

## FEDERAL COMMUNICATIONS COMMISSION

FCC 98-185

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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

## APPEARANCES

Bruce A. Eisen, Allen G. Moskowitz, and Margot Polivy, on behalf of Rainbow Broadcasting, Ltd.; Harry F. Cole, on behalf of Press Broadcasting Company, Inc.; and David Silberman and Stewart A. Block, on behalf of the Separate Trial Staff, Office of General Counsel.

## DECISION

## TABLE OF CONTENTS

	Paragraph
I. INTRODUCTION	1
II. EX PARTE ISSUE	4
III. FINANCIAL MISREPRESENTATION ISSUE	19
IV. TOWER LITIGATION MISREPRESENTATION ISSUE	29
V. CONSTRUCTION ISSUE	39
VI. CONCLUSIONS AND ORDERING CLAUSES	51

Adopted: July 30, 1998 ; Released: August 5, 1998

By the Commission: Chairman Kennard not participating.

## I. INTRODUCTION

1. By this decision, the Commission affirms (and modifies in certain respects) the Initial

Decision ("I.D."), 12 FCC Rcd 4028 (ALJ 1997), of Administrative Law Judge Joseph Chachkin ("ALJ"). We waive 47 C.F.R. § 73.3598(a) and, accordingly, find that Rainbow Broadcasting Company ("Rainbow") constructed Station WRBW(TV), Channel 65, Orlando, Florida in a timely manner. We find that Rainbow did not commit disqualifying misconduct in connection with applications for extension of time in which to construct, but we do impose sanctions for violation of our *ex parte* rules, in the form of a strong admonishment to Rainbow's counsel and an admonishment to Rainbow itself. We also grant Rainbow's application for pro forma assignment of its construction permit to Rainbow Broadcasting Limited ("RBL").

2. This proceeding is before the Commission on remand from the United States Court of Appeals for the District of Columbia Circuit. See Press Broadcasting Co., Inc. v. FCC, 59 F.3d 1365 (D.C. Cir. 1995). The Commission awarded Rainbow a construction permit after a comparative hearing and then granted it a series of extensions of time within which to construct the station. In the order remanded by the court, the Commission granted a sixth such extension over the objection of Press Broadcasting Company, Inc. ("Press"),<sup>1</sup> the licensee of Station WKCF(TV), Channel 18, Clermont, Florida, that improper *ex parte* contacts by Rainbow with staff members of the Mass Media Bureau influenced the proceeding. Rainbow Broadcasting Co., 9 FCC Rcd 2839 (1994). Although it concluded that the Commission's decision was not tainted by the contacts, the court (based on a report by the Commission's Inspector General) rejected the Commission's rationale for not imposing a sanction, finding that Rainbow "could not reasonably have believed" its *ex parte* contacts were permitted because the Commission "had repeatedly informed Rainbow's counsel that it considered the adjudication to be restricted within the meaning of its *ex parte* rules." Press Broadcasting Co., Inc. v. FCC, 59 F.3d at 1370. The court also found that there were substantial and material questions of fact regarding Rainbow's representations, contained in its January 1991 fifth extension request, concerning its financial qualifications and its failure to construct due to a legal dispute with its proposed tower owner. Id. at 1371. Following the remand, the Commission issued a Memorandum Opinion and Order and Hearing Designation Order ("HDO"), 11 FCC Rcd 1167 (1995) (corrected by Erratum, DA 96-156, released February 12, 1996), specifying the following hearing issues:

(1) To determine whether Rainbow 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 Rainbow's behalf, and by meeting Commission staff to discuss the merits of Rainbow's application proceedings.

(2) To determine whether Rainbow made misrepresentations of fact or was lacking in candor with respect to its financial qualifications regarding its ability to

---

<sup>1</sup> On November 24, 1997, Press informed the Commission that it has been succeeded as a party-in-interest by P & LFT LLC. To avoid confusion, we will continue to refer to this entity by its former name.

construct and initially operate its station, in violation of Sections 1.17 and 73.1015 of the Commission's rules or otherwise.

(3) To determine whether Rainbow 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.

(4) To determine whether Rainbow 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.

(5) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Rainbow is qualified to be a Commission licensee and whether grant of the subject applications serves the public interest, convenience and necessity.

The Commission placed the burdens of proceeding and proof with respect to all issues on Rainbow. Finally, the HDO made Press 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 fact that the Mass Media Bureau had recused itself from the proceeding. Id. at 1169.

3. The I.D. resolved all issues, including the ex parte, financial misrepresentation, and tower litigation misrepresentation, in Rainbow's favor, and found that Rainbow was entitled to an extension of time to construct under the hardship provision of 47 C.F.R. §73.3534(b). The ALJ concluded that Rainbow is qualified to be a licensee and that grant of its applications will serve the public interest. In their exceptions, Press and the Separate Trial Staff urge denial of Rainbow's applications; Rainbow and RBL reply that Rainbow is qualified. Press also seeks oral argument. This request is denied because we do not believe such argument would materially assist our resolution of this proceeding.

## II. EX PARTE ISSUE

### Background

4. As more fully described in Section V, below, during the pendency of litigation challenging the Commission's grant of Rainbow's construction permit, the Commission's Mass Media Bureau (Bureau) granted four requests by Rainbow for extensions of time to construct. (Each extension request was granted for only a six month period.) Several months after the litigation was concluded and Rainbow's grant of a construction permit became final, Rainbow, on January 25, 1991, filed a fifth extension request, and the Bureau granted it on February 5, 1991. On February 15, 1991, Press filed an Informal Objection to Rainbow's extension request

and, when it learned the Bureau had already acted on the request, Press filed a Petition for Reconsideration on February 25, 1991. Rainbow counsel Margot Polivy testified that she believed that both of these pleadings by Press were "informal" in nature, and that this fact affected the status of the proceeding under the *ex parte* rules. Rainbow filed a sixth extension request on June 25, 1991 and an application for *pro forma* assignment to RBL on November 29, 1991. *Id.*, 12 FCC Rcd at 4030-31 ¶¶8-11, 13.

5. In October 1991, the Commission sent Polivy a copy of a response from the Office of Managing Director to a letter from one George G. Daniels, regarding the status of the Rainbow extension application under the Commission's *ex parte* rules. The response stated in part (Joint Exh. 4):

Your letter to the Managing Director was forwarded to the Office staff for reply in keeping with the Commission's *ex parte* rules, which deal with communications relative to the outcome of all "restricted" proceedings under consideration by the Commission.

\*\*\*

Because there was a Petition for Reconsideration filed in February 1991 (supplemented June 1991), and an Objection filed in July 1991, of the grant of the application of Rainbow for extension of grant of construction permit in this matter, the proceeding is considered "restricted" until such time as a final Commission decision is made and no longer subject to reconsideration or review by the Commission or the courts. See 47 CFR Section 1.1208.

Polivy testified that she understood the response to mean that under the *ex parte* rules, the proceeding was restricted as to Daniels as an informal party and, hence, he could not make *ex parte* contacts. However, Polivy states she believed that the proceeding was not restricted as to Rainbow as the applicant, based on her comprehension of the-then note to 47 C.F.R. §1.1204(a), which allowed *ex parte* communications by applicants without disclosure, but not by informal objectors, in proceedings in which there are no formal oppositions. *Id.* at 4032-33 ¶¶15-16.

6. Prior to the Bureau's action on Rainbow's sixth extension request, Polivy made several telephone calls regarding the proceeding to Paul R. Gordon, the staff attorney assigned to the case. Gordon stated that, on each of these occasions, Polivy attempted to discuss the merits of the case, but he told her the proceeding was restricted and cut her off when she got beyond a status discussion. He said Polivy repeatedly told him she disagreed with his view on the applicability of the *ex parte* rules. Gordon did not recall what Polivy said about the merits and kept no notes or record of their conversations. Polivy denied that Gordon informed her during the calls that they could not discuss the merits of the proceeding because of the *ex parte* rules. She described the conversations as "aggressive status calls" meant to convey that a decision should not be delayed but which did not touch on the merits. *Id.* at 4033-34 ¶¶ 18-21; Tr. 1018-21.

7. On June 18, 1993, the Bureau's Video Services Division ("VSD") denied Rainbow's sixth extension request and dismissed the assignment application. In late June 1993, after learning of the VSD's decision, Polivy telephoned Antoinette Cook Bush, a friend and former client, who was counsel to the Senate Committee on Commerce and Transportation, and asked her to contact the Commission on Rainbow's behalf. Bush and Polivy did not discuss the status of the proceeding under the Commission's ex parte rules. Polivy asked Bush to "find out what was going on over there" because the Commission had "certainly done something that was different from anything they had ever done." Tr. 523-24. According to Polivy, the purpose of Bush's call would be "to get the attention of the senior [Bureau] staff" so that they would take "seriously" any petition for reconsideration filed by Rainbow. Tr. 519. Polivy understood that, because of Bush's position, her contact was likely to get a response from the Commission, but Polivy did not tell Bush to see if she could get the decision reversed. Bush described Polivy as "upset" at the time Polivy called her. I.D., 12 FCC Rcd at 4034 ¶¶ 22, 25-26; Tr.557.

8. Bush telephoned Bureau Chief Roy Stewart in late June 1993. In an affidavit given to the Inspector General, Stewart stated that Bush pointed out that Rainbow was a minority broadcaster and asked whether the denial of Rainbow's extension application was consistent with Commission policies encouraging minority ownership of broadcast stations. Rainbow Broadcasting Co., 9 FCC Rcd at 2845 ¶32. At the hearing, Bush testified that she considered her brief conversation with Stewart to be a status call within her prerogative as counsel for a Senate committee with FCC oversight responsibilities. She indicated to Stewart she was calling regarding the Rainbow denial and said Stewart did not seem to remember the case even though she attempted to jog his memory by saying that Rainbow was the applicant who defended the minority ownership policy and that the case had gone to the Supreme Court. Bush did not recall asking how the denial was consistent with FCC minority ownership policies and did not request any particular action. She said Stewart told her he would have someone call her back. Stewart himself did not testify but his deposition was admitted into evidence in lieu of his appearance. He was not questioned at his deposition regarding the substance of his conversation with Bush and was not called as a witness to rebut her testimony. I.D., 12 FCC Rcd at 4035 ¶¶ 27-30; Press Exh. 19.

9. On July 1, 1993, Polivy and Joseph Rey, Rainbow's 90% owner, met at the Commission with Stewart and other Bureau staff members, including the Chief of the Video Services Division, the Chief of the Division's Television Branch, the Assistant Chief for Law of the Bureau, and Gordon. Polivy had sought the meeting. Press and its legal representative were not present. The discussion addressed the merits of Rainbow's extension application. Rey attended the meeting at Polivy's request and provided information about what Rainbow had done during its construction period. Prior to the meeting, Rey was not aware of the Managing Director's response to the Daniels letter; Polivy did not send Rey a copy of the response or discuss it with him. Rey also did not know that Bush had contacted the Commission at Polivy's behest and neither he nor his partner, Leticia Jaramillo, personally contacted Bush about the extension application. On the day following the meeting, Rainbow filed a petition for

reconsideration, which the Bureau granted on July 30, 1993. I.D., 12 FCC Rcd at 4031, 4036-37 ¶¶9, 33-34, 36-39; Tr. 382, 717-21. The Commission subsequently affirmed the Bureau's action granting Rainbow a further extension of time. With regard to the ex parte issue, the Commission concluded that, although Rainbow's two contacts involving Bush's call to Stewart and Rainbow's meeting with Bureau staff violated the ex parte rules, no sanction would be imposed because Polivy "apparently sincerely believed that the proceeding was not restricted." Rainbow Broadcasting Co., 9 FCC Rcd at 2843 ¶22.

10. In the I.D., the ALJ noted the Commission's binding ruling that the filing by Press of its Petition for Reconsideration restricted the proceeding for ex parte purposes, see Rainbow Broadcasting Co., 9 FCC Rcd at 2844, but held that the Commission's determination that Bush's call to Stewart constituted a prohibited presentation could be revisited on the basis of new evidence in the record. Specifically, the ALJ found that, because Stewart was not questioned at his deposition on the subject, Bush's testimony about the substance of their telephone conversation was uncontradicted and permitted a conclusion that the call was not a violation of the ex parte rules. The ALJ also credited Polivy's account of her conversations with Gordon, finding that the latter's inability to recall what Polivy said and his failure to make a written report of the contacts as required by 47 C.F.R. §1.1212 undercut his testimony that Policy attempted to discuss the merits of the case. With regard to Rainbow's meeting with Commission staff, the ALJ found that, although this contact violated the rules, no Rainbow principal intended to violate the ex parte rules and that Polivy had an honest, if mistaken, belief that her contacts were permissible. The ALJ accepted Polivy's belief that the proceeding was exempt as to Rainbow based on Polivy's view that Press's pleadings did not constitute formal oppositions as defined in the then-current version of the Commission's ex parte rules. Similarly, the ALJ credited Polivy's understanding that a note to the then-current version of 47 C.F.R. §1.1204(a), listing general exemptions, allowed oral ex parte contacts between Rainbow and the Commission in the context of an unopposed adjudication but barred oral or written ex parte contacts by informal objectors, and accepted her view that the Managing Director's letter to Daniels meant only that the proceeding was restricted as to Daniels because he was not a formal participant. In this regard, the ALJ pointed out that the Commission has recently simplified its rules to eliminate the need to determine whether an opposition is "formal" in order to determine if a proceeding is restricted as to any persons. See Ex Parte Presentations in Commission Proceedings, 12 FCC Rcd 7348 (1997) at ¶¶17-18. Finally, the I.D. concluded that, even if Polivy intentionally violated the rules, Rey did not personally contact the staff and was unaware of Polivy's discussions with Bush and staff personnel prior to the meeting with Stewart, and Commission precedent does not support disqualification in the circumstances presented.

11. In its exceptions, Press argues that Polivy offered no valid explanation for misunderstanding the Managing Director's letter, and never sought clarification from the Commission. Thus, Press maintains, there is no evidence to undermine the court's finding that the letter "left no room for doubt that the FCC considered its ex parte rules applicable to the adjudication." 59 F.3d at 1370. Press further asserts that, although the ALJ made no demeanor

findings, he improperly credited Polivy's testimony over Gordon's even though Gordon, unlike Polivy, had no personal stake in the outcome of the proceeding. In addition, Press argues that the ALJ erroneously found that Stewart should have been called as a witness to rebut Bush's testimony if Press wished to rebut that testimony. According to Press, there was no need to call Stewart as a witness because Bush's and Stewart's accounts were not inconsistent: Bush did not contradict Stewart's prior statements but simply did not remember asking Stewart whether denial of Rainbow's application was consistent with the Commission's minority ownership policy. Press concludes that Rainbow's ex parte activities require its disqualification or, at minimum, denial of its applications. The Separate Trial Staff does not except to the ALJ's resolution of this issue. Rainbow, supported by RBL, replies that the ALJ correctly held that its principals had no involvement in ex parte violations, and that its counsel had an honest belief that the proceeding was not restricted and that her contacts with the Commission's staff were allowable.

### Discussion

12. The issue to be decided is whether Rainbow knowingly violated the Commission's ex parte rules and, if so, whether its conduct warrants disqualification. As the Commission stated in authorizing the taking of oral depositions of the Bureau employees who participated in the July 1, 1993 meeting with Rainbow, the issue goes to "whether Rainbow believed the contacts to be consistent with the Commission's ex parte rules and whether it intentionally violated sections 1.1208 [which prohibits ex parte presentations in restricted proceedings] and 1.1210 [which prohibits the solicitation of others to make ex parte presentations] by soliciting a third party contact on its behalf and by meeting with Bureau staff to discuss the merits of the Bureau's denial of its extension request." Rainbow Broadcasting Co., 11 FCC Rcd 8927, 8929 ¶8 (1996). In determining whether Rainbow believed its conduct violated the rules, a key consideration is "Rainbow's understanding of the applicability of the ex parte rules to this proceeding." Id. at 8929 ¶11.

13. We uphold the ALJ's basic conclusion that the conduct at issue was not disqualifying, but we modify his findings in two respects. First, in addressing the issue, the ALJ recognized that he was bound by the Commission's finding that Press's February 1991 Petition for Reconsideration of Rainbow's fifth extension application restricted the proceedings under the then-applicable version of 47 C.F.R. §1.1208. Nevertheless, he concluded that he could revisit the Commission's ruling that Bush's call to Stewart was a presentation under 47 C.F.R. §1.1202(a) -- a communication addressing the merits or outcome of the proceeding -- on the basis of new evidence in the record. In this regard, the ALJ noted that, whereas the parties stipulated that the discussion at the July 1, 1993 meeting was an impermissible presentation, they did not agree to a similar stipulation regarding Bush's call to Stewart. We disagree with the ALJ that, because Stewart was not called for rebuttal, the present record requires a conclusion different from that previously reached by the Commission.

14. In concluding that Bush's call to Stewart was not a presentation, the ALJ emphasized

that Bush's testimony was uncontradicted. Bush's testimony is not necessarily supportive of the conclusion that there was no presentation, however. Bush did not deny that she asked Stewart whether denial of Rainbow's extension application was consistent with the Commission's minority ownership policies; rather, she stated only that she did not recall doing so. Tr. 572-73; 583-84. Hence, even if Stewart had testified, there would have been nothing in Bush's testimony for him to rebut. Furthermore, Polivy's own testimony that she wanted Bush to "find out what was going on" because the Commission had "done something that was different" from anything it had done before, and her understanding that Bush's position made it likely she would "get the attention" of the senior staff so that Rainbow's position would be taken "seriously" if it filed a petition for reconsideration, strongly support the conclusion that Polivy intended Bush to deal with the merits of the application in her phone call. We therefore believe the weight of the evidence, including Stewart's affidavit, supports the Commission's prior conclusion that the call was intended to show support for Rainbow's extension application and, hence, was an ex parte presentation.

15. As to the question of whether Rainbow knew it was violating the ex parte rules, we focus first on Polivy's role as principal actor. She consistently maintained her belief that the proceeding was not restricted because she considered Press's pleadings to be informal in nature. As the court observed, however, the reasonableness of Polivy's view is undermined by the Managing Director's response to the Daniels letter and, to the extent Gordon's testimony is credited, Polivy's conversations with Gordon. The Daniels response plainly describes the proceeding as restricted as a result of the filing of the Petition for Reconsideration and does not suggest that the proceeding is restricted only as to specific parties. Nor does it make reference to the note to the former version of 47 C.F.R. §1.1204(a), upon which Polivy relied for her belief that oral ex parte contacts between Rainbow and the Commission were permitted and which relates to the differing treatment of certain entities in exempt proceedings. While there was no legal requirement to do so, we also note that Polivy never sought clarification of the response from the Commission to support her interpretation. Tr. 411, 416. If we were to reverse the ALJ and credit Gordon's testimony, the reasonableness of Polivy having stuck to her erroneous view of the rules without at least further clarification would be further undermined, although Gordon's testimony does amply support Polivy's claim of a sincerely held view because Gordon confirms that Polivy repeatedly asserted her erroneous legal position in response to Gordon's insistence that the ex parte rules for restricted proceedings applied to the proceeding. As discussed below, we need not decide whether the ALJ was correct in crediting Polivy's testimony over Gordon's because we agree with the ALJ that, even if Polivy intentionally violated the rules, Rainbow should not be disqualified.

16. Nevertheless, Polivy was at the very least on notice from the Office of Managing Director, which then had responsibility with respect to the ex parte rules, that the proceeding was restricted. In our view, therefore, she should have at least sought clarification of the question before proceeding. The failure to do so, even if it did not amount to an intentional violation of the ex parte rules, was sufficiently unreasonable as to warrant a strong admonition that similar conduct should not occur in the future.

17. Our decision here is not dependent on an assessment of Polivy's conduct. Significantly, while Polivy at the very least should have exercised more caution, the record also shows that no Rainbow principal was informed of the staff's warnings or independently engaged in ex parte behavior, and none was aware of or involved in Polivy's ex parte conduct, with the exception of Rey's limited participation at the July 1, 1993 meeting. Specifically, with regard to the Managing Director's letter, it is undisputed that Rey did not know of the Daniels response prior to the July 1 meeting. Similarly, there is no evidence that Rey was aware of any statements Gordon may have made to Polivy that the proceeding was restricted. Nor does the record show that Rey knew either of Polivy's contacts with Bush or that Bush telephoned Stewart. Finally, although Rey attended the July 1, 1993 meeting with Bureau personnel, the meeting was arranged by Polivy. Rey did not personally contact the staff, and he attended the meeting at Polivy's request to provide information on what Rainbow had done during the construction period. Thus, at worst, it appears that Rey acted in ignorance of the impact of the ex parte rules on his attendance at the meeting.

18. Based on the foregoing, we agree with the ALJ's conclusion that, even if counsel were found to have intended to violate the ex parte rules, there are no grounds for finding that any Rainbow principal knowingly did so. We also agree with the ALJ that disqualification is not warranted in these circumstances. Although applicants are bound by the acts of their agents, see Carol Sue Bowman, 6 FCC Rcd 4723 ¶4 (1991); Hillebrand Broadcasting Corp., 1 FCC Rcd 419, 420 n. 6 (1986), and it is axiomatic that they are responsible for knowing and complying with the Commission's rules, these principles do not warrant disqualification of the applicant here. There is no doubt that the violations actually occurred and are attributable to Rainbow. Nevertheless, the applicant's knowledge of the misconduct is a highly relevant factor in determining whether disqualification is appropriate. Centel Corp., 8 FCC Rcd 6162 (1993), petition for review dismissed sub nom. American Message Centers v. FCC, No. 93-1550 (D. C. Cir. Feb. 28, 1994), rehearing denied (May 25, 1994) (carrier not disqualified, despite multiple ex parte violations, where two of the violations were inadvertent and unintentional, and others involved reasonable belief contacts were permissible); see also Voice of Reason, Inc., 37 FCC 2d 686, 709 (Rev. Bd. 1972), recon. denied, 39 FCC 2d 847, rev. denied, FCC 74-476, released May 8, 1974. Significantly, even where intentional ex parte misconduct has been found, the Commission has declined to disqualify applicants where, as here, the incidents were isolated events in the course of a long proceeding. See Pepper Schultz, 4 FCC Rcd 6393, 6403 (Rev. Bd. 1989), and cases cited therein, rev. denied, 5 FCC Rcd 3273 (1990); see also Desert Empire Television Corp., 88 FCC 2d 1413, 1417 (1982) (imposing only modest monetary forfeiture where licensee engaged in willful and repeated ex parte communications on at least three separate occasions). The applicant's conduct here is far less egregious. We agree with the ALJ, therefore, that, on this issue, the present record and Commission precedent do not warrant disqualification of Rainbow or denial of its applications. We, however, issue an admonishment to Rainbow to exercise caution in complying with the ex parte rules.

### III. FINANCIAL MISREPRESENTATION ISSUE

Background

19. In its original construction permit application, Rainbow certified that it was financially qualified. In its January 25, 1991 fifth extension application, Rainbow stated that "[a]ll representations contained in the application for construction permit still are true and correct." Joint Exh. 2; I.D., 12 FCC Rcd at 4038 ¶43. The truthfulness of Rainbow's representation that it continued to be financially qualified is in issue.

20. In November 1990, Rainbow brought suit against Guy Gannett Publishing Company ("Gannett"), the owner of the transmission tower in Bithlo, Florida that Rainbow planned to use, and sought a preliminary injunction to prevent Gannett from leasing space at the top of the tower to Press, which was attempting to move its WKCF(TV) transmitting facilities to that site. Rainbow claimed that it had the exclusive right to use the space under its own lease with Gannett. See Rey v. Guy Gannett Publishing Co., 766 F. Supp. 1142, 1143 (S.D. Fla. 1991). The complaint alleged that, if Press located its antenna at the top of the tower, Rainbow would be irreparably injured, and its construction permit would be rendered "valueless" because Rainbow would "not be able to secure the financing to build a television station for Channel 65 on the Bithlo tower or any other tower in the area." Press Exh. 9 at 9, 13. Relying on the statement of its financial consultant, Susan Harrison, Rainbow explained that there were currently four network-affiliated television stations in the Orlando area, that the market could accommodate only one additional station, that if Press entered the same space on the tower as leased to Rainbow, there would be "two television stations where only one additional station can economically survive on that site," and that "[n]o financing will be available to build and operate the station." Press Exh. 9 at 13-14; I.D., 12 FCC Rcd at 4038-39 ¶¶44-47. At the hearing in this proceeding, Rey testified that he agreed with Harrison's opinion that, if such circumstances developed, the station would be "worthless" because (Tr. 781):

[I]f Rainbow were to be relegated as the sixth station in the marketplace, there was not enough revenues to go around to make that station, the sixth station, that is, viable, and I don't think anybody in their right mind would have put money into something that could not pay for itself.

21. On January 11, 1991, two weeks prior to the filing of Rainbow's fifth extension request, Rey gave the following testimony in the tower litigation regarding the impact of Press's location at the top of the tower on Rainbow's ability to obtain financing (Press Exh. 10 at 6-9):

Q. Who is your financier? Who is loaning you the money for this --

A. Rainbow has an agreement with an investor to build and operate the station. It has not been reduced to writing because of this.

\* \* \*

Q. Who is it?

A. By the name of Howard Conant.

\* \* \*

Q. He 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 has 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 gets on that tower, the likelihood is that he will not finance the station.

The Florida district court denied Rainbow's request for injunctive relief on June 6, 1991, concluding that Rainbow had not demonstrated irreparable harm because, inter alia, "Rainbow . . . has not obtained any financing commitment for the project." Rey v. Guy Gannett Publishing Co., 766 F. Supp. at 1145.

22. The conversation with Conant regarding the status of Rainbow's financing, to which Rey alluded in his court testimony, took place in late 1990 when Rey informed Conant of the tower suit. He told Conant that he believed that, if Rainbow were relegated to the status of the sixth station in the market, the station would be "valueless." Rey was concerned that Press's Station WKCF(TV) would be able to reach a larger market if it relocated to the Bithlo site, and he was also very pessimistic because 1990 was a recession year. I.D., 12 FCC Rcd at 4040 ¶49; Tr. 753, 780-82, 791. Nevertheless, Rey explained in this proceeding that his court testimony that everything was put on hold because of the tower litigation referred only to reducing the oral agreement with Conant to writing and going ahead with construction. He further stated that his testimony regarding Conant's likely unwillingness to proceed with financing should Press locate on the tower really reflected Rey's own state of mind and pessimism at the time, that Conant relied on Rey's advice about the viability of the project and would have lent the money if Rey told him the station could succeed, and that Conant never told him he would withdraw from their financing agreement if the injunction was denied. By the summer of 1991, Rey believed conditions in the market had improved dramatically and he was much more optimistic about the television project, even though the district court had denied Rainbow's request for injunctive relief. Specifically, he believed there was a "big uplift" following the Gulf War, there was talk about a possible new network emerging in the future, and Nielsen was planning to meter the Orlando market, which could result in higher ratings for a new station. I.D., 12 FCC Rcd at 4041-42 ¶¶51-3; Tr. 754-56. Conant confirmed that Rey met with him in late 1990 to discuss Rainbow's progress and said Rey told him the project had become riskier because of the tower dispute. He stated that Rey also questioned whether Rainbow should seek equity financing

instead of relying on Conant. Conant testified that he adopted a "wait and see attitude" because of the tower litigation and the prospect of another television station in the market, but never stated that he would not honor his commitment to Rainbow. Conant repeated his pledge to finance the station in the summer of 1991 after Rey told him that conditions in the Orlando market had improved economically. 12 FCC Rcd at 4042-43 ¶¶55-6, 58. Ultimately, Rainbow decided to rely on equity financing from limited partners to construct the station. *Id.* at 4043 ¶¶58-9.

23. The *I.D.* concluded that Rainbow did not misrepresent its financial qualifications in its fifth extension application because the oral loan agreement with Conant remained intact and was never withdrawn. Even if Conant specified a condition on the loan that Rainbow maintain its exclusive space on the Gannett tower, the ALJ held, Rainbow had no obligation to report this fact under 47 C.F.R. §1.65 because it never lost reasonable assurance of the availability of the Conant loan. In any event, the ALJ accepted the testimony of Rey and Conant that no such contingency existed. Finally, the ALJ concluded that the Florida district court's finding in the tower litigation that Rainbow had not arranged financing has no bearing here because the court apparently required Rainbow to prove the existence of a binding written loan agreement in order to obtain a preliminary injunction, whereas the Commission accepts oral financial commitments and only requires reasonable assurance that a loan will be available.

24. In its exceptions, Press argues that Rainbow's representation in its fifth extension application that it was financially qualified was contrary to its simultaneous assertion in the tower lawsuit that, absent an injunction, it would be unable to secure financing. Rainbow's representation is also suspect, Press alleges, because Rainbow did not claim that financing was available from Conant in its Opposition to Press's Petition for Reconsideration of the Commission's grant of Rainbow's fifth extension application, Rey's testimony in the tower suit did not mention any of the terms of the oral commitment from Conant, and Conant did not have a past financial relationship with Rainbow's principals. Finally, Press contends, since Rey testified at the hearing that Conant's commitment depended on Rey's view that the project was viable, Rey's belief in early 1991 that construction would be "worthless" undermined the reliability of the commitment. The Separate Trial Staff posits in its exceptions that Rainbow's failure to disclose in its fifth extension request that the availability of its financing was contingent on its success in obtaining injunctive relief in the district court demonstrated a lack of candor. The Staff asserts that the ALJ erroneously read Rey's testimony in the tower litigation to mean that the only thing being held up by the suit was the reduction to writing of the financing, rather than the financing itself. In the Staff's view, the *I.D.* also erred in emphasizing that Conant reconfirmed his commitment to Rainbow in the summer of 1991 instead of focusing on Rey's state of mind in January 1991 when Rainbow filed its fifth extension request. Lastly, the Staff argues that the ALJ applied the wrong legal standard by discussing Rainbow's reporting obligations under 47 C.F.R. §1.65 instead of questioning whether Rainbow misrepresented or lacked candor in violation of 47 C.F.R. §§1.17 and 73.1015. Rainbow and RBL reply that the ALJ correctly concluded that the oral financial agreement provided Rainbow with reasonable

assurance of financing; that whatever temporary doubts Rey may have had about the station's viability, the agreement with Conant was never altered or withdrawn during all relevant times; and Rainbow was not required to report a loss of financing to the Commission because the lender remained committed to the project.

#### Discussion

25. Sections 1.17 and 73.1015 require licensees, permittees, and applicants to make truthful written statements to the Commission. These rules expressly prohibit the making of any misrepresentation or willful material omission in any application, pleading, or any other written submission. Moreover, the duty of candor requires applicants to be fully forthcoming as to all facts and information that may be decisionally significant to their applications. Swan Creek Communications v. FCC, 39 F.3d 1217, 1222 (D.C. Cir. 1994). We conclude that Rainbow did not violate these rules or policies when it affirmed in its January 25, 1991 fifth extension application that its financial certification remained true and correct. Joint Exh. 2 at 1. We find that at the time Rainbow made this representation it continued to have a viable oral commitment from Conant to provide financing.

26. Questions arise about the truthfulness of Rainbow's representation, as regards Conant's commitment, because of certain representations made contemporaneously by Rainbow in its litigation against Gannett in U.S. District Court. In its complaint in that litigation, Rainbow alleged that it would suffer irreparable economic harm if Press were permitted to locate its television antenna at the top of the Bithlo tower because Press' competition would jeopardize the viability of Rainbow's station. Press Exh. 9 at 7. The complaint was supported by a statement from Rainbow's financial expert, which specifically claimed, as an element of irreparable harm, that Rainbow would be unable to obtain financing if such circumstances developed. *Id.* at 12, 14. Consistent with the complaint, Rey stated twice in his testimony in the tower litigation, on January 11, 1991, that "everything" relating to the agreement for financing of the station had been put on hold because of the lawsuit, asserted that Conant's proposed loan was "pending" the resolution of the litigation, and affirmed that Conant had told him that, if Press got on the tower, the "likelihood" was that he would not finance the station. Rainbow Exh. 3 at 19-21; Press Exh. 10 at 7-9.

27. Taken at face value, these representations made in the court litigation would seem to contradict Rainbow's assertion that it continued to have committed financing from Conant. Thus, the court required us to designate this issue for hearing. Rainbow, however, presented testimony in this proceeding by both Rey and Conant seeking to reconcile the court testimony with its simultaneous assertion of financial qualification. Ultimately, the issue of misrepresentation and lack of candor turns on the credibility of this explanatory testimony. Both Rey and Conant testified that in late 1990 Rey met with Conant and informed him of his misgivings concerning the viability of the project if Press were permitted to share the top slot on the Bithlo tower. Tr. 752-53, 790. Rey told Conant, consistent with Rainbow's position in the court litigation, that he

was convinced that the station would be "worthless" and "valueless" if Rainbow did not become the fifth station in the market. *Id.* The witnesses testified that Conant did not share Rey's pessimistic outlook and recommended that they should adopt a wait and see attitude. Tr. 683, 686-87, 690, 753-54. They interpreted this to mean that Conant would be guided by Rey's assessment of the situation following the resolution of the court litigation. That is, if Rey believed that the project was viable at that time, Conant remained committed to provide financing. If, however, Rey continued to doubt the viability of the project, Conant would withdraw. Tr. 686, 691, 702, 791, 795-96, 918-27. Accordingly, Rey explained that his statement that Conant informed him that he would not likely finance the venture if Press received a slot on the tower, was actually a combination of Conant's intentions and Rey's speculation that he would likely advise Conant that the two should not proceed. Tr. 795-96, 921-22. Thus, Conant assertedly remained unconditionally committed to provide financing if Rey should ask for it.

28. We believe that the explanatory testimony of Rey and Conant should be credited. Although the ALJ did not make explicit demeanor findings, his active questioning of Rey and Conant (*see, e.g.*, Tr. 920-22) indicates that he scrutinized this testimony carefully and was ultimately persuaded by it. *See I.D.*, 12 FCC Rcd at 4057-58 ¶ 110. Given the ALJ's opportunity to hear the testimony and observe the witnesses and our own review of the record, we conclude that a preponderance of the evidence supports the ALJ's finding on this point. In view of these considerations, we find that Rainbow continued to have a committed source of funds, notwithstanding its bleak assessment in the court litigation of its prospects. We conclude, therefore, that the ALJ correctly found that Rainbow has not lacked candor or made a misrepresentation.

#### IV. TOWER LITIGATION MISREPRESENTATION ISSUE

##### Background

29. The Commission issued a construction permit to Rainbow on April 22, 1986, but Rainbow's grant did not become final until August 30, 1990, when the Supreme Court denied rehearing of its affirmance of the Commission's decision. *See Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, *pet. for rehearing denied*, 497 U.S. 1050 (1990). Rainbow did not construct during the pendency of the court appeal; instead, it requested and received four extensions of time from the Commission. *I.D.*, 12 FCC Rcd at 4043-44 ¶¶61, 64. Its construction permit was thus extended to January 31, 1991. In its fifth extension application, filed January 25, 1991, Rainbow represented as follows (Joint Exh. 2):

Upon denial of rehearing by the Supreme Court, Rainbow engaged engineering services to undertake construction of the station. Actual construction has been delayed by a dispute with the tower owner which is the subject of legal action in the United States District Court in the Southern District of Florida.

The truthfulness and candor of Rainbow's stated reason for not constructing, which it repeated in its sixth extension application filed June 25, 1991, is in issue.

30. As previously recited, Rainbow brought suit in November 1990 seeking a preliminary injunction to prevent Gannett from leasing space at the top of the Bithlo tower to Press. On November 27, 1990, at a prehearing conference, the judge in the tower litigation entered an order which directed Gannett to maintain the "status quo" and "to not sign or consummate any agreement or lease with Press" until the preliminary injunction hearing was over. The order, subsequently memorialized, remained in effect until June 1991. I.D., 12 FCC Rcd at 4047 ¶¶74-5; Rainbow Exh. 5; Press Exh. 16. Rey testified at the hearing in this proceeding that his understanding of the judge's status quo order was that it precluded Gannett and possibly Rainbow from proceeding with construction from November 1990 to June 1991. Tr. 732-33, 803, 981. Rey, however, conceded that there was no specific language in the status quo order or the transcript of the prehearing conference at which the status quo order was issued that expressly prohibited Rainbow from constructing. Tr. 840, 976-77. In any event, Rey further asserted that construction of Rainbow's station and placement of its antenna had to await construction of the transmitter building; that, under the terms of Rainbow's lease agreement with Gannett providing for the use of tower space for Rainbow's antenna and a transmitter room for Rainbow's transmitting equipment, Gannett had the sole authority to build the transmitter building; and that Rainbow was powerless to act on its own. And although Rainbow had to work with Gannett, Rey stated that, during the course of the litigation, Gannett was "not talking to" him. Rey maintained that because the status quo order prevented Gannett from building for Press, it also would not build for Rainbow because Rainbow and Press were involved in the same single building construction, which was designed to house the transmitters for three broadcast stations on the tower. I.D., 12 FCC Rcd at 4044, 4048 ¶¶62-3, 78; Rainbow Exh. 6; Tr. 733-34, 804, 857-58, 865.

31. The record also reflects that, beginning in late 1989 or early 1990, there was correspondence between Rey and Richard Edwards, Gannett's official in charge of its towers, regarding the antenna mounting and the proposed transmitter building and, that, in August 1990, Rey reviewed blueprints of the transmitter building sent to him by Edwards. Rey, Edwards, and Gannett's engineer also met in the summer of 1990 and reviewed preliminary plans for construction of the transmitter building. In October 1990, however, Rainbow informed Gannett that failure to recognize its exclusive right on the tower would result in litigation. Between December 1990 and June 1991, during the pendency of the tower litigation (and the status quo order), there was no further correspondence between Rainbow and Gannett regarding construction. I.D., 12 FCC Rcd at 4045-47 ¶¶66-70, 75; Tr. 873. Thereafter, on July 9, 1991, after the status quo order was lifted, James E. Baker, a Gannett official, informed Rey that Gannett had executed a lease with Press for space at the top of the Bithlo tower. Press Exh. 6. In addition, on July 17, 1991, Baker wrote to Rey and stated that "during the last seven months, we have been moving forward with the permitting process for our building addition and negotiations with the contractor for the construction of the building shell." Baker also stated that Gannett had signed

a contract for construction of the building shell and that "[w]e have begun construction." The letter further asserted that, on November 26, 1990, the day before the status quo order was issued, John DiMatteo, another Gannett official, had written to Rey requesting information pertaining to the construction plans but that Gannett had received no reply. Baker also stated that "[u]ntil recently, it was our understanding that you would not build your television station if Press Broadcasting was allowed on our tower. We understand now that you intend to occupy the tower space." Press Exh. 7. Construction of the transmitter building was completed in November 1991 and Rainbow built the station 7 1/2 months after the Bureau's July 30, 1993 reconsideration and grant of Rainbow's sixth extension application. I.D., 12 FCC Rcd at 4051 ¶87; Tr. 741-43, 981-82.

32. The ALJ found that Rainbow's representation in its extension applications was truthful. He accepted Rey's testimony that Rainbow did not have authority to construct on its own because its lease with Gannett provided that only the latter could construct the transmitter building. The ALJ further found that the pre-litigation correspondence between Rainbow and Gannett officials showed that, despite Rainbow's efforts to expedite matters, Gannett did not undertake any construction prior to the Florida judge's status quo order. Because the record did not provide any reasons for Gannett's failure to proceed earlier -- no Gannett or Press official testified -- and since Gannett began construction of the transmitter building after it signed a lease with Press for space on the tower, the ALJ said that suspicions were raised that Gannett did not intend to construct the building until Press was included as a tenant and that Press may have played a role in Gannett's decision. Although he recognized that the actions of Gannett and Press were outside the purview of the hearing, the ALJ opined that the Commission may wish to further consider this matter. Moreover, while the district court's status quo order was in effect, the ALJ stated, Rainbow was correct that construction by Gannett could not proceed. The ALJ concluded that Rainbow did not misrepresent facts by asserting that construction was delayed by a legal dispute with the tower owner.

33. In its exceptions, Press contends that the ALJ erred in not finding that Rainbow engaged in misrepresentation because it knew the legal dispute with Gannett did not prevent it from constructing its station. Press asserts that the ALJ also ignored certain testimony in the tower litigation, which, according to Press, demonstrates that Rainbow could have constructed during the litigation, and Rey's testimony at the hearing that he could have proceeded to construct by dismissing the suit. Press also disputes the I.D.'s finding that the Florida judge's status quo order prohibited Gannett from undertaking the construction necessary for Rainbow's installation and asserts that Gannett was in fact moving forward with the construction process during the period of the litigation. In addition, Press states that, contrary to the ALJ's opinion, Gannett cooperated with Rainbow prior to the litigation but Rainbow cut off communications during the pendency of the suit. Finally, Press objects to any suggestion by the ALJ that Press may have colluded with Gannett to keep Rainbow from constructing its station and urges that this language in the I.D. be stricken. The Separate Trial Staff argues in much the same vein. It principally contends that the I.D.'s conclusions are erroneous because Rainbow's failure to construct during

the relevant time period was due solely to its own unwillingness to proceed until economic conditions in the market improved. The Staff contends that the ALJ should not have accepted Rey's testimony that Rainbow was unable to construct during the pendency of the tower litigation, because nothing in the judge's status quo order barred construction of Rainbow's station but only prevented Gannett from going forward with a lease to Press. The ALJ also incorrectly blamed Gannett for the delay in construction, in the Staff's view, because Gannett was willing to move forward with the construction process, but Rainbow did not respond to Gannett's November 26, 1991 request for information during the pendency of the litigation. The Staff concludes that it was Rainbow's private business determination, based on Rey's concerns about being the sixth television station in the market, rather than Gannett's failure to proceed, as found by the ALJ, that motivated Rainbow's decision not to construct. Rainbow and RBL reply that the I.D. correctly resolved the issue because the lawsuit against Gannett was intended to protect Rainbow's contractual rights, not to delay construction, and that Rainbow's representation regarding the effect of the dispute with the tower owner was truthful because after November 1991 Rainbow was initially precluded from going forward with construction by the Florida judge's status quo order.

#### Discussion

34. This issue concerns whether Rainbow was untruthful when it stated in its January 25, 1991 fifth extension application and its June 25, 1991 sixth extension application that construction of its facilities had been "delayed by a dispute with the tower owner, which is the subject of legal action . . . ." Joint Exh. 2 at 3. We agree with the ALJ that these statements do not reflect a lack of candor. It is undisputed that up until November 1990, when Rainbow filed its lawsuit, Rainbow and Gannett had been engaged in communications looking toward construction. It is also undisputed that these communications broke off at about the time that Rainbow initiated the suit on November 2, 1990, and that they did not resume until June 1991, after the District Court had denied Rainbow's motion for a preliminary injunction and the status quo order was lifted. Thus, the litigation between Rainbow and Gannett certainly occasioned a delay.

35. Furthermore, we agree with the ALJ, that Rainbow's representations do not conceal the nature of the litigation or that Rainbow initiated it. Rainbow stated in its fifth extension application (Joint Exh. 2 at 3):

Rainbow anticipates that its exclusive right to the use of the tower aperture will be recognized by the District Court. Rainbow is ready, willing and able to proceed with construction upon a ruling from the District Court and anticipates completion of construction within 24 months of a favorable Court action.

We find that Rainbow's statement that it anticipated favorable court action in which the District

Court would recognize Rainbow's "exclusive right to use the tower aperture" fairly apprised the Commission that Rainbow was suing Gannett to enforce its claimed exclusive right. Thus, we discern no intent on the part of Rainbow to mislead the Commission into believing that Gannett was suing it. Moreover, the statement discloses that Rainbow was seeking to vindicate an "exclusive" right to use the tower, not the right to use the tower. Accordingly, there is no basis to infer that Rainbow was attempting to deceive the Commission into believing that prevailing in the law suit was essential for Rainbow to establish its right to construct.

36. In view of the foregoing, the issue becomes whether construction reasonably could have been expected to proceed during the litigation -- that is, the extent to which "actual construction" was delayed by the tower dispute litigation, as Rainbow stated in its extension requests. As an initial matter, we agree with the ALJ that the lease between Rainbow and Gannett contemplated that Gannett's construction of the transmitter building was an essential step in the construction process. See Tr. 733, 804, 833, 851, 857; Rainbow Exh. 6 at 6; Rainbow Exh. 7 at 8. We therefore have no basis to expect Rainbow to have engaged in construction independently of Gannett, and thus Gannett's unwillingness or inability to construct would have effectively prevented construction. The question then becomes whether the litigation between Rainbow and Gannett led to Gannett's unwillingness or inability to proceed with construction.

37. In this regard, the status quo order does not expressly prohibit construction. It requires Gannett "to preserve the status quo and not to sign or consummate" a lease with Press. Rainbow Exh. 5 at 1; Press Exh. 14 at 1-2; Press Exh. 16 at 8-10, 13. However, at the prehearing conference in the tower litigation at which the status quo order was adopted, Rainbow's lawyer contended that the status quo order should be deemed to prohibit construction (Press Exh. 16 at 10):

Your honor, that would certainly -- if that [i.e., Gannett's willingness to stipulate that it would preserve the status quo] included the fact that they [i.e., Gannett] wouldn't allow any construction to take place on the antenna prior to a lease, we would certainly feel assured that the preliminary injunction didn't have to take place immediately.

See also Tr. 976-77. Thereafter, Gannett and Rainbow entered into a mutually agreeable stipulation that became the basis for the status quo order.

38. Under these circumstances, Rainbow and Gannett had reason to believe that the status quo order contemplated that construction would not proceed. Testimony by Rey, which the ALJ credited, indicates that the parties understood this to be the case. Tr. 732-33, 803-04, 849, 857, 862, 868-69, 976-77, 981. Moreover, the record is devoid of evidence that Gannett made any effort to persuade Rainbow to proceed with construction during the pendency of the status quo order (although Gannett did undertake certain preliminary steps, such as obtaining permits. Press Exh. 7). In this regard, Gannett has sought to intervene in this proceeding to challenge the ALJ's

findings that it and not Rainbow was to blame for the lack of progress toward construction prior to the status quo order. Petition for Leave to Intervene to File Exceptions and to Reopen the Record, filed September 26, 1997, by Gannett. It does not, however, challenge the ALJ's finding that the status quo order barred construction, or attempt to fault Rainbow for its conduct during that period.<sup>2</sup> *Id.* at 2, 4-6, 8.<sup>3</sup> As Gannett acknowledged in a letter to Rainbow shortly after the denial of Rainbow's request for injunctive relief and the lifting of the status quo order: "It is extremely difficult to deal with these [construction] issues while in litigation and under the constant threat of further litigation." Press Exh. 7 at 3. In view of the foregoing, we find that the status quo order reflected an understanding between Rainbow and Gannett that construction would not proceed and thereby effectively precluded construction. Rainbow's statements in its fifth and sixth extension applications were therefore not lacking in candor.

## V. CONSTRUCTION ISSUE

### Background

39. The Commission designated this issue to determine whether there is any factual basis to support either a grant of waiver of 47 C.F.R. §73.3598(a) or a grant of an extension request based on the hardship provision of 47 C.F.R. §73.3534(b). HDO, 11 FCC Rcd at 1168 ¶7. Section 73.3598(a) provides:

Each original construction permit for the construction of a new TV broadcast

---

<sup>2</sup> Our review of the record does not lend support to the ALJ's "suspicion" (I.D., 12 FCC Rcd at 4059 ¶ 115) that Gannett was unwilling to construct the transmitter building until Press had secured transmitter space on the Gannett tower. Accordingly, we disavow the ALJ's language to this effect. Our action obviates the need for Gannett's Petition for Leave to Intervene to File Exceptions and Reopen the Record, filed September 25, 1997, which is premised on Gannett's interest in refuting the ALJ's inferences that Gannett's conduct was "suspicious" (I.D., 12 FCC Rcd at 4048 ¶ 79). We will therefore deny the petition.

<sup>3</sup> In an affidavit attached to Gannett's petition, James E. Baker, a Gannett official, recites: "Thus, as the record clearly demonstrates, up to the time the status quo order was imposed, Gannett was wholly cooperative with Rainbow and stood ready to proceed with construction." Id., at Attachment at 8. In responding to the petition, Press stated: "Press has no objection to acceptance into the record of Gannett's pleading, including the affidavit of James E. Baker included therewith. The factual representations contained therein are not inconsistent with the previously developed evidentiary record of this case." Comments of Press Broadcasting Company, Inc. on "Petition for Leave to Intervene to File Exceptions and Reopen the Record," filed October 7, 1997 at 1. In view of this admission, we note that although not part of the record, Baker's statement is fully consistent with the conclusions reached herein.

station, or to make changes in an existing station, shall specify a period of no more than 24 months from the date of issuance of the original construction permit within which construction shall be completed and application for license filed.

In pertinent part, Section 73.3534(b) provides:

Applications for extension of time to construct broadcast stations . . . will be granted only if one of the following three circumstances have occurred:

. . . (3) No progress has been made for reasons clearly beyond the control of the permittee (such as delays caused by governmental budgetary processes and zoning problems) but the permittee has taken all possible steps to expeditiously resolve the problem and proceed with construction.

40. The Commission issued a construction permit to Rainbow on April 22, 1986. Rainbow's grant was appealed to the District of Columbia Circuit but, at the Commission's request, the case was remanded by the court and, between November 1986 and February 1988, the proceeding was held in abeyance pending the Commission's review of its minority ownership policies. See Metro Broadcasting, Inc., 2 FCC Rcd 1474 (1987), aff'd, 3 FCC Rcd 866 (1988). The case was returned to the court of appeals in June 1988 and the court affirmed the grant to Rainbow in April 1989. See Winter Park Communications, Inc. v. FCC, 873 F.2d 347 (D.C. Cir. 1989). Rainbow's grant became final on August 30, 1990 after the Supreme Court affirmed the decision of the lower court and then denied rehearing. See Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, pet. for rehearing denied, 497 U.S. 1050 (1990). Although Rainbow's permit expired in April 1988 during the pendency of the litigation, it was reinstated upon the condition that Rainbow seek an extension of time. Between July 11, 1988 and July 2, 1990, Rainbow filed four applications for extensions of time to construct, which were granted. Rainbow filed a fifth extension application on January 25, 1991, which was granted for the period from February 5, 1991 through August 5, 1991, and a sixth extension request on June 25, 1991. On June 18, 1993, the Video Services Division denied Rainbow's sixth extension request and cancelled its authorization; it also dismissed as moot Rainbow's pro forma assignment application and Press's petition for reconsideration of Rainbow's fifth extension, which was still pending when Rainbow filed its sixth extension application. Rainbow's permit was reinstated on July 30, 1993, when the Bureau granted its petition for reconsideration. I.D., 12 FCC Rcd at 4043-44, 4051-52 ¶¶61, 90-91; Joint Exhs. 1, 8; Press Broadcasting Co., Inc. v. FCC, 59 F.3d at 1367.

41. Prior to August 30, 1990, when its grant became final, Rainbow did not undertake construction, but it engaged in pre-construction activities including planning of the transmitter building, selection of equipment, and making approximately \$500,000 in rent payments to Gannett for the transmitter site since 1986. I.D., 12 FCC Rcd at 4044 ¶64; Tr. 726, 947. Rey stated that Rainbow also contributed funds to the construction of the transmitter building, which was completed in November 1991. After the Bureau reconsidered and granted Rainbow's sixth extension request in 1993, Rainbow bought equipment, installed it, completed construction in 7

1/2 months, and went on the air in June 1994. Tr. 743, 981.

42. The ALJ determined that Rainbow was entitled to grant of its extension application. The I.D. found that, although Rainbow's construction permit was issued on April 22, 1986, its grant remained under a cloud until the Supreme Court denied rehearing on August 30, 1990. Under the circumstances, the ALJ stated, Rainbow's unwillingness to expend funds to construct between those dates was understandable. The ALJ held that the appellate litigation constituted a matter beyond the permittee's control for purposes of 47 C.F.R. §73.3534(b) and, if a waiver of 47 C.F.R. §73.3598 is required, the uncertainty engendered by the appellate challenge justifies it. Furthermore, the ALJ noted that only five months elapsed between the time Rainbow's grant became final and the filing of its fifth extension application in January 1991, and only ten months had passed when it filed its sixth extension application in June 1991. Because its sixth extension application remained pending for two years, the ALJ found that 22 of the 32 months that elapsed after the conclusion of the appellate process occurred after the expiration of Rainbow's permit. According to the HDO, 11 FCC Rcd at 1167, the ALJ stated, the only period germane to evaluating Rainbow's construction efforts is the time during which it held a valid construction permit. Because this period amounted to far less than the full 24 months provided for construction under 47 C.F.R. §73.3598, the ALJ concluded that grant of Rainbow's sixth extension application is warranted under the hardship provision of 47 C.F.R. §73.3534(b), regardless of whatever progress Rainbow made when it held an unexpired permit. In addition, the ALJ found that Rainbow had taken all possible steps to proceed with construction when it did have a valid permit, such as signing a lease and making rent payments. Rainbow was stymied in proceeding further with construction, in the ALJ's view, by Gannett's inaction until it secured Press as a tenant. The ALJ concluded that these factors provided further grounds for granting an extension under 47 C.F.R. §73.3534(b).

43. In its exceptions, Press maintains that Rainbow did not demonstrate that its failure to construct was due to circumstances clearly beyond its control. Press alleges that Rainbow's dispute with the tower owner did not prevent it from constructing between August 1990 and July 1991, and Rainbow could have voluntarily dismissed the lawsuit at any time. Press asserts that Rainbow's wish to avoid competition is not a valid justification for its failure to construct. In addition, Press disputes the ALJ's finding that Rainbow took all possible steps to remove any impediment to construction and submits that, in fact, Rainbow created the impediment by bringing the tower suit and not cooperating with Gannett during its pendency. Press also excepts to the ALJ's finding that Rainbow did not have a full 24 months to construct and argues that the court of appeals disposed of this question by holding that Rainbow had to make the showing required under 47 C.F.R. §73.3534, irrespective of when its permit was originally issued and any subsequent appeals. The Separate Trial Staff likewise contends that the I.D.'s conclusion that the issue should be resolved in Rainbow's favor because Rainbow did not get the normal 24 month construction period provided by 47 C.F.R. §73.3598 is contrary to the court's remand order holding that the construction period ran from the date of the original construction permit. The Staff argues that Rainbow also did not show that it was entitled to equitable relief pursuant to

47 C.F.R. §73.3534(b). In this regard, the Staff states, Rainbow's extension application must be evaluated based on events that occurred during the most recent construction period which, in this case, ran from August 30, 1990 through August 5, 1991, the expiration date of Rainbow's fifth extension of time. Rainbow chose not to construct during this period, the Staff maintains, because it was intent on preventing competition by keeping Press off of the top slot on the Bithlo tower, and Rainbow did not demonstrate that the tower litigation precluded construction. In the Staff's view, the LD erred in failing to find that the postponement was thus clearly due to causes under Rainbow's control. Finally, the Staff also disagrees with the ALJ that Rainbow's pre-construction efforts during the time it held a valid permit justify a further extension of time and notes that Rainbow did not claim in either its fifth or sixth extension application that it had made substantial progress toward construction.

### Discussion

44. We conclude that Rainbow should be deemed to have constructed its station in a timely manner. Specifically, the circumstances of this case warrant granting a waiver of 47 C.F.R. § 73.3598(a) to the extent it provides that the 24-month construction period should commence from the time that the construction permit originally issued. On the facts here, it is more appropriate to begin counting the 24-month period from the date when the grant of Rainbow's construction permit became final on August 30, 1990. Moreover, the period during which Rainbow's sixth extension application was pending should not be included in the 24-month period. Accordingly, because Rainbow timely constructed well within a two year period, Rainbow should not have been required to demonstrate the prerequisites for granting an extension under 47 C.F.R. § 73.3534(b) at the times of its fifth and sixth extension applications on January 25, 1991 and June 25, 1991. In any event, assuming that the requirements of 47 C.F.R. § 73.3534(b) are pertinent, we find that Rainbow made an adequate showing in its fifth and sixth extension requests that the delay in construction was due to reasons beyond Rainbow's control.

45. We continue to believe that counting the initial 24-month construction period from the issuance of the original construction period would lead to an unreasonable and unfair result in this case. Much of our reasoning in this regard has already been set forth in the Memorandum Opinion and Order remanded by the Court of Appeals. Rainbow Broadcasting, Inc., 9 FCC Rcd 2839, 2846-47 ¶¶ 36-40 (1994), remanded sub nom. Press Broadcasting, Inc. v. FCC, 59 F.3d 1365 (D.C. Cir. 1995). As we pointed out, the circumstances effectively deprived Rainbow of an unencumbered 24 months in which it reasonably could have been expected to construct the station. Rainbow's construction permit issued on April 22, 1986, some five months after judicial appeals had been filed on November 15, 1985 (official notice taken). These appeals raised fundamental questions about the validity of Rainbow's construction permit that were resolved only after more than four years of protracted litigation. The grant of Rainbow's permit turned on the preferences that Rainbow received for minority and female ownership (Metro Broadcasting, Inc., 2 FCC Rcd 1474, 1475 ¶ 8 (1987)), which reflected issues of profound public importance that were subject to intense scrutiny. The Commission itself cast a cloud over the validity of the

grant to Rainbow by seeking remand of the proceeding from the Court of Appeals in order to reexamine the policy basis of the decisional preferences. This inquiry did not terminate until February 23, 1988, when Congress intervened to preclude such reexamination. Metro Broadcasting, Inc., 3 FCC Rcd 866 (1988). Despite the termination of the Commission inquiry and the return of the case to the courts, however, important issues remained concerning the constitutionality of the preferences, and these were not finally laid to rest for the purposes of this case until August 30, 1990, when the Supreme Court's decision in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), rehearing denied, 497 U.S. 1050 (1990), became final. Rainbow cannot reasonably be faulted for not beginning construction during this four-year period of litigation and uncertainty, when its construction permit was not final.

46. The 24-month construction period was enacted to provide an "adequate" or "realistic" time to construct. See Amendment of Sec. 73.3598, 102 FCC 2d 1054, 1055 ¶ 2, 1057 ¶ 4 (1985). Moreover, the imposition of the strict criteria in 47 C.F.R. § 73.3534(b) for demonstrating entitlement to a six month extension was premised on the presumed adequacy of the 24-month period, which was expected to result in "fewer applications to extend time" and was intended to eliminate "unwarranted" delays. Id. Generally, the 24-months-to-construct rule and the rule providing for extensions of no more than six months do not conflict. For example, where an applicant that actually had 24 months to construct seeks an extension on the basis of "substantial progress" under section 75.3524(a)(2), an extension of not more than six months is entirely appropriate.

47. However, the initial 24-month period can hardly be considered "adequate" or "realistic" under the circumstances of this case, in which the entire period expired before Rainbow could have realistically been expected to commence construction. And where, as in this case, the entire initial 24-month period (and more) was consumed by litigation ultimately resolved by the Supreme Court, it is not sensible to limit extensions to six months. A Bureau staff member initially resolved this apparent tension between the 24-month rule and the rule limiting extensions to six months by advising Rainbow in 1988 that, once the litigation was over, it would get 24 months to construct, to be provided in six-month extension increments. Tr. 757, 807-08. Holding Rainbow to the criteria of 47 C.F.R. § 73.3534(b) for granting an extension would have, in effect, required Rainbow to meet these strict criteria without ever having an "adequate" or "realistic" period for completing construction. Specifically, at the time of its fifth extension request, Rainbow's construction permit had been final for only five months, and, at the time of the sixth request, for ten months. We hold that the Bureau should have adhered to its advice when Rainbow filed its sixth extension request and granted another six-month extension. Instead, the Bureau failed to act, so that the fifth extension expired on August 5, 1991, even though Rainbow had received less than 12 of the 24 months to which it was entitled upon completion of the Metro Broadcasting litigation. Once Rainbow's construction permit was reinstated on July 30, 1993, it was on the air within eleven months, so that it held a valid construction permit for less than 24 months from the conclusion of the Metro Broadcasting litigation until it completed construction.

48. We are mindful that in remanding the proceeding to the Commission the court stated that "[t]he rule providing for a 24-month construction period manifests that the period runs from the date of the original permit, not of actual construction or any subsequent extension." 59 F.3d at 1372. Thus, "Rainbow was unquestionably required to apply and qualify for an extension." *Id.* When Rainbow filed its fifth extension request on January 25, 1991, it therefore had to show that an extension was warranted, because the 24-month period running from the date of the issuance of the permit had long since run during the course of the Metro Broadcasting litigation. The court, however, did not consider -- since the Commission did not consider -- whether the rule should be waived under circumstances manifestly contrary to the underlying premise of the rule -- that 24 months, beginning from the issuance of the permit, was "adequate" and "realistic" for construction -- and its purpose of eliminating "unwarranted" delays. Rainbow did not engage in unwarranted delays in this case. It is also noteworthy that, despite the prolonged uncertainty concerning its permit, Rainbow made substantial expenditures related to construction, including more than \$500,000 in lease payments on the tower. Therefore, the balance of equities weighs in Rainbow's favor, not against it. The circumstances recited above thus create strong equities in favor of waiving the rule, and a waiver in these circumstances is consistent with the policies underlying the rule. We therefore hold that the 24-month period should be deemed to have begun running August 30, 1990.

49. In addition, for the reasons set forth in the Hearing Designation Order in this proceeding, we do not count in the 24-month period the interval between the expiration of Rainbow's construction permit, during which Rainbow's sixth extension application (filed June 25, 1991) was pending, and the Bureau's reinstatement of Rainbow's permit on July 30, 1993. (Jt. Exh. 9). Rainbow Broadcasting, Inc., 11 FCC Rcd 1167, 1167-68 ¶¶ 3-6 (1995). The hiatus of nearly two years while Rainbow's sixth extension request was pending was not Rainbow's fault. Rather, it was the fault of the Bureau, which should have granted six-month extensions until Rainbow had been given 24 months to construct. And it is well-settled that applicants cannot rely on construction occurring after a construction permit has expired, *see Mansfield Christian School*, 10 FCC Rcd 12589, 12590 (1995) (extension application must be evaluated based on events that occurred during most recent construction period), so that it would be unfair to fault Rainbow for failing to construct during that period. The court of appeals noted that, in fact, "Rainbow continued construction work on its transmitter building for three months after the expiration of its permit authority in August 1991 until the building was completed." 59 F.3d at 1372. But just as construction after a permit has expired does not aid an applicant, it should not count against an applicant either. The work done for three months to complete the building after the fifth extension expired was done at Rainbow's peril, and would not help it if no further extensions were otherwise warranted, but cannot fairly subtract from Rainbow's entitlement to time to construct. Accordingly, we conclude that Rainbow was entitled to its fifth and sixth extensions (and additional extensions until it had been given 24 months to construct), and we waive the requirement that Rainbow justify these extension requests. Rainbow completed construction by June 1994, within the construction period as now defined.

50. Because we deem Rainbow's construction to be timely, there is no reason to consider whether the construction period should be extended under the criteria specified in 47 C.F.R. § 73.3534(b). In the alternative, even if we were to apply those requirements in the circumstances of this case, we agree with the ALJ that Rainbow has shown that its failure to construct was due to reasons beyond its control within the meaning of section 73.3534(b). As the ALJ found, the appellate litigation involving Rainbow's permit was a circumstance beyond Rainbow's control, and it was therefore appropriate to grant Rainbow successive extensions until that litigation concluded on August 30, 1990. The status quo order in the tower litigation was imposed only five months later, before Rainbow had a full opportunity to make substantial progress toward construction. In some past cases, we have held that a dispute between a site owner and the permittee, or litigation involving the permittee, did not meet the standard of section 73.3534(b)(3). See Women Broadcasters, Inc., 12 FCC Rcd 7824, 7827 ¶ 12 (1997); Kim Shaw Wong, 11 FCC Rcd 11928, 11935 n.9 (1996). However, in this case, as the court indicated: "The FCC must address whether Rainbow has made the required showing . . . of hardship under subsection (b)(3); that question may turn on the disputed issue of whether the tower litigation precluded Rainbow from beginning construction." 59 F.3d at 1372. We find that the tower litigation effectively did preclude construction. Rainbow filed its fifth and sixth extension requests during the pendency of the status quo order, which impaired Rainbow's ability to proceed further. As noted above (paragraphs 36, 38), Rainbow and Gannett recognized that Rainbow could not construct independently of Gannett and both understood that the status quo order made construction by Gannett inappropriate. While Rainbow might have proceeded with construction by not prosecuting the litigation in the first place, we believe that it would be unreasonable, under the circumstances of this case, to apply the rule in a manner that would effectively have required Rainbow to forfeit any chance of vindicating what it believed to be legitimate rights under its contract with Gannett. Rainbow should not be denied all opportunities for normal business litigation simply because, through no fault of its own, its original construction permit was subjected to prolonged legal challenges. Moreover, we find that, unlike the permittee in Women Broadcasters, Inc., Rainbow did not attempt to rely on its dispute with the site owner for an excessive period of time. We have no record basis to find that the tower litigation was intended to delay construction. Thus, we hold in the alternative that the fifth and sixth extension requests are properly granted under the criteria specified in the rule.

#### VI. CONCLUSIONS AND ORDERING CLAUSES

51. We conclude that Rainbow did not commit disqualifying misconduct in connection with its applications for extension of time and that Rainbow has demonstrated that grant of a waiver of 47 C.F.R. § 73.3598(a) would serve the public interest. Specifically, we conclude that Rainbow did not intentionally violate the ex parte rules or lack candor with respect to its financial qualifications and regarding the tower litigation. We further conclude that under the circumstances of this case, subjecting Rainbow to the literal terms of 47 C.F.R. § 73.3598(a), which would require Rainbow to have constructed its station within 24 months of the issuance of its construction permit, would be unfair and contrary to the public interest. During that period, fundamental uncertainties about the validity of Rainbow's authorization made it unreasonable to