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W. R. Bradshaw

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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

-----)
In Re:)
)
SCRIPPS HOWARD BROADCASTING CO.)
and)
FOUR JACKS BROADCASTING, INC.)
)
Baltimore, Maryland)
-----)

MM Docket No. 93-94

The above-entitled matter came on for pre-hearing conference pursuant to notice before Richard L. Sippel, Administrative Law Judge, at 2000 L Street, N.W., Washington, D.C., in Courtroom No. 4, on Thursday, June 3, 1993, at 9:00 a.m.

APPEARANCES:

On behalf of Scripps Howard Broadcasting Company:

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On behalf of Four Jacks Broadcasting, Inc.:

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On behalf of Mass Media Bureau:

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25	Conference Began: 9:00 a.m.	Conference Ended: 10:00 a.m.

P R O C E E D I N G S

(9:00 a.m.)

1
2 JUDGE SIPPEL: -- record. I'm going to start by
3 receiving appearances of counsel. For Scripps Howard?
4 MR. ROBERTS: David Roberts, Baker and Hostetler.
5 JUDGE SIPPEL: Okay.
6 MR. HOWARD: Kenneth Howard, Baker and Hostetler.
7 MR. GREENEBAUM: Leonard Greenebaum, Baker and
8 Hostetler.
9 MS. GOSS: Margaret Goss, Baker and Hostetler.
10 JUDGE SIPPEL: Okay. And on behalf of Four Jacks?
11 MS. SCHMELTZER: Kathryn R. Schmeltzer, Fisher,
12 Wayland, Cooper and Leader.
13 MR. LEADER: And Martin R. Leader.
14 JUDGE SIPPEL: And the Bureau?
15 MR. ZAUNER: Robert A. Zauner and Norman Goldstein
16 for the Mass Media Bureau.
17 MR. GOLDSTEIN: Your Honor, may I just state. I'm
18 going to have to leave for a meeting with the Commissioner
19 about ten to 10:00, so Mr. Zauner will be here, but I'd like
20 to just be able to leave.
21 JUDGE SIPPEL: All right. We may be, may be
22 fortunate enough to have completed the conference by ten
23 minutes of 10:00, but I'm making no commitments. There is a
24 lot to cover this morning. I'm awaiting reply pleadings on
25 four outstanding motions, all of which are, are significant

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1 motions. And there has also been a Motion to Strike that was
2 filed by Scripps Howard against an opposition to a renewal
3 commitment that was filed.

4 And also there was filed yesterday, it's a Motion
5 to Correct one of my memorandum opinions and orders. So there
6 -- I'm, I'm stating that for the record, because I know that
7 there are a lot of issues that need to be resolved in the
8 context of how this case is going to get litigated.

9 But there -- what I want to focus on this morning
10 is, is, is the main issue here is the, the renewal application
11 and the competing application and the issues that are going to
12 be heard under that no matter what the, the outcome of the
13 other, the other motions may be.

14 My primary purpose here is to get procedural dates

1 parties, that -- I'm sorry. Let me restate that. Public
2 witnesses, that is witnesses that are not parties, that are
3 going to be sponsored by the, the respective parties.
4 ~~And there'd be the other, the other alt-- the other~~

1 everything -- or hearing all the evidence here in Washington,
2 D.C.

3 Let me start first with the determination of the
4 renewal period. It's important to me, certainly, to focus on
5 that relevant period of time for which the evidence is going
6 to be considered. I, I understand what -- I think I
7 understand what Scripps Howard's position is and that is that
8 you're seeking a, a period from May 30, 1991, to September 30,
9 1991.

10 MR. HOWARD: Yes, Your Honor.

11 JUDGE SIPPEL: Is that correct?

12 MR. HOWARD: Yes, Your Honor.

13 JUDGE SIPPEL: All right. Now, and, and, and that,
14 that starts with the date that you acquired control -- or
15 Scripps Howard acquired control up until the end of the
16 renewal period?

17 MR. HOWARD: Yes, Your Honor.

18 JUDGE SIPPEL: All right. Now, Mr. Leader, your
19 position is that there's a cut-off time?

20 MR. LEADER: Yes, sir, which is the date on which
21 we filed the application. I think that's specified in the
22 rules and other cases.

23 JUDGE SIPPEL: Right. It's September 3, 1991. So
24 we're talking about a period of -- what's in contest there is
25 a period of about 27 days.

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1 MR. LEADER: That's correct.

2 JUDGE SIPPEL: Okay. What is the Bureau's position
3 on this? Do you have anything, Mr. Goldstein?

4 MR. GOLDSTEIN: It appears that they indicated that
5 they were -- that the licensee was not on notice. And unless
6 they can demonstrate that they were on notice, it seems to me
7 that it's not unreasonable for them to go to the end of the
8 license period.

9 JUDGE SIPPEL: Say -- I'm sorry. Say that again?

10 MR. GOLDSTEIN: The, the licensee in, in opposing
11 the attempt to limit the renewal expectancy to the date that
12 they filed their applica-- their application, the licensee
13 claimed that they were not aware of the filing of the
14 application.

15 JUDGE SIPPEL: Right. That's what they said.

16 MR. GOLDSTEIN: To the extent that they were not
17 aware of the applica-- they were not aware of the competing
18 application, it seems to me to be not unreasonable to allow
19 them to go to the end of the license term.

20 JUDGE SIPPEL: I see.

21 MR. GOLDSTEIN: It's not the -- the term is put on
22 notice and if they were not put on notice that they were not
23 advised of it.

24 JUDGE SIPPEL: Okay. I, I hear what you're saying.

25 MR. GOLDSTEIN: I don't think it makes that much of

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1 a difference.

2 JUDGE SIPPEL: Well, it's -- does it make that much
3 of a dif-- I mean, is there going -- can I resolve this very
4 quickly by saying it's, it's -- this is much ado about
5 nothing?

6 MR. LEADER: No, I don't think it is much ado
7 about nothing.

8 JUDGE SIPPEL: All right. I --

9 MR. LEADER: For two reasons, one is --

10 JUDGE SIPPEL: I'm sorry?

11 MR. LEADER: The application was filed on September
12 3rd, which is the date prescribed by the rules.

13 JUDGE SIPPEL: I understand that.

14 MR. LEADER: I had a conversation with Mr. Zyphang
15 about a week thereafter when he became aware of the fact that
16 the application had been filed and asked -- inquired of me why
17 I didn't serve Scripps Howard with a copy of the application.
18 I told him I was not required to under the rules.

19 MR. GOLDSTEIN: Your Honor, in light of what he's
20 saying, unless Mr. Zyphang attempts to refute what he said,
21 they were put on notice and that we would state that the
22 filing of the application --

23 MR. LEADER: Mr. Zyphang originated the call to me.
24 He said I heard you filed an application and I said, that's
25 correct. He said, why didn't you send me a copy and I said,

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1 because I wasn't required to under the rules.

2 JUDGE SIPPET: Do, do you have records that reflect
3 the date of that phone call?

4 MR. LEADER: It was before September 30th and it
5 was no more than a week after because he told me he had heard
6 from people in Baltimore and his client had heard and he
7 wanted to know if it were true and I told him it was true.

8 JUDGE SIPPET: So you -- something like around the
9 10th of September.

10 MR. LEADER: Couldn't have been -- could not have
11 been more than the 10th, and then there was a radio convention
12 in September 1991 in San Francisco and Mr. Zyphang approached
13 me in the lobby of the hotel. I believe it was the Marriott
14 Hotel. And indicated to me that he wanted to talk about --

1 I understand. I was just trying to look at the -- I'm trying
2 to address the practicalities of this as well.

3 MR. LEADER: But the rule and precedent, number
4 one, is I'm under no obligation. A, a -- in a comparative --
5 proceeding, an applicant for new facilities is under no
6 obligation to serve the incumbent with the app-- with the
7 application. Number two, all the cases on renewal period are
8 very clear in when the renewal period begins and when the
9 renewal period ends. I don't know what -- why there is an
10 issue here as to the renewal period under which Scripps Howard
11 is to be tested.

12 JUDGE SIPPEL: Well, I think it's -- I, I think --
13 I think these issues become very fact-intensive, though, when
14 you -- you know, when you're having a set of facts that
15 perhaps was not contemplated when the general -- the general
16 rule for it was, was determined. And we, we have a short
17 period of time here.

18 MR. LEADER: But the rule here --

19 JUDGE SIPPEL: I, I understand what you're saying.

20 MR. LEADER: -- the postulate -- but, but the rule
21 -- if the Commission were concerned about what you're
22 postulating, they could say -- they could have written rules
23 that the renewal period begins when the incumbent has
24 knowledge or notice -- received notice of the filing of the
25 application. And they didn't do that.

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1 JUDGE SIPPEL: Okay. I hear you. Mr. Howard?

2 MR. HOWARD: Your Honor, I think that the key facts
3 here are that yes, there was a substantial delay in when the
4 actual notice was delivered to, to Scripps Howard that the --
5 and you talk about the practical matter. There's an obvious
6 practicality that there was not any change that occurred in
7 the programming of the station to bolster his program -- a
8 major market television station. You don't change that
9 station's operation for the better in any way in a period of a
10 week, which is the -- really the issue of debate. After when
11 the notice may have occurred -- well, a week and a half from
12 when he says the notice occurred.

13 The second thing is that the precedents on which he
14 ~~relies talk about the concern over the -- of the Commission~~

1 | should accrue to, to Scripps Howard from it's well-planned,
2 | and documented that it was planned, efforts to expand its
3 | local news coverage during that time.

4 | JUDGE SIPPEL: Let me ask you this question, then.
5 | I take it from that explanation, then, you're not going,
6 | you're not going to offer any evidence of, of new planning --

1 I, and I heard what you said, but I, I've, I've had occasion
2 to take a look at this Post Newsweek case, 23 FCC 2nd, not
3 only in the context of this case, but in another case over
4 which I presided involving a renewal in Secaucus, New Jersey.
5 And it -- I went back and I looked at what I wrote at that
6 time. This was back in 1988 and NMN FCC 88M-3358 and this
7 seems to be a case very much in point with that situation.

8 And the holding of that case is -- again there was
9 a short period of time, 65 days, from -- that, that would be
10 the renewal measurement, because of an acquisition of a new
11 sta-- of a station by a new, a new renewal applicant so to
12 speak. And the Commission held that as the, the planning that
13 was done up until the time of the renewal cut-off, that was
14 implemented -- I mean -- I'm sorry.

15 Up to the time that the opposing application was
16 filed, the planning that was done up to that point is, of
17 course, admissible into evidence and the implementation of
18 that planning that might have been implemented after the,
19 after the contested applicant filed but before the end of the
20 renewal period, is also considered to be relevant evidence.
21 And it makes a heck of a lot of sense, because you want to see
22 if the plans that were made that go up to the cut-off point
23 were actually carried out.

24 I mean any evidence of that would certainly be, be
25 relevant, because if they just made plans and didn't do

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1 anything to carry them out, that would be an adverse inference
2 against them it would seem to me. So, I, I don't -- I'm, I'm
3 satisfied with handling it that way and I -- that is that
4 there will be -- the renewal period will run through the 30th
5 of September, howsomever there'll be no evidence received of
6 new programming that was initiated or conceived of after the
7 third of September. Understand? All right.

8 MR. ZAUNER: Your Honor, did you say at the end
9 there that there would be no evidence of new programming that
10 was implemented after the third of September?

11 JUDGE SIPPEL: No. I just -- I said just the
12 opposite.

13 MR. ZAUNER: Okay. That's why I --

14 JUDGE SIPPEL: That the implementation,
15 implementation of evidence comes in for that whole period.
16 The planning evidence stops at the third of September -- at or
17 about the third of September. Now if there's some narrow
18 issue that comes in that there was something that was being
19 thought of on the fourth of September and you didn't have
20 notice of it, you can make argument on that evidence, but --
21 and make your record on it, but my ruling with respect to the
22 renewal expectancy has been made and that's going to be it --

23 MR. ZAUNER: Yes, Your Honor.

24 JUDGE SIPPEL: -- as far as what I'm going to
25 consider. Okay for that. Now, let me, let me move on --

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1 well, we're talking about renewal expectancy. I've -- like I
2 said, I've got, I've got some considerable pleadings on my
3 desk that I didn't bring in this morning, but there -- I did
4 bring in this pleading with respect to your seeking -- that
5 is, Scripps Howard seeking a threshold showing of unusually
6 good past programming record. And I know you're opposed to
7 that, Mr. Leader.

8 MS. SCHMELTZER: That's correct.

9 JUDGE SIPPEL: Ms. Schmeltzer. Okay. I, I
10 understand that. I've read your papers. I don't know. Is
11 the Bureau going to take a written position on that?

12 MR. GOLDSTEIN: It falls under the comparative
13 aspect of -- precedent is that we don't get involved in
14 that aspect.

15 JUDGE SIPPEL: All right. I, I didn't mean to put
16 you on the spot on that. I just want to be sure that I'm not
17 waiting for something that I haven't looked at. I know
18 there's going to be a reply pleading on this. I guess my
19 question is this, Ms. Schmeltzer. Supposing there were -- and
20 I understand your arguments. I mean, I understand the points
21 that you're making in your papers, so I don't want to dwell on
22 that, but I'm, I'm saying, supposing there were a situation
23 where -- a hypothetical situation.

24 I'm sure that this would probably never, ever
25 happen, but let's say that there was a company that came and

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1 | acquired a station in Washington, D.C. -- a TV station. And,
2 | and, and they had several other properties around the country
3 | as broadcasting properties that they had done a terrible job
4 | with and they were seeking a renewal expectancy under
5 | circumstances similar to the -- I mean a short period of time
6 | -- of expectancy time that they have to work with and they're
7 | making all kinds of representations that we're going to put on
8 | some terrific programming here.

9 | But yet they have a track record that is -- that
10 | shows them to be absolutely miserable in, say, five of the
11 | markets. Would -- in a situation like that, would you --
12 | would it be appropriate, do you think, to consider or would it
13 | make sense to consider the previous negative track record when
14 | a person is -- in a renewal expectancy. Person is saying that
15 | in the future -- from now on in the future we're going to do a
16 | good job?

17 | MS. SCHMELTZER: Your Honor, I -- there's -- I
18 | think there are two issues there. The one is, did they make
19 | the threshold showing for the unusually good past broadcast
20 | record in Washington. And then the second issue that you're
21 | asking about is, would it be appropriate to introduce rebuttal
22 | evidence as to their track record elsewhere? I, I think
23 | you're asking two different questions.

24 | JUDGE SIPPEL: Well, I'm trying to -- I was -- I'm
25 | trying to put it on the flip side of this one. I'm saying

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1 that there's a, there's a, there's a short period of time. I
2 mean to arbitrarily say 65 days, like in that Newsweek case.
3 And they've got 65 days in which to try and make it a
4 convincing argument that they should get a renewal expectancy.

5 MR. LEADER: In Baltimore.

6 MS. SCHMELTZER: In Baltimore. That's right. The
7 other market --

8 JUDGE SIPPEL: Well, all right --

9 MR. LEADER: That's pretty important.

10 JUDGE SIPPEL: Well, I'm trying to keep, I'm trying
11 to keep this hypothetical.

12 MR. LEADER: Well, the problem with your
13 hypothetical is that if I were a challenger, I'd probably
14 challenge one of those stations with a miserable record.
15 That's the problem with your hypothetical.

16 JUDGE SIPPEL: Well, I'm saying, if you have
17 evidence of the miserable record, aren't you going to try and
18 introduce it?

19 MS. SCHMELTZER: The only way it could possibly be
20 relevant to Baltimore is if there were some character

1 | both ways.

2 | MS. SCHMELTZER: I'm saying on the unusually good

3 | or unusually poor past broadcast record. A. that's never been

1 MS. SCHMELTZER: No. It's been considered under
2 renewal expectancy.

3 MR. HOWARD: But if you don't get a renewal
4 expectancy --

5 MS. SCHMELTZER: If you don't get a renewal
6 expectancy, you wouldn't get past broadcast record either.

7 MR. LEADER: The renewal expectancy is predicated
8 on your past broadcast record. That's what it's all about.
9 Why they have different standards between competitive
10 applications for new facilities and comparative renewals.

11 JUDGE SIPPEL: Well, now wait a minute. Now
12 you're, now you're getting ahead of me. It's based on -- the
13 renewal expectancy is based on past broadcasting. It's
14 programming.

15 MR. LEADER: The renewal expectancy is based --

16 JUDGE SIPPEL: It's based on programming. Well, I,
17 I mean I got case law that is going to tell me that. I don't
18 need to argue that point.

19 MR. LEADER: Right.

20 JUDGE SIPPEL: The point is, is that if you get it
21 as, as Mr. Howard's -- situation looks, as long as you get a
22 case where they can't make renewal expectancy, for whatever
23 reason, but they got other --

24 MR. LEADER: So why should the challenger
25 penalized?

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1 JUDGE SIPPPEL: Well, let, let me finish my
2 proposition here. My, my -- let me postulate this. They
3 can't do the -- they can't make renewal or they want a
4 fallback position and they got properties in five other
5

1 these questions.

2 MS. SCHMELTZER: I mean, I guess your, your concern
3 is they have operated Baltimore for a short period of time.
4 That was there decision. They could have closed
5 simultaneously with the renewal. And they could have closed
6 -- I mean, they could have closed at any time, but they, they
7 chose to close right before the renewal was due, which is a
8 risk. And everyone knows that.

9 JUDGE SIPPEL: Let me ask you -- well, all right.
10 I don't know. I was going to posit the situation if this were
11 just a straight comparative issue for a new facility, but I, I
12 understand what your position is on that. But you have cited
13 -- I'm going to have to go back and look at your cases very
14 carefully, but is there -- are you saying that there really is
15 case law and there's decision law that says what your argument
16 postulates? That in a renewal situation --

17 MS. SCHMELTZER: That's correct.

18 JUDGE SIPPEL: -- if you can't meet renewal
19 expectancy, you cannot consider --

20 MS. SCHMELTZER: Well, I don't think anyone --

21 JUDGE SIPPEL: -- the past work -- assuming that
22 you -- hypothetically, assuming that a party makes the
23 threshold showing, and I know it's very difficult to make. I
24 mean there's a lot of cases on that. But assuming that a --
25 in a renewal case, the renewal applicant can make the

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1 threshold showing in -- on the comparative side -- on the
2 straight, head-on head comparative issue, but they can't make
3 it, they can't make a broadcasting record in -- for the
4 renewal expectancy purposes for whatever reason. You're
5 saying that that -- that issue can't be litigated? That issue
6 can't be heard.

7 MS. SCHMELTZER: There's two reasons why it can't.
8 Number one, it's subsumed by the renewal expectancy. But
9 number two, in order to get past broadcast record, your
10 ownership has to be integrated into the management of the
11 station and they are not proposing integration. And there are
12 cases that say that as well.

13 JUDGE SIPPEL: Okay. I hear you. I hear what
14 you're saying. I, I mean I'm not saying okay, I necessarily
15 agree with everything you're saying, but I, I'm very -- I'm
16 much better focused now. Do you want to say anything more to
17 that Mr. Howard?

18 MR. HOWARD: I just don't -- I don't think it's
19 come up, Your Honor, is the response. Did, did you mean to
20 say -- I think you were asked whether there was precedent that
21 says that, that a renewal applicant cannot seek past broadcast
22 record.

23 MS. SCHMELTZER: There were -- there's --

24 MR. HOWARD: I don't think that that's the case.

25 MS. SCHMELTZER: The -- when the Commission has

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1 discussed this in pure comparative cases, they have
2 specifically said the comparative renewal is a different
3 animal because you have the renewal expectancy there. They've
4 specifically said that.

5 JUDGE SIPPPEL: All right. Well, you've got a, you,
6 you've got an opportunity for a reply pleading, Mr. Howard.
7 You can fo-- you, you know where I'm -- what my concern is and
8 if you can focus on it in your reply, I'm going to

1 to renewal expectancy, for example. On the side of Four
2 Jacks, of course, it would be the inte-- principles who are
3 going to be -- who are proposed for integration.

4 And you've indicat -- I think there's been an
5 indication in the joint report that the parties are going to
6 -- will, will work out a schedule independently on that, but
7 the documents have to be exchanged first. And I agree with
8 that.

9 MS. SCHMELTZER: Your Honor, I do have one
10 question. Scripps Howard knows who our integrated principles
11 are because we've identified them in the integration
12 statement. But we don't know who is going to be sponsoring
13 their renewal expectancy exhibits, and now that you've defined
14 that relevant period, I would like to know that within a
15 certain period of time.

16 JUDGE SIPPEL: All right. You're going to -- yeah.
17 You're -- I'm going to get to that when I start setting,
18 setting the dates, but that's going to be one of the first
19 things that you're going to learn, obviously. But I -- as I
20 said. I'd like to, I'd like to see that evidence developed
21 during the month of July. Between now and the month of July
22 and then getting into August, I'd like to see the discovery of
23 what I would call the -- I'm going to call them now the non-
24 party public witnesses. And I'm assuming again, Mr. Howard,
25 that you, you have indicated in your renewal expectancy --

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