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

FCC 93M-486
32063

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| In re Applications of |) | MM DOCKET NO. <u>93-94</u> |
| |) | |
| SCRIPPS HOWARD BROADCASTING COMPANY |) | File No. BRCT-910603KX |
| |) | |
| For Renewal of License of Station WMAR-TV |) | |
| Baltimore, Maryland |) | |
| |) | |
| and |) | |
| |) | |
| FOUR JACKS BROADCASTING, INC. |) | File No. BPCT-910909WE |
| |) | |
| For a Construction Permit for a New |) | |
| Television Facility on Channel 2 |) | |
| at Baltimore, Maryland |) | |

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MEMORANDUM OPINION AND ORDER

Issued: July 22, 1993; Released: July 26, 1993

Background

1. This is a ruling on a "Threshold Showing Of Scripps Howard Broadcasting Company's Unusually Good Past Programming Record" that was filed on May 13, 1993. An Opposition was filed on May 26, 1993, by Four Jacks Broadcasting, Inc. ("Four Jacks"). Scripps Howard Broadcasting Company ("Scripps Howard") filed a Reply on June 8, 1993.¹

2. Scripps Howard seeks to offer proof on the past broadcasting record of seven of its VHF TV stations which it owns and controls, including Station WMAR-TV at Baltimore which is the subject of this proceeding. Scripps Howard also will be offering proof on the renewal expectancy of Station WMAR-TV which is limited to non-entertainment programming during the renewal period, May 30, 1991 to September 3, 1991.² For reasons stated below, Scripps Howard will be limited to offering only evidence of its non-entertainment broadcasting at Station WMAR-TV during the renewal period.

¹ There also was discussion of this issue on-the-record. See Prehearing Conference, June 3, 1993, Tr. 39-47.

² For purposes of renewal expectancy, proof will also be received on programming that was implemented by Scripps Howard on WMAR-TV after September 3, 1991, but on or before September 30, 1991. See Order FCC 93M-337, released June 7, 1993.

Facts

3. Scripps Howard owns and controls VHF network-affiliated TV stations in the following markets: Cleveland, Ohio (WEWS-TV); Cincinnati, Ohio (WCPO-TV); Detroit, Michigan (WXYZ-TV); Memphis, Tennessee (WMC-TV); Kansas City, Missouri (KSHB-TV); Phoenix, Arizona (KNXV-TV); West Palm Beach, Florida (WPTV-TV); Tulsa, Oklahoma (KJRH-TV); and Baltimore, Maryland (WMAR-TV). See Threshold Showing at Programming Exh.C.³ Local community ascertainment is required by Scripps Howard at each station notwithstanding the absence of a regulatory requirement.

4. In order to achieve individual station accountability, each general manager of the [nine] TV stations is made an officer of Scripps Howard. The policy for all Scripps Howard stations is set by Vice President Ken Lowe ("Lowe"). Scripps Howard represents that Mr. Lowe assists in the production of "unusually good local non-entertainment programming." He also is responsible for a "central clearing house for the sharing of issues-responsive programming ideas -- and program segments [for use] throughout the company." See Threshold Showing at 3.

5. Another Scripps Howard Vice President, Robert Rowe ("Rowe"), is assigned to "assist the individual stations in offering local newscasts." He oversees the adherence of all stations to an internal Scripps Howard "News Code of Conduct" which prohibits any involvement in community affairs that could compromise objectivity. Issue-responsive programming is implemented on a group-wide basis, all Scripps Howard stations must follow group management policies, and each station's issues/programs lists are presented for group management quarterly review. See Threshold Showing at 4. Id.

6. Scripps Howard posits its hours and quantitative ranking of local non-entertainment programming for one month in 1990 (May) and one month in 1991 (July) as compared with other network affiliated TV stations in six markets, excluding Baltimore. The comparisons in the Baltimore market are for July, 1991 and mid-September, 1991. See Programming Exh.A. The months were selected by Scripps Howard for purposes of this hearing as being "relevant" and reasonably easy to research. Therefore, the statistics are selective rather than absolutely random and they constitute only one twelfth of a two-year period. It is noted, however, that the other months of the years were not analyzed for the selection of only the best statistics that are the most favorable to Scripps Howard. To that extent, the sample was random.⁴ In

³ Scripps Howard represents in its pleading that since 1947 it has acquired ten TV stations none of which has been sold. However, evidence would be offered of the programming of only those stations which "are most similar in size and operation to Station WMAR-TV." See Threshold Showing at 1, 6.

⁴ The exhibit was prepared by Scripps Howard personnel, or by counsel, for the purpose of litigation. Therefore, if the statistics for the "randomly" selected months were not found to be favorable to Scripps Howard, other months could have been tested and selected for consideration.

Baltimore, the most relevant market, WMAR-TV placed third in July 1991 and first in mid-September of that same year with an increase in hours per month from 20.5 to 26 hours. The hours employed by Scripps Howard in the other six markets range from 15.5 (West Palm Beach) to 29 (Detroit). In some markets the lead of Scripps Howard is more narrow than in other markets. But Scripps Howard does prevail in its overall comparison with other network affiliated stations of hours per month expended for broadcasting non-entertainment programming in the months and years that it selected. There is no evidence offered on specific ascertainment of community needs that are responsive to the broadcasting that is claimed to be unusually good.

7. Scripps Howard also relies to a lesser extent⁵ on its Nielsen and Arbitron news ratings. According to Scripps Howard, during the May 1990 period identified in Para. 6 above, the ratings show three of the stations as the market leaders in early evening news; three others led in late evening news; and only one station placed third in each of the time periods. In the July 1991 period, three stations led in the early news and three led in the late evening news. One and two stations also trailed competitors. In February 1993, six of the seven Scripps Howard network affiliates led their markets in news segments while one and two stations finished third. See Threshold Showing at 5-6.

8. Scripps Howard also relies on ownership of ten TV stations over a period of forty four years. This evidence is offered to show stability and commitment to serving licensed communities.

Discussion

9. The Commission's standard for applying a substantial qualitative comparative merit for an unusually good past programming record is as follows:

We are interested in records which, because either unusually good or unusually poor, give some indication of unusual performance in the future. Thus, we shall consider past records to determine whether the record shows (i) unusual attention to the public's needs and interests, such as special sensitivity to an area's changing needs through flexibility of local programs designed to meet those needs, or (ii) either a failure to meet the public's needs and interests or a significant failure to carry out representations made to the Commission.

Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393, 398 (1965). The Commission considers such proof as an indication of future performance based on the "particular reasons" that were responsible for delivering the unusual service in the past. But there is no nexus shown between the centralized quality control system of the Scripps Howard enterprise and a showing of unusually good programming at the local level.

⁵ Scripps Howard states that "ratings standing alone are an unreliable guide to a station's news quality." See Threshold Showing at 5.

Nor in the case of Station WMAR-TV would there be sufficient evidence of future performance based on a past record since its former general manager has left the employ of Scripps Howard. Cf. Memorandum Opinion and Order, FCC 93M-427, released June 29, 1993 (issue on use of professional management at WMAR-TV denied as moot because of the resignation of former vice president Arnold J. Klein). In addition, the data for only four of twenty four months are not persuasive of a threshold showing of an unusually good past programming record. The ratings are not found to be reliable evidence for the purposes of raising a substantial issue of fact on unusually good past programming.

10. In addition, it is noted that Scripps Howard concedes the significance of "localism" in its programming. See Threshold Showing at 7. The delineation by Scripps Howard of its centralized supervision of local stations does not alone establish unusually good local programming. Mr. Lowe oversees a "central clearing house" for issues-responsive programming for use throughout the company. Local stations' issues/programs lists are reviewed quarterly for adherence to management policies. Mr. Rowe assists local station managers in offering local newscasts. Issue responsive programming is implemented on a group-wide basis. And Mr. Rowe assists local station managers in offering their local newscasts. These management initiatives tend to indicate a regimen of central control over local programming which may be conducive to centralized quality control but which could have the potential to impede "localism."⁶

11. But integration is not a condition precedent to an issue of unusually good programming. Scripps Howard relies on its management team and its oversight of quality control which would carry forward at Station WMAR-TV. The Policy Statement refers to "the particular reasons" which have accounted for the programming. The reference to an owner-manager is specified as an example. There is no exclusion of the theory advanced by Scripps Howard which would not include integration of ownership. See Policy Statement, *supra* at 398. But in some cases Scripps Howard is very close to its competitors and in one instance (July 1991) WMAR-TV finished third in non-entertainment hours. These facts show no more than a good programming record. Those facts are not persuasive for adding an issue of unusually good programming. Furthermore, there are only references made to a company wide policy of ascertainment of the local needs to be addressed with relevant local programming. But the non-entertainment programming referred to in the statistical two months/two years analysis was not accompanied by a showing of how Scripps Howard ascertained that the local needs related to that programming. See Committee for Community Access v. F.C.C., 737 F.2d 74, 77 (D.C. Cir. 1984) (formal ascertainment is no longer required but a licensee must still determine the major issues facing the community and air programs that are responsive to those needs).

⁶ This is only a tentative observation based on the presentation of Scripps Howard in its Threshold Showing. It is not a criticism of management. But it supports the ultimate ruling that the Threshold Showing does not support adding an issue of unusually good programming. The precise nature of a Scripps Howard policy of "localism" would first need to be resolved as an issue of fact.

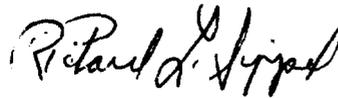
Therefore, the necessary element of an adequate ascertainment has not been shown in a substantial way in the Threshold Showing and therefore the issue will not be added.

12. Four Jacks argues that because this is a comparative renewal case in which Scripps Howard must establish a renewal expectancy, there is no basis to permit additional proof of past broadcast record. But if Scripps Howard should fail to establish a renewal expectancy and the case should become a straight standard comparative case, Scripps Howard could introduce evidence on unusually good programming if the threshold showing were adequate. See Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, 3 F.C.C. Rcd 5179, 5185 (1988) (describing applicability of "past broadcast record" issues in comparative renewal proceedings). The key difference would be that evidence related to renewal expectancy would be limited to ascertainment and non-entertainment programming at WMAR-TV in the Baltimore community and the station's service area. Id. The Review Board has noted that in comparative broadcast cases it is "more rarely" that applicants seek credit for any past broadcast record. Knoxville B/cing Corp., 103 F.C.C. 2d 669, 689-90 (Review Bd 1986). In that case, which was a straight comparative case, the ownership of the applicant seeking credit for an unusually good record was to be integrated. But the Review Board held that the issue of good broadcasting record was independent of the integration of ownership. Id. at 686. That holding would be applied here if Scripps Howard had met its threshold burden.⁷ But because of a failure of a threshold showing, there will be no evidence received on unusually good programming. See Gilbert Group, Inc. 88 F.C.C. 2d 398, 405 (Review Bd 1981).

Ruling

Accordingly, for the reasons stated above, IT IS ORDERED that the Threshold Showing Of Scripps Howard Broadcasting Company's Unusually Good Past Programming Record that was filed on May 13, 1993, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Administrative Law Judge

⁷ Scripps Howard is correct. If the tables were turned and Four Jacks could make a satisfactory threshold showing that Scripps Howard had an unusually poor broadcast record at its various stations, that evidence would be relevant on the straight comparative issue. That evidence also would be distinct from the evidence received on the renewal expectancy.