found that there had been an ex parte violation, characterized the ex parte violation as a close question and recited that the Commission had

never before addressed the question as to whether a petitioner seeking reconsideration of an informal opposition may be considered a formal opposition. 9 FCC Rcd at 2844, par. 80.

Although the Commission found that Press' petition for reconsideration met the "bright line" test for a formal opposition, it concluded as follows:

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. Id. at 2844-2845.

The Commission also noted that what "may have additionally clouded a correct perception of Press' 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". Id. at 2844, f.n. 23. Finally, the Commission pointed to the Inspector General's finding regarding the sincerity of RBC's belief that its contacts were permissible. Id. at 2845.

78. Resolution of this issue turns on whether or not Polivy, herself, intended to violate the ex parte rules. The evidence is clear that she believed she had not engaged in impermissible contacts, and that her belief was reasonably founded on the Commission's Rules. In such cases, sanctions are unwarranted. See, Centel Corp., 8 FCC Rcd 6162, 6164 (1993).

79. Polivy's construction of the ex parte rules, and in particular Section 1.1204, was premised on her belief that the Commission had specifically exempted adjudicative proceedings which had not been formerly opposed. See, Section 1204(a)(1). Moreover, she was certain that Press' various filings were all of an informal nature, and the fact that a petition for reconsideration had been filed did not in any way elevate the pleading in her mind since the petition did nothing but reiterate the arguments contained in Press' Informal Objection. Plain

and simply, Polivy firmly believed that petitions for reconsideration did not lie against informal objections.

80. Polivy understood that the note to Section 1.1204(a)(1) and (2) had particular applicability to the RBC proceeding. The note and the rule read together provides that there are no ex parte restraints or disclosure requirements in adjudicative proceedings which have been informally opposed, so that ex parte communications are permissible between the Commission and the formal party involved, or its representative. On the other hand, informal objectors are subject to ex parte procedures barring oral ex parte contacts.<sup>6</sup>

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<sup>6</sup> Section 1.1204 recites, in pertinent part, as follows:

Subject to the provisions of §1.1203 (Sunshine Period Prohibition), §1.1206 (Non-Restricted Proceedings), and §1.1208(b) (Restricted Proceedings), there are no ex parte restraints or disclosure requirements in the following types of proceedings:

- (1) An adjudicative proceeding as defined in §1.1202(d) or other proceeding specified in §1.1208(c)(1)(ii) unless it
  - (i) is formally opposed or involves a formal complaint (see §1.1202(e); or
  - (ii) involves mutually-exclusive applications; or
  - (iii) has been designated for hearing (see §1.1208(c)(1)(i)).

NOTE. - In proceedings exempted by subsection 1.1204(a)(1)..., oral ex parte communications are permissible, but only between the Commission and the formal party involved or his representative. Any informal objectors (whether their objections are oral or written) are subject to ex parte procedures set forth in §1.1208 barring oral ex parte contacts except where confidentiality is necessary to protect these persons from possible reprisals. Oral communications between Commission staff and advisory coordinating committee members with respect to coordination of assignment of frequencies in the private land mobile services and fixed services authorized under 331 of the Communications Act are not prohibited.

81. Polivy reasonably believed that the RBC applications were exempt from the ex parte rules because they had not been formally opposed as defined in §1.1202(e). Section §1.1202(e)(1) provides that a formal opposition includes three elements: (1) the caption and text of the pleading [must] make it unmistakably clear that the pleading is intended to be a formal opposition...; (2) the pleading [must be] served upon the other parties...; and (3) the pleading [must be] filed within the time period, if any, prescribed for such a pleading... Press' February 15, 1991 Informal Objection was not filed until after a Commission grant of RBC's fifth extension request, so that Press' filing fell short of §1.1201(e)(1)(iii) having not been filed before action on any application for an instrument of authorization. See, Section 73.3587 of the Rules.

82. Press' February 25, 1991 Petition for Reconsideration did not, in Polivy's mind, formalize the proceeding because it merely resubmitted the prior-filed Informal Objection under a new title. Moreover, at the time that the alleged ex parte contacts occurred, §1.106 of the Commission's Rules did not contemplate the filing of petitions for reconsideration by informal objectors. Hence, in such cases as Redwood Microwave Association, Inc., 61 FCC 2d 442 (1976), the Commission held as follows:

Standing to file a petition for reconsideration is conferred by Section 405 of the Communications Act of 1934, as amended, and by Section 1.106(b) of the Commission's Rules "upon a petitioner for reconsideration who is either a party-in-interest, or a person aggrieved or whose interests are adversely affected by the Commission's action. Provision is made for the latter category of petitioners in order to confer standing upon a person who is unable to participate in the proceeding before the Commission acted, but Rule 1.106(b) requires a showing of "...good reason why it was not possible for him to participate in the earlier stages of the proceeding". We do not consider these sections of the Act and our rules as intended to confer standing upon a petitioner for reconsideration following that petitioner's participation in the earlier proceeding as an informal objector. 61 FCC 2d at 443, citing Max M. Leon, Inc., 58 FCC 2d 114, 115 (1976).

Polivy believed that Press' petition for reconsideration was facially unauthorized and facially defective to the extent that it utterly failed to satisfy the formality requirements of the ex parte rules.

83. Press' second informal objection, filed July 10, 1991, similarly failed to satisfy the requirements of §1.1202(e)(1)(i), and when on January 7, 1992, Press filed its Informal Objection and Request to Hold Application in Abeyance, thereby opposing RBC's application for a pro forma transfer of control, Polivy reasonably believed that the pleading once more failed to satisfy the requirements of §1.1202(e)(1)(i) of the Rules.

84. It is true that the Commission ultimately concluded that Press' petition for reconsideration "restricted Rainbow's application proceedings for purposes of the ex parte rules". 9 FCC Rcd at 2844. However, the Commission's subsequent judgment does not alter the fact that Polivy had an honest belief that the RBC proceeding was not "restricted" to RBC or to her, as RBC's representative.

85. In remanding the proceeding to the Commission, the Court of Appeals was particularly concerned about Polivy's receipt of the Managing Director's letter and her contacts with Video Services Division staff person, Paul Gordon. With regard to the Managing Director's letter, Polivy's testimony was completely consistent with the manner in which she viewed the RBC proceeding. She advanced her belief that, as the aforementioned Note to §1.1204(a)(1) and (2) of the Rules recite, oral ex parte communications were permitted between the formal party (RBC) and the Commission because of the informality of Press' pleadings. The Managing Director's letter was transmitted to a third party who was not a formal participant before the Commission. Hence, Polivy logically reasoned that the proceeding was restricted with regard to

any contact initiated by the third party to the Commission, thus implicating the ex parte rules as to that individual. The fact that the Managing Director's letter referred to a "restricted proceeding" was, to Polivy, a matter which related directly to George Daniels, as to whom she knew the proceeding was restricted, but had no applicability to RBC. Even if Polivy's construction of the law was ultimately deemed to be incorrect, there is no basis in this record to hold that Polivy had anything less than a legitimate and legally supported belief that the Managing Director's letter and her understanding were in harmony.

86. Then there is the matter of Paul Gordon. Polivy's testimony stands out in stark contrast to Gordon who, contrary to her testimony, maintained that she telephoned him on several occasions to discuss the merits of the case prior to a Video Services Division decision in June of 1993. Polivy, of course, testified that the telephone calls that she placed to Gordon were permissible status inquiries, and that Gordon's recollection otherwise was incorrect.

87. Undoubtedly, Polivy did engage in the aggressive status calls to which she testified. Why not? The Commission had failed to act on RBC's applications for what had been an inexplicably long amount of time. The pleadings were in and the positions of the parties well known, and yet from January 25, 1991, when RBC's fifth extension application was filed, to June 18, 1993, when the Video Services Division denied RBC's sixth extension application, there had been no action whatsoever and consequently no mechanism to trigger RBC's construction. No wonder RBC's counsel pressed Gordon for a decision! Polivy's contacts fell within the limits outlined in Centel Corp., *supra*, 8 FCC Rcd at 6164, par. 11.

88. But Gordon's testimony is singularly unconvincing with regard to his unsupported claim that he and Polivy discussed the merits of the case. In fact, Gordon never testified that

Polivy did discuss the merits with him, only that she “attempted” to do so. Moreover, Gordon could not remember what merits Polivy attempted to discuss, failed to make notes of the conversations, and made no written report of an ex parte contact as he was required to do by §1.1212 of the Rules.<sup>7</sup> Gordon’s failure to comply with the Commission’s rules undercuts his claim that Polivy engaged, or attempted to engage, in ex parte discussions, and his assertion that he was unaware of the requirements of §1.1212 only more evidence of his lack of knowledge. Furthermore, Gordon’s knowledge of the ex parte rules is faulty, even to this day. His testimony that he was uncertain whether the proceeding became restricted when the original informal objection was filed, or when Press filed its petition for reconsideration, amply demonstrates that he had little, if any, grasp of one of the most basic precepts of this complex set of rules. Gordon would have applied the ex parte rules in the face of a simple informal objection, the kind of pleading which in no way would have triggered the ex parte proscriptions against RBC, and which the Commission, itself, found to be of no consequence in determining whether a

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<sup>7</sup> §1.1212 provides as follows: (b) If a prohibited oral ex parte presentation has been made, the Commission personnel to whom the presentation was made shall forward to the Managing Director a statement containing the following information:

- (i) The name of the proceeding.
- (ii) The name and address of the person making the presentation and that person’s relationship (if any) to the parties to the proceeding or to their attorneys.
- (iii) The date and time of the presentation, its duration, and the circumstances telephone, personal interview, casual meeting, etc., under which it was made.
- (iv) A brief summary of the substance of the presentation.
- (v) Whether the person making the presentation persisted in doing so after having been advised that the presentation was prohibited.
- (vi) The date and time in which the statement was prepared.

proceeding had become restricted. 9 FCC Rcd at 2844. Gordon's faulty recollection, his failure to follow established Commission practices which would have applied had he actually been on the receiving end of an ex parte communication, and his lack of the most basic understanding of the ex parte rule, neutralizes his testimony that Polivy attempted to discuss the merits of the case with him.<sup>8</sup>

89. It is clear that the senior Commission staff did not believe that RBC's contacts were restricted. Pendarvis asked if any objections had been filed, and Polivy freely told him that Press had opposed the extension requests. Importantly, when the July 1, 1993 meeting convened in Stewart's office, Polivy provided the staff with a handout that made specific reference to Press' informal objections and to its request for reconsideration. In short, it appears that the staff had quite the same understanding with regard to the ex parte rules as did Polivy! It may well be that a salient result of this proceeding is to provide more definition and clarity to a convoluted and difficult set of rules to interpret. However, to strap RBC with disqualification under the circumstances brought out in this record would be unreasonable.<sup>9</sup>

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<sup>8</sup> Of course, even if Polivy had discussed the merits of the case with Gordon, premised upon her reasonable understanding of the ex parte rules, no violative intent could be ascribed to her.

<sup>9</sup> Antoinette Cook Bush's involvement in this proceeding, although of concern to the Court of Appeals, is of little consequence. Bush, as counsel to the United States Senate Commerce Committee, did what she had done in many previous cases, i.e., contacted the staff to find the facts and circumstances surrounding an adverse decision, and no Commission staff person indicated in any way to Bush that the proceeding was restricted. Indeed, the record does not establish that Bush did anything other than to secure a status update. She felt that Polivy was upset with the decision and had simply asked her to inquire what, if any, action could be taken. Polivy believed Bush's contact could cause the senior staff to focus on the questions raised so that if, indeed, a petition for reconsideration were filed on RBC's behalf, it would not remain unacted upon and result in the long delay occasioned by RBC's fifth extension request. Section 1.1210 of the  
(continued...)

90. Polivy may be accused of having been aggressive in the pursuit of her client's interests; she may be accused of misreading Commission law;<sup>10</sup> but she cannot rightly be accused of intentionally violating the ex parte rules, which is the only matter in issue. Nothing in this record reflects an abusive or bad faith attempt to circumvent any rule in order to advantage RBC, and surely Press suffered no prejudice from Polivy's contacts. What is demonstrated by the testimony and the facts and circumstances adduced at hearing is an incomprehensibly long period of time during which RBC's applications were pending and objections unresolved, a processing attorney with little recollection and even less of an understanding of the ex parte rules, and a Commission staff which felt as secure as did Polivy about the merits discussion notwithstanding Press' objections.

91. The mere existence of a legal mistake without a showing of mala fides does not constitute disqualifying conduct. Cf., MCI Telecommunications Corp., 3 FCC Rcd 509, 512 (1988). Neither Press nor the Separate Trial Staff has presented evidence that shows an intention by Polivy to improperly influence the resolution of the merits of the proceeding.

92. Even if the Presiding Judge were to conclude that Polivy intentionally violated the rules, a conclusion which would have absolutely no basis on the strength of this record, RBC should not bear the consequences since Rey incontrovertibly testified that he was aware of no misconduct or improprieties. There is no evidence that Rey ratified Polivy's contacts, or that he

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<sup>9</sup> (...continued)

Rules prohibited Polivy from soliciting Bush to make a contact that she, Polivy, could not herself have made. The fact that Polivy believed that Bush could contact the Commission is further proof that polivy had no intention of violating the ex parte rules.

<sup>10</sup> Even now that matter is uncertain, since neither the Commission nor the court has ever grappled with the implications of the Note to Section 1.1204(a) of the Rules.

had knowledge of her discussions with Commission staff persons and with Bush. Any arguable misconduct, therefore, cannot be imputed to RBC. Further, as the Commission and the Court have previously held, RBC received no benefit from the contacts. It was merely advised to file a petition for reconsideration setting forth the facts, and there is no evidence that the staff or the Commission was swayed by the contacts to reach a favorable conclusion upon reconsideration. The record discloses that no RBC principal authorized Polivy to contact Bush. Rey only learned about the prospect of violative conduct well after the July 1, 1993 meeting, so any arguable wrongdoing should not be imputed to RBC. See, WORZ, Inc., 36 FCC 1535 (1964).<sup>11</sup>

93. The resolution of any ex parte issue depends upon the particular facts and circumstances surrounding the alleged infraction. However, in considering what may be an appropriate sanction, intent, while not a factor in determining whether a presentation has been made, is pertinent in weighing whether a sanction is called for. See, Voice of Reason, Inc., 37 FCC 2d 686, 708-709 (Rev. Bd. 1972), recon. denied, 39 FCC 2d 847 (Rev. Bd. 1973), rev. denied, FCC 74-476, released May 8, 1974. It is un rebutted that RBC's principals did not know of the specific ex parte prohibitions. Moreover, if there was a violation it was not made in the face of specific knowledge of the Commission's rules or prior warnings that such conduct was unacceptable. Hence, the record evidence demonstrates that the issues must be resolved in RBC's favor. See, Pepper Schultz, 4 FCC Rcd 6393, 6403 (Rev. Bd. 1989).

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<sup>11</sup> If Polivy's contacts truly were ex parte violations, it should nevertheless be clear that she was anything but surreptitious in an attempt to influence someone charged with the duty of deciding a contested question. Cf., WKAT, Inc. v. Federal Communications Commission, 111 U.S. App. D.C. 253, 296 F2d 383, cert. denied 368 U.S. 841. She was entirely open with the staff and provided them with a chronological list of filings, including reference to Press' petition for reconsideration at the Stewart meeting.

## **B. FINANCIAL MISREPRESENTATION ISSUE**

94. The record clearly demonstrates that RBC possessed a reasonable belief, and was in fact correct, that it had secured the requisite financial resources for the construction and operation of Station WRBW(TV) throughout the period of time relevant to this proceeding.<sup>12</sup> In satisfying the Commission's financial criteria, Rey negotiated a financing agreement with Conant which provided RBC with access up to \$4 million dollars. This definite and precise financing agreement, complete with collateral personal assurances and a repayment schedule, more than satisfied the Commission's financing requirements.

95. Furthermore, the evidence clearly establishes that this same RBC financial agreement remained, according to Conant's testimony, operative and binding throughout the period of time in question. While the tower litigation created some measure of uncertainty on Rey's part, Conant never withdrew his pledge to the applicant, and reaffirmed his commitment to the financing agreement subsequent to the tower litigation.

96. The measure of unwavering financial commitment is consistent with the finding of the district court. In the injunction hearing the district judge was not charged with evaluating the "reasonable assurance" provided by Conant pursuant to Commission standards of financial qualifications. Instead, the district court applied a completely different criterion for evaluating the "exceptional circumstances" required for a preliminary injunction. Thus, the record supports the conclusion that there was at no time a misrepresentation to the Commission regarding RBC's financial qualifications.

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<sup>12</sup> The relevant period of time under this issue begins after 1991 (Tr. 105-106).

97. The record also demonstrates that the financial agreement between RBC and Conant satisfied the Commission's requirement that an applicant have reasonable availability of sufficient monies to construct and operate the station for ninety days without revenue. See, Financial Qualifications Standards, 72 FCC 2d 784 (1979). The specific financing agreement negotiated was both sufficiently substantial and definite to more than satisfy this standard.

98. Rey and Conant had agreed on an established financing plan for Station WRBW(TV). Between their initial conversation regarding station financing in 1983, and the mid-1984 meeting in Conant's Chicago office, Rey developed the working business plan for a station in the Orlando market. Rey entered into the Chicago meeting with numerous years of experience in the field of broadcasting, and Conant was surely no neophyte, having been an owner of a television station in his own right. Their previous joint business experience with WDZL(TV) in Miami and their six year friendship provided Conant with a level of familiarity with and trust in Rey's business judgment. The negotiations between Rey and Conant, and the subsequent RBC financing agreement, cannot be characterized as the mere discussion of a loan with a potential lender. Instead, the evidence reflects that after an in-depth discussion, the parties agreed to a definite, specific financing arrangement replete with the details of the total loan disbursement, interest rate, repayment terms, and collateral. Cf. Marlin Broadcasting of Central Florida, Inc. 5 FCC Rcd 5751 (1990).

99. The level of specificity of the negotiations in Chicago is mirrored in the explicit nature of the RBC financial agreement. Rey and Conant discussed the station's business plan, audience and sales projections, expenses and the general nature of the Orlando television market. Premised on Rey's specific knowledge of the Orlando market and Conant's general experience,

Conant agreed that once RBC was prepared to proceed with construction, he would lend RBC up to \$4 million for construction and operating expenses incurred by the station in its first year of operation. This level of financial backing is more than monetarily sufficient and exceeds the minimum time frame requirements of the Commission. See, Financial Qualification Standard, supra. The testimony of both Rey and Conant collaborate the satisfactory nature of the financing agreement.

100. There is no evidentiary question as to Rey's justifiable reliance on Conant's personal ability to provide the promised funds. However, it has been established through Rey's testimony that he reviewed Conant's financial statements close enough in time to enable him to legitimately enter into the agreement, and that those documents reflected ample funds upon which to rely. Where financial statements show that a person has assets many times the value of the cash which such assets are relied upon to yield, they provide reasonable assurance of the ability to secure the required funds. See International Broadcasting, Co., 3 FCC 2d 449, 451 (1966); Cornwall Broadcasting Corp., 89 FCC 2d 704, 706 (Rev. Bd. 1982); Cannon's Point Broadcasting Co., 93 FCC 2d 643 (Rev. Bd. 1983).

101. Since Rey was aware that construction could not begin until after the resolution of the Supreme Court litigation surrounding the license process, Rey and Conant mutually agreed to defer the reduction of the RBC financing agreement to writing until the litigation had ended and it was time to move forward to construction. The record shows that Conant has entered into other agreements for significant amounts of money notwithstanding the absence of a written agreement and that he considered the oral agreement to be definite, final and binding. In any

event, the absence of a written RBC financing agreement does not diminish the legitimacy of the financial certification. See, Emission de Radio Balmaseda, Inc., 8 FCC Rcd 4335 (1993).

102. The RBC financing agreement remained in effect throughout the relevant period. The two parties communicated with regard to the status of the license and associated litigation, and neither Rey nor Conant ever expressed a desire to dissolve their agreement. The decisional fact is that RBC honestly and accurately believed that it had reasonable assurance of adequate funds at the time that it certified its application, and that it never relinquished that assurance during the specific time period in issue. See, Northampton Media Associates, 4 FCC Rcd 5517 (1989), recon denied, 5 FCC Rcd 3075 (1990), aff'd, Northampton Media Associates v. FCC, 941 F.2d 1214 (D.C. Cir. 1991).

103. During the period of time between November of 1990 and the summer of 1991, Rey and Conant discussed the station viability issues facing RBC. Specifically, Rey informed Conant of the pending tower litigation and its potential ramifications for RBC. As Rey explained to Conant, if RBC failed to prevail in the tower litigation, WRBW(TV) would emerge as the sixth, instead of the fifth, station in the Orlando market. Additionally, WRBW(TV) would be relegated to a less preferable transmitter location, further impeding its market access. Rey and Conant also discussed the economic downturn of the region and the possibility of turning to equity financing as a result of the existing Orlando economic situation.

104. Crucial to this proceeding, and collaborated by all of the evidence of record, Rey and Conant ended their discussions with the conclusion that the project should move forward and that the existing RBC financing agreement should continue without alteration. Conant, relying on Rey's judgment, adopted a "wait and see" posture with regard to the current uncertainties.