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FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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

**SEPARATE TRIAL STAFF'S  
EXCEPTIONS TO INITIAL DECISION**

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## Summary

The *Initial Decision (I.D.)* erred in granting the applications of Rainbow Broadcasting Company ("RBC") for an extension of time to construct and for an assignment of its construction permit for television station WRBW(TV) in Orlando, Florida. The *I.D.* concluded that the tower litigation misrepresentation issue, the financial misrepresentation issue, and the extension/waiver issues should be resolved in favor of RBC. The record establishes that each of these issues should be resolved against RBC, and that its extension applications should be denied, its construction permit cancelled, and the assignment application dismissed as moot.

First, RBC made material misrepresentations of fact and/or was lacking in candor when it stated twice to the Commission that a dispute with its tower owner precluded it from constructing. The dispute was initiated by RBC and did not prevent RBC from constructing its station. RBC's decision not to construct between August 1990 and August 1991 was motivated solely by RBC's private business judgment. In particular, RBC believed that its construction permit was "worthless" and represented a poor financial risk during most of this period. Second, RBC misrepresented its financial qualifications to the Commission. At the same time RBC was representing under oath to the Commission that it continued to be financially qualified it was representing under oath to a United States District Court in Florida that all of its financing was "on hold" pending the outcome of the tower litigation. Third, RBC failed to show that its failure to construct between August 1990 and August 1991 was due to reasons clearly beyond its control. In light of the evidence adduced pursuant to the misrepresentation/lack of candor issues and the extension/waiver issue, RBC is not qualified to be a Commission licensee.

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## Separate Trial Staff's Exceptions to Initial Decision

### Preliminary Statement

1. The Separate Trial Staff, pursuant to Section 1.276 of the Commission's Rules, 47 C.F.R. § 1.276, hereby respectfully submits its Exceptions to the *Initial Decision of Administrative Law Judge Joseph Chachkin*, 12 FCC Rcd 4028, released April 2, 1997 (*I.D.*). In support whereof, the following is shown.

### Statement of the Case

2. This is a proceeding on remand from the United States Court of Appeals for the District of Columbia Circuit to determine whether the applications of Rainbow Broadcasting Company ("RBC") for an extension of time to construct and for an assignment of its construction permit for Station WRBW(TV), Channel 65, Orlando, Florida, should be granted. *See Press Broadcasting Co., Inc. v. FCC*, 59 F.3d 1365 (D.C. Cir. 1995) ("*Press*"). The Court reversed the Commission's Memorandum Opinion and Order in *Rainbow Broadcasting Company*, 9 FCC Rcd 2839 (1994) (Jt. Ex. 10), and remanded the matter to the Commission. The Court ordered the Commission to "conduct further proceedings consistent with th[e Court's] opinion." *Press*, 59 F.3d 1365.

3. The Commission responded to the Court's decision in *Press* by designating the above-captioned applications for hearing on the following issues:

- (a) 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.
- (b) 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.

- (c) 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 73.1015 of the Commission's rules or otherwise.
- (d) 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.
- (e) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether [RBC] is qualified to be a Commission licensee and whether grant of the subject applications serves the public interest, convenience and necessity.

*Memorandum Opinion and Order and Hearing Designation Order ("HDO")*, 11 FCC Rcd 1167, released November 22, 1995; *Erratum*, released December 15, 1995.

4. The *HDO* made Press Broadcasting, Inc. ("Press"), the licensee of television station WKCF(TV), Channel 18, Clermont, Florida, which had opposed RBC's extension and assignment applications at the Commission, 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.

5. The *I.D.* resolved all the issues in RBC's favor and granted the applications. The *I.D.* concluded that: (a) RBC did not misrepresent the facts or lack candor regarding the nature of a dispute between it and the owner of the transmitter tower it planned to use in terms of its failure to construct in connection with its fifth and sixth extension applications; (b) RBC did not misrepresent the facts or lack candor with respect to its financial

qualifications regarding its ability to construct and initially operate its station; (c) RBC demonstrated that grant of an extension under Section 73.3534(b) was justified; (d) RBC did not intend to violate the *ex parte* rules; and (e) in light of the evidence adduced pursuant to the misrepresentation/lack of candor issues, the extension issue, and the *ex parte* issue, RBC is qualified to be a Commission licensee. The *I.D.* ultimately concluded that a grant of RBC's applications would serve the public interest, convenience and necessity.

### **Questions Presented**

Whether RBC misrepresented the facts and/or lacked candor in its fifth and sixth extension applications where RBC affirmatively stated that its failure to construct its television station was due to a dispute between RBC and the owner of the transmitter tower it planned to use, when RBC failed to disclose to the Commission that the litigation was initiated by RBC and did not preclude it from constructing.

Whether RBC misrepresented the facts and/or lacked candor in its fifth extension application where RBC affirmatively stated that it was ready, willing and able to construct its television station, but did not disclose that all of its financing had been "put on hold" pending the outcome of the tower litigation and that its ability to finance the station was dependent on its success in keeping Press from the top position on the Bithlo tower.

Whether RBC failed to demonstrate that grant of a waiver of Section 73.3598(a) or grant of an extension of time to construct under Section 73.3534(b) was justified where RBC's decision not to go forward with construction was based solely on private business considerations and was not due to factors clearly beyond RBC's control.

### **Argument**

6. Despite the lengthy record in this proceeding (*i.e.*, hundreds of pages of exhibits and over a thousand pages of hearing testimony), the critical and dispositive facts are not complex and may be summarized as follows:

7. Although it had a valid construction permit as of August 30, 1990,<sup>1</sup> RBC made

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<sup>1</sup> 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

an affirmative decision not to commence construction at that time because of its concerns about the economic conditions in the Orlando market. RBC principal Joseph Rey<sup>2</sup> believed that RBC's construction permit was "valueless" and "worthless" "if it were to be the sixth station in the Orlando market at the time." Press Ex. 9, pp. 9, 10, 12-14; Tr. 780, 790, 916, 939. Mr. Rey explained that 1990 was a recession year and that advertising budgets projected for 1991 were expected to be lower than they were in 1990, and he was very pessimistic about the economic outlook for the Orlando market at this time. Tr. 753, 989. Mr. Rey believed there were not enough revenues to go around for a sixth station. Tr. 781.

8. Mr. Rey was particularly concerned that Press would become the fifth station in the market ahead of RBC if Press moved to the top location on the "Bithlo tower," which would have increased Press's coverage of the Orlando metropolitan area. Tr. 790. To prevent Press from moving to the top slot of the Bithlo tower, RBC initiated litigation seeking a preliminary injunction against the tower owner, Guy Gannett Publishing Company ("Gannett"), claiming that RBC had a contractual right to the elusive use of the top position on the Bithlo tower ("the Tower Litigation"). Press Ex. 9.<sup>3</sup> RBC alleged in this litigation that, if Press was permitted to share the top slot on the Bithlo tower, RBC "**will be unable**

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(1990), *petition for rehearing denied*, 497 U.S. 1050 (1990). The grant of the construction permit to RBC became "final," *i.e.*, no longer subject to administrative or judicial review, on August 30, 1990. Jt. Ex. 1, Stipulation No.11; Tr. 505.

<sup>2</sup> Mr. Rey is the general manager of RBC's station (WRBW(TV)), and president of Rainbow Broadcasting Co., Inc., the general partner of Rainbow Broadcasting, Ltd. (RBL) (Tr. 710).

<sup>3</sup> RBC's complaint 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, p. 9.

to secure financing" to build and operate its station. Press Ex. 9, p. 13 (emphasis added). Rey testified to the same effect in a hearing in District Court on RBC's motion for a preliminary injunction. Press Ex. 10, pp. 7, 8-9.

9. At the same time it was making these representations to the District Court, RBC was seeking a fifth extension of its construction permit, telling the Commission that its construction had been "delayed" by a "dispute" with the tower owner, and verifying to the Commission that it remained financially qualified and was ready, willing and able to construct its station. Jt. Ex. 2. Although the Commission granted RBC a fifth extension based on these representations, RBC undertook no construction during the six-month extension period, and applied for a sixth extension on June 25, 1991, again representing that its construction was delayed by the dispute with the tower owner. RBC only began construction in 1993 -- after the District Court denied RBC's motion for a preliminary injunction in *Rey v. Guy Gannett Publishing Co.*, 766 F.Supp. 1142 (S.D. Fla. 1991), and after Mr. Rey saw signs that the economy was picking up and came to believe that a sixth television station could be viable in the Orlando market.

10. The tower litigation misrepresentation issue, the financial misrepresentation issue, and the extension/waiver issue all arise from these facts. The *I.D.*, however, completely ignored these dispositive facts, and erred as a matter of fact and law in finding for RBC on these issues.

**A. RBC Should Be Disqualified Because It Misrepresented and/or Lacked Candor In Describing The Nature Of The Tower Litigation**

11. At the hearing, Mr. Rey conceded that after the Supreme Court denied rehearing in *Metro Broadcasting* on August 30, 1990, there was no pending litigation

concerning RBC's construction permit. Tr. 762. At that point, there was no valid reason for RBC not to construct. Tr. 763. Nevertheless, it is undisputed that RBC undertook no construction at all during the remainder of the fourth extension period, and during the entirety of its fifth extension period -- encompassing the period from August 30, 1990 through August 5, 1991 (the expiration date of RBC's fifth extension of time to construct). RBC sought to excuse its failure to construct during this critical period solely on the ground that the tower dispute with Gannett precluded it from constructing. Jt. Exs. 2 & 3. But, the record evidence shows that this representation was not true and RBC knew it was not true. Specifically, the evidence clearly shows that RBC's failure to construct during this time period was the result of RBC's unwillingness -- not inability -- to build. *See, e.g.*, Tr.. 780-81, 790, 872, 888, 916, 989; *see also* Press Ex. 9, pp. 9, 12-14.

12. This compelling evidence, which was completely ignored by the *I.D.* in the findings and conclusions on the tower litigation misrepresentation issue (*see I.D.*, ¶¶ 60-88, 113-116), required a denial of RBC's two extension applications because "a permittee who postpones construction solely for economic considerations is deemed to have exercised its independent business judgment and the failure to construct is not attributed to circumstances beyond the permittee's control." *Hymen Lake*, 56 FCC 2d 379, 381 (Rev. Bd. 1975). *See Chester P. Coleman*, 12 FCC Rcd 3330, 3334 ¶ 10 (1997) ("*Coleman*"), *appeal pending sub nom. Coleman v. FCC*, No. 97-1205 (D.C. Cir., docketed March 31, 1997) ("private business decisions do not constitute circumstances beyond an applicant's control"); *Kin Shaw Wong*, 11 FCC Rcd 11928, 11935 ¶ 16 (1996) ("*Wong*") (decision not to construct was "motivated by business judgment rather than by matters beyond [permittee's] control"). *See*

discussion at pp. 22-23 below.

13. In *Press*, the Court of Appeals concluded that "substantial and material questions of fact exist[ed] regarding Rainbow's representations, contained in its January 1991 extension request, about its . . . failure to construct." *Press*, 59 F.3d at 1371. The Court held that the "tower dispute was [RBC's] sole basis for its petition." *Id.* (emphasis added). The Court explained that, "Although we have recognized that questions of misrepresentation are ordinarily within the province of the Commission, . . . the FCC's conclusion [9 FCC Rcd at 2847 ¶ 43] that no material question of fact existed because '[RBC] did not . . . represent to the Commission that **the tower dispute precluded it from constructing,**' . . . is so flatly inconsistent with the clear import of [RBC's] representation as to require further proceedings." *Id.* (emphasis added).

14. The record evidence shows (a) that the Tower Litigation was initiated by RBC,<sup>4</sup> and (b) that it did not prevent RBC from going forward with construction of its station, and RBC knew it. The evidence also shows that RBC decided not to construct until the local economy improved. This decision was based on Mr. Rey's pessimism about the economy in late 1990-mid 1991 and the low value of RBC's construction permit if RBC was the sixth station in the market. *See* p. 4 above. Therefore, the *I.D.* should have concluded that RBC intentionally misrepresented the nature of the tower litigation in its extension applications. At the very least, the record establishes that RBC was lacking in candor about

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<sup>4</sup> Contrary to the *I.D.* (¶ 77 n. 10), this important fact was not disclosed by RBC in either of the captioned extension applications. *See* Jt. Exs. 2 & 3. Instead of revealing the title of the litigation, which would have disclosed that the lawsuit was brought by RBC and its principals against Gannett and others, RBC took the unusual step of stating only the case number of the action without disclosing the names of the litigants. *Id.*

the effect of that litigation on RBC's ability to construct.

15. The *I.D.* (§§ 78 & 79) accepted Mr. Rey's testimony that, in his mind, RBC was prevented from going forward with construction during the pendency of the motion for a preliminary injunction in the Tower Litigation because of something the District Judge (Judge Marcus) said at a prehearing conference in the case. Mr. Rey testified that he believed RBC was precluded from constructing between late November 1990 and June 1991. Tr. 732-33. Mr. Rey also testified that RBC could not build without the landlord and the landlord wasn't talking to RBC at the time. However, as demonstrated below, the record shows that Mr. Rey's testimony was not credible and must be rejected.<sup>5</sup>

16. RBC's dispute with Gannett did not preclude RBC from constructing its station. In the prophetic words of the Video Services Division ("VSD") of the Mass Media Bureau in 1993, "the dispute with Gannett was not over whether [RBC] could construct but rather over whether it could prevent a competitor [Press] from utilizing its site. It was only after [RBC] failed to obtain a preliminary injunction against Gannett that it initiated steps toward construction." Jt. Ex. 8, p. 3.<sup>6</sup> Thus, far from relying on some notion that Gannett was preventing RBC from constructing, RBC's **allegations in the civil suit** demonstrated that there was absolutely no impediment to RBC's construction whatsoever. See Press Ex. 9 (Verified Complaint in *Rey v. Gannett*). Moreover, approximately one month before RBC told the Commission that construction had been "delayed" because of a "dispute" with the

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<sup>5</sup> The *I.D.* made no credibility or demeanor findings on any of the issues.

<sup>6</sup> The staff recognizes that the VSD's decision was later reversed by the Chief of the Bureau; however, the VSD's initial reaction to RBC's extension applications was essentially correct because it is now borne out by the record in this proceeding.

tower owner, Mr. Rey testified under oath in December 1990 in the Tower Litigation that he recognized that RBC could construct at any time if it so chose. Press Ex. 17, p. 2. See Tr. 848, 856. Inexplicably, the *I.D.* completely ignored this startling testimony.

17. Although Mr. Rey attempted to explain this testimony at the hearing, his testimony at the hearing cannot be credited. Mr. Rey testified that he believed RBC could not construct the station during the pendency of RBC's motion for a preliminary injunction because of an order by Judge Marcus directing the parties to maintain the status quo. Tr. 733. However, this testimony is belied by (a) Mr. Rey's deposition testimony in the Tower Litigation, and (b) documentary evidence in the record, namely, the transcript of the prehearing conference (Press Ex. 17) and the judge's order itself (RBC Ex. 5), neither of which contains any language barring construction of RBC's station. In addition, Howard Conant, RBC's purported source of financing and an RBC witness (*see* p. 14 below), testified that Mr. Rey never told him that "the tower litigation legally prevented [RBC] from going forward" with construction. Tr. 701.

18. In any event, RBC stipulated that RBC did not make this claim to the Commission in any of the numerous pleadings it filed in the proceeding before the case went to the Court of Appeals in 1994, Tr. 830, thus diminishing significantly the credibility of Mr. Rey's revisionist testimony at the hearing. Moreover, there is no documentary or testimonial evidence to corroborate Mr. Rey's testimony. The only credible evidence on this matter (Press Ex. 16 & RBC Ex. 5) shows that Gannett and the other defendants in the Tower Litigation were prohibited only from going forward with a lease of space on the tower to **Press**; however, they were not prohibited from going forward with construction of RBC's

facilities.

19. But even if there were such an injunction, Mr. Rey **admitted** that RBC could have removed it simply by voluntarily dismissing its lawsuit and going forward with construction. Tr. 888. Mr. Rey testified, however, that he didn't want to dismiss the case at the time (November-December 1990) because he believed the construction permit would have been "worthless" and he would have "give[n] it back to the FCC." *Id.* The *I.D.* completely ignored this astonishing testimony.

20. Instead, the *I.D.* (§ 114-115) mistakenly placed all of the blame for the failure of RBC to construct during the relevant time period on Gannett -- and, inferentially, on Press.<sup>7</sup> But the record shows that "it was [Gannett's] understanding" from late 1990 through mid-1991 "that [RBC] would not build [its] television station **if Press . . . was allowed on [the Bithlo] tower**" Press Ex. 7, p. 2 (emphasis added). Gannett's understanding was reasonable and consistent with other evidence in the record. *See* Press Ex. 9; & RBC Ex. 7; & pp. 4-5 above. Gannett was being sued by RBC to keep Press off of the top slot of the Bithlo tower and RBC was stating in pleadings and letters to Gannett that it would not be able to construct its station if Press was allowed to occupy the same place on the Bithlo tower. Press Ex. 9; RBC Ex. 7, pp. 10-14. Moreover, RBC admitted that it could have voluntarily dismissed the complaint against Gannett at any time, thus belying its representations to the Commission that the dispute with Gannett precluded it from constructing and that it was ready, willing and able to construct. In addition, RBC was also

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<sup>7</sup> There is no basis on this record for any of the *I.D.*'s adverse findings and observations about Press. *See I.D.*, §§ 79 & 114. These "findings" are speculative at best and are clearly beyond the scope of the issues in this proceeding. *See HDO*, ¶ 9.

challenging Press's proposed move to the Bithlo tower at the Commission and in the Court of Appeals. See *Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations (Clermont and Cocoa, Florida)*, 4 FCC Rcd 8320 (Mass Media Bureau 1989), *aff'd*, 5 FCC Rcd 6566 (1990), *affirmed sub nom. Rainbow Broadcasting Co. v. FCC*, 949 F.2d 405 (D.C. Cir. November 8, 1991). The petition for judicial review in *Rainbow Broadcasting* was filed on December 10, 1990 (official notice requested), which was shortly after RBC filed its complaint in the Tower Litigation. The *I.D.* completely ignored these other efforts by RBC to prevent Press from providing television service to the entire Orlando market from the Bithlo tower. The staff requested official notice of these actions by RBC, but the *I.D.* ignored the staff's request.

21. The *I.D.* concluded (§ 114-115) that, during the period November 1990 - June 1991, construction of the station was delayed by Gannett's unwillingness and/or inability to cooperate with RBC in the construction of the transmission facility pending resolution of the Tower Litigation. Mr. Rey acknowledged, however, that Gannett had solicited important information from RBC in November 1990 (Press Ex. 7), and that RBC had intentionally declined to respond to this request for approximately nine months because of "legal positioning" concerns on RBC's part, Tr. 869, 872. See *I.D.*, § 85 n. 11, which purports to deal with this evidence, but completely misses the point.

22. In other words, the record evidence shows that, when Gannett tried to obtain information from RBC that would have permitted Gannett to go forward with construction of RBC's facilities, RBC did not cooperate with Gannett because of the pending litigation RBC had initiated to prevent competition by keeping Press off of the top slot of the Bithlo tower.

Documentary evidence thus establishes 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 Ex. 7.

23. Mr. Rey also testified that he believed Gannett could not and would not build the transmitter building from November 1990 to June 1991. Tr. 735, 833, 856-58. However, this testimony, which was relied on by the *I.D.* (§§ 78, 114), is contradicted by a statement in a letter dated July 17, 1991, to Mr. Rey from James E. Baker, Vice President-Finance of Gannett, that, "during the last seven months" preceding July 17, 1991 -- *i.e.*, from approximately December 1990 to July 17, 1991, the precise time period during which Mr. Rey testified Gannett was unable and unwilling to construct -- Gannett had "been moving forward with the permitting process for [the transmitter] building addition and negotiations with the contractor for the construction of the building shell." Press Ex. 7, pp. 1-2. Mr. Rey was unable to confirm or dispute the accuracy of Gannett's statement concerning Gannett's construction-related efforts during the period December 1990-July 1991 because "I never asked them. There was no reason to ask them." Tr. 872. Thus, Mr. Rey admitted that he elected not to communicate with Gannett about that topic during that time period and thus had no way of knowing whether Gannett would or would not cooperate with RBC. This evidence undermines essential aspects of the *I.D.*'s findings and conclusions on this issue.

24. The *I.D.* bought Mr. Rey's story hook, line and sinker and improperly absolved RBC of any responsibility for failing to construct during the relevant time period.

According to the *I.D.*'s version of events, Gannett was dragging its feet with regard to construction. As noted above, the record evidence, especially Press Ex. 7, does not support the *I.D.*'s conclusions. Rather, the record -- including even documents on which the *I.D.* purported to rely -- shows that RBC did not construct during the period November 1990 - July 1991 for private business reasons because it did not want to be the sixth television station in the depressed Orlando market. See p. 4 above. The *I.D.* completely ignored this critical evidence about Mr. Rey's state of mind at the time.

25. RBC's misrepresentations and lack of candor regarding the nature of the tower litigation are without question grounds for RBC's disqualification. RBC engaged in deliberate lack of candor, if not outright misrepresentation, in the two extension applications filed with the Commission. "Intent is a factual question that can be inferred if other evidence shows that a motive or logical desire to deceive exists . . . ." *Black Television Workshop of Los Angeles, Inc.*, 8 FCC Rcd 4192, 4198 n. 41 (1993). "[W]here the factual question at issue is the intent of a party, . . . proof of the disputed fact may turn on inferences to be drawn from other facts." *California Public Broadcasting Forum v. FCC*, 752 F.2d 670, 679 (D.C. Cir. 1985). Such inferences may properly be drawn against RBC.

26. Contrary to the *I.D.*'s conclusion (¶ 116), RBC plainly had a motive to deceive the Commission into believing that the Tower Litigation "precluded" it from constructing. Under Section 73.3534 of the Commission's Rules, an extension of a construction permit will be granted only if the permittee has (a) completed construction, or (b) made "substantial progress" in its construction, or (c) been prevented from making progress for reasons "clearly beyond the control of the permittee . . . ." RBC could not satisfy either of the first

two criteria; therefore, it had to persuade the Commission that factors beyond its control had prevented it from constructing.

**B. RBC Should Be Disqualified Because It Misrepresented And/Or Lacked Candor With Respect To Its Financial Qualifications**

27. The *I.D.* erred in failing to find that RBC misrepresented the facts or lacked candor regarding its financial qualifications in its fifth extension application. In that application (Jt. Ex. 2), RBC affirmatively represented that it remained financially qualified and that it was ready, willing and able to proceed with construction upon the conclusion of the Tower Litigation. However, the record shows that at the time he signed that application on behalf of RBC, Mr. Rey firmly believed that availability of any financing for the station was contingent on the success of the pending motion in District Court for injunctive relief to keep Press from the top position on the Bithlo tower. The failure to disclose this contingency to the financing made these affirmative statements a misrepresentation or, at the least, demonstrated a lack of candor.

28. On January 11, 1991, just two weeks before filing the fifth extension application, Mr. Rey testified in the Tower Litigation that the financing for the station was dependent on the successful outcome of the injunction proceedings -- that is, keeping Press off of the top slot of the Bithlo tower:

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

A: I said it has not been reduced to writing because of this. There is an agreement for the financing of the station, and then this hit and everything was put on hold. You asked me that in a deposition. I said that **everything had been put on hold because of this.**

\* \* \* \* \*

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 [Press] gets on that tower, the likelihood is that he will not finance the station.**

Press Ex. 10, pp. 7 & 8-9 (emphasis added).

29. Although the *I.D.* quoted this testimony (¶ 48), the *I.D.* nevertheless found that the financing "was never withdrawn or put on hold." *I.D.* ¶ 108. The *I.D.* erroneously found that the above-quoted testimony meant only that Mr. Conant's agreement to finance the station had not been reduced to writing because of the litigation, and that the oral agreement otherwise continued in full force during the pendency of the preliminary injunction proceeding. *Id.* at ¶¶ 52-53.

30. The conclusion of the *I.D.* that the financing was not "put on hold" is clearly contrary to Mr. Rey's own testimony that "**everything**" had been put on hold because of the litigation. Moreover, the *I.D.* failed to take into account the purpose of the testimony in the Tower Litigation, namely, to establish irreparable harm and to show that there would be no financing available at all if Press were allowed on the Bithlo tower. Plainly, in order to show irreparable harm, Mr. Rey had to show more than merely that the oral agreement had not been reduced to writing. Thus, in the context of the preliminary injunction hearing, the fair -- and only -- import of the statement, "everything had been put on hold because of this," is that the **financing itself** had been put on hold and its continuation was contingent on the litigation's successful resolution. This is also the only reading of the testimony that is consistent with the representations of RBC's verified Complaint in the Tower Litigation (sworn to by Mr. Rey) that, "If Gannett allows Press to broadcast from the top slot and its

aperture on the Bithlo tower, RBC's ability to compete in the Orlando television market will be obstructed to the point that **it will not be able to secure the financing** to build a television station . . . on the Bithlo tower or any other tower in the area." Press Ex. 9, p. 13 (emphasis added). See *id.* at p. 14 ("No financing **will be** available to build and operate the station . . .").

31. The *I.D.* also erred in failing to keep focused on Mr. Rey's state of mind during January 1991. Instead, the *I.D.* drifted to a discussion of the views of RBC's purported financier, Mr. Conant (*I.D.* ¶¶ 54-57, 110),<sup>8</sup> and the fact that Mr. Conant reconfirmed his financing commitment without qualifications later in the Spring of 1991 when the economy picked up (*I.D.* 58). But the critical issue under the *HDO* is whether RBC misrepresented the facts and/or lacked candor in its fifth extension application. Thus, the emphasis of the *I.D.*, that Mr. Conant may have been more optimistic than Mr. Rey about the prospects of RBC in the market (*I.D.* ¶¶ 53, 110), is irrelevant. All that is important is what Mr. Rey believed Mr. Conant would do as of the time RBC filed its fifth extension application. On that question, the record shows that Mr. **Rey** believed that Mr. Conant would not finance the station if Press were on the top slot of the Bithlo tower, Tr. 795, and that Mr. Rey held that belief at the time he signed RBC's fifth extension application, Tr. 781-82.

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<sup>8</sup> In characterizing Mr. Conant's state of mind the *I.D.* (¶¶ 54-57) did not give adequate weight to Mr. Conant's testimony that he told Mr. Rey that he (Conant) would take a "wait and see" attitude about financing the station depending on the outcome of the case. Tr. 754. This statement also can only be construed to mean that the financing itself (not merely reducing it from an oral to a written agreement) was on hold and contingent on the success of the injunction.

32. Thus, the testimony is clear that when he signed RBC's fifth extension application, Mr. Rey believed that the financing was "on hold," was contingent on the successful outcome of the Tower Litigation, and that "the likelihood was that [Mr. Conant] would not finance the station" if Press succeeded in getting on the tower. Yet, none of these material contingencies was disclosed to the Commission. Instead, RBC **affirmatively** told the Commission that all of its past representations remained true and correct (Jt. Ex. 2, p. 1), and further represented that it was "ready, willing and able" to commence construction upon the conclusion of the litigation without further qualification (Jt. Ex. 2, p. 2). Candor and accuracy would have required RBC to disclose to the Commission in its fifth extension application that its financing was "on hold" "pending the resolution of the Tower Litigation" and that RBC was prepared to go forward with construction *only* if RBC was successful in keeping Press from becoming the fifth station in the market.

33. The *I.D.* (§109) found that there was no duty under Section 1.65 of the Commission's Rules to disclose these material contingencies in the extension application because they had not yet ripened. But the *I.D.* focused on the wrong legal standard. It is the affirmative misrepresentations of RBC in its fifth extension application -- not a failure voluntarily to come forward under Section 1.65 -- that is the focus of this proceeding. Regardless of whether or not RBC would otherwise have been obligated under Section 1.65 to come forward voluntarily to disclose the contingency in the absence of the filing of its extension application,<sup>9</sup> RBC violated Sections 1.17 and 73.1015 of the Commission rules

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<sup>9</sup> Indeed, the *I.D.* is incorrect in its holding that the change in RBC's financial qualifications was not sufficient to trigger a filing obligation under Section 1.65 even in the absence of the filing of an extension application. Mr. Conant's financing commitment

when it affirmatively misrepresented the true facts, or, at a minimum, lacked candor in its statements to the Commission in support of its application. *See The Lutheran Church/Missouri Synod*, 12 FCC Rcd 2152, 2162-63 ¶ 19 (1997) ("*Lutheran Church*"), *appeals pending*, Nos. 97-1115 & 97-1116 (D.C. Cir., docketed February 28 and March 3, 1997). In the words of the Commission:

The essence of lack of candor is concealment, evasion, or other failure to be fully informative. The duty of candor requires applicants to be fully forthcoming as to all facts and information that may be decisionally significant to their applications. Broadcasters are held to "high standards of punctilio" and must be "scrupulous in providing complete and meaningful information" to the Commission.

*Id.* (citations omitted).

34. Moreover, the contingencies to Mr. Conant's purported oral loan agreement made it impossible for RBC to state categorically that it continued to be financially qualified. In *Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166 (1980), the Commission held that where an applicant relies on a promise of a loan there must be "a **present firm** intention to make a loan future conditions permitting." *Id.* at 167. (emphasis added). Mr. Rey's testimony in the Tower Litigation that "everything" is "on hold," and that future financing was dependent on obtaining an injunction against Gannett in the Tower Litigation simply

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changed from an unconditional commitment to one conditioned on the fact that RBC must be the fifth station in the market. Such a major change is of "decisional significance," and must be timely reported to the Commission. *See Texas Communications Limited Partnership*, 6 FCC Rcd 5191, 5192 (1991) (applicant lacked due diligence in reporting change in financial qualifications); *Henry R. Malloy, Jr.*, 10 FCC Rcd 9369, 9372 (ALJ 1995) (failure to report change in financial capability of sole financial backer).

cannot be squared with the requisite “present firm” intention required by the Commission.<sup>10</sup>

**C. RBC’s Fifth and Sixth Extension Applications Should Be Denied Because RBC Failed to Show That Its Failure to Construct Was Due to Reasons Clearly Beyond Its Control**

35. In *Press*, the Court of Appeals concluded that the Commission could not grant RBC’s application to extend its construction permit on the ground that RBC was not afforded the “normal” 24-month construction period provided by Section 73.3598 and thus did not need to make the showings ordinarily required of applicants by Section 73.3534. The Court held that the 24-month construction period ran from the date of the original construction permit rather than of actual construction or of any subsequent extension, and that the Commission’s 1994 decision, 9 FCC Rcd 2839, arbitrarily relieved RBC of its obligations under the pertinent Commission rules. *Press*, 59 F.3d at 1371-72.

36. Despite these admonitions, the *I.D.* concluded (§ 126) that the extension/waiver issue should be resolved in RBC’s favor primarily because it did not get the normal 24 months to which it was entitled by the rules and also because it demonstrated that an extension was justified under Section 73.3534(b). The first conclusion is contrary to the Court’s holding in *Press* (*see HDO*, § 7) and the second holding is contrary to the record

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<sup>10</sup> The *I.D.* (§ 112) makes much of that fact that the District Court denied a preliminary injunction in part on the finding that RBC did not have a legally binding agreement for financing, whereas the Commission recognizes that oral agreements can provide the necessary reasonable assurance of financing. But the staff is not asserting that a written agreement is necessary under Commission policy to establish an applicant’s financial qualifications. Rather, the staff is arguing that the material contingency in the continuation of the purported oral agreement by Mr. Conant in this case should have been disclosed to the Commission in the fifth extension application and that the failure by RBC to do so fails the Commission’s stringent test for honesty and candor. *See Lutheran Church*, 12 FCC Rcd at 2162-63 § 19.