

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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

To: The Commission

OPPOSITION TO MOTION TO STRIKE

Guy Gannett Communications ("Gannett"), by its attorneys, hereby opposes the "Motion to Strike" filed by Rainbow Broadcasting Company and Rainbow Broadcasting, Ltd. (collectively, "Rainbow").^{1/} As is demonstrated herein, Rainbow's Motion is based on nothing more than an unsupported assumption and therefore should be denied.

Rainbow erroneously assumes that since Section 1.223 of the Commission's Rules is silent as to pleading cycles, then the pleading rules for interlocutory hearings (Section 1.294) must apply. Rainbow's Motion, however, fails to explain how it reaches this conclusion, especially when the Commission's Rules and case law dictate that Gannett's Reply should not be stricken.

Rainbow first mischaracterizes Section 1.223 of the Commission's Rules as preventing a petitioner from responding to an opposition to a petition to intervene, when in fact the Rule does

^{1/} Rainbow's Motion to Strike was filed with the Commission on October 22, 1997 and sent to Gannett's attorneys via United States mail. Since this matter is pending before the Commission and pursuant to sections 1.45(b) and 1.4 of the Commission's Rules, Gannett's Opposition is timely. 47 C.F.R. § 1.4, 1.45(b) (1996).

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not discount the possibility of a Reply but merely does not provide for any pleadings one way or another.^{2/} Without any explanation, Rainbow then leaps to the conclusion that the Commission's Rules regarding interlocutory hearings and proceedings control the pleading cycle as to Gannett's Petition. To the contrary, the Commission's Rules dictate that, unless otherwise provided, pleadings in Commission proceedings shall be filed in accordance with the provisions set forth in 47 C.F.R. § 1.45.^{3/} Therefore, since Section 1.223 is silent as to the pleading cycle, Section 1.45 of the Commission's Rules must apply.^{4/} Under 47 C.F.R. § 1.45(b), "[t]he person who filed the original pleading may reply to oppositions within 5 days after the time for filing oppositions has expired." Because Gannett's Reply was a timely response to Oppositions filed against its original pleading, there are no grounds for striking Gannett's Reply.

In addition, Section 1.294 of the Commission's Rules, cited by Rainbow, does not apply to Gannett's Petition, Reply and the instant Opposition because it relates only to interlocutory actions in hearing proceedings. Interlocutory actions are those that are provisional or preliminary and that are made before a final decision which "settle[] some step, question, or default *arising in the progress* of the cause."^{5/} Since the Administrative Law Judge issued an Initial Decision and closed the record, there is currently no matter pending before him. It is

^{2/} Under Rainbow's reading of the Rule, 47 C.F.R. § 1.223 does not even confer a right for a party to file an Opposition.

^{3/} 47 C.F.R. § 1.45.

^{4/} Under these circumstances, Gannett has filed its pleadings, including the present Opposition, in accordance with the 47 C.F.R. § 1.45. See *supra* note 1, *Gannett's Reply to Oppositions to Petition for Leave to Intervene to File Exceptions and Reopen the Record* n.1.

^{5/} 46 AM JUR 2D *Judgments* § 201 (1994) (emphasis added); see BLACK'S LAW DICTIONARY 815 (6th ed. 1990).

evident, therefore, that Gannett's Petition is not arising in the progress of the cause nor is it concerning a provisional or preliminary matter. Instead, Gannett's filings, including this Opposition, concern a matter that is before the Commission pertaining to a concluded hearing. Under these circumstances, it would be wrong to characterize Gannett's filings as interlocutory. Moreover, the Commission's case history runs contrary to Rainbow's argument that Section 1.294 applies to the present circumstances. As recently as 1993 and as far back as 1966, the Commission has accepted replies to oppositions to petitions to intervene and petitions to reopen the record and has not stricken such filings.^{6/} Therefore, should the Commission review and consider Gannett's Reply and instant Opposition, the Commission will be acting wholly consistent with its precedent.^{7/}

Gannett's Reply should not be stricken because it raises significant and material issues the Commission should consider in ruling on Gannett's Petition which will eventually assist in the proper resolution of the matters under consideration. Under these circumstances, the Commission has forgone strict application of its filing Rules and has denied Motions to Strike.^{8/} As detailed in its Reply, Gannett's participation in the proceeding may affect the ultimate

^{6/} See, e.g., *Capitol City Broad. Co.*, 8 FCC Rcd 8478, 8478 n.2 (1993); *Greater Wichita Telecasting, Inc.*, 96 FCC 2d 984, 988 n. 19 (1984); *Great River Broad.*, 11 FCC 2d 885, 885 (1968); *Lamar Life Broad.*, 3 FCC 2d 784, 784 (1966).

^{7/} Even in cases where the Commission has struck replies, it is clear that the present facts are readily distinguishable from those instances. Principal among those distinguishing facts is that each of the petitioners in those cases was a party to the initial proceeding and had ample opportunity and information to prepare their petition. Moreover, the relief sought by petitioners in those cases differs significantly from that sought by Gannett. See, e.g., *La Fiesta Broad. Co.*, 2 FCC 2d 255 (1965).

^{8/} See, e.g., *Portland Communications Corp.*, 46 RR 2d 1235, 1236-37 (1979); *Columbia Broad. Sys Inc.*, 46 FCC 2d 903, 905-06 (1974); *Scripps-Howard Broad. Co.*, 2 FCC 2d 1051, 1053 (1966).

disposition of whether Rainbow Broadcasting Company made misrepresentations regarding the nature of the tower litigation. Moreover the Baker Affidavit will raise substantial and material questions concerning the testimony of Joseph Rey which may affect the disposition of the other issues in the Initial Decision. In essence, without Gannett's Reply, the Commission may be precluded from uncovering facts material to making a decision as to the tower litigation issue and as to the other issues central to the Initial Decision. Therefore, in order for the Commission to achieve both fairness, truth and a completeness of the record in this proceeding, it should follow established Commission precedent and not strike Gannett's Reply.

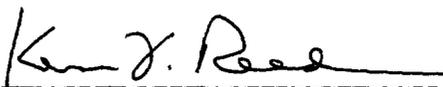
Finally, even if the Commission should find that a petition to intervene is controlled by the filing cycle described for interlocutory pleadings, the Commission should, nevertheless, deny Rainbow's Motion since Section 1.294 does not contemplate the unique circumstances presented by Gannett's Petition. Gannett comes to this proceeding after the release of an Initial Decision as an innocent bystander who was injured by the unsupported conclusions contained in the Initial Decision and who has not been provided an opportunity to correct the record. Gannett was not a party to the proceeding, had no notice that its conduct was subject to question, did not participate as a witness and was not actually notified of the Administrative Law Judge's conclusions upon release of the Initial Decision. Under these circumstances, the Rules concerning interlocutory pleadings should not apply.

In sum, the Commission should not strike Gannett's Reply to Oppositions to Petition for Leave to Intervene to File Exceptions and Reopen the Record for three reasons. First, the Rules and Commission precedent demonstrate that the pleading cycle for Gannett's filings are controlled by Section 1.45 and not by the pleading cycle governing interlocutory pleadings.

Second, the Commission has established a practice of considering filings of significant decisional value which will eventually assist in the proper resolution of matters under consideration. Finally, in the event that the Commission holds that Section 1.223 is controlled by the pleading cycle of interlocutory filings, then the Commission should not strike Gannett's filings due to the unique circumstances presented by its Petition. In light of the foregoing, Rainbow's Motion should be denied.

Respectfully submitted,

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November 4, 1997

CERTIFICATE OF SERVICE

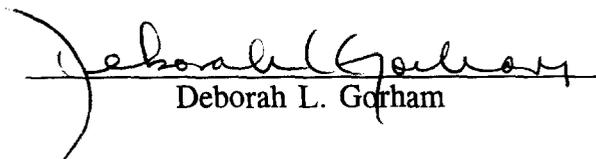
I, Deborah L. Gorham, a legal secretary at Dow, Lohnes & Albertson, PLLC, do hereby certify that on this 4th day of November, 1997, I sent the above "Opposition to Motion to Strike," via first-class mail, postage-prepaid, to the following:

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