

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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Federal Communications Commission
Office of the Secretary

In re:)
Application of)
Four Jacks Broadcasting, Inc.) File No. BPCT-910903KE
for Construction Permit for)
Channel 2)
Baltimore, Maryland)

PETITION TO DENY APPLICATION

TO: Chief, Mass Media Bureau

Scripps Howard Broadcasting Company (hereinafter "Scripps Howard"), licensee of television station WMAR-TV, Baltimore, Maryland, hereby petitions the Commission to deny the above-referenced application of Four Jacks Broadcasting, Inc. (hereinafter "Four Jacks") for a construction permit for Channel 2 in Baltimore. This application is mutually exclusive with the pending application of Scripps Howard Broadcasting Company for renewal of its license for television station WMAR-TV (FCC File No. BRCT-910603KX).

I. Introduction.

The Commission should reject this application as unacceptable for filing because it is replete with errors and omissions and it fails to meet the minimum standards of acceptability for applications for new TV facilities.

Among the application's failures are:

1. It is substantially incomplete because it fails to disclose the height of the tower. As a result of this misstatement, it also incorrectly indicates that:
 - a. No increase in height is required by its proposal.
 - b. No FAA notification is necessary.
2. It states that Four Jacks has an available site when in fact it knows or has reason to know that the site specified is unsuitable and thus, unavailable for its intended purpose.
 - a. The structure on which the antenna would be placed would thus be rendered unsafe and would pose a peril to person and property.
 - b. The site, if used as proposed, could create serious interference with aeronautical communications and other tower users, including other Commission licensees.

- c. Operations from the site would not provide the required protection to the FCC monitoring station at Laurel, MD.
 - d. The site has not been approved for use in the proposed manner by the FAA.
 - e. It fails to fully address the possible environmental effects of the proposal.
3. It states that Four Jacks has sufficient funds to construct and operate the station for three months without revenue, when, in fact, Four Jacks has underestimated the costs involved and thus does not have sufficient funds available.

Finally, Four Jacks has previously engaged in bizarre litigation practices with respect to Scripps Howard and WMAR-TV, and serious questions concerning Four Jacks' character qualifications have been raised in another proceeding.

II. Four Jacks' Application is Substantially Incomplete.

It is settled policy that "where a cut-off period is established, applications must be submitted in substantially complete form before the cut-off date to be entitled to comparative consideration." Port Huron Family Radio, Inc., 66 Rad. Reg.2d (P&F) 545, 549 (quoting Advance Inc., et al., 88 F.C.C.2d 100, 107 (1981) recon. denied, 89 F.C.C.2d 177 (1982)). The Federal Communication Commission (hereinafter "FCC" or "Commission") rules specify that "[a]pplications that are not substantially complete

will be returned to the applicant." 47 C.F.R. § 73.3564(a) (1991).

If the application contains so little information as of the original date of filing that the Commission staff is unable to process the application in a manner consistent with the public interest, it must be dismissed as incomplete. Henry M. Leshner, 67 F.C.C.2d 278, 280 (1977). As this Petition to Deny demonstrates, the Four Jacks application contains a blatant misstatement as to antenna height which, particularly in light of the special circumstances identified herein, amounts to an omission and renders the application substantially incomplete.

A. Height in Application is Inaccurate.

In its application, Four Jacks lists 1200 North Rolling Road, Catonsville, Baltimore County, Maryland as its antenna site. An examination of the Baltimore County public land records conducted after the filing of the application indicates that this land and the tower on the land are owned by the principals of Four Jacks. The application further specifies that this supporting structure is also used by station WPOC(FM).

Four Jacks listed the height of the top of the supporting structure above ground as 216 meters and the height of the base as 165 meters, for a total of 381 meters. See application at Section V-C, q.7. However, reports by Donald G. Everist, an engineering consultant with the firm of Cohen, Dippell and Everist, P.C., and Donald R. Hall, a registered Maryland Property Line Surveyor, indicate that the height of the tower is actually only 368.53

meters or 1209.10 feet. See Exhibit A at 3, Hall Affidavit. Thus, there is a difference of approximately 40 feet between the tower height as claimed by Four Jacks and the actual tower height. Furthermore, the study conducted by Mr. Everist indicates that the old station WBFF-TV Channel 45 pylon antenna formerly atop the WPOC(FM) tower has apparently been removed, thus accounting for the 40 foot discrepancy. See Exhibit A at 3.

Four Jacks' principals control the licensee of WBFF-TV and, as noted above, own and control this tower site. Further, the discrepancy between the tower's actual height and its reported height may be presumed to be due to Four Jacks' principals own action in removing the antenna previously used for their station, WBFF-TV. Because this inaccuracy concerns tower height, it involves information which is vital to the Commission's ability to effectively process the application in the public interest. This misstatement is particularly severe because the Commission "relies heavily on the completeness and accuracy of the submission made to it" and "applicants have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate." WHW Enterprises, Inc. v. FCC, 753 F.2d 1132, 1139 (D.C. Cir. 1985).

Finally, As discussed infra at 16, Four Jacks' principals were obliged under the FAA's rules to notify that agency of the change in the tower's height which they effected. Not only did Four Jacks' principals presumptively fail to ensure that the proper governmental authority was notified of the initial change in

height, it failed to correct this serious omission in this application.

B. Inaccurate Height in Application Results in Patently Defective Application.

In previous cases when an incorrect tower height has appeared in an applicant's 301 Form in a situation in which the application proposes to locate a transmitter on a tower already licensed to an existing Commission licensee, the application has been deemed to be acceptable for filing if the Commission staff, based on a specific reference to the previously licensed tower, "could, drawing on the application as a whole, confidently verify its actual tower height by taking official notice of the tower height as found in the Commission's records for the licensed facility." Jo-Al Broadcasting, Inc., 5 F.C.C.R. 3399, 3399 (1990) (FM application); Benny L. Bee, Jr., 5 F.C.C.R. 1280, 1281 (1990) (FM application). Otherwise, this deficiency would render the application unacceptable for filing because of the omission of necessary data, thus disqualifying the applicant since the date for filing was past. Id.¹

¹ In addition, with respect to FM, the Commission has stated that a substantially complete application must include antenna heights above average terrain, above ground level, and above mean sea level: Statement of New Policy Regarding Commercial FM Applications that are not Substantially Complete or are Otherwise Defective; 58 Rad. Reg.2d (P&F) 166 (1985) (hereinafter "Policy Statement"). "Clearly, the various antenna heights are employed in a number of processing evaluations by the staff. Their absence, or the absence of any one of them, renders the application not substantially complete." Id. at 168. Accurate antenna height data is equally necessary in order for the staff to complete the evaluations associated with a TV application.

Here, the staff could not confidently verify the height of the tower by reference to its records on the date of filing, September 3, 1991, the date on which Commission precedent dictates that a substantially complete application must be submitted. See e.g., Advance Inc., 88 F.C.C.2d 100. On that date, WPOC(FM)'s records listed the erroneous height, presumably because Four Jacks failed to even notify that licensee of the change as well. The Commission need not apply a "hard look" approach to find that Four Jacks did not submit a substantially complete application on September 3, 1991. It need simply note that the Four Jacks' application

C. Other Serious Misstatements in Application
Flowing From Misstated Tower Height.

Several other important flaws in Four Jacks' application follow from this discrepancy between its claimed height and the actual height of the tower. One is that Four Jacks obviously will have to increase the current height of the tower in order to utilize the site as proposed in its application. Four Jacks' application, however, claims no such change will be necessary. Again, this is such a material misstatement that the Commission staff has not been given adequate data by which it can process the application in the public interest. Such a height change requires Federal Aviation Administration ("FAA") approval in the form of a "no air hazard determination," approval which Four Jacks has expressly claimed is not applicable to its application and which it has not sought. Finally, not only does this misstatement hinder the ability of the Commission staff to analyze the Four Jacks proposal; as demonstrated below, it masks the lack of suitability of the designated site.

In addition, it is relevant that the omission of correct tower height information from Four Jacks' application demonstrates repeated non-compliance with governmental requirements. First, Four Jacks presumably failed in its responsibilities to notify the FAA of the approximately 40 foot reduction in tower height. Then, Four Jacks affirmatively misstated the resulting height to the FCC as if it had not effected any change to the tower's height. Accordingly, Four Jacks' principals have demonstrated a pattern of non-compliance with the regulations of two separate government

agencies with respect to the same subject. Such a pattern of disregard for supplying accurate tower height information in response to valid and important government regulatory requirements warrants dismissal of the application as not substantially complete.

III. Four Jacks has Failed to Identify a Suitable Site.

Separately, Commission precedent establishes that an applicant must have reasonable assurance of the availability of a suitable transmitter site at the time the application is filed. Naguabo Broadcasting Company, 68 Rad. Reg.2d (P&F) 1325 (Rev. Bd. 1991); National Innovative Programming Network, Inc. of the East Coast, 2 F.C.C.R. 5641, 5643 (1987); George Edward Gunter, 104 F.C.C.2d 1363, 1364 (Rev. Bd. 1986); Alden Communications Corporation, 59 Rad. Reg.2d (P&F) 259 (Rev. Bd. 1985). Consequently, if an applicant, upon filing, lacks reasonable assurance of a suitable transmitter site, the applicant is not technically qualified to be a Commission licensee and its application will be returned as patently defective. 62 Broadcasting Inc., 65 Rad. Reg.2d (P&F) at 1835 Shoblom Broadcasting, Inc., 95 F.C.C.2d 444, 445-446 (Rev. Bd. 1983) aff'd sub nom; Royce International Broadcasting Co. v. F.C.C., 762 F.2d 138 (D.C. Cir. 1985). For "[i]t is elementary that a prospective construction permittee must have, if little else, an antenna site, the technical keystone of a broadcasting operation." 62 Broadcasting, Inc., 65 Rad. Reg.2d (P&F) at 1834.

Four Jacks may have absolute assurance of a piece of land and

a tower because it owns these facilities, but this very fact also undermines its erroneous claim that the site is suitable for its intended purpose. It also precludes any assertion by Four Jacks that the site deficiencies identified herein were not "foreseeable" problems at the time its application was submitted. The cumulative effect of these deficiencies is to render the site unsuitable. Since Four Jacks did not, as of the filing date, have a suitable site, it incorrectly certified that it had an available site and thus, its application must be dismissed as unacceptable for filing.

A. The Proposed Transmitter Site is Unsafe.

Of all the reasons why this application should be denied

[REDACTED]

[REDACTED]

notes that "[a]ny significant icing of the tower and its guy cables, in addition to wind loading specified for this geographical area, will put the tower and surrounding area in serious danger." Exhibit C at 7. Not only will employees and other authorized personnel be endangered, but innocent people on adjoining property, as well as the adjoining property itself, will be at risk.

To constitute a suitable site, a designated site must be capable of effectuating an applicant's proposal. See FCC Form 301, Section VII, q.2; see also, Cuban-American Limited, 2 F.C.C.R. 3264 (1987) (Review Board affirms Administrative Law Judge's technical disqualification of two applicants on ground that site was not suitable due to inability of tower to support antenna)³; Greater Washington Educational Telecommunications Association, 53 F.C.C.2d 910 (1975) (Commission finds that an additional factor militating against grant of proposal is question of whether tower is structurally capable of supporting an additional antenna); cf. Luis Prado Martorell, Loiza, P.R., 7 F.C.C.2d 73 (1967) (Commission adds issue on ground that site may be too small for proposed

³ In Cuban-American, site suitability was initially questioned due to pre-negotiation conditions imposed on the applicants by the owner of the designated site. Before the land owner would give the applicants reasonable assurance that they could designate his land and tower in the application, they had to satisfy him that, among other requirements, the existing tower would support their antennas. Results of a design study test conducted by the applicants indicated that although it would be technically feasible to place an antenna on the tower, it would be extremely hazardous, extremely expensive, and extremely disruptive to do so. Thus, the applicants were found to be technically unqualified.

construction).

There is no doubt that the proposed construction will not meet current structural standards as set out by the Electronic Industries Association ("EIA"). As demonstrated by Exhibit C, towers are currently subject to EIA standard RS-222E, which Four
towers cannot meet if it were to add the additional weight of a

B. Electromagnetic Interference with
Aeronautical Communications and
Other FCC Licensees.

Channel 2 operates within the allotted frequency band 54-60 MHz. The second harmonic of Channel 2 (108-120 MHz) falls within the aeronautical band. Since the Four Jacks proposed site is closer to Baltimore Washington International Airport than WMAR-TV's existing site, the potential for electromagnetic interference ("EMI") with airport receivers is much greater. Intermodulation and harmonic studies should be performed for EMI compatibility with the aeronautical services.

The FCC and the FAA are currently engaged in negotiations regarding the question of air hazard determinations based on FAA objections due to potential EMI problems with aircraft receivers. See Oasis Radio Affiliates, Inc. 6 F.C.C.R. 508, 508 (1991) (citing Letter from former Commission Chairman Dennis R. Patrick to Secretary of Transportation Samuel K. Skinner); Texas Communications Limited Partnership, 6 F.C.C.R. 1260, 1261 (1991). The Commission has stated that "[u]ntil such time as there is an agreement between the agencies concerning the harmful effects of EMI to aircraft navigation equipment, the policy of the FCC is to specify an air hazard issue absent clearance of a proposed site by the FAA." Oasis, 6 F.C.C.R. at 508. As evidenced by the affidavit of Michael Moore, a professional air space and procedures specialist (See Exhibit B), FAA regulations require that EMI studies must be performed to ensure that the Four Jacks proposal will not interfere with aeronautical communications. However, Four

Jacks has failed to notify the FAA of its proposed site or to initiate FAA tests to determine if an EMI problem would exist.

Furthermore, the Channel 2 super turnstile antenna proposed by Four Jacks requires the displacement of the WPOC(FM) antenna to the 170 meter (558 foot) level of the tower; 28.3 meters (93 feet) below its current position. See Exhibit A at 5. There are also many other users on the tower, some of which are FCC licensees, that Four Jacks has failed to identify. Id. Since Four Jacks did not identify the users, it also did not give an adequate description of the expected, undesired effect of Channel 2 operations at the proposed site, as required by Form 301, Section V-C, q. 14. As noted by Mr. Everist, Four Jacks:

was silent on the intermodulation effects that would result from the proximity of a relocated WPOC antenna with the auxiliary user frequencies....Similarly, the interaction of Channel 2 with the auxiliary user frequencies was not addressed.

Id. at 5-6. Four Jacks' failure to identify other users or to address the expected intermodulation effects makes it impossible for the Commission to place any reliance on its statement that it will "take appropriate steps (i.e., install and maintain traps or filters) to minimize the interference in fixed receivers." Without conducting a study of the effects of its proposal on WPOC(FM) or other users, it is impossible to know if intermodulation interference can be avoided.

C. Commission Monitoring Station Does Not Receive Requisite Protection.

Section 73.1030(c) of the Commission rules informs all applicants of the need to protect FCC monitoring stations against interference. See 47 C.F.R. §73.1030(c). However, the analysis

Thompson Broadcasting of Battle Creek, Inc., 3 F.C.C.R. 3942, n.1 (1988). "It is indisputable that an application is not grantable until any required FAA clearance has been received." Cuban-American Limited, 2 F.C.C.R. 3264, 3265 (1987).

FAA regulations provide that:

[E]ach sponsor who proposes any of the following construction or alteration shall notify the Administrator in the form and manner prescribed in § 77.17:

- (1) Any construction or alteration of more than 200 feet in height above the ground level at its site.

14 C.F.R. § 77.13(a)(1) (1991). The regulations also define "alteration" of a structure as "a change in its height." 14 C.F.R. § 77.5(b). The tower is not physically shielded by the neighboring 1505 foot AMSL antenna tower and is thus not exempt from FAA notification requirements. See Exhibit B at 2. Thus, not only must Four Jacks notify the FAA of the increase in height it must now make to effectuate its proposal; it should have notified them of the 40 foot decrease in height which it has already made to the tower. It apparently had not made such notification at the time it filed its FCC application.

Four Jacks has erroneously stated in its FCC application that it does not need to secure FAA approval. This conclusion is based on its use of incorrect height data for the existing tower. Furthermore, use of this incorrect data is completely inexcusable in light of the fact that they own the tower and should know the correct height data.

"In general, changes in tower heights or coordinates require the concurrence of the FAA before the Commission will issue a construction permit." Abacus Broadcasting Corp., MM Docket No. 91-350 (HDO, released: December 5, 1991). The fact that the tower Four Jacks shortened was previously approved by the FAA does not obviate the need to notify the FAA because "such a change, under some circumstances, may modify the painting and lighting requirements for the tower structure." Id. Thus, Four Jacks'

6. It is unsafe. A new tower will have to replace the old tower (assuming grant of all required approvals) at a substantial cost. Thus, the applicant has underestimated the cost and therefore the revenues necessary for the requested facility.

"It is fundamental that an applicant be found financially qualified to build the station for which the construction permit is awarded and to have a sufficient reserve of unencumbered capital to operate the station for the initial start-up period without reliance on prospective advertising revenues." Dutchess Communications Corp. 101 F.C.C.2d 243, 244 (1985). The Review Board has stated that "an applicant's financial qualifications are a sine qua non of licenseeship." Washoe Shoshone Broadcasting, 3 F.C.C.R. 3948, 3959, (1988). As part of its obligation, an applicant must "engage in serious and reasonable efforts to ascertain predictable construction and operation costs." Victorson Group, Inc., 5 F.C.C.R. 4506, 4515 (1990), modified, 6 F.C.C.R. 1697 (1991) (applicant disqualified for filing a false financial certification due to failure to establish a basis for projected pre and post grant costs and failure to secure reasonable assurance of sufficient funds available to meet the projected costs). This underestimation is particularly severe due to the fact that Four Jacks owns the tower in question and knew or should have known that the additional expense for replacing the tower would be necessary.

Failure to correctly estimate the costs of construction and operation for the purposes of the application has led to the

financial disqualification of applicants. See Bendel Broadcasting Corp., 98 F.C.C.2d 164, 170 (1984) (applicant found financially unqualified when at late stage in the proceeding it was clear that its "proposal neither reasonably accounts for all of its potential expenses nor substantiates the availability of sufficient funds"); United Broadcasting Company, 93 F.C.C. 2d 482, 509 (1983) (Commission concluded that applicant did not demonstrated its financial qualifications because the liquid assets available "fall

the licensee, the Commission must understand the history of disputes between the principals of Four Jacks and Scripps Howard, as well as between the principals of Four Jacks and other Commission licensees. Throughout this history, Four Jacks has dealt with Scripps Howard and other Commission licensees in a spurious manner.

In 1990, Chesapeake Broadcasting Inc. ("Chesapeake"), a corporation owned by the principals of Four Jacks, opposed the assignment of the license of station WMAR-TV from the previous licensee, Gillett Broadcasting of Maryland, Inc. ("Gillett") to Scripps Howard (FCC File No. BALCT-900910KE). After considerable delay partially caused by Chesapeake, the Commission granted the application by unanimous vote. Chesapeake promptly appealed the grant to the United States Court of Appeals. Then, Chesapeake abruptly and inexplicably withdrew its appeal. Had Chesapeake delayed another day, it is doubtful that Scripps Howard or any one other than Gillett would have been the renewal applicant. Four Jacks principals' actions with respect to this transaction, especially in light of their current attempt to obtain a grant of the Channel 2 license, are highly questionable.

Furthermore, evidence of improper conduct by the principals of Four Jacks has been presented to the Commission in a "Complaint and Request For Ruling" filed by WNUV-TV-54 Limited Partnership, licensee of television station WNUV-TV, Baltimore, MD and Mark I. Baseman, an attorney in Pittsburgh, PA. This pleading raises serious questions concerning the character qualifications of the

principals of Four Jacks. It alleges harm to WNUV-TV caused by improper conduct of these same principals.

Just as seriously, the complaint suggests that the principals of Four Jacks may have failed to provide full information to the Commission in order to obtain approval of an application to substitute their general manager's company as the licensee of their TV station in Pittsburgh while simultaneously buying another station in the same market. Subsequently, it is alleged the Four Jacks principals implemented a plan to control both stations. in

trustee"). Thus, the rules violations alleged by WNUV-TV and Mr. Baseman bear on Four Jacks' qualifications to be a Commission licensee. These allegations are particularly serious because, if true, they suggest that Four Jacks has made misrepresentations to or has lacked candor before the Commission. See Astroline Communications Company Limited Partnership v. Federal Communications Commission, 857 F.2d 1556 (D.C. Cir. 1988) (evidence of violation of Commission's one-to-a-market rule could raise questions about applicant's candor in submissions to Commission). For these reasons, an issue has been raised as to Four Jacks' basic qualifications to be a Commission licensee.

VI. Conclusion.

For the foregoing reasons, the above-referenced application should be dismissed, or in the alternative, denied.

Respectfully submitted,

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January 28, 1992

CERTIFICATE OF SERVICE

I, Cathleen Parham, a secretary in the law firm of Baker & Hostetler, do hereby certify that a copy of the foregoing, "Petition To Deny Application" was mailed on this 28 day of January, 1992, to the following:

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