

FCC MAIL SECTION

Federal Communications Commission

FCC 97D-05

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

In re Applications of)	GC Docket No. 95-172
)	
RAINBOW BROADCASTING COMPANY)	File No. BMPCT-910625KP
)	File No. BMPCT-910125KE
)	File No. BTCCT-911129KT
)	
For an Extension of Time to Construct)	
)	
and)	
)	
For an Assignment of its Construction)	
Permit for Station WRBW(TV),)	
Orlando, Florida)	

Appearances

Bruce A. Eisen, on behalf of Rainbow Broadcasting Company; Harry F. Cole, on behalf of Press Broadcasting Company, Inc.; Margo Polivy, on behalf of Rainbow Broadcasting, Limited; and David Silberman and Stewart A. Block, on behalf of the Separate Trial Staff, Office of General Counsel, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
JOSEPH CHACHKIN

Issued: March 26, 1997

Released: April 2, 1997

Preliminary Statement

1. By Memorandum Opinion and Order and Hearing Designation Order, (HDO), 11 FCC Rcd 1167, released November 22, 1995, the Commission designated for hearing Rainbow Broadcasting Company's (RBC) application for an extension of time in which to construct its television station and 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.¹
- (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. The HDO made Press a party to the hearing and directed the Office of General Counsel to designate a separate trial staff to represent the Commission, in light of the Bureau's recusal from the proceeding. Id. at ¶10. The HDO placed the burden of proceeding with the introduction of evidence upon issues (1) through (5) and the burden of proof with respect to all issues upon RBC. Id. at ¶11.

3. Hearing sessions were held in Washington, D.C. on June 25, 26, 27 and 28, 1996, and July 11, 1996. The record was closed on July 11, 1996. Order, FCC 96M-177, released July 16, 1996; Tr. 1065. Proposed findings of fact were filed September 26, 1996; replies were filed October 24, 1996.

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

Findings of Fact

Issue 1: Ex Parte Issue

4. Issue 1 seeks "To determine whether [RBC] 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 RBC's behalf, and by meeting with Commission staff to discuss the merits of [RBC's] application proceedings."

5. The issue concerns two ex parte contacts between representatives of RBC and the Mass Media Bureau staff following the June 18, 1993 decision of Barbara Kreisman, Chief of the Video Services Division (VSD) of the Mass Media Bureau denying RBC's sixth extension application, and dismissing as moot RBC's pending application to assign the construction permit to RBL. (Jt. Ex. 8). The contacts consisted of the following:

a telephone call by Antoinette Cook Bush, then senior counsel to the Senate Committee on Commerce and Transportation (Tr. 553) to Roy Stewart, Chief of the Mass Media Bureau by telephone in late June, 1993 (Tr. 571-573); and

a meeting on July 1, 1993 attended by Margot Polivy (RBC's counsel), Joseph Rey (a general partner of RBC) and the following members of the Mass Media Bureau staff: Bureau Chief, Roy Stewart; Barbara Kreisman, Chief of the Video Services Division; Clay Pendarvis, Chief of the Television Branch; Robert Radcliffe, Assistant Chief for Law of the Mass Media Bureau; and Paul Gordon, a staff lawyer in the Television Branch. Jt. Ex. 1, Stipulation No. 26.

The facts and circumstances concerning the contacts are discussed below.

6. RBC has been a client of the firm of Renouf & Polivy since 1987 and that firm has been RBC's communications counsel in all matters relevant to this proceeding. (Tr. 376). Margot Polivy has been a partner in Renouf & Polivy since 1972. (Tr. 375). Ms. Polivy has practiced before the Commission for more than 30 years. (Tr. 506). From 1964 to 1970, Ms. Polivy worked at the FCC, first as an attorney advisor at the FCC Review Board, then as a trial attorney at the Hearing Division of what was then the FCC's Broadcast Bureau, and then at the Office of General Counsel in the Office of Administrative Law. (Tr. 376).

7. RBC has stated on the record that it relied solely on counsel in determining its compliance with the ex parte rules, and it waived the attorney-client privilege to put Ms. Polivy on the stand in its defense on the ex parte issue.

8. On January 25, 1991, RBC filed an application for a fifth extension of its permit to construct its television station in Orlando, Florida (File No. BMPCT-910125KE). (Jt. Ex. 2). On February 5, 1991, the Commission, granted RBC's application for a fifth extension

of its construction permit (File No. BMPCT-910125KE). (Jt. Ex. 1, Stipulation No. 14). The Commission issued a public notice announcing the filing of the application on February 5, 1991, the same day the Commission approved the application. (Tr. 400, 485).

9. On February 15, 1991, Press filed an "Informal Objection" to RBC's fifth extension application. (Jt. Ex. 1, Stipulation No. 14). When Press learned that the Commission had already approved RBC's fifth extension request, it filed a Petition for Reconsideration on February 25, 1991. (Press Ex. 5). Polivy received a copy of Press' Informal Objection and Petition for Reconsideration. (Tr. 377-378, 379). She sent copies of both documents to Joseph Rey and discussed both filings with him. (Tr. 378, 379). Rey holds 90% of the partnership shares of RBC, is the general partner of RBL, and is the general manager of Station WRBW-TV. (Tr. 710-711). RBC, through Polivy, filed an Opposition to Press' Petition for Reconsideration. (Tr. 379).

10. Polivy viewed the February 15 document as an "informal" objection both because of its title² and the fact that a formal petition would not have been permitted against a request for an extension of time (Tr. 377-378, 404). When she subsequently received Press' February 25, 1991 Petition for Reconsideration of the Commission's grant of RBC's fifth extension request (Tr. 378-379), Polivy believed 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 believed that the pleading was unauthorized because Commission precedent does not contemplate a petition for 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 granted (Tr. 531-532).

11. RBC filed an application for a sixth extension of its construction permit (File No. BMPCT-910625KP) on June 25, 1991. (Jt. Ex. 3). On July 10, 1991, Press filed an "Informal Objection" to RBC's sixth extension application. Jt. Ex. 1, Stipulation No. 18. Polivy received a copy of Press' Informal Objection. (Tr. 381). She sent a copy of the pleading to Rey, and discussed it with him. (Tr. 382).

12. On November 27, 1991, RBC filed a "Supplement" to its sixth extension application (File No. BMPCT-910625KP). (Jt. Ex. 5).

13. On November 29, 1991, RBC filed an application for the consent to the pro forma assignment of construction permit to Rainbow Broadcasting, Ltd. (RBL). (Press Ex. 18). None of the pleadings recited in paragraphs 11-13 were acted on until the VSD issued its decision on June 18, 1993. (Jt. Ex. 1, Stipulation No. 24).

² 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).

14. On September 10, 1991, George G. Daniels, of Orlando Florida, wrote to the FCC concerning RBC's application for an extension of its construction permit. In response, Douglas Sandifer, of the staff of the Office of Managing Director, sent Daniels a letter on October 8, 1991 (hereinafter referred to as "the Daniels' letter"). Jt. Ex. 4. The letter stated in pertinent part:

Your letter to the Managing Director was forwarded to the Office staff for reply in keeping with the Commission's ex parte rules, which deal with communications relative to the outcome of all "restricted" proceedings under consideration by the Commission. The Managing Director asked me to respond on his behalf.

The ex parte rules require service on all parties of filings addressing the merits or outcome of restricted proceedings. Because there was a Petition for Reconsideration filed in February 1991, (supplemented June 1991) and an Objection filed in July 1991, of the grant of the application of Rainbow for extension of construction permit in this matter, this proceeding is considered "restricted" until such time as a final Commission decision is made and no longer subject to reconsideration or review by the Commission or the courts. See 47 CFR Section 1.1208. The Commission granted Rainbow a construction permit but the station has not been constructed. A decision in this matter is not expected for several months.

In accordance with FCC rules as found in 47 CFR Section 1.1212(e), I am, by copies of this letter, providing notice and disclosure of your communication to all parties to this proceeding. Additionally, this letter and your communication will be placed in a public file associated with (but not made a part of) the record in the proceeding. See 47 CFR Section 1.1212(d).

15. The Daniels letter showed that copies were sent to RBC's counsel, Margot Polivy, and Press' counsel, Harry F. Cole. (Jt. Ex. 4 at p. 2). Polivy received a copy of the Daniels letter sometime in October 1991. (Tr. 382, 405). She read the letter at the time she received it. (Tr. 405-406).

16. Polivy testified that at the time she received the Daniels letter, she understood it to explain to Daniels that the proceeding was restricted as to Daniels as an informal party, but it was not restricted as to RBC as the applicant. (Tr. 383). She testified that she based her opinion on her understanding of a portion of the ex parte rules that are not cited in the Daniels letter -- the note to Section 1.1204(a). (Tr. 383). Polivy believed that the note to Section 1.1204(a) permitted oral ex parte contacts between the formal party involved in the proceeding or its representative, but barred ex parte contacts, written or oral, by informal objectors such as Daniels and Press. (Tr. 383-384). On the basis of that reading of the note to the ex parte rules, Polivy believed that the restriction stated in the Daniels letter applied to Daniels, but was not directly relevant to RBC as the formal party. (Tr. 384, 405-407). Polivy did not go back and review the actual text of the ex parte rules. (Tr. 410-411; 416-417). Polivy did not seek

clarification or attempt to discuss the Daniels letter with Sandifer, or anyone else at the FCC. (Tr. 411, 416).

17. Polivy does not recall sending a copy of the Daniels letter to Rey, and does not recall discussing the letter with him. (Tr. 382). She stated that she did not discuss this particular letter with Rey because in her view "it didn't apply to [RBC] and it's not the sort of letter I would send to a client. It is of no specific interest to the client. It didn't affect [RBC]." (Tr. 382-282).

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

19. Gordon recalled that he had had at least three telephone discussions with Polivy prior to the June 18 decision denying RBC's application for a sixth extension of its construction permit (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).

20. Gordon could not recall what Polivy had said either specifically or generally concerning the merits (Tr. 1023-1024). He had no contemporaneous notes of their conversations, kept no telephone logs, and made no diary entries of the contacts (Tr. 1025, 1036-1037). Further, Gordon made no written 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 applications that Section 1.1212 of the rules did require the filing of such a report (Tr. 1041).

21. Polivy testified that Gordon did not state in any contact with her prior to the June 18 decision 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. (Tr., 429-431). 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).

22. On June 18, 1993, the VSD, by letter signed by Barbara Kreisman, Chief of VSD, denied RBC's June 25, 1991 application for a sixth extension of its construction permit cancelled the construction permit, and found the application for assignment was, therefore, moot. (Jt. Ex. 8). Polivy was told of the substance of the VSD decision by Gordon in a telephone call from Gordon on June 24, 1993, and received a written copy by mail sometime after that date. Tr. 384-385.

23. After Gordon 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). Gordon did not raise with Polivy any question concerning whether or not a meeting with Kreisman would be appropriate (Tr. 1034).

24. Antoinette Cook Bush is Polivy's longtime friend, former client and colleague who, in July 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 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. In late June 1993, after learning of the VSD decision, Polivy telephoned Bush and asked her to contact the FCC in connection with the RBC applications. (Jt. Ex. 1, Stipulation No. 25). Polivy did not mention to Bush that there was any question regarding the restricted status of the RBC proceedings. (Tr. 579). Also, Polivy did not discuss with Bush the Daniels letter. Tr. 584-585. Polivy believed that the proceeding was not restricted as to Bush because Bush was placing a Congressional status call. (Tr. 522).

26. Polivy testified she asked Bush to "find out what was going on over there" because the Commission had "certainly done something that was different from anything they had ever done." (Tr. 523-524). Polivy testified that the purpose of Bush's call was "to get the attention of senior staff" at the Mass Media Bureau so that they would take any petition for reconsideration RBC filed "seriously." (Tr. 519). Polivy understood that Bush was at that time counsel for the Senate Committee on Commerce and Transportation, and that having Bush contact the Mass Media Bureau regarding the VSD decision would get a response. (Tr. 523). Polivy asserted that she did not tell Bush to call to see if she could get the decision reversed but rather "to find out what was going on over there." (Tr. 523). Polivy did not ask Bush to contact any particular person at the Agency. (Tr. 447). Bush recognized that Polivy was very "upset" and "irate" at the time she called her to ask Bush to contact the FCC staff. (Tr. 557, 568, 569, 571, 719).

27. Bush agreed to call the FCC "to see if there was any additional information that the Commission [staff] could provide." (Tr. 572). Bush testified that she considered the call to the Mass Media Bureau staff a "status call" within her prerogative as counsel for a Senate Committee with oversight responsibilities over the FCC. (Tr. 571-572, 585-587). Bush did not discuss the matter with an 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). Before making the call, Bush did not attempt on her own to determine whether the proceeding was restricted under the ex parte rules. (Tr. 588-589).

28. Bush contacted Stewart by telephone from her home in New York City, where she was on maternity leave. (Tr. 568, 572). Bush and Stewart had a short conversation regarding the RBC matter. (Tr. 572). Bush indicated to Stewart she was calling him about Rainbow's request for an extension of time which had been denied. Bush states that when Stewart did not seem to recall the case, she told him that Rainbow was the applicant who had defended the minority ownership policy which went all the way up to the Supreme Court. Bush states she referenced the minority ownership policy and the Supreme Court decision in an effort to jog his memory as to the case. (Tr. 560). Bush has no recollection of asking Stewart "how the denial of the RBC extension application was consistent with the FCC's minority ownership policies." (Tr. 572-573, 583-584).

29. Bush states that her reference to the minority ownership policy and the Supreme Court decision did not help Stewart recall the case and Stewart told her he would have somebody call her back. Tr. 560. Bush did not request Stewart or Pendarvis, who subsequently called her, to take any particular action (Tr. 572). Stewart did not tell Bush he would do anything other than having someone call her back. (Tr. 560).

30. Stewart's deposition was admitted into the record by stipulation in lieu of his appearance at hearing. (Press Ex. 19). Stewart was not asked any questions at his deposition concerning the substance of his telephone conversation with Bush. (See Press Ex. 19). All counsel were fully aware of that fact. (See Tr. 1055-1056). Notwithstanding, Stewart was not called to rebut Bush's testimony and her testimony concerning her conversation with Stewart is uncontradicted.

31. After talking to Stewart, Bush believes she told Polivy that Stewart did not know anything and that somebody else was going to call her back. Polivy did not ask Bush to do anything further. (Tr. 561).

32. Bush further testified that Clay Pendarvis, Chief of the Television Branch of the Video Services Division, called her back on behalf of Stewart. Pendarvis told Bush that if there was additional information that RBC wished the staff to consider regarding RBC's applications, it should file a petition for reconsideration. (Tr. 575). Bush informed Polivy about her conversation with Pendarvis. (Tr. 562).

33. On July 1, 1993, Polivy and Rey, on behalf of Rainbow, met in Roy Stewart's office at Commission headquarters, 1919 M Street, N.W., Washington, D.C., with Stewart, Barbara Kreisman, Chief of the VSD; Clay Pendarvis, Chief of the Television Branch; Gordon; and Robert Ratcliffe, Assistant Chief for Law of the Bureau. (Jt. Ex. 1, Stipulation No. 26; Tr. 451-452). Neither Press nor any of its principals nor Harry Cole, Press's counsel, attended the July 1 meeting. (Jt. Ex. 1, Stipulation No. 27). The discussion at the July 1, 1993 meeting, which lasted between 15 and 20 minutes, addressed the merits of RBC's applications for extension of time to construct. (Jt. Ex. 1, Stipulation No. 28; Tr. 394).

34. Prior to the July 1, 1993 meeting, Polivy had brief conversations with Pendarvis as well as Stewart in setting up the meeting. (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).³ 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).⁴

35. 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 cancelled 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).

36. Rey had not seen the Managing Director's letter (Joint Exhibit No. 4) 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 application (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 only learned that Bush had contacted the FCC when Polivy told him in the second half of 1993 that Press had filed allegations raising the possibility of an improper meeting (Tr. 718-719). Rey states that Polivy was very upset, and kept referring to Commission rules which she felt made it clear that there had been no impropriety (Tr. 726).

37. Polivy 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

³ Whether or not Polivy referred to Press' petition for reconsideration in her brief conversations with Stewart and/or Pendarvis is of no consequence. The decision being challenged which was obviously available to the staff makes specific reference to Press' petition for reconsideration. (See Jt. Ex. 8, p. 2, note 2).

⁴ 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).

office (Tr. 719-720). Rey attended the July 1 meeting to provide information about what RBC had done during its construction period. (Tr. 720-721). He had not contacted the FCC staff personally. (Tr. 720-721). Rey recalled that at the start of the meeting, Polivy handed out a two or three page chronology of the RBC applications. (Rainbow Ex. 8, Appendix A). 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.

38. No one at the meeting stated anything with regard to the propriety of discussing the RBC applications. Towards the end of the meeting, 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. 721-722).

39. Following the meeting with the Bureau staff, Rey and Polivy returned to Polivy's office to work on the petition for reconsideration, which was filed the following day, July 2, 1996. (Tr. 396; Jt. Ex. 1, Stipulation No. 29). 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).

Issue 2: Financial Misrepresentation Issue

40. Issue 2 seeks "To determine whether RBC 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 Sections 1.17 and 73.1015 of the Commission's rules or otherwise."

41. RBC's certification that it is financially qualified rests on an oral agreement entered into in mid-1984 between Joseph Rey and Howard Conant whereby Conant agreed to lend RBC up to \$4,000,000 to construct and operate the station for approximately one year (Tr.

749-750).⁵ At the time, the Orlando television hearing remained pending at the Commission and Conant and Rey mutually decided to defer a written agreement until the litigation had ended and it was time to commence construction. (Tr. 751, 758).

42. Joseph Rey is presently the general manager of Station WRBW(TV) at Orlando, Florida, and President of RBC, the general partner of Rainbow Broadcasting, Ltd. (RBL) (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).

43. On January 25, 1991, RBC filed an application for a fifth extension of its construction permit. (Jt. Ex. 2). RBC stated therein that "All representations contained in the application for construction permit still are true and correct." (Jt. Ex. 2, p. 1). Rey, who had previously certified in RBC's original application that RBC was financially qualified, has never sought to modify that certification (Tr. 937-938). The misrepresentation/lack of candor issue stems from testimony given by Rey in a District Court proceeding which raises a question whether RBC's representation in its 1991 extension application that it continued to be financially qualified was truthful.⁶

44. 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. (Jt. Ex. 1, Stipulation No. 12; Press Ex. 9). The lawsuit was originally filed in Florida state court, but Gannett removed it to the United States District Court for the Southern District of Florida within a week of its filing. (Jt. Ex. 1, p. 2; Tr. 731, 931). (See Press Ex. 9; Tr. 777). The complaint in the Miami Tower Litigation sought a preliminary injunction to prevent Gannett from leasing antenna space to Press at the top of the tower.

45. The complaint alleged that if Press was able to move its antenna location to the top of the Bithlo tower, RBC would not be able to obtain any financing for its construction of a competing station, and its construction permit would be rendered "valueless." (Press Ex. 9 at 9 ¶27). Joseph Rey personally signed and swore to the accuracy of the complaint. (Press Ex. 9 at 11; Tr. 710, 774, 778).

⁵ The agreement provided 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). In return Conant was to receive 50% of the positive cash flow for the first five years, 25% thereafter, and upon sale of the station, 10% of the net sales price. (Tr. 750).

⁶ At a prehearing conference where the scope of the issues were discussed, all parties agreed that issue 2 relates solely to the 1991 period onward and that the period prior to 1991 including RBC's initial ability to fund the station was not pertinent. (Tr. 98-106).

46. The complaint specifically incorporated by reference the statement of Susan Harrison, a principal in a Washington, D.C. consulting firm specializing in financial and economic analyses for the communications industry. (Press Ex. 9 at 9 ¶27). Harrison's affidavit averred, *inter alia*, that if Gannett leased the space to Press, RBC will be irreparably injured because, according to Harrison, RBC's construction permit will be worthless and RBC "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 Ex. 9 at 13).

47. Harrison's affidavit explained her opinion as follows (Press Ex. 9 at 13):

There are currently four television stations (all which are currently affiliated with a network) operating from a centrally-located transmitter site in the Orlando area. That market can only accommodate five television stations, i.e., one additional station. Any more stations would not be economically viable since they would not achieve minimum share levels required for buyers of television advertising time.

According to Harrison's affidavit, Press' entry on the same position on the Bithlo tower as currently leased to RBC "would create two television stations where only one additional station can economically survive on that site." *Id.* Rey testified that at the time he verified the complaint, he agreed with Harrison's conclusions and believed that a sixth station in the market would have been worthless because of insufficient market revenues. (Tr. 782, 936-936). Accordingly, he did not expect anyone to put money into an enterprise that could not pay for itself. (Tr. 781-782, 916).

48. In furtherance of RBC's request for a preliminary injunction, Rey, on behalf of RBC, gave the following testimony on direct examination on January 11, 1991 regarding the impact that locating Press at the top of the Bithlo tower would have on RBC's ability to obtain financing (Press Ex. 10 at 6-9):

Q: Now, you also do not have any written loan agreements with anybody to finance your venture--

A: Written, no.

Q: Who is your financier? Who is loaning you the money for this --

A: Rainbow has an agreement with an investor to build and operate the station. It has not been reduced to writing because of this.

* * *

Q: Who is it?

A: By the name of Howard Conant.

Q: Is he representing a group of [investors] or just himself?

A: I believe its just himself.

* * *

Q: Has he 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 has been put on hold because of this.

Q: Has this gentleman told you he will no longer loan you the money?

A: It's pending the resolution of this matter.

Q: Has he told you that if your space is not exclusive on [the Gannett tower] 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.

Q: Have you talked to anybody else about loaning you the money?

A: As of late, he is the only person I was talking to.

49. The conversation with Conant alluded to by Rey in his court testimony occurred in late 1990 when Rey informed Conant of the lawsuit against Gannett. (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).

50. 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).

51. 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). The denial of the preliminary injunction had nothing to do with the decision to move toward construction because, as Rey testified, by that time he had reason to be far more optimistic about the television project. (Tr. 992, 994).

52. At hearing, Rey was asked about his response in the Court proceeding to a specific question, namely, whether Conant had "actually given you some money and taken a promissory note, for example?". Rey's response, which is quoted in paragraph 48, supra includes the statement that "everything has been put on hold because of this." Rey testified that "this" refers to the Rey v. Gannett litigation (Tr. 923). Further, the phrase, "everything has been put on hold" referred to reducing the agreement to writing and going ahead with construction. (Tr. 923-924). In this regard, Rey stated that he was not going to ask Conant "to go ahead with it if I believed that this thing is not worth it." (Tr. 924). Rey emphasized that the oral loan agreement entered into in 1984 had not been put on hold and that Conant never retracted or put on hold his commitment to finance the station. (Tr. 926-927).

53. Rey was also questioned concerning his testimony in the Court proceeding 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 stated that was an accurate reflection of Rey's state of mind on January 11, 1991 (Tr. 795). Rey explained 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. 795-796; 913). Rey testified that Conant never told him that he would withdraw from the financing agreement if the injunction was denied but, rather, that Rey had put himself into Conant's "head" (Tr. 796) and assumed what would

have happened if Rey told Conant that the project was not "viable" and was "worthless" (Tr. 795-796). Rey also believed that Conant would have lent the money if he had told Conant that "even though we are a sixth station in the marketplace, it is viable." (Tr. 918). Rey made clear that Conant was always committed to lending funds to RBC and was waiting for RBC to make the request. (Tr. 918-920). 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).

54. 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 corroborated Rey's testimony as to Conant's financial commitment. Conant emphasized, like Rey, 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). Conant's intention was to have the agreement reduced to writing when the money was advanced. (Tr. 695). He was waiting for Rey to come and tell him that he was ready for the loan (Tr. 695-696). The loan was never implemented since as discussed, *infra*, Rey decided to rely instead on equity financing to build and operate the station.

55. Conant recalled that Rey came 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. Conant told Rey that they should take a "wait and see attitude." Conant testified that he never stated that he would not honor his commitment to the company. Further, while there was some skepticism on Rey's and his part, the meeting concluded without any change in their agreement to go forward. (Rainbow Ex. 5, p. 1).

56. When asked to elaborate what he meant by a "wait and see" attitude, Conant recalled that at the 1990 meeting Rey was disappointed with the prospect of litigation. Also, Rey didn't like the idea of a delay in the beginning of the operation of the station and that there might be six stations instead of five. Conant felt it was appropriate to wait and see what develops because he was not as negative as Rey. Conant thought that the television broadcast business probably would improve and that while having six stations in the market was a concern, it was not a major obstacle. (Tr. 683-686).

57. Conant stated that Rey was his advisor and that his concerns was a reflection of Rey's concerns. (Tr. 686). Conant stated that having six stations in the market rather than five would not have affected the loan agreement. (Tr. 683). Further, he reiterated that he was always ready to finance the station when he was told that RBC had the full authority to proceed to build it (Tr. 670, 673-674, 684). Conant relied upon Rey to tell him when RBC was free to construct (Tr. 703). He would have provided the money pursuant to the agreement if Rey had advised him that RBC had FCC authorization to construct and RBC wanted to go forward. (Tr. 702).

58. Later, in the summer of 1991, Conant learned from Rey that conditions in the Orlando market had improved economically and that the Neilson Company planned to meter the market. At the time, Conant reiterated his pledge to finance the station. Rey told him that RBC was still considering the possibility of developing equity financing. Conant then told Rey that if he was unsuccessful in that pursuit, he, Conant, stood ready and willing to live up to his commitment. (Rainbow Ex. 5, p. 1).

59. In late 1992, when Conant became ill with Hodgkin disease, he and Rey agreed that limited partners would be enlisted to provide financing for the station. Notwithstanding Conant's preoccupation with beating the disease and regaining his health, Conant told Rey he would follow through on the agreement if needed (Rainbow Ex. 5, p. 1).⁷

Issue 3: Tower Litigation Misrepresentation Issue

60. Issue 3 seeks "To determine whether RBC 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 Sections 1.17 and 73.11015 of the Commission's rules or otherwise." The issue concerns the reasons given by RBC in the fifth and sixth extension applications as to "why construction has not been completed" (Jt. Exs. 2, 3, page 1).

61. 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

⁷ In the 1991-1992 period, Conant also agreed to give RBC a "bridge loan" up to \$4,000,000 if needed, to get the station up and operating while the funding by the limited partners was being finalized. However, RBC did not need the "bridge loan." (Tr. 900-901).

(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 F.2d 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).

62. RBC has a lease agreement with Gannett executed on January 6, 1986 providing for the use of tower space for RBC's antenna and a transmitter room for RBC's transmitting equipment. (RBC Ex. 6). The lease agreement specifies in Article IV(C) the procedure for constructing the transmitter building, the first step in constructing RBC's facilities. It provides that the landlord (Gannett) will construct for tenant (RBC) "an addition to the transmitter building" and "shall bill tenant monthly the actual cost of construction as provided in Article III(c) herein." Article IV(c) further provides that RBC's only involvement in the construction process is to provide Gannett "with names and references of a preferred contractor to perform the construction work" which Gannett had to approve. Article IV(c) also provided that Gannett was "to commence construction with reasonable promptness and to prosecute such construction to completion with reasonable diligence." Id. at 6.

63. Article III(c) provides that RBC's interest in the transmitter building "shall be that fraction determined by dividing the total number of square feet in the Transmitter Building". Id. at 4. In this connection, Gannett 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). RBC was to occupy the center room, the closest location possible to the tower. (RBC Ex. 7, p. 2, 8; Press Ex. 7, p. 3).

64. Prior to August 30, 1990, the date RBC's construction permit became final, there was no physical construction of the station. RBC had engaged in such pre-construction activities as planning of the transmitter building, selection of equipment and, since 1986, had made rental payments under its lease with Gannett. (Tr. 726, 947).

65. However, even before the construction permit began final RBC sought to expedite the construction of the transmitter building, which, as noted, was the first step in making RBC operational. On the other hand, the correspondence discussed below, shows that despite RBC's best efforts, Gannett failed to "commence construction with reasonable promptness" as promised in the lease agreement.

66. On January 30, 1990, Rey sent a letter to Richard Edwards , an executive employee of Gannett who was in charge of their towers. Rey's letter was in response to a letter from Edwards sent in late 1989 or early January of 1990. Edwards sought information from RBC regarding the antenna mounting and the proposed transmitter building. Rey's letter asked for specific information about the tower and the building construction to enable RBC to respond (RBC Ex. 7, p. 1). Edwards did not respond to the January 30 letter.

67. On August 10, 1990, Rey wrote to Edwards complaining of Edwards' failure to respond to the January 30, 1990 letter. Rey pointed out that RBC "now has a clear path to construct the facility and it is our desire to proceed as quickly as possible." Rey stated that RBC could not afford to wait any longer and decided to construct its own transmitter building. Rey's letter listed the names of the architect, contractor and electrician and their qualifications. Also, Rey's letter enclosed the preliminary plans of the building that would be needed to house the WRBW transmitter. The letter renewed the prior request for tower information and a plot plan of the site showing the proposed placement of the building. Finally, Rey stated that RBC wanted to apply for a building permit soon "and must request that you respond to this letter as soon as possible." (RBC Ex. 7, p. 2). At the time he wrote this letter, Rey was confident that the Supreme Court decision would shortly become final (Tr. 729).

68. On August 24, 1990, Rey again wrote to Edwards. Rey noted therein that he recently received from Edwards the blueprints of the transmitter building addition and "was surprised that the original plans were dated June 12, 1990, and yet they were not shown to me until this week." Rey indicated the transmitter room which RBC wanted. Rey stated "we are anxious to proceed with construction as rapidly as possible so that we can be operational by mid-1991," that "any unnecessary delay can result in significant damages to us" and that "[s]ince the completion of the transmitter building is the first step (before equipment can be installed, etc.) it is essential that we reach an agreement immediately as to the plans and the approval of our designated contractor." Rey also stated therein that RBC had "received no response to our January 30, 1990 letter including the questions raised to therein which are essential to our planning." Rey suggested that a meeting be held in the next two weeks with the attorneys and engineers present to address the matters raised in the letter including RBC's specific location on the tower. Also, it was necessary "to set forth a timetable for the completion of the design of the transmitter building and its construction." (RBC Ex. 7, p. 8).

69. In 1988 and 1989, Edwards had asked Rey for consent to lease tower space at the 1500 foot height, the same slot which RBC proposed to use. Rey refused to give consent. (Tr. 766-767). Rey had no objection to Press' use of space at the 1400 foot level. (Tr. 765-766). At the time Edwards sought consent in the 1988-1989 period, Edwards did not indicate that Gannett was about to sign a lease with Press. (Tr. 766-767). In August 1990, when Rey reviewed the blueprints sent to him by Edwards, he learned, for the first time, that one of the rooms had been preplanned. Rey was specifically told by Edwards that Gannett intended to sign a lease with Press, giving Press antenna space at the same 1500 foot level, previously given to RBC. (Tr. 731, 766).

70. On October 2, 1990, the Florida attorney for RBC, Malcolm H. Fromberg wrote to James Baker, Vice President of Gannett. Fromberg states that following the August 23, 1990 letter from Rey to Edwards, Rey and Edwards and Gannett's engineer met and reviewed the preliminary plans for construction of the transmitter building; that Edwards was receptive to changes in the basic plans and that RBC could designate the space it preferred; that RBC agreed to provide Edwards with proposed revisions to the plan and designation of the desired space, which will be accomplished shortly; and that RBC subsequently reserved the remaining space available in the generator room for auxiliary power. Also, Fromberg wanted to know whether Gannett had entered into a lease with Press providing for antenna rights within the aperture of the antenna slot currently leased to RBC. Fromberg stated RBC's position that it had exclusive use of the upper slot and that the placement of additional antennas within the aperture of the slot would result in litigation. (RBC Ex. 7, pp. 10-11).

71. On October 19, 1990, John F. Flaherty, attorney for Gannett, wrote to Fromberg.⁸ Flaherty stated Gannett's position that under the Lease Agreement RBC's occupancy of the tower space was "non-exclusive." Further, Flaherty gave notice to RBC that it must by November 1, 1990 agree that it will occupy the top television antenna space "with the clear understanding that its aperture use will be non-exclusive." Failing this, RBC "will be deemed to be in breach of this Agreement." (RBC Ex. 7, pp. 13-14).

72. On the same date, Fromberg wrote to Baker. Fromberg advised Baker that RBC "did intend to proceed with the installation of their antenna on Bithlo Tower on the top antenna slot of the two slots designated in Exhibit 11C." Fromberg also advised that the lease of space within the aperture of RBC's top slot to Press would be an anticipatory breach of RBC's Lease Agreement. Fromberg also confirmed, with regards to the plans for construction of the transmitter building, that RBC designated the middle room since "the bridge connecting the transmitter rooms to the tower will be abutting the middle room, thus making the middle room the closet location to the bridge." (RBC Ex. 7, p. 15).

73. On or about November 2, 1990, RBC brought an action for injunctive relief in Florida state court against Gannett, the owner of the transmission tower (the Bithlo tower) that RBC planned to use (Jt. Ex. 1, Stipulation No. 12; Press Ex. 9; Tr. 777). The lawsuit was originally filed in Florida state court, but Gannett removed it to the United States District Court for the Southern District of Florida within a week of its filing. Joseph Rey, et al. v. Guy Gannett Publishing Co., et al. (No. 90-2554-CIV, United States District Court, S.D. Florida) (Miami Tower Litigation). (Jt. Ex. 1, p. 2; Tr. 731, 931. See Press Ex. 9; Tr. 777). The complaint alleged that RBC had the exclusive right to use the tower's top television broadcasting space, which Gannett had also rented to Press. (Press Ex. 9, p. 3).

⁸ The letter was faxed to Fromberg on October 19, 1990.

74. On November 27, 1990, at a prehearing conference in the Miami Tower Litigation, Judge Harold Marcus, the presiding Judge ordered that the status quo be preserved. The Order, memorialized in a transcript (Press Ex. 16). and in a subsequent order (RBC Ex. 5) ordered Gannett "to not sign or consummate any agreement or lease with PRESS and/or CHANNEL 18 until the preliminary injunction hearing is held and the outcome is determined." (RBC Ex. 5, p. 1). In this connection, as reflected in a letter of March 27, 1991 from Edwards to Robert McAllen, President of Press, Gannett understood the Order to mean that "if Bithlo Tower Company proceeds in any way with Press that we will be in violation of a court order." (RBC Ex. 7, p. 17).

75. The status quo order remained in force until June 1991. During the period of November 1990 to June 1991, the only communication between RBC and Gannett was in connection with the litigation. Information concerning the construction of the transmitter building which RBC sought since August 1990 was not provided. (Tr. 861-862, 873). While Gannett was not communicating with RBC during this period, the letter dated March 27, 1991 from Edwards to McAllen, the President of Press, reveals that these parties were in active communication concerning the construction of Press' facilities. (See RBC Ex. 7, p. 17).⁹ The nature and extent of discussions between McAllen and Edwards concerning the construction of the transmitter building to be shared by RBC and Press is not disclosed by the record. Neither Edwards or McAllen testified in this proceeding. However, as discussed, *infra*, Gannett began construction of the transmitter building only after Press signed a lease with Gannett for space on the tower. (Press Ex. 7).

76. On January 25, 1991, RBC filed its fifth application for extension of time. On February 5, 1991, the Commission granted RBC's application for an extension of its construction permit through August 5, 1991. 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. (Jt. Ex. 1, Stipulations 13, 14, 15).

77. The January 25, 1991 extension application states, in pertinent part, the following reason why it had not completed construction (Jt. Ex. 3, p. 3).

Upon denial of rehearing by the Supreme Court, Rainbow engaged engineering services to undertake construction of the station. Actual 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 (Case No. 90-2554 CIV MARCUS). A motion for preliminary injunction was heard on January 11, 14 and 16, 1991 and is scheduled to conclude on January 23, 1991, with a decision anticipated shortly thereafter.

⁹ In the letter from Edwards to McAllen, Edwards assured McAllen "We are behind you and our support is solid. When you construct this channel 18 facility in Orlando you will have a superior system. Something to be proud of." (RBC Ex. 7, p 17).

Rainbow anticipates that its exclusive right to the use of the tower aperture will be recognized by the District Court.¹⁰ Rainbow is 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.

78. Rey testified that the "delay" referred to in the extension request was caused by the fact that RBC could not build on its own, citing Articles III and IV of its lease with Gannett. (RBC Ex. 6, pp. 4-10; Tr. 804, 858). Rey explained that RBC had to go through the owner who wanted a single construction building, i.e., a three room transmitter building which would house the transmitters for all three broadcast tenants (which included RBC and Press) on the tower. (Tr. 803-804, 859). As asserted by Rey, and confirmed by the correspondence between Rey and Edwards, construction of RBC's television station must begin, logically, with the transmitter building before questions of the placement of the antenna are addressed (Tr. 850-851). The authority to build the transmitter building rested solely on Gannett and under the terms of the lease RBC was powerless to act on its own. Under the Judge's Order, Gannett could not build for Press, which also meant that Gannett could not construct for RBC since RBC and Press were involved in that same single construction. (Tr. 858).

79. A review of the terms of the lease and the correspondence between the parties demonstrates that the reasons given by RBC for the delay in construction was entirely truthful. RBC's lease with Gannett specifically provides that while RBC could designate a contractor, only Gannett had the authority to construct the transmitter building, the first step in building RBC's station. (See RBC Ex. 6, p. 6). The correspondence between the parties, discussed supra, show that despite RBC's repeated efforts to expedite construction, Gannett had not undertaken any construction of the transmitter building as of the date of the Judge's Order preserving the status quo. In fact, Gannett had apparently not even obtained the necessary permits to construct the building. (See Press Ex. 7, p. 1). The reasons for Gannett's failure to undertake construction are not disclosed by the record. As noted, no Gannett or Press official testified. However, since there does not appear to have been any barrier preventing Gannett from constructing the transmitter building, it is reasonable to infer that Gannett did not intend to construct the building until Press was included as a tenant. Moreover, since blueprints prepared by Gannett in June 1990 reveal that a transmitter room had been preplanned for Press' use, a further unanswered question is whether Press played any role in Gannett's decision. As previously noted, Gannett began construction of the transmitter building only after it signed a lease with Press for space on the tower. (Press Ex. 7). In any event, RBC did not have the authority to construct on its own. However, while Gannett's failure to construct earlier is suspicious, it would appear that Gannett was barred by the court from constructing the transmitter building while the status quo order was in force since the same building and adjoining rooms were to be occupied by RBC and Press. Therefore, it is found that RBC did not misrepresent facts in the fifth and sixth extension

¹⁰ Contrary to the assertion of STS, in its Finding 72, the quoted portion leaves no doubt that the legal action was brought by RBC.

applications in asserting that construction was "delayed by a dispute with the tower owner which is the subject of legal action...."

80. On June 6, 1991, the district court denied RBC's motion for a preliminary injunction. Rey v. Guy Gannett Publishing Co., 766 F. Supp. 1142 (S.D. Fla. 1991). (Jt. Ex. 1, Stipulation 16).

81. On June 25, 1991, RBC filed an application for a sixth extension of its construction permit. On July 10, 1991, Press filed an "Informal Objection" to RBC's sixth extension application. On November 27, 1991, RBC filed a "Supplement" to its sixth extension application. On November 29, 1991, RBC filed an application for the consent to the pro forma assignment of construction permit to Rainbow Broadcasting, Ltd. On June 18, 1993 the VSD acted on RBC's sixth extension application (Jt. Ex. 1, Stipulations 17, 18, 20, 21, 24).

82. RBC's sixth extension application filed June 21, 1991, stated, in pertinent part, as follows:

Upon denial of rehearing by the Supreme Court, Rainbow engaged engineering services to undertake construction of the station. Actual 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 (Case No. 90-2554 CIV MARCUS). A motion for preliminary injunction was denied by the court on June 6, 1991.

Immediately upon denial of the preliminary injunction request, Rainbow notified the tower owner of its intention to commence construction (a copy of the letter to Guy Gannett Tower Co. is appended heretofore) and requested that the lease provisions regarding construction bids be effectuated. In addition, Rainbow has initiated discussions with equipment manufacturers regarding construction specifications and intends to place its equipment order as soon as the building construction schedule is finalized.

Rainbow will commence operation prior to December 31, 1992, as it previously informed the Commission.

83. The sixth extension application was equally straightforward. As the correspondence discussed, infra, discloses, following the vacating of the status quo order, RBC intensified its efforts to get Gannett to construct the transmitter building, which was finally completed in November 1991.

84. The letter appended to the sixth extension application was from Rey to Baker dated June 18, 1991 detailing what had transpired between August and November 1990. Rey states therein that on August 1990, RBC sent Edwards "proposed plans and designated the architect and contractors of its choice as per the lease agreement for the purpose of commencing

the construction of the transmitter building." Further, Rey states that in a letter dated August 20, 1990, "we were informed by Mr. Edwards that Gannett had already (in June of 1990), without our knowledge, proceeded to have plans prepared by Miorelli Engineering of Melbourne who is also a general contractor." The letter further reveals that on September 13, 1990, a meeting was held with Edwards who agreed to supply RBC with a detailed bid based on Gannett's proposed plans so that RBC could determine whether it would select Gannett's proposed contractor or choose its own. However, despite an additional request for such information on November 5, 1990, the detailed bid had not been furnished (as of June 18, 1991). After stating that "we cannot be delayed any further," Ray submitted, pursuant to the lease, the name of its proposed architect and proposed builders. (Jt. Ex. 3, p. 4).

85. The letter from Baker to Rey dated July 17, 1991 exhibits for the first time, a plan of action on the part of Gannett to begin actual construction of the transmitter building. Baker notes in the letter that Gannett had recently signed a lease with Press. Baker also recites that Gannett has been moving forward with the permitting process for the building addition and negotiations with the contractor for the construction of the building shell; that Gannett signed a construction contract with Miorelli Engineering, Inc. (Miorelli) for the construction of the building as depicted in the June 12, 1990 plans prepared by Miorelli; and that it has begun construction. Baker offered RBC the choice of participating in the single building project as described in the June 12, 1990 blueprint or other building alternatives. The letter also provides the allocated cost for building RBC's center transmitter room (\$41,106) and for the wave guide bridge to the tower (\$8,000). (Press Ex. 7).^{11 12}

86. On July 23, 1991, Rey responded to Baker's letter of July 17, 1991. Rey pointed out that since Edwards initially presented the single construction concept in August 1990, "Rainbow has consistently indicated its interest in pursuing that concept and in cooperating with Gannett." Rey also noted that "[s]ince August 1990, Rainbow has repeatedly requested and has yet to receive a copy of the actual bid which identifies exactly what the contractor will be providing at exactly what price." Further, "[Y]our letter of July 17th is the first communication which even begins to answer the question I have repeatedly asked Rick Edwards since last summer." Rey also noted that the July 17th letter and several previous letters speak in terms of Exhibits B and C to the lease. Rey reaffirmed RBC's position that Exhibits B and C are

¹¹ The letter refers to a November 1990 letter from John R. Di Matteo, a Gannett official requesting agreement to the single building concept and also advising RBC that it needed to complete an Exhibit B to the lease agreement. The need for RBC to agree to the single building concept is difficult to understand since Rey made clear in multiple meetings with Edwards and in correspondence that it was interested in pursuing that concept. (Tr. 860-861). With respect to Di Matteo's request for completion of Exhibit B to the lease, RBC's counsel advised against providing this information since they regarded the request as "bait" intended to undercut RBC's position that the lease was complete on its face. (Tr. 868-869).

¹² The July 17, 1991 letter also refers to a July 9, 1991 letter from Baker to Rey (Press Ex. 6) requesting information as to the location of RBC's antenna. In a letter dated July 22, 1991, Rey asserted it was not necessary for RBC to designate its mounting position prior to the time the antenna is actually mounted. Notwithstanding RBC provided a designation of its mounting position. (RBC Ex. 7, p. 18).

complete in themselves and "[t]he fact that the lease contemplates that further information will have to be provided in the course of performance does not in any way detract from the completeness or validity of the lease as executed." (RBC Ex. 7, pp. 19-21).¹³

87. Construction of the transmitter building was completed in approximately November 1991 (Tr. 741). Rey stated that RBC expended approximately \$60,000 of its own funds in the construction of the building. RBC was unwilling to borrow money from Conant while the extension application remained pending and was under challenge by Press (Tr. 741-742). Also under his agreement with Conant, he could not draw on Conant's funds until the permit was "free and clear." (Tr. 742). When the Commission ultimately granted the extension request, RBC bought equipment, installed the equipment and went on the air in March 1994, 7 1/2 months after the Commission granted RBC's sixth extension request. (Tr. 742-743, 981-982).

88. RBC's sixth application (Jt. Ex. 3) and Supplement filed November 27, 1991 (Jt. Ex. 5) represented that RBC would commence operation prior to December 31, 1992. As explained by Rey, that representation was necessarily premised on the Commission rejecting Press' objections and the granting of the extension request. RBC would have met that date if the Commission had granted its extension request by July 1991. (Tr. 870, 981-982). RBC was willing to use its own funds to rent tower space (\$500,000 between October 1986 and August 1993) (Tr. 942, 986) and to construct the transmitter building. It was however, unwilling to borrow millions of dollars for such big ticket items as a transmitter until it had a free and clear construction permit. (Tr. 874-879, 910-911).

Issue 4: Section 73.3534/73.3598 Issue

89. Issue 4 seeks to determine "whether RBC has demonstrated that under the circumstances either grant of a waiver of Section 73.3598(a) or grant of an extension under Section 73.3534(b) is justified."

90. As discussed more fully in paragraph 61, *supra*, RBC's original construction permit was issued on April 22, 1986; between November 1986 and February 1988, the permit was held in abeyance pending the outcome of the Commission's review of its minority ownership policies; in April 1989, the Court of Appeals affirmed the Commission's award of a construction permit to RBC; the grant became final on August 30, 1990. During the period of July 11, 1988 and July 2, 1990, RBC filed four applications for extensions of time, which were granted.

91. Section 73.3598 of the Commission's rules affords permittees 24 months in which to construct new television stations. Only five months had elapsed from the time RBC's construction permit became final and the filing of its fifth extension applications in January of 1991. Similarly, only ten months had passed at the time RBC filed its sixth extension application

¹³ The lawsuit with Gannett was eventually settled with Gannett paying RBC a substantial sum of money for RBC giving consent to allow another antenna on the same 1500 foot aperture. (Tr. 994-995).

in June, 1991. On June 18, 1993, VSD denied RBC's sixth extension application, which then had been pending for two years. RBC's construction permit was reinstated when, on July 30, 1993, the Chief, Mass Media Bureau, granted RBC's petition for reconsideration. In all, 22 of the 32 months that passed since the conclusion of litigation concerning RBC's license occurred after the expiration of RBC's construction permit.¹⁴ The Commission made clear in the HDO that the post-authorization period is not considered in evaluating the sufficiency of RBC's construction efforts. Rainbow's beliefs or efforts during this time period are not germane. See 11 FCC Rcd 1167, 1168 (1995). In this connection, RBC's construction efforts during the pertinent ten months when RBC held an unexpired construction permit are discussed under the tower misrepresentation issue and will not be repeated here.

CONCLUSIONS

92. Issue 1 seeks to determine whether RBC 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 RBC's behalf and by meeting with Commission staff to discuss the merits of RBC's application proceedings. Section 1.1208 prohibits ex parte presentations in restricted proceedings.¹⁵

Section 1.1210 prohibits the solicitation of others to make ex parte presentations. A presentation "is a communication directed to the merits or outcome of the proceeding." A "status inquiry" is not prohibited. See Section 1.1202(a).

93. The issue concerns two ex parte contacts between representatives of RBC and the Mass Media Bureau staff. One of the contacts consisted of a telephone call by Antoinette Cook Bush, the senior counsel to the Senate Committee on Commerce and Transportation to Mass Media Bureau Chief Roy Stewart in late June 1993; the second contact was a meeting on July 1, 1993 attended by Margo Polivy, Joseph Rey and several members of the Mass Media Bureau staff including Stewart. The parties have stipulated that the July 1, 1993 meeting addressed the merits of Rainbow's application and was, therefore, an impermissible "presentation." However, a similar stipulation has not been agreed to with regard to Bush's phone call to Stewart.

94. The Commission's ruling that the February 25, 1991 filing by Press of its petition for reconsideration restricted this proceeding for ex parte purposes (9 FCC Rcd 2839, 2844-2845 (1994)) is not subject to reconsideration in this tribunal. However, its determination that Bush's telephone call to Stewart constituted a "presentation" which was based on the then available evidence, may be revisited where there is additional information on the subject

¹⁴ Rey always believed that RBC had two years from August 30, 1990 in which to build its station. (Tr. 744, 756, 807, 808, 911). Rey was informed by his attorney that a staff lawyer in the Bureau had stated that RBC would receive its requisite two years but in six months extensions. Rey was surprised that unlike the five extensions which were swiftly granted, the sixth extension took two years to resolve. (Tr. 756-757, 801-808).

¹⁵ The rule exempts ex parte presentations in certain proceedings not applicable here. See Section 1.1204(b).