

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of)	
)	
Sandab Communications Limited Partnership II)	
)	
For Renewal of Licenses for)	File Nos. BR-950912UB
Stations WTTB(AM)/WGYL(FM))	BRH-950912UA
Vero Beach, Florida)	
)	
For Assignment of Licenses for)	File Nos. BAL-960111GU
Stations WTTB(AM)/WGYL(FM))	BALH-960111GV
Vero Beach, Florida to Fairbanks)	
Communications, Inc.)	

MEMORANDUM OPINION AND ORDER

Adopted: September 19, 1996

Released: September 24, 1996

By the Commission:

I. INTRODUCTION

1. The Commission has before it for consideration a letter from counsel for the Southern Region of the National Rainbow Coalition ("Rainbow") to the Managing Director filed July 23, 1996. The letter requests that the Commission receive and review without disclosure to the public or the parties to the above-captioned applications a further letter and ten exhibits submitted "under seal" which Rainbow alleges contain information pertinent to the above-captioned applications.

II. BACKGROUND/PLEADINGS

2. On July 22, 1996, we released a decision granting the captioned renewal applications filed by Sandab Communications Limited Partnership II ("Sandab"). Sandab Communications Limited Partnership II, FCC 96-305, released July 22, 1996 ("Sandab"). In that decision, we also denied a petition to deny filed by Rainbow that questioned the licensee's compliance with our Equal Employment Opportunity ("EEO") Rule, 47 C.F.R. § 73.2080, Section 73.2080 of the Commission's Rules. On July 23, 1996, Rainbow filed an Emergency Motion to Vacate Grant of Renewals and Hold Assignment Applications in Abeyance. Rainbow's Motion indicates that the principal basis for the relief sought is contained in the sealed submission for which Rainbow requests confidentiality. The Motion urges that the information contained in Rainbow's sealed submission raises questions concerning the conduct of the renewal applicant, Sandab, and also the prospective assignee of the licenses, Fairbanks Communications, Inc. ("Fairbanks"), in connection with pursuing the grant of their applications that, if known, would

result in the designation for hearing of the above-captioned renewal and assignment applications. No further information is provided in Rainbow's Motion as to the nature of the material being filed under seal. Rainbow's Motion was served on counsel for Sandab and Fairbanks. Rainbow also served counsel for Sandab and Fairbanks with the letter to the Managing Director requesting that its submission be received and considered under seal. In addition, on August 21, 1996, Rainbow filed a timely Petition for Reconsideration of our decision in Sandab which, in part, incorporates by reference the evidence submitted under seal.

3. In the letter requesting confidential treatment, Rainbow asserts that the accompanying submission should be considered under seal because "public disclosure of the matters described therein would compromise a pending federal criminal inquiry." It further states that its counsel had been "asked by the appropriate federal law enforcement officials to withhold public disclosure of these matters and, if they must be filed with the FCC, to file them under seal." These assertions are supported by a declaration under penalty of perjury of Rainbow's counsel. Finally, Rainbow requests that its submission under seal be returned if the Commission determines that the submission cannot be considered on a confidential basis.

III. DISCUSSION

4. A person who is submitting information to the Commission may request that such information not be made routinely available for public inspection. 47 C.F.R. § 0.459, Section 0.459 of the Commission's Rules. Rainbow's request accordingly must be evaluated in light of the requirements of Section 0.459. Pursuant to Section 0.459(d) of the Rules, the standards for such relief are governed by the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, and the requesting party must show "by a preponderance of the evidence" that non-disclosure is consistent with the pertinent provisions of the FOIA. TKR Cable of Ramapo, 11 FCC Rcd 3538 (1996). Under the FOIA, the Commission is required to disclose reasonably described agency records requested by any person, unless the records contain information that fits within one or more of the nine exemptions from disclosure provided in the Act. 5 U.S.C. § 552(b). *See also* 47 C.F.R. § 0.457, Section 0.457 of the Commission's Rules, which references seven of the statutory exemptions pertinent to records maintained by the Commission. Having reviewed the evidence presented by Rainbow, we find that it has failed to establish by a preponderance of the evidence that confidentiality is justified.

5. Initially, Rainbow has failed to comply with Section 0.459(a), which requires that information for which protection is sought be clearly identified and, if feasible, separated from information for which protection is not sought. Rainbow's submission under seal contains documents that are already part of the public record in connection with the renewal proceeding. There would be no basis for claiming protection for such documents. Moreover, with respect to the new information contained in the submission, we cannot determine whether the asserted justification for confidentiality applies to all, or only some, of this information.

6. Section 0.459(b) requires that a person requesting confidentiality specify the basis for withholding the information from public inspection, with reference to Section 0.457 of the Rules. As noted, that provision references the FOIA exemptions pertinent to the Commission.

Rainbow does not state the specific basis for its request with reference either to the FOIA or the Commission's Rules. The only apparent basis for Rainbow's request is provided by Section 0.457(g)(1) of the Rules, which is based upon 5 U.S.C. § 552(b)(7)(A). The provision exempts: "records compiled for law enforcement purposes, to the extent that production would: (1) Interfere with enforcement proceedings . . ." Initially, we cannot determine to what extent the information supplied by Rainbow constitutes an investigatory record compiled for law enforcement purposes, as opposed to information compiled by Rainbow for its own purposes. Further, the conclusory assertion that disclosure of this information would impede a criminal investigation, without further explanation or substantiation, is insufficient to meet Rainbow's burden of showing by a preponderance of the evidence that non-disclosure would be consistent with the FOIA.

IV. CONCLUSION

7. In light of the foregoing, we will deny Rainbow's request that its submission under seal be considered on a confidential basis. Pursuant to Section 0.459(e) of the Rules, we will return the submitted materials to Rainbow in accordance with its request. However, we will also afford Rainbow the option, within ten days of the release of this Memorandum Opinion & Order, to file and serve the appropriate parties with the requisite copies of the materials filed under seal with the Secretary for inclusion in the public record and for consideration in conjunction with Rainbow's Motion and Petition for Reconsideration, along with proof of service on Sandab and Fairbanks.

V. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that the July 23, 1996, request of the Southern Region of the National Rainbow Coalition that the Commission receive and consider its submission under seal on a confidential basis **IS DENIED**.

9. **IT IS FURTHER ORDERED** that the Mass Media Bureau shall, pursuant to Section 0.459(g) of the Rules, notify the Southern Region of the National Rainbow Coalition by telephone of this ruling and of the five working day period for seeking a judicial stay and send copies of this Memorandum Opinion and Order by Certified Mail -- Return Receipt Requested -- to the Southern Region of the National Rainbow Coalition, Sandab Communications Limited Partnership II, and Fairbanks Communications, Inc.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary