

evidence.

37. The *I.D.* completely ignored the Court's holding in *Press* when it concluded (¶ 126) that RBC was "entitled" to an unfettered two years to construct after August 1990, when judicial review in the licensing proceeding was complete. This argument was considered and firmly rejected by the Court of Appeals in *Press*, 59 F.3d at 1371-72, and thus must be rejected here. In the words of the Court, RBC "was unquestionably required to apply and qualify for an extension." 59 F.3d at 1372. It was error for the *I.D.* to conclude that RBC "received far less than the full 24 months to which it was entitled," *I.D.*, ¶ 126, because, in the words of the Court of Appeals, it "arbitrarily relieve[ed] [RBC] of its obligations under" Section 73.3534. 59 F.3d at 1372. See *Coleman*, 12 FCC Rcd at 3332 ¶ 7. The Court's decision is the law of the case and RBC is bound by it.¹¹ In any event, RBC did not construct within two years of the Supreme Court's order denying rehearing in *Metro Broadcasting*, and when RBC finally got around to constructing in 1993, it took only 7½ months to get the station on the air. Tr. 981-82.

38. RBC also failed to show that its extension applications should be granted pursuant to Section 73.3534(b) of the Commission's rules or pursuant to a waiver (*i.e.*, equitable) theory. Under Section 73.3534(b), broadcast station construction permits will be extended only in one of three circumstances: (1) construction is complete and testing is underway looking toward prompt filing of a license application; (2) substantial progress has been made; or (3) no progress has been made for reasons clearly beyond the control of the

¹¹ See *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir.), *cert. denied*, 116 S.Ct. 180 (1995); *Northwestern Indiana Tel. Co. v. FCC*, 872 F.2d 465, 471 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1035 (1990).

permittee and the permittee has taken all possible steps to expeditiously resolve the problem and proceed with construction. The Commission adopted these strict criteria for extensions in 1985 and gave explicit notice of its determination to limit construction permit extensions to only those permittees that could make a satisfactory showing under one of the three criteria in Section 73.3534(b). *In the Matter of Amendment of Section 73.3598 and Associated Rules Concerning the Construction of Broadcast Stations*, 102 FCC 2d 1054 (1985) ("*Construction of Broadcast Stations*"). It is also well established that extension applications are to be evaluated based upon events that occurred during the most recent construction period. *See, e.g., Mansfield Christian School*, 10 FCC Rcd 12589, 12590 (1995). In this case, the most recent construction period was August 30, 1990 - August 5, 1991.

39. The decision by RBC not to build its station **during this period**, when, by its own self-serving calculations, it had a "free and clear," "final" and "valid" construction permit was "at odds with the Commission's policy to encourage permittees to build in a reasonable time or to risk cancellation of their permits." *Wong*, 11 FCC Rcd at 11935 ¶ 17, citing *Construction of Broadcast Stations*, 102 FCC 2d 1054. The Tower Litigation -- which was the sole basis advanced by RBC for an extension -- was initiated **by RBC**, not by Gannett, and the purpose of the litigation (as well as RBC's contemporaneous litigation in the D.C. Circuit in *Rainbow Broadcasting Co. v. FCC*, 949 F.2d 405) challenging the Press channel swap) was to prevent competition by keeping Press off of the top slot of the Bithlo tower. The pendency of the Tower Litigation did not -- by any stretch of the imagination -- "preclude" RBC from constructing, as RBC said it did.

40. Since RBC twice made the representation to the Commission that the litigation

precluded it from constructing, and since this was the only basis alleged by RBC for its failure to construct, RBC was required to demonstrate at the hearing that the litigation affected its ability to construct "in order to justify an extension based upon the pending litigation." *Wong*, 11 FCC Rcd at 11935 n. 9, citing *Press*, 59 F.3d 1365; and *HDO*, 11 FCC Rcd at 1168. *See* Section 73.3534(b)(3). RBC did not make such a showing at the hearing.

41. Whether or not a delay in construction is a matter within the applicant's "control" turns largely on the particular factual pattern presented. The Commission has consistently held that a permittee that postpones construction solely because of economic considerations is considered to have exercised its independent business judgment, a circumstance within the permittee's control and, therefore, not a basis for granting an extension. *See Coleman*, 12 FCC Rcd at 3334 ¶ 10; *Wong*, 11 FCC Rcd at 11935 ¶ 16; *Hymen Lake*, 56 FCC 2d at 381; *Joe L. Smith, Jr.*, 5 RR 2d 582, 589-90 (1965); *The Thames Broadcasting Corp.*, 29 FCC 1110, 1113 (1960) ("*Thames*"). In past cases, the Commission has viewed unfavorably extension requests when delays were occasioned by: depressed business conditions, *see Hymen Lake*, 56 FCC 2d at 381; the applicant's interest in avoiding competition from other broadcast facilities in the same market, *see Community Service Telecasters, Inc.*, 6 FCC Rcd 6026, 6028 (1991); and the applicant's belief that its proposed station represented a poor financial risk, *see, e.g., Thames*, 29 FCC at 1113.

42. In this case, Mr. Rey testified at length about the depressed business conditions in the Orlando market in late 1990 - mid 1991 (Tr. 753, 989); RBC's strong desire to avoid competition from *Press* (Tr. 780-81,790); and his belief that, during the

relevant construction period (August 1990 - August 1991), RBC's station was "worthless" and represented a poor financial risk (Tr. 780, 790). Therefore, the *I.D.* cannot be squared with the numerous cases cited above as well as more recent extension cases. The *I.D.* should have concluded that the decision by RBC not to construct during the period August 1990 - August 1991 was an exercise of independent business judgment and, as such, the postponement was clearly due to causes under the permittee's control. See *Coleman*, 12 FCC Rcd at 3334 ¶ 10; *Wong*, 11 FCC Rcd at 11935 ¶ 16; *Carolyn S. Hagedorn*, 11 FCC Rcd 1695, 1696 ¶¶ 16-20 (1996) ("*Hagedorn*"); *Deltaville Communications*, 11 FCC Rcd 10793, 10798 ¶ 12 (1996) ("*Deltaville*").

43. Contrary to the *I.D.*'s conclusions (¶ 127), RBC's meager construction efforts during the critical time period, August 1990 - August 1991 (*i.e.*, writing a few letters to Gannett and contacting equipment suppliers for price quotes), when it had a valid, unexpired construction permit did not justify a further extension of the construction permit under Section 73.3534(b)(2). That rule requires **substantial and sustained progress** toward construction. "Substantial progress" is defined in the rule as a "demonstration that equipment is on order or on hand, site acquired, site cleared *and* construction proceeding toward completion." Section 73.3534(b)(2) (emphasis added). RBC did not do all or most of these things; therefore, it cannot benefit from the rule.

44. RBC did not claim in either of its captioned extension applications that it was entitled to an extension because it had made "substantial progress" toward construction. See Section 73.3534(b)(2) of the Commission's rules. Its entire case for an extension rested on the claim that the Tower Litigation precluded it from constructing. Jt. Exs. 2 & 3. See

Press, 59 F.3d at 1371; *Hagedorn*, 11 FCC Rcd at 1696 ¶ 13 (1996) ("an applicant must either take the initiative to present its case fully and completely at the outset, or bear fully the risk that its showing will be found inadequate"). *See also Deltaville*, 11 FCC Rcd at 10797 ¶ 10. It was not until RBC filed a supplement to its sixth extension application on November 27, 1991 that RBC claimed that it had made some progress toward construction by building a transmitter building at its transmitter site and "engag[ing] in final equipment selection." Jt. Ex. 5, p. 2. RBC also repeated its promise to "be operational by December 1992," *id.*, a promise it did not keep.

45. The *I.D.* also concluded that there was an "uncertainty" in this case which excused RBC from constructing after the Supreme Court denied rehearing in *Metro Broadcasting*. To support this erroneous conclusion, the *I.D.* cited (¶ 120) *Channel 16 of Rhode Island, Inc. v. FCC*, 440 F.2d 266 (D.C. Cir. 1971). But that case was decided 14 years before the Commission adopted its strict policy concerning construction permit extensions that is now in effect, *see* p. 21 above, and does not provide binding precedent in this case. Moreover, the Court of Appeals refused to disturb the Commission's holding that the permittee's failure to reactivate its station in light of proposed competitive cable television operations did not result from circumstances beyond its control. 440 F.2d at 274. Rather, the Court held that in the circumstances of that case there were "other matters sufficient to justify the extension," *id.* at 275, a separate consideration no longer considered relevant by the Commission in construction permit extension cases. *See Construction of Broadcast Stations*, 102 FCC 2d 1054.

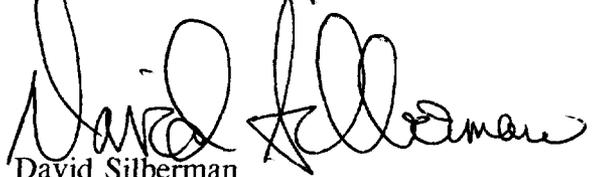
46. The *I.D.* concluded (¶¶ 121-122) that the "uncertainty" cited by the Court in

the *Channel 16* case somehow excused RBC from going forward with construction after August 30, 1990, because there was a similar "uncertainty" in this case. However, there was no uncertainty concerning the finality of the grant of RBC's construction permit as of August 30, 1990. See Tr. 983. As of that date, RBC had a valid construction permit that was no longer subject to Commission or judicial review. Jt. Ex 1, p. 2. At that time, RBC decided not to go forward with construction solely for private business reasons. Uncertainty as to FCC policies had nothing to do with it.

Conclusion

47. Based on the foregoing, the Commission should deny RBC's applications for extension of time to construct, dismiss as moot RBC's application for a *pro forma* assignment of its construction permit to RBL, cancel RBC's construction permit, and delete the call sign for RBC's station.

Respectfully submitted,



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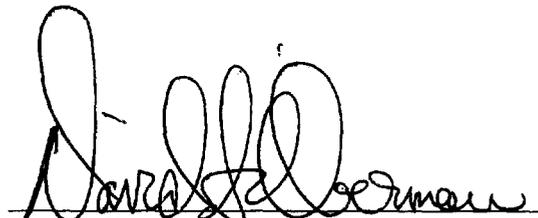
CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Separate Trial Staff's Exceptions to Initial Decision were sent by first class mail, postage prepaid this 16th day of May 1997, to the following:

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