

RBC then understood them,^{9/} the only alternative to attempting to enforce its contract and defend its authorized proposal would have been to abandon its contractual rights, turn its back on half a million dollars spent to hold the 1500 foot antenna slot and accept the lower 1400 foot slot. Aside from its deleterious effects on RBC's service proposal, such a decision would have required filing an application for modification of its construction permit and initiating a course of action certain to cause further delay and, no doubt, further controversy. STS/Press suggest no reason why it would be better policy for the Commission to prefer the delay engendered by its own reconsideration of an inferior proposal to that entailed in RBC's litigation on behalf of its authorized proposal.

32. In raising the question of the availability of waiver consistent with the *Press Broadcasting v. FCC* decision, STS and Press are excepting to the Commission's *HDO*, not the ALJ's *Initial Decision*: Designated Issue 4 specifically contemplated a determination whether RBC has demonstrated that grant of a waiver of Section 73.3598(a) is justified. It is just such a demonstration that the

^{9/} It was RBC's understanding and belief at this time, on the advice of its technical consultants, that it was not possible as an engineering matter for two UHF stations to share the 1500 foot slot. (Tr. 975).

ALJ considered, finding that precedent and equitable considerations warrant waiver for an applicant given less than 24 months to construct.

33. In any event, however, the suggestion that either the ALJ or the HDO mistakenly allowed for consideration of a waiver in light of the Court's *Press* opinion is manifestly incorrect. Rather than foreclosing waiver under Section 73.3534, the Court specifically contemplated the possibility that the Commission might determine waiver was warranted and said that the question "may turn on the disputed issue of whether the tower litigation prevented Rainbow from beginning construction." ***Press Broadcasting, supra***, 59 F.3d., at 1372. The Court did not evaluate, much less reject, Rainbow's showing in that regard; it simply rejected the Commission's original belief that such a showing was not required. Accordingly, the issue was designated and Rainbow made a full showing of the circumstances supporting waiver. In evaluating that showing the ALJ concluded not only that RBC had not had the normal construction period (*I.D.*, Conclusion 126), but also that it had made every effort to construct "during the brief period that it held a valid construction permit" and was precluded from doing

so by the tower owner, with the possible collusion of Press. (I.D., Conclusion 127).

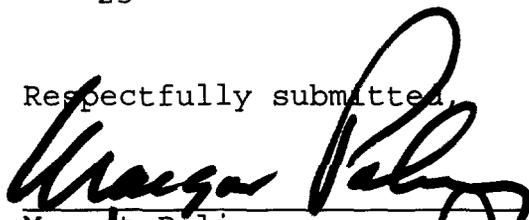
34. The ALJ concluded that RBC had satisfied Issue 4 both by its demonstration that Section 73.3534(b) should be waived and because it satisfied Section 73.3534(b)(3) by showing that progress had not been made due to circumstances beyond the applicant's control-- i.e., that RBC could not go forward with construction until the tower owner acted and the tower owner declined to do so until a lease with Press was signed.^{10/} Aside from their erroneous reading of the Court of Appeals decision, STS/ Press make no objections to the ALJ's favorable resolution of Issue 4 that are not wholly derivative from arguments made and answered here in the context of Issue 3. Accordingly, they offer no ground for disturbing the ALJ's entirely reasonable resolution of this issue.

CONCLUSION

For the reasons stated above and, as to Issue 1, in the Reply to Exceptions filed by Rainbow Broadcasting Company, the Initial Decision of Administrative Law Judge Joseph Chachkin should be affirmed.

^{10/} STS and Press object to this material finding under Issue 3. For the reasons discussed in that argument, those objections are without merit.

Respectfully submitted,



Margot Polivy



Katrina Renouf
RENOUF & POLIVY
1532 Sixteenth Street, N.W.
Washington, D.C. 20036
202.265.1807

Counsel for Rainbow Broadcasting
Limited

29 May 1997

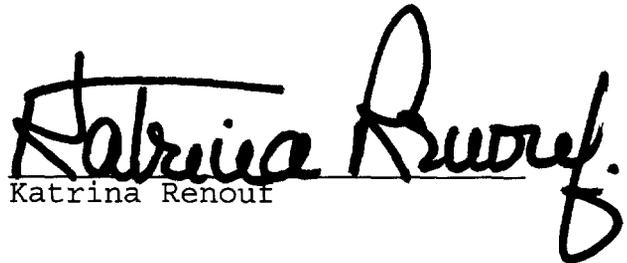
CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Rainbow Broadcasting Limited Reply to Exceptions were sent first class mail, postage prepaid, this twenty ninth day of May 1997, to the following:

David Silberman, Esquire
Stewart A. Block, Esquire
Office of the General Counsel
Federal Communications Commission
1919 M Street, N.W., Room 602
Washington, D.C. 20554

Harry F. Cole, Esquire
Bechtel & Cole, Chartered
1901 L Street, N.W.
Suite 250
Washington, D.C. 20036
Counsel for Press Broadcasting Company, Inc.

Bruce A. Eisen, Esquire
Kaye, Scholer, Fierman, Hayes & Handler
901 Fifteenth Street, N.W.
Suite 1100
Washington, D.C. 20005


Katrina Renouf