

ORIGINAL

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

In re Applications of)
)
RAINBOW BROADCASTING COMPANY)
)
For an extension of time)
to construct)
)
and)
)
For an Assignment of its)
construction permit for)
Station WRBW(TV), Orlando, Florida)

GC Docket No. 95-172
File No. BMPCT-910625KP
File No. BMPCT-910125KE
File No. BTCCT-911129KT

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OCT 24 1996

TO: The Honorable Joseph Chachkin
Administrative Law Judge

Federal Communications Commission
Office of Secretary

CONSOLIDATED REPLY OF PRESS BROADCASTING COMPANY, INC.
TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF
RAINBOW BROADCASTING COMPANY, RAINBOW BROADCASTING, LIMITED,
AND THE SEPARATE TRIAL STAFF

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October 24, 1996

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TABLE OF CONTENTS

Summary ii

Failure to Construct Misrepresentation Issue 2

Financial Misrepresentation Issue 10

Section 73.3534(b)/Section 73.3598(a) Issue 18

Ex Parte Issue 24

SUMMARY

The proposed findings of fact and conclusions of law submitted by Rainbow Broadcasting Company ("RBC") and Rainbow Broadcasting, Ltd. ("RBL") are based on an incomplete, self-servingly selective review of the evidentiary record herein. To reach proposed conclusions favorable to their position, RBC and RBL ignore clear evidence which contradicts their position. To the limited extent that they attempt to address any such evidence, their attempts at explanation (or, in some cases, revision) are unsuccessful.

While Press Broadcasting Company, Inc. ("Press") does generally concur with the proposed findings of fact and conclusions of law submitted by the Separate Trial Staff ("STS"), Press disagrees with the STS's conclusion relative to the Ex Parte Issue herein. As set forth in the text, below, Press continues to believe (as discussed in its Proposed Findings of Fact and Conclusions of Law) that the Ex Parte Issue must be resolved unfavorably to RBC.

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1. Press Broadcasting Company, Inc. ("Press") hereby submits its Consolidated Reply to the Proposed Findings of Fact and Conclusions of Law ("Findings") filed separately in the above-captioned proceeding on behalf of Rainbow Broadcasting Company ("RBC"), Rainbow Broadcasting, Ltd. ("RBL") and the Commission's Separate Trial Staff ("STS"). While Press concurs generally with most (but not all) of the STS's Findings, Press disagrees with the Findings of RBC and RBL. The primary points of disagreement are discussed below. ^{1/}

^{1/} To the limited extent that Press may not, in this Reply, address each and every point advanced by any of the other parties, that should not be interpreted as an indication that Press agrees with such points.

Failure to Construct Misrepresentation Issue

2. In their respective Findings, both RBC and RBL seem not to recognize the starting point which the Court of Appeals established relative to the Failure to Construct Misrepresentation Issue (Issue No. 3 in the Hearing Designation Order). In remanding this case to the Commission, the Court of Appeals specifically observed that

[RBC] stated [in its January, 1991 extension application] that it required an extension because "[a]ctual construction has been delayed by a dispute with the tower owner which is the subject of legal action in the United States District Court for the Southern District of Florida." [citation omitted]. In Press's view the statement was grossly inaccurate because [RBC] had initiated the tower litigation and was in no way precluded from beginning construction during its pendency. The issue is material because the tower dispute was [RBC]'s sole basis for its [extension application]. . . . [T]he FCC's conclusion that no material question of fact existed because "[RBC] did not . . . represent to the Commission that the tower dispute precluded it from constructing," 9 F.C.C.R. at 2847, is so flatly inconsistent with the clear import of [RBC]'s representation as to require further proceedings.

59 F.3d at 1371. The Failure to Construct Misrepresentation Issue thus arose from the fact that the "clear import" of RBC's initial claim to the Commission was that RBC had been precluded from constructing by the Miami Tower Litigation, while the underlying facts and circumstances -- notably, the fact that RBC had initiated the Miami Tower Litigation and was not precluded from constructing during its pendency -- plainly contradicted that claim.

3. In its Findings, RBL seems not to acknowledge the threshold inconsistency which caused the Court to remand the case

on this issue. RBL Findings at 56. RBC at least acknowledges that the Court "appears to have adopted" Press's position with respect to this issue. RBC Findings at 49.

4. RBC then attempts to explain away the Court's obvious concerns by stating that

[t]he Court, quite naturally, was not aware of Rey's state of mind with regard to the tower litigation.

Id. But if the Court really "was not aware of Rey's state of mind", that was because RBC had never bothered to disclose that "state of mind" in the nearly four and one-half years between (a) the filing of Press's initial objection to the January, 1991 extension application and (b) the Court's July, 1995 decision. As the record herein reflects, from the inception of this litigation RBC has had an open invitation -- and an affirmative burden, see, e.g., Carolyn S. Hagedorn, 11 FCC Rcd 1695 (1996) -- to explain exactly what it meant in the language it used in its January, 1991 and June, 1991 extension applications. ^{2/}

5. That invitation was effectively reissued in June, 1993, when the Video Services Division ("VSD") concluded that RBC's failure to construct was voluntary. Jt. Exh. 8. Again, if the basis for the VSD's decision had been factually wrong, it was incumbent on RBC to demonstrate that error in a petition for reconsideration. RBC did in fact file such a petition. But in

^{2/} Indeed, under Hagedorn, RBC was obligated to provide that explanation in its January, 1991 extension application, not in some supplement to-be-filed-someday. See, e.g., Hagedorn, 11 FCC Rcd at 1696, ¶12 ("an applicant must either take the initiative to present its case fully and completely at the outset, or bear the risk that its showing will be found inadequate").

that petition, RBC said nothing about Mr. Rey's "state of mind" or any other factors which might have lent any validity to the statements in RBC's extension applications. See Rainbow Exh. 8.

6. RBC/RBL are only now, in the face of a disqualifying hearing issue, coming up with any purported justifications for RBC's 1991 representations to the Commission. And that fact raises threshold questions concerning the credibility, the legitimacy, of those latterday justifications. After all, when RBC has had, since January, 1991, the opportunity, the incentive and the affirmative burden of explaining its failure to construct, and when RBC has repeatedly declined to do so ^{3/}, any explanation offered now must be deemed inherently suspect.

7. In its January, 1991 and June, 1991 extension applications, RBC advised the Commission 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 (Case No. 90-2554 CIV MARCUS).

Jt. Exh. 2, p. 3; Jt. Exh. 3, p. 3. The record clearly demonstrates that that representation was false and that RBC had a motive to misrepresent the true situation. See Press Findings at 15-31, 82-84. Both RBC and RBL assert in their respective Findings that no misrepresentation occurred. See RBC Findings at 49; RBL Findings at 57. According to both, actual

^{3/} RBC/RBL both now claim that Judge Marcus, in the Miami Tower Litigation, took action in a November, 1990 prehearing conference which somehow precluded RBC from constructing. But RBC and RBL have stipulated that neither RBC nor RBL ever advised the Commission that RBC's construction was precluded because of an order issued by Judge Marcus during a prehearing conference in the Miami Tower Litigation. See Tr. 827-830.

construction was delayed both by an order issued by Judge Marcus in the Miami Tower Litigation, and separately by the unwillingness and/or inability of Guy Gannett Publishing Company ("Gannett"), the tower owner, to cooperate with RBC in the construction of the transmission facility pending resolution of the Miami Tower Litigation. Id.

8. But the record reveals that Judge Marcus' order did not preclude RBC's construction; by its own clear terms that order simply precluded Gannett from entering into a lease with Press or otherwise altering its relationship with Press. See, e.g., Press Findings at 16-21.

9. Similarly, with respect to the question of whether Gannett would cooperate with RBC in the construction of its facilities, the record demonstrates that it was RBC, and not Gannett, which chose not to pursue construction during the period November, 1990 - June, 1991. See, e.g., Press Findings at 22-28.

10. The claims advanced by RBC and RBL in their respective Findings are based solely on the testimony of Mr. Rey. ^{4/} But, as Press demonstrated in its Findings, Mr. Rey's testimony was not credible. See, e.g., Press Findings at, e.g., 77-79.

^{4/} RBC and RBL do refer to three documents, i.e., the RBC/Gannett lease and two written orders of Judge Marcus. RBC Findings at 31; RBL Findings at 53-54. But, the lease itself does not address whether construction could or could not have been undertaken; it says, at most, that construction would require both parties' cooperation. As to whether both parties were agreeable to cooperate as required by the lease, the only evidence cited by RBC and RBL is Mr. Rey's testimony. Similarly, with respect to Judge Marcus' written orders, the written orders do not support RBC/RBL's claims concerning the supposed effect of Judge Marcus' orders vis-à-vis RBC derive. See Press Findings at 16-21. Those claims solely from Mr. Rey's testimony.

11. And not only do RBC's Findings rely exclusively on a non-credible witness, they conveniently ignore evidence which clearly contradicts RBC/RBL's self-serving versions of the record. For example, both RBC and RBL contend that Mr. Rey was convinced, as of the November 27, 1990 prehearing conference in the Miami Tower Litigation, that RBC was absolutely precluded from constructing as a result of Judge Marcus' order. RBC Findings at 50; RBL Findings at 53. But the record shows that, in December, 1990 -- less than a month after that prehearing conference -- Mr. Rey testified as follows:

Q: Is it your understanding as you sit there right now if you want to put the antenna up top that you can put it up at that height on the tower?

Rey: I could put it up at that height but I have to share it is what they are telling me.

Press Exh. 17. In the instant hearing Mr. Rey confirmed the truthfulness of that deposition testimony. Tr. 856. Mr. Rey's December, 1990 deposition testimony is impossible to square with his latterday claim that RBC was precluded from constructing. Neither RBC nor RBL even acknowledges Mr. Rey's December, 1990 testimony, much less attempts to explain it.

12. Similarly, neither RBC nor RBL acknowledges Mr. Rey's testimony that he never asked Judge Marcus for any relief from this supposed interim prohibition. If, as both RBC and RBL seem to argue, Mr. Rey (a) was precluded by Judge Marcus from constructing but (b) really did want to construct, then Mr. Rey would ordinarily have been expected to raise that point in some

fashion with Judge Marcus. ^{5/} Mr. Rey did not do so.

13. Similarly, with respect to the question of Gannett's supposed non-cooperation during the period November, 1990 - June, 1991, neither RBC nor RBL acknowledges, much less seeks to explain, Mr. Rey's testimony that Gannett had solicited information from RBC in November, 1990, but that RBC had voluntarily declined to respond for some nine months because of "legal positioning" concerns on RBC's part, Tr. 869. Additionally, neither RBC nor RBL acknowledges, or seeks to explain, the documentary evidence indicating that, contrary to Mr. Rey's testimony, Gannett was indeed willing and able to move forward with construction -- and, in fact, that Gannett had continued the construction process consistently during the period December, 1990 - July, 1991. See Press Findings at 25-26.

14. Similarly, neither RBC nor RBL mentions Mr. Rey's concession that RBC could have simply dismissed the Miami Tower Litigation, thus eliminating any supposed impediment to construction. Press Findings at, e.g., 29.

15. The evidence not even referred to, much less substantively addressed, by RBC and RBL undermines essential aspects of their Findings. The failure by RBC/RBL to deal with that evidence guts the validity of their Findings.

16. Both RBC and RBL also seem to argue that, in its

^{5/} Section 73.3534 requires that an applicant for an extension of a construction permit take "all possible steps to expeditiously resolve" any impediments to construction. Thus, RBC was under an independent obligation to seek some such relief from Judge Marcus -- that is, if RBC really did believe that Judge Marcus' ruling was impeding construction.

extension applications, RBC had no motive to attempt to deceive the Commission concerning the reason for the lack of construction progress because RBC was not required to explain that lack in those applications. RBC Findings at 54; RBL Findings at 58. That claim is wrong. As the Court of Appeals held, RBC "was unquestionably required to apply and qualify for an extension" pursuant to Section 73.3534. Press Broadcasting Company, Inc. v. FCC, 59 F.3d 1365, 1372 (D.C. Cir. 1995).

17. Section 73.3534 requires in relevant part that an applicant for an extension demonstrate that no progress had been made for reasons clearly beyond the control of the permittee, but that the permittee had taken all possible steps to expeditiously resolve the problem and proceed with construction. Thus, RBC had to demonstrate that it had been precluded from constructing by reasons "clearly beyond [its] control", but that it had taken "all possible steps to expeditiously resolve the problem". See Section 73.3534(b).

18. The RBC/RBL claim that no Section 73.3534 showing was required appears to arise from their notion that, until RBC had had a full two-year construction period -- as calculated according to RBC's own self-serving (and erroneous) view of "construction period" ^{§/} -- RBC did not have to make any showing

^{§/} It bears noting that RBC's concept of a "two-year period" is itself contradicted by RBC's own January, 1991 and June, 1991 extension applications, Jt. Exhs. 2 and 3. Grant of RBC's permit became final on August 30, 1990. Jt. Exh. 1, ¶11. Thus, a "full two-year construction period" would have given RBC until August 30, 1992 in which to complete construction. But in its extension applications, RBC advised the Commission that RBC
(continued...)

at all. RBC Findings at 54; RBL Findings at 58. But the Court of Appeals rejected that notion, 59 F.3d at 1371-1372. Since neither RBC nor RBL sought rehearing or further review on that point, the Court's determination is final and represents the law of the case. Accordingly, the RBC/RBL claims that Section 73.3534 did not apply to RBC in 1991 are without merit and must be disregarded.

19. There is a further, factual, basis on which to reject the RBC/RBL claim that Section 73.3534 was not applicable to RBC's 1991 extension applications. In RBC's January, 1991 extension application, RBC itself cited Section 73.3534! See Joint Exhibit 2, p. 3. Presumably, if that section were really irrelevant to RBC's application -- as RBC and RBL both now assert -- RBC would not have cited that section in its application. Since RBC did cite it in the application itself, RBC's new claim that the section is irrelevant hereto can and should be rejected.

20. In summary, apart from Mr. Rey's self-serving, largely incredible testimony, RBC and RBL have cited no evidence supporting their claim that RBC did not misrepresent or lack candor in its explanation for its failure to construct. The record evidence clearly establishes that that explanation was false, that Mr. Rey knew it to be false, and that RBC had a motive for attempting to deceive the Commission as to that particular point. The Findings submitted by RBC and RBL ignore

^{6/}(...continued)
intended to construct by December 31, 1992 -- a full four months beyond the "full two years". In other words, RBC itself ignored the "full two-year" notion which it is now touting.

that evidence, and rely instead only on self-serving bits and pieces culled from Mr. Rey's generally incredible testimony. As a result, the RBC/RBL Findings with respect to the Failure to Construct Issue are unreliable, and should be disregarded.

Financial Misrepresentation Issue

21. With respect to the Financial Misrepresentation Issue (Issue No. 2 in the HDO), both RBC and RBL choose to ignore evidence which is factually unfavorable to their theory of the case, and they misapply the law to the evidence which they do choose to consider.

22. Both RBC and RBL begin with the view that RBC was, in fact, financially qualified as of the January, 1991 and June, 1991 extension applications. To reach that conclusion, both RBC and RBL blind themselves to the evidentiary record, relying instead on an unduly constricted view of the facts.

23. For example, both RBC and RBL claim that RBC had a legitimate loan commitment from Mr. Conant. RBC Findings at, e.g., 43; RBL Findings at, e.g., 47. That claim is based in part on the notion that the "terms and conditions of the loan were understood by the lender and the borrower." RBL Findings at 47. However, the evidence does not support that claim. When asked about the terms of the loan in January, 1991, in his testimony in the Miami Tower Litigation, Mr. Rey failed to identify any of the terms which he now says were in place as of that time; and the one term he did mention in his January, 1991 testimony (i.e., an equity participation in RBC for Mr. Conant) is now nowhere to be

seen. See Press Findings at 37-39. The record does not support a conclusion that, at least as of January, 1991, Mr. Rey was familiar with the terms of the supposed loan on which RBC and RBL now stake their respective cases. ^{7/}

24. Similarly, both RBC and RBL claim that Messrs. Rey and Conant were well-acquainted with one another and had had a "history of business dealings" (RBL Findings at 47) and "satisfactory past experiences" (RBC Findings at 22). The record evidence, however, thoroughly disproves that claim. See, e.g., Press Findings at 39-42. ^{8/} Neither RBC nor RBL acknowledges, much less attempts to explain, that record evidence.

25. Similarly, both RBC and RBL assert that Mr. Rey had adequate knowledge of Mr. Conant's financial situation to be assured that Mr. Conant had sufficient liquid resources to support a \$4 million loan commitment. See, e.g., RBC Findings at 15; RBL Findings at 46 ("Rey became intimately familiar with Conant's financial status"). But the record does not support

^{7/} At no time during the period from February, 1991 until April, 1996 (when RBC submitted Mr. Conant's sworn declaration in connection with its Motion for Partial Summary Decision herein) did RBC ever advise the Commission or the Court of Appeals concerning the existence and terms of this supposed Conant loan. Throughout that more-than-five-year period RBC's financial qualifications were constantly in question, and yet RBC remained constantly silent relative to Mr. Conant.

^{8/} Ms. Jaramillo is mentioned only in passing in the RBC/RBL Findings, and not at all in connection with the Financial Misrepresentation Issue. This is odd, because in his sworn written statement (Rainbow Exh. 4), Mr. Conant had gone to great lengths to emphasize that his willingness to lend RBC money was supposedly based on his extensive past relationships and experiences with both Mr. Rey and Ms. Jaramillo. See Press Findings at 39-42.

that assertion. See Press Findings at 41-42. The most that Mr. Rey could say about Mr. Conant's financial situation was that Mr. Rey recalled that Mr. Conant's net worth was supposedly in excess of \$10 million. Tr. 748-49.

26. Citing International Broadcasting Co., 3 F.C.C.2d 449 (1966), Cornwall Broadcasting Corp., 89 F.C.C.2d 704 (Rev. Bd. 1982) and Cannon's Point Broadcasting Co., 93 F.C.C.2d 643 (Rev. Bd. 1983), RBC asserts that that level of knowledge was sufficient to satisfy Mr. Rey that Mr. Conant had sufficient funds to support the supposed \$4 million loan commitment. RBC Findings at 44. But the cited cases do not support that proposition. In International Broadcasting, the lending source had a net worth 54 times greater than its loan commitment (loan amount of \$260,000, net worth of \$14,000,000). In Cornwall Broadcasting, the ratio was 1:16 (loan amount of \$50,000, net worth of \$800,000). In Cannon's Point, the ratio was 1:22 (loan amount of \$10,000, net worth of \$220,000).

27. Here, by contrast, the most the record reveals is a supposed loan amount of \$4,000,000, and a net worth of something more than \$10,000,000 (Tr. 748-49), for a ratio of only 1:2.5. Such an inordinately low ratio has been specifically held to be inadequate to support the claimed loan. See Coastal Bend Family Television, Inc., 94 F.C.C.2d 648, 656, ¶12 (ratios of 1:2.4 and 1:3 are "dramatically less than what case precedent contemplates for the presumption of ready liquidity"). Since Mr. Rey did not even describe with any particularity the documents he supposedly reviewed, much less provide any extrinsic evidence concerning

Mr. Conant's financial situation, it cannot be concluded that Mr. Conant could provide RBC with reasonable assurance of financing. Id.

28. Thus, contrary to the self-serving findings tendered by RBC and RBL, the record evidence does not support a conclusion that RBC was at any relevant time financially qualified.

29. Starting from their faulty premise, both RBC and RBL attempt to misdirect the legal analysis under this issue by claiming that RBC was never under any obligation to report its precise financial situation in connection with the January, 1991 and June, 1991 extension applications. RBC Findings at 48; RBC Findings at 50. But there is no Section 1.65 reporting issue in this case. The question here is not whether RBC merely overlooked some obligation to report; rather, the central question is whether the information which RBC did give to the Commission was fully accurate and candid. Thus, Section 1.65 and the obligation to report changes in the applicant's status are irrelevant hereto.

30. With respect to the Financial Misrepresentation Issue designated herein (as opposed to the Section 1.65/reporting issue suggested by RBC/RBL), the facts are stunningly clear. In both its January, 1991 and its June, 1991 extension applications, RBC represented that it was financially qualified. See Press Findings at 32. In the January, 1991 extension application, RBC went even further, volunteering that it was "ready, willing and able to proceed with construction upon a ruling from the District Court" in the Miami Tower Litigation. Jt. Exh. 2, p. 3.

31. But the record evidence demonstrates that, as of January, 1991, Mr. Rey (who executed the January, 1991 extension application) understood that, if Press were allowed to install its antenna on the Gannett tower: (a) Mr. Conant would not be willing to provide any funds at all, see Press Findings at 45-52, Press Exh. 10, pp. 6-9; and (b) RBC would not be able to obtain any financing at all for construction of its station, Press Exh. 9, pp. 12-14. Mr. Rey's testimony herein clearly reaffirmed his view that, if Press were to operate its station from the Gannett tower as a result of either a denial of injunctive relief or dismissal of RBC's suit against Gannett, no funds would have been available from Mr. Conant. See Press Findings at 45-52.

32. Moreover, Mr. Rey's testimony demonstrated that the non-availability of funds would be attributable to RBC's own unwillingness to proceed with construction in light of the then-prevailing competitive environment. See Press Findings at 50-51. In other words, not only was RBC UNable to construct (for lack of financing) in January, 1991, it was also at that time UNready and UNwilling to construct (because of a supposedly unfavorable competitive environment).

33. Thus, the facts as developed at hearing reveal a situation completely contrary to RBC's explicit and unequivocal representation to the Commission that RBC was, at that time, financially qualified and "ready, willing and able" to construct

irrespective of any decision Judge Marcus might have made.^{2/} That alone is sufficient to establish beyond argument that RBC engaged in misrepresentation (or, at a minimum, gross lack of candor) with respect to its financial qualifications in its January, 1991 extension application.

34. RBC and RBL attempt to sidestep the inevitable results of the factual record by revising that record. First, they generally pretend that RBC's complaint initiating the Miami Tower Litigation -- a complaint which was executed under oath by Mr. Rey -- doesn't exist, or at least doesn't reflect the position of Mr. Rey. But the Complaint, including several damning statements concerning RBC's financial inability, see Press Findings at 7-8, was subscribed under oath by Mr. Rey. During his testimony in the instant hearing, Mr. Rey confirmed his belief in the accuracy of those statements. Tr. 753, 780-81, 938. The Complaint cannot, therefore, be ignored here.

^{2/} In its January, 1991 extension application, RBC advised the Commission that RBC was

ready, willing and able to proceed with construction upon a ruling from the District Court and anticipates completion of construction within 24 months of a favorable Court action.

Jt. Exh. 2, p. 3. The first clause -- stating that RBC was "ready, willing and able" -- is subject only to the condition that there be "a ruling from the District Court". That clause is not in any way contingent on the notion that the ruling be favorable or unfavorable. That is underscored by the fact that the second clause -- stating the anticipated time for construction -- is specifically tied to "a favorable Court action". In other words, RBC's own language reveals that RBC was clearly aware of the difference between "a ruling", on the one hand, and "a favorable" ruling, on the other. RBC's own language demonstrates that RBC's claimed readiness, willingness and ability to construct was not contingent on any particular result in the District Court.

35. RBC and RBL next attempt to revise Mr. Rey's testimony in the Miami Tower Litigation by referring to Mr. Rey's self-serving testimony in the instant proceeding. RBC Findings at, e.g., 17; RBL Findings at, e.g., 22. But, as Press has argued in its own Findings, Mr. Rey's latterday revisions are incredible. Mr. Rey's 1990-1991 statements in the Miami Tower Litigation are very clear. By contrast, the twists and spins that RBC and RBL now try to impose on those earlier statements are almost incomprehensible and certainly lacking in credibility. ^{10/}

36. What is abundantly clear on this record is that, in the context of the Miami Tower Litigation, RBC felt that its best interests required a claim that RBC was not going to be able to get financing, while in the context of its extension applications (and the current hearing), RBC felt that its best interests required a contradictory claim. In other words, RBC was ready, willing and able to say whatever it thought would get it what it wanted, regardless of where the truth might lie. That is the

^{10/} As an example, RBL states (at page 49 of its Findings):

Speaking in the context of market conditions in Orlando in January 1991, it was Rey's opinion that if he were to construct WRBW at that time, and if it were to be built then as the sixth rather than the fifth Orlando station, with Press' already established station as the fifth station, then it was likely that Conant would not finance Rainbow's station.

Compare that circumlocution with Mr. Rey's actual January, 1991 testimony in the Miami Tower Litigation:

Q: Has [Mr. Conant] told you that if your space [on the Gannett tower] is not exclusive on there, that he won't finance you?

A: He has told me if Channel 18 gets on that tower, the likelihood is that he will not finance the station.

Press Exh. 10, pp. 8-9.

essence of deception and lack of candor.

37. In a different but related context, RBC and RBL both also attempt to deflect the adverse impact of Judge Marcus' findings concerning RBC's lack of financial qualifications. RBC Findings at 47-48; RBL Findings at 48. Judge Marcus had found, as a matter of fact, that RBC had "not obtained any financing commitment." 766 F. Supp. at 1145. While both RBC and RBL go to extraordinary lengths in their efforts to avoid the consequences of that finding ^{11/}, neither succeeds. The fact is that, in the Miami Tower Litigation, RBC had the burden of demonstrating, inter alia, that it would be irreparably harmed absent an injunction. RBC attempted to meet that burden by showing, inter alia, that it had some financing commitment which it would lose if an injunction did not issue. After assessing all of the evidence before him, Judge Marcus found, as a matter of fact, that RBC "has not obtained any financing commitment." Id. RBC did not seek reconsideration or review of that finding, and it has long since become final.

^{11/} For example, both RBC and RBL seem to claim that Judge Marcus didn't really mean to say what he clearly said. RBC Findings at 47; RBL Findings at 48. RBC even goes so far as to suggest that Judge Marcus may have ignored some evidence (although RBC does not identify exactly what evidence may have been ignored). RBC Findings at 47.

Proceeding from that ill-conceived and unsupported argument, RBC then asserts that the Court of Appeals' conclusion (i.e., that RBC's claim of financial qualification is inconsistent with Judge Marcus' decision) is itself somehow inconsistent with the evidence which was before Judge Marcus. Id. But the Court of Appeals was basing its conclusion on Judge Marcus' finding that "Rainbow . . . has not obtained any financing commitment." See 59 F.3d at 1371, quoting from 766 F. Supp. at 1145. The Court of Appeals' conclusion is clearly consistent with that finding.

38. In any event, the relationship between Judge Marcus' finding and the Commission's financial qualification standards is largely immaterial. Again, the Financial Misrepresentation Issue is directed to the question of whether the representations made by RBC to the Commission were accurate and candid. As demonstrated above and in Press's Findings, there can be no question but that RBC's representations were, in fact, false and misleading, designed to hide RBC's lack of financial qualifications from the Commission.

Section 73.3534(b)/Section 73.3598(a) Issue

39. In support of their arguments for extension of RBC's permit pursuant to Section 73.3534(b) and a waiver of Section 73.3598(a), both RBC and RBL rely generally on the same flawed factual claims described above in connection with the Failure to Construct Misrepresentation Issue. That is, both RBC and RBL claim that RBC was prevented from constructing between November, 1990 and June, 1991 by some order issued by Judge Marcus. RBC Findings at 50; RBC Findings at 53. As demonstrated above and in Press's Findings (at 16-21), that just isn't true.

40. Neither of Judge Marcus' two written orders (Rainbow Exh. 5, Press Exh. 14) nor anything said during the prehearing conference in the Miami Tower Litigation (Press Exh. 16) could reasonably be understood to have precluded, in any way, RBC from proceeding with construction. And even if Mr. Rey somehow really did conclude that Judge Marcus' orders did preclude RBC from constructing, Mr. Rey and RBC could and should (see Footnote 5

above) have sought relief from Judge Marcus; no such effort was made. Thus, RBC/RBL's reliance on the supposed effect of the claimed "status quo order" is ineffective.

41. Similarly, the claims of both RBC and RBL (see RBC Findings at 51, RBL Findings at 36-37, 54) concerning the supposed lack of cooperation on the part of Gannett are baseless in view of the fact that the record clearly demonstrates that it was RBC, and not Gannett, which unilaterally chose not to communicate with the other party concerning construction during the period November, 1990 - June, 1991. See, e.g., Press Findings at 22-28. Neither RBC nor RBL elects even to mention that evidence, much less to explain how their arguments concerning Gannett's supposed unwillingness and/or inability to cooperate can be squared with the fact that during the period November, 1990 - June, 1991, Mr. Rey and RBC declined, for private, strategic reasons of "legal positioning", to respond to Gannett's November, 1990 request for information. See, e.g., Press Findings at 27-28.

42. Both RBC and RBL also argue that RBC was entitled to, but never really received, a full two-year construction period. RBC Findings at, e.g., 54; RBL Findings at, e.g., 63. There are multiple problems with this argument. First, as the Court of Appeals has already concluded, since RBC's permit was issued in April, 1986, RBC already had two full years to construct. See 59 F.3d at 1371-72. As a result, RBC was required to request and obtain extensions of its permit thereafter. Id. That matter has already been finally resolved in this case by the Court.

43. RBC and RBL both assert that RBC had been led to believe by some Commission staffmember that it would receive a full two years after the close of all appellate litigation. But even if RBC was told that by some Commission staffer, reliance on such informal advice from staffmembers does not and cannot alter established Commission rules and policies. See, e.g., Malkan FM Associates v. FCC, 935 F.2d 1313 (D.C. Cir. 1991).

44. Moreover, the "two-year construction period" argument is little more than a red herring here. The record shows that Station WRBW was ultimately constructed in little over seven months. Press Findings at 56. Thus, had RBC commenced construction promptly in August, 1990, it could have had its station in operation well before the expiration of its fifth extension period in August, 1991. But RBC chose not to construct from August, 1990 through June 18, 1993. In view of that election, RBC cannot now claim that any equities support a waiver of the rules in its favor.

45. RBC and RBL also both cite RBC's expenditures over the last ten years in support of its claim to an extension. RBC Findings at 52; RBL Findings at 67-68. But again, that claim is not supported by the record. First, other than the vaguest and most general claims of out-of-pocket expenses, the record contains no evidence concerning precisely how much those expenses actually amounted to, what they were for, or when each was paid. It is well-established that the focus of a request for extension of a permit is the efforts and expenses made during the most recent extension period. E.g., Golden Eagle Communications,

Inc., 6 FCC Rcd 5127 (1991). Thus, in the assessment of the January, 1991 extension application, it would be necessary to know RBC's precise construction-related efforts/expenses during the preceding period (from July, 1990 through January, 1991). Similarly, in the assessment of the June, 1991 extension application, it would be necessary to know the same information for the period January-June, 1991. The record is devoid of any such detailed information. Accordingly, RBC/RBL cannot claim equities arising from any expenditures RBC may supposedly have made at some point in the process.

46. Both RBC and RBL also point to the construction of the transmitter building as an indication of RBC's supposed diligence. RBC Findings at 52; RBL Findings at 68. But contrary to the claims of RBC/RBL, the transmitter building was built by Gannett, not by RBC. See Press Exh. 7. Nor can RBC even be said to have been the motivating force behind that particular construction: from the July 17, 1991 letter of Mr. Baker, a Gannett official (Press Exh. 7), it is clear that the transmitter building was going to be built with or without RBC's involvement, and the only question was whether RBC would elect to participate in a joint construction effort. Finally, while RBL claims that RBC "immediately" sought to commence construction after Judge Marcus' denial of injunctive relief on June 6, 1991, the record reflects that as of July 23, 1991 -- more than a month and a half after Judge Marcus' decision -- RBC still had not advised Gannett of RBC's interest in participating in construction of the transmitter building. See Rainbow Exh. 7, p. 19; Press Exh. 7.

Thus, RBC and RBL cannot validly claim substantial "credit" for construction of the transmitter building.

47. Both RBC and RBL also cite Channel 16 of Rhode Island v. FCC, 440 F.2d 266 (D.C. Cir. 1971) as supporting some kind of waiver and further extension of RBC's permit. RBC Findings at 55; RBL Findings at 62. But Channel 16 is readily distinguishable from the instant case. In Channel 16, a permittee asserted that the Commission's failure over an extended period to adopt certain industry-wide regulatory policies could justify a waiver or further extension based on certain broad "catch all" language in the Commission's rules as then codified.

48. But in RBC's case, we have no extended uncertainty about any industry-wide regulatory policy. And in any event, the "catch all" language of the rules which came into play in Channel 16 has since been eliminated by the Commission. In its place, since 1985, the Commission has implemented a strict policy prohibiting extensions of construction permits absent the "one-in-three" showing required by Section 73.3534.

49. Finally, any uncertainty which might have existed concerning the validity of RBC's initial construction permit had completely disappeared by August 30, 1990, when grant of that permit became final. But RBC's failure to construct occurred after that time. Thus, Channel 16 is inapposite to RBC's situation.

50. The Commission has, for more than ten years, applied a stern policy of requiring permittees to proceed with construction promptly or risk losing their authorizations. Permittees who