

admonition that the proceeding was restricted (Tr. 1018-1021).

Polivy flatly denied Gordon's recollection and testified that the calls were made to ascertain the status of the proceeding (Tr. 397, 415, 469, 506-509).

27. The ALJ concluded that Polivy's testimony was credible, noted Gordon's inability to recall anything that Polivy said during the telephone contacts, and further cited Gordon's failure to make a written report of any ex parte contact as required by the Rules. I.D., par. 101. Press contends that Gordon's testimony must somehow receive greater weight than Polivy's because Polivy's client had a "substantial stake" in the outcome of the proceeding, and because the ex parte allegations involved her personally. Then Press, that paradigm of integrity,¹⁰ argues

¹⁰ The document about which Press complains was found actually to have been in its own files. A full description of the facts surrounding that matter can be located at Transcript pp. 360-363; 949-961. See, also, the ALJ's Memorandum Opinion and Order, FCC 96M-195, released August 22, 1996. Press has no business accusing any person or party of withholding documents. In their petition to deny the renewal of license for Press' station WKCF-TV at Clermont, Florida, the Rainbow principles showed that Press had deliberately failed to disclose the contents of a settlement document which was a critical part of an intraband exchange of television channels approved by the Commission in 1990. The concealed document was intended to further a tax fraud. Press was aware that its production would have prevented it from securing Channel 18 at Clermont, and RBC remains confident that the Commission will acknowledge Press' broadcast-related wrongdoing and designate the renewal

(continued...)

that Polivy might have withheld a document in discovery so that her veracity is in doubt.

28. Press is in error. The ALJ weighed the evidence and reasonably held that Gordon's complete inability to recall the substance of his conversations with Polivy could not result in an adverse conclusion regarding Polivy's intentions. I.D., par.

101. Moreover, the staff attorney's failure to follow procedures or to even take notes of their conversations, placed his own fuzzy recollections into such doubt that they could not be credited.

29. The ALJ also properly resolved the question concerning Antoinette Cook Bush's telephone call to Roy Stewart, Chief of the Mass Media Bureau. I.D., par. 95. Miss Bush, senior counsel to the Senate Committee on Commerce and Transportation, had no specific recollection of discussing the merits of RBC's applications in her contact to Stewart. Rather, she testified that she had mentioned RBC's application, tried to jog Stewart's memory of the case by referencing RBC's defense of the minority ownership policy in the Supreme Court, and attempted to get Stewart to provide her with a status update (Tr. 560, 572, 582). Press contends that the "record" before the Commission and the

¹⁰ (...continued)
application for hearing.

Court of Appeals shows that Stewart stated under oath that Bush had asked whether the denial of RBC's applications was consistent with the Commission's minority ownership policy. This, argues Press, was Stewart's position on the matter for a significant period of time and since Bush did not contradict his statement, Stewart's should be credited.

30. As noted previously, there is a basic evidentiary problem with several claims urged by Press and the Separate Trial Staff. Hence, Press discusses, as if it were established law, that any prior pronouncement by the D.C. Circuit regarding this case cannot be revisited. Similarly, it attempts to place significance on extra-hearing statements allegedly offered by Stewart. The ALJ recognized the weakness of this premise. He stated that a Commission ruling "based on the then available evidence, may be revisited when there is additional information on the subject previously unknown to the Commission." I.D., par. 94, citing, Atlantic Broadcasting Company, 5 FCC 2d 717, 721 (1966). The very purpose for the Court's remand was to develop facts on a hearing record so that a reasoned decision could be reached. Press, 59 F.3d 1366, 1372-1373. The only fair way to conclude an administrative hearing is to render a decision based upon record evidence. See, Kiro, Inc. v. FCC, 545 F.2d 204

(D.C. Cir. 1976). The Administrative Procedure Act provides, in pertinent part, as follows:

The transcript of testimony and exhibits, together with all papers and requests filed in a proceeding, constitutes the exclusive record for decision... 5 U.S.C. §556(e).

Stewart, as the ALJ noted, was never called as a rebuttal witness and never tested through cross-examination. Thus, any recollection he might have had regarding Bush's contact with him is wholly outside the record of this proceeding. I.D., par. 95. Press had an ample opportunity to present further evidence, and it is not now entitled to parry with the offer of more evidence not adduced on the hearing record. See, Colorado Radio Corp. v. FCC, 118 F.2d 24,26 (D.C. Cir. 1941); See, also, Thomas W. Lawhorne, 11 FCC Rcd 4635 (Rev. Bd. 199), rev. denied, FCC 96-432, released November 7, 1996. In any event, the ALJ held that even if the Bush-Stewart conversation were held to be a "presentation" under the ex parte rules, the issue would still be resolved in RBC's favor. I.D., par. 96, f.n. 16.

V. Conclusion

31. Neither Press nor the Separate Trial Staff have filed exceptions which could neutralize the ALJ's thorough decision. Neither RBC or any of its representatives ever harbored an

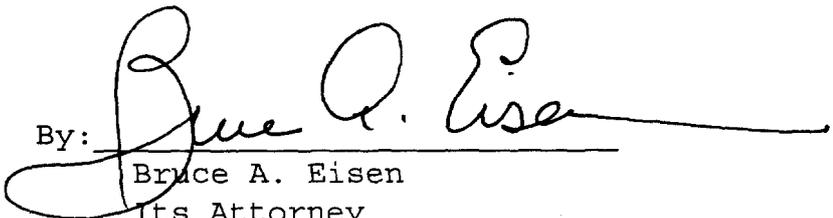
intention to violate the ex parte rules. Indeed, the Commission itself has recognized the lack of clarity which had previously existed with its ex parte rules and has recently amended its rules to cure a number of perceived deficiencies. Nothing in the exceptions undercuts the ALJ's conclusions that at all relevant times RBC was financially qualified to construct and operate its television station as proposed. Moreover, it was never required to report a loss in financing since its lender remained committed to the project. No statements made by RBC to the Commission in connection with certain tower litigation in Florida were accurate and properly used to support RBC's requests for construction permit extensions. Finally, RBC -- like all permittees -- was entitled to a full 24-months to construct its new station, either through a properly granted extension of its construction permit, or through a waiver of Section 73.3598 of the Rules.¹¹

¹¹ Press urges the Commission to require Station WRBW-TV to shut down and, pending final resolution of this proceeding, to return RBC and Rainbow Broadcasting, Limited (RBL) to the status quo as of June, 1993, when the Commission granted the pro forma assignment application from the former to the latter entity. Such a request is inappropriate and not properly before the Commission since the ALJ made no findings or conclusions on the matter. See, Section 1.277(a) of the Rules. Press made a similar argument that was rejected by the ALJ in his Memorandum Opinion and Order, FCC 95M-29, released March 7, 1996. It never sought to appeal that decision. In any event, Folkways Broadcasting Co., Inc. v. FCC, 379 F.2d 447, 449 (D.C. Cir 1967), relied (continued...)

In light of the foregoing, the exceptions to the
Initial Decision should be denied.

Respectfully submitted,

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¹¹ (...continued)
upon by Press, is inapposite, having involved a Commission
grant of temporary operating authorization, something not at
issue here.

CERTIFICATE OF SERVICE

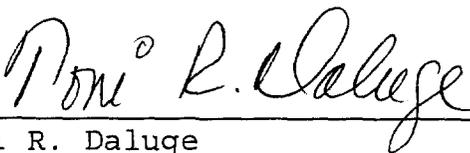
I, Toni R. Daluge, a secretary in the law firm of Kaye, Scholer, Fierman, Hays & Handler, LLP, do hereby certify that on this 29th day of May, 1997, a copy of the foregoing "Reply to Exceptions of Press Broadcasting Company, Inc. and Separate Trial Staff" was sent via United States mail, postage prepaid, to the following:

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