DUPLICATE

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

RECEIVED

FEB 1 2 1992

Federal Communications Commission
Office of the Secretary

In re Application of)
)

TABLE OF CONTENTS

SUMMARY ii

OPPOSITION TO PETITION TO DENY APPLICATION 1

I. Scripps Howard's Technical Arguments Are Premised On A Fundamental Misunderstanding Of The Governing Commission Standard 2

II. Scripps Howard's Technical Arguments Are Erroneous 3

A. Tower Height 4

B. The Tower Structure 5

C. Electromagnetic Interference 7

D. FCC Monitoring Station 8

E. Environmental Concerns 9

III. Four Jacks Has Properly Estimated The Costs of Construction and Operation 10

IV. Alleged Character Issues 12

VI. Conclusion 14

SUMMARY

Scripps Howard argues that Four Jacks' application should be denied because it is substantially incomplete, because its proposed tower is unsuitable, and because Four Jacks does not

RECEIVED

FEB 1 2 1992

Federal Communications Commission
Office of the Secretary

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In re Application of	)	
	)	
FOUR JACKS BROADCASTING, INC.	)	
	)	FCC File No. BPCT-910903KE
For A Construction Permit for	)	
a New Television Facility on	)	
Channel 2 at Baltimore, MD	)	

To: The Chief, Mass Media Bureau

OPPOSITION TO
PETITION TO DENY APPLICATION

Four Jacks Broadcasting, Inc. ("Four Jacks"), applicant for a construction permit for Channel 2 at Baltimore, Maryland, by its attorneys, hereby opposes the "Petition to Deny Application" filed by Scripps Howard Broadcasting Company ("Scripps Howard") on January 28, 1992. Scripps Howard's application for renewal of Station WMAR-TV, Channel 2, Baltimore, Maryland is mutually exclusive with Four Jack's application.

1. The Scripps Howard petition advances three basic arguments with respect to the Four Jacks application. First and foremost, Scripps Howard claims that the Four Jacks application "fails to meet the minimum standards of acceptability for new TV facilities." In support, Scripps Howard refers to the Commission's FM application processing standards and totally ignores the pertinent TV processing standards. Second, Scripps Howard raises speculative questions about Four Jacks' estimated costs of construction. Finally, Scripps Howard advances totally unsupported allegations concerning Four Jacks' "character

qualifications." As demonstrated herein, the confused and

> of TV applications received, the lenient approach toward defective applications used in the TV service does not lead to undue delay for applicants who file initially complete and acceptable applications.
>
> The procedure used to identify defective applications under the TV approach depends upon whether the application is subject to a comparative hearing. For applications subject to comparative hearings, the TV processing staff uses the Hearing Designation Order as a vehicle for identifying defects and for deciding how those defects can be corrected. For TV applications not subject to a hearing, the staff sends a deficiency letter to the applicant.

(NPRM, ¶16).

Scripps Howard's failure to understand the basic difference between the FM and TV processing standards is a fundamental flaw in its petition and thus its arguments must be totally rejected.

II. Scripps Howard's Technical Arguments Are Erroneous

3. Scripps Howard advances the following arguments with respect to the technical aspects of the Four Jacks application: (a) that the height of the antenna structure specified in the application is inaccurate; (b) that the proposed structure will be "unsafe"; (c) that the Four Jacks proposal will cause electromagnetic interference; (d) that the Commission monitoring station may not be protected and (e) that there are "environmental concerns". Each of these arguments is based on speculation and erroneous facts as demonstrated in the attached Statement of Herman E. Hurst, Jr. of the firm of Carl T. Jones Corporation, Four Jacks' consulting engineer.

A. Tower Height

4. Scripps Howard contends that the overall height of the support structure proposed by Four Jacks is 40 feet less than that set forth in the Four Jacks application. This argument is premised on a substantial misunderstanding of the facts by Scripps Howard.

5. The tower proposed by Four Jacks is owned by Cunningham Communications, Inc. ("Cunningham")[2/] and from 1968 to 1987 housed the WBFF(TV), Baltimore, Maryland Channel 45 antenna. In 1987, WBFF was granted authority to relocate to a new tower structure. The removal of the WBFF antenna from the tower accounts for the 40 feet noted by Scripps Howard.

6. It has continually been the intention of Cunningham to maintain the airspace clearance for the height vacated by the WBFF antenna so that it would be available to potential users

B. The Tower Structure

7. Scripps Howard contends that the proposed Four Jacks site is "unsafe" because the applicant "is proposing to add an enormous amount of weight atop the existing structure." (Petition to Deny, p. 10). With respect to this argument, Scripps Howard is terribly confused. First of all, Scripps is operating under a fundamental misconception. It believes that Four Jacks will "add the additional weight of a Channel 2 transmitter to the structure." (Petition to Deny, p. 12). Transmitters are not placed on top of towers.

8. The other arguments made by Scripps Howard in connection with the tower structure are not supported by any of the statements it submitted.[4/] Donald G. Everist, Scripps Howards' engineer states that "[w]e are not aware that any structural analysis of the tower has been performed by FJB" and "it appears that the tower will need to be structurally modified" (Everist Statement, p. 4). Similarly, Matthew J. Vlissides, another Scripps Howard consultant, submits a purported analysis in which he makes numerous "assumptions" and then "recommends" that the subject tower not be used for the installation of the Channel 2 antenna. In a giant leap of logic, Scripps Howard makes the totally unsupported and speculative conclusion that the

---

3/(...continued)
or notifying Cunningham or Four Jacks and without actual or apparent authority. Nationwide's action was null and void because it had no authority to request that the airspace clearance be reduced.

4/ Scripps Howard alludes vaguely to a "zoning complaint," Four Jacks has no knowledge of any such complaint.

"additional load will cause the tower to endure enormous new stress." Obviously, any addition to a tower will cause new stress but that does not mean that the tower is structurally unsafe and Scripps Howard has failed to demonstrate that the tower is unsafe. Significantly, Mr. Vlissides' statement contains a broad disclaimer in which he assumes no responsibility

(Rev. Bd. 1985), 62 Broadcasting Inc., 65 RR 2d 1829 (Rev. Bd. 1989), and Shoblom Broadcasting, Inc., 95 FCC 2d 444 (Rev. Bd. 1983), aff'd sub nom. Royce International Broadcasting Co. v. FCC, 762 F.2d 138 (D.C. Cir. 1985) all involved site availability issues and thus do not support Scripps Howard's argument. Greater Washington Educational Telecommunications Association, 53 FCC2d 910 (1975) is totally inapposite since it concerned an applicant proposing an experimental TV station on Channel 12 which requested a waiver of the short spacing rules.

11. The only site suitability cases cited by Scripps Howard are Cuban-American Limited, 2 FCC Rcd 3264 (Rev. Bd. 1987) and Luis Prado Martorell, 7 FCC 2d 73 (1967) and these cases fail to support Scripps Howard's thesis. In Cuban-American there was a site suitability issue because a tower owner, Dudley Taft, was not willing to consider any proposals to mount additional TV antennas on his tower and imposed suitability conditions precedent to site negotiations. That is not the case here. In Luis Prado Martorell, supra, a site suitability issue was added because the applicant failed to submit photographs with its application. Furthermore, when suitability questions are properly raised, they give rise to an issue, not denial of an application.

C. Electromagnetic Interference

12. The argument advanced by Scripps Howard with respect to electromagnetic interference is premised on potential interference based on proposed rules. This argument is

completely speculative and conclusory, as explained in the attached engineering statement. Four Jacks proposes to use an existing support structure. Moreover, Scripps Howard has failed to cite any cases where an application was returned as unacceptable because of potential interference under proposed rules. Accordingly, the argument should be summarily rejected.

D. FCC Monitoring Station

13. Scripps Howard argues that the Cunningham site is not "suitable", and that the application is therefore substantially incomplete, because the application does not address protection to the FCC monitoring station in Laurel, Maryland. As explained in the attached engineering statement, and contrary to Scripps Howards' claims, Section 73.1030 does not require that any advance consultation with the FCC monitoring station be undertaken, or that any advance approval be obtained prior to this application.[5/] Since Four Jacks has not violated Section 73.1030, Scripps Howards' arguments relating to that rule provide no basis for denial of Four Jacks' application.

5/ Moreover, Scripps Howards' allegations concerning the field strength of Four Jacks' proposed operation at the Laurel facility are inconsistent. The text of the pleading itself quotes projected field strength levels for both audio and visual components of the signal that are radically different from the levels quoted in the supporting engineering statement. Compare page 15 of the Petition to Deny with Exhibit A, Page 2 of the Petition to Deny (Engineering Statement of Donald G. Everist). Both sets of figures are wrong. See Engineering Statement of Herman Hurst at Page 3.

E. Environmental Concerns

14. Scripps Howard also argues that Four Jacks' application is subject to environmental processing. This argument, like most of the Petition to Deny, is premised on Scripps Howard's own assumption that the existing Cunningham tower is unsuitable. The argument plainly assumes that "the Four Jacks proposal will require construction of a new tower", so that "there may be significant changes in the surface features of the land." Petition to Deny at 17. As shown above, Scripps Howard's speculative assumption that a new tower will be required is incorrect. Moreover, even if a new tower were required, Scripps Howard has provided no basis for making the further assumption that construction of a new tower on the site of an existing tower would necessitate any changes to the surface features of the land. Four Jacks' application is categorically excluded from environmental processing.

15. The Engineering Statement of Cohen, Dippell and Everist also states that Four Jacks' application does not address protection of workers. Apparently, Scripps Howard has not reviewed the Engineering Statement of Four Jacks' application, which adequately addresses the steps Four Jacks will undertake to ensure that workers are protected (see attached Statement of Herman Hurst).

III. Four Jacks Has Properly Estimated The Costs of Construction and Operation

16. Scripps argues that Four Jacks has underestimated the costs of construction and operation because its proposed tower cannot be used for the intended purpose.[6/] This argument fails along with the one to which it is bootstrapped. As shown previously, the sole premise of the argument that Four Jacks' proposed tower is unsuitable is a series of unsubstantiated assumptions about the tower itself. One might as well apply the same assumptions to Scripps Howard's own current tower for WMAR, and conclude with the same confidence that the current WMAR tower is unsuitable for a Channel 2 antenna. Furthermore, some of the key assumptions regarding the tower -- particularly the substantial loading caused by the transmission lines -- are just plain wrong, as explained in the attached Engineering Statement of Herman Hurst.

17. Of course, even if all of Scripps Howard's false assumptions regarding the suitability of the tower are credited arguendo, that still would not render Four Jacks financially unqualified. Scripps Howard's entire argument relies on several unstated assumptions about what may or may not be included in Four Jacks' budget -- a budget it has not seen. This is the worst kind of speculation.

6/ Scripps carelessly alleges that Four Jacks has underestimated the costs of both construction and operation. But its argument -- that a new tower must be built to accommodate the antenna -- goes solely to construction costs. Scripps does not allege any facts or offer any analysis to support its claim that Four Jacks has underestimated its operations costs.

18. Another key Scripps Howard assumption is belied by its own petition to deny. Four Jacks' application shows that it has reasonable assurance of $500,000 in funds in excess of its estimated costs of construction. By Scripps Howard's own inflated estimate, a new tower that would accommodate Four Jacks' proposal would cost no more than $350,000. So, even assuming 1) that the Cunningham tower could not accommodate the proposed antenna; 2) that Four Jacks' budget does not otherwise provide for tower expenses; and 3) that the new tower would cost as much as Scripps Howard estimates, Four Jacks still has sufficient funds to construct and operate the station for three months without revenue. Indeed, even after building a new tower, it would still have a quite healthy "cushion" of $150,000.

19. There is no basis whatsoever for Scripps Howard's feeble speculation that the $500,000 cushion may be needed for attorneys' and engineers' fees. This argument is rife with even more unstated and unsupported assumptions about Four Jacks' finances and its budget. Section 309(d)(1) of the Communications Act of 1934, as amended, requires that allegations of fact made in a petition to deny must be supported by an affidavit of a person with personal knowledge of the facts alleged. Scripps Howard has not provided any such affidavits regarding Four Jacks' financial affairs, and Scripps Howard's idle speculation about Four Jacks' internal affairs is legally insufficient to support the petition. The financial qualifications aspect of Scripps

Howard's petition to deny is therefore invalid as a matter of law.[7/]

IV. Alleged Character Issues

20. Section V of Scripps Howard's petition to deny argues, essentially, that Four Jacks lacks basic character qualifications to receive the construction permit because 1) it once filed a petition to deny against Scripps Howard; and 2) because another Commission licensee has filed a complaint against another licensee controlled by the principals of Four Jacks. These matters are spurious for a number of reasons. First, they are so vague that it is impossible to ascertain precisely what kind of misconduct is alleged. Second, no affidavits by persons with personal knowledge of the facts alleged are supplied with respect to either matter, so these allegations are patently inadequate to support denial of the application as a matter of law, under Section 309(d)(1) of the Communications Act of 1934, as amended. Indeed, the entire section of the petition to deny challenging Four Jacks' basic qualifications contains no specific allegations of fact at all. It is ludicrous for Scripps Howard to allege that the simple fact that Scripps Howard and the Four Jacks principals have been in adversarial positions in a past FCC

7/ The cases Scripps Howard cites in support of its financial qualifications argument are irrelevant. They are cited for simple, and general propositions that have no bearing on the instant case. Scripps Howard provides no legal support for its proposition that an applicant may be dismissed as financially unqualified because the petitioner thinks the applicant's tower might not support its antenna.

proceeding is a basis for denial of Four Jacks' instant application.

21. Scripps Howard also contends that an issue has been raised as to Four Jacks' basic qualifications because WNUV-TV-54 Limited Partnership and a Pittsburgh attorney have filed a complaint against another licensee controlled by the Four Jacks principals. Scripps Howard gives a cursory summary of the general allegations made in the complaint, but does not allege any facts that would provide a basis for denial of Four Jacks application, and provides no supporting affidavit as required. Instead, it cites a string of cases standing for the general proposition that violations of the Commission's rules and policies may be predictive of an applicant's truthfulness and reliability, and concludes that the WNUV allegations, "if true" may "suggest" that a rule violation has occurred. Having failed to allege any facts that would constitute a rule violation, Scripps Howard's attempt to incorporate by reference an entire pleading regarding matters of which it has no knowledge must fail.[8/]

22. Finally, as a procedural matter, Scripps Howard's allegations regarding Four Jacks' financial and character qualifications are not the proper subjects of a petition to deny, since they do not go to the grantability of the application

---

8/ In fact, the complaint Scripps Howard attempts to incorporate by reference itself failed to include legally sufficient affidavits of personal knowledge in support of the matters alleged therein. The WNUV complaint itself is utterly meritless and abusive of the Commission's processes as demonstrated in the Response to the Complaint.

itself. Accordingly, there is no basis for consideration of these allegations.

VI. Conclusion

For the reasons explained herein, Scripps Howard's Petition to Deny Four Jacks' application must be denied.

Respectfully submitted,

FOUR JACKS BROADCASTING, INC.

By: Martin R. Leader

Martin R. Leader
Kathryn R. Schmeltzer
John K. Hane III

Its Attorneys

Fisher, Wayland, Cooper
and Leader
1255 23rd Street, N.W.
Suite 800
Washington, D.C. 20037-1125
(202) 659-3494

Date: February 12, 1992

CARL T. JONES
CORPORATION

STATEMENT OF HERMAN E. HURST, JR.
IN SUPPORT OF AN OPPOSITION
TO A PETITION TO DENY
AN APPLICATION FOR A NEW TELEVISION
BROADCAST STATION IN BALTIMORE, MARYLAND
FCC FILE NO. BPCT-910903KE

Prepared For: Four Jacks Broadcasting, Inc.

I am a Radio Engineer, an employee of the firm of Carl T. Jones Corporation, with offices located in Springfield, Virginia.

My education and experience are a matter of record with the Federal Communications Commission.

This office has been authorized by Four Jacks Broadcasting, Inc. ("Four Jacks"), applicant for a new VHF television station to serve Baltimore, Maryland, on Channel 2, to prepare this statement in support of its Opposition to Petition to Deny. The Four Jacks Application for Construction Permit (FCC File No. BPCT-910903KE) is mutually-exclusive with the pending application of Scripps Howard Broadcasting Company ("Scripps Howard") for renewal of its license for television station WMAR-TV (FCC File No. BRCT-910603KX). On January 28, 1992, Scripps Howard filed a Petition to Deny ("Petition") the Four Jacks Application.

Scripps Howard alleges in its Petition that the Four Jacks application "has not provided an adequate technical presentation for full FCC evaluation" and therefore

Carl T. Jones Corporation
7901 Yarnwood Court Springfield Virginia 22153-2899 (703) 569-7704 Fax: (703) 569-6417

"should be returned."[1] According to the Scripps Howard Petition the Four Jacks Application is "incomplete" concerning the following issues:

1. Protection to FCC Monitoring Station
2. Antenna Height
3. Environmental Concerns
4. FCC Form 301, Section V-C, Question 14

Contrary to Scripps Howard's allegations, the Four Jacks proposal is complete with regard to the issues raised in the Scripps Howard Petition as demonstrated herein.

I. Protection to FCC Monitoring Station

In its Petition, Scripps Howard alleges that the Four Jacks proposal has "apparently failed to seek advance consultation with the FCC Monitoring station [near Laurel, Maryland] regarding monitoring station protection."[2]

Section 73.1030 of the FCC Rules entitled, "Notifications concerning interference to radio astronomy, research and receiving installations", subsection (c), sets forth the procedures regarding Protection to FCC Monitoring stations. Nowhere within this rule section does the FCC require any advance consultation with, or approval from, the monitoring station. Rather, the FCC Rule "advises" or "suggests" that applicants give

---

[1] See Scripps Howard Petition, Engineering Statement, Page 2.

[2] Id., Page 3.

consideration and/or seek consultation when the proposed transmitter site is in the vicinity of the monitoring station.[3]

In addition, Scripps Howard overstated the field strength present at the reference coordinates of the monitoring station. The proposed facility will produce a predicted field strength of 92 dBu at the monitoring station (rather than 103.5 dBu as Scripps Howard claims), an increase of 7 dBu over that field strength presently predicted at the Laurel facility from WMAR-TV.

Scripps Howard claims that the WPOC(FM) relocation will result in WPOC(FM) increasing its predicted field at the Laurel monitoring station by 1.6 dB.[4] However, the relocation of WPOC(FM), as discussed in the original application, will result in an predicted decrease in the WPOC(FM) predicted field at the monitoring station from 83.98 dBu to 83.92 dBu.

Normal application processing procedure will result in the FCC's staff evaluating the effect of the instant proposal on Commission monitoring stations. It is submitted that the proposed predicted field strength levels at the Laurel monitoring station when compared to existing levels will be determined to have no impact upon the facility.

---

[3] See 47 C.F.R. § 73.1030(c)(1), (c)(2), (c)(3).

[4] See Scripps Howard Petition, Engineering Statement, Pages 2-3.

II. Antenna Height

Scripps Howard has introduced a discrepancy regarding the overall height of the proposed support structure. According to Scripps Howard, the overall height of the support structure is 40 feet less than claimed in the Four Jacks Application. As a result, Scripps Howard claims that (1) Four Jacks failed to notify the Federal Aviation Administration ("FAA") or the FCC of the 40 foot reduction in height and (2) Four Jacks failed to notify the FAA of the "proposed" 40 foot increase in height.

At the time Four Jacks filed its application, the support structure was authorized to occupy 1249 feet of airspace. This determination was made by the Federal Aviation Administration ("FAA") in aeronautical study No. DCA-OE-68-19 (See Copy Attached). This determination does not expire.

The subject support structure housed the WBFF(TV), Baltimore, Maryland, Channel 45 antenna from 1968 to 1987. In 1987, the FCC granted WBFF(TV) the authority to relocate its facility to a new tower structure (See FCC File No. BMPCT-870422KH). The removal of the WBFF(TV) antenna accounts for the 40 foot height discrepancy.

It was the intention of the tower owners, Cunningham Communications, Inc., to maintain the airspace clearance for the height vacated by WBFF(TV) antenna. The tower was to be extended at a later date to accommodate antennas for land mobile users. Because the height reduction was only temporary, the FAA was not notified of the removal of the WBFF(TV) antenna. Further, in this instance the FAA rounds to the

nearest 100 feet in its airspace evaluation. Therefore, the temporary 40-foot reduction does not impact established airspace. In the interim, Cunningham Communications, Inc. maintained the marking and lighting of the tower in accordance with FCC and FAA regulations.

Subsequently, Four Jacks secured the top of the tower for its proposed Channel 2 antenna. At the time Four Jacks filed its application, notification to the FAA was not necessary because Four Jacks did not propose to increase the FAA approved height of the tower.

III. Environmental Concerns

The main argument Scripps Howard has introduced concerning the environmental impact of the Four Jacks proposal is that "it is not certain ... whether this [the existing] tower can be used without significant structural modification or replacement."[5] Based on this assertion, Scripps Howard claims that possible modifications to the existing tower or construction of a new tower could potentially adversely affect the environment.

Scripps Howard's conclusion that the tower is physically unable to accommodate the new Channel 2 superturnstile antenna was based on numerous assumptions of critical tower parameters/ support characteristics and, as a result, is not adequately substantiated. Therefore, the unfounded presumption that new tower construction or

[5] See Scripps Howard Petition, Engineering Statement, Page 4.

major tower modification may be necessary does not warrant an environmental concern.

With regard to occupational safety, Scripps Howard alleges that Four Jacks had "not disclosed how this protection will be met or what precautions will be undertaken."[6] To the contrary (as stated in the original application on Page 8 of the Engineering Statement), Four Jacks is committed to insuring the safety of personnel to the extent that the proposed television station will go off-the-air if necessary to avoid RF exposure in excess of the American National Standards Institute Guidelines.

In addition, Four Jacks has committed to institute joint measures with co-located station WPOC(FM), the only remaining major contributor to on-site RF radiation. The net RF contribution of WPOC(FM) and the proposed Channel 2 facility would be only 9.06% of the ANSI guideline value. While additional Land Mobile/SMR stations are currently located on the tower, the two broadcast facilities would produce nearly 100% of the total RF energy considered in evaluating the site for compliance with FCC requirements set forth in OST Bulletin No. 65.

IV. FCC Form 301, Section V-C, Item 14

Scripps Howard claims that because Four Jacks did not disclose the other users on the support structure (other than WPOC(FM)) an assessment required by Section V-C, Q.14 of FCC Form 301 cannot be made. Further, Scripps Howard asserts that Four

Jacks "failed to perform a study of the proposed Channel 2 operation upon the multitude of auxiliary user antennas as required by Section V-C, Q. 14 of FCC Form 301."[7]

Contrary to the Scripps Howard assertions, question 14 of FCC Form 301 does not require any assessments be made or any such study preformed. Notwithstanding this fact, Four Jacks has committed that, "in the event any type of intermodulation interference occurs with any other facilities which have not been identified the applicant [Four Jacks] will take appropriate steps to minimize the interference" (See BPCT-910903KE, Four Jacks Engineering Statement, Page 5).

In its Petition, Scripps Howard also alleges that Four Jacks was silent with respect to the intermodulation effects of a relocated WPOC(FM) antenna and the overall effect of the proposed Channel 2 antenna.

Also stated on the above-referenced Page 5 of the Four Jacks engineering statement, "the applicant [Four Jacks] accepts the responsibility to alleviate any new intermodulation interference ... resulting from the instant proposal." The instant proposal clearly includes the relocation of the WPOC(FM) antenna and the installation of the new Channel 2 antenna.

---

[7] Id.

OTHER TECHNICAL ISSUES

1. FAA Electromagnetic Interference Issue

An aeronautical consultant was retained by Scripps Howard to evaluate the effects of the Four Jacks proposal. On behalf of Scripps Howard, the consultant concluded that the FAA would evaluate the Four Jacks proposal "based on proposed rules [regarding] Electromagnetic Interference (EMI) evaluations. It is expected that the FAA and FCC will develop a common electromagnetic evaluation process."[8] Clearly, the Four Jacks proposal is not subject to "proposed rules" or "expected processes" of any type.

In addition, as an existing support structure, the structure is not subject to Part 77 of the FAA Rules. The consultant's continued references to proposed FAA rules and procedures are without merit.

2. Site Suitability Issue

In its Petition, Page 2, Scripps Howard, through its attorneys, claims that the support structure proposed by Four Jacks is unsuitable for its intended purpose because the structure would be rendered unsafe if used as proposed. This allegation is based wholly upon the determination of Vlissides Enterprises, Inc. ("Vlissides"), who performed a "computer structural analysis" of the proposed support structure on behalf of Scripps

[8] See Petition, Affidavit of Michael L. Moore, Page 2.