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

FCC MAIL SECTION

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In re Applications of)

SCRIPPS HOWARD BROADCASTING COMPANY)

For Renewal of License of Station WMAR-TV
Baltimore, Maryland)

and)

FOUR JACKS BROADCASTING, INC.)

For a Construction Permit for a New
Television Facility on Channel 2
at Baltimore, Maryland)

MM DOCKET NO. 93-94

File No. BRCT-910603KX

File No. BPCT-910903KE

MEMORANDUM OPINION AND ORDER

Issued: December 01, 1993 ; Released: December 03, 1993

1. This is a ruling on the Request For Permission To File Appeal that was filed by Four Jacks Broadcasting Company ("Four Jacks") on November 22, 1993. At the Presiding Judge's request (93M-726), as modified by Erratum 40368, An Opposition To Request For Permission To File Appeal was filed timely on November 30, 1993 by Scripps Howard Broadcasting Company ("Scripps Howard"). The Mass Media Bureau's Opposition To Request For Permission To File Appeal also was filed on November 30, 1993.

2. Four Jack's request for an interlocutory appeal is taken from the Presiding Judge's evidentiary ruling in Memorandum Opinion And Order, FCC 93M-708, released November 16, 1993. The request was timely made and therefore it will be considered. See 47 C.F.R. §1.301(b). Such an appeal may be granted where the Presiding Judge is persuaded by a party's showing that:

the appeal presents a new or novel question of law or policy and that the ruling is such that error would be likely to require remand should the appeal be deferred and raised as an exception.

Id.

3. It is again noted that Scripps Howard offered selected letters from WMAR-TV viewers of its programming in support of its burden to show by a preponderance of the evidence that it is entitled to a renewal expectancy.

Over the objection of Four Jacks, Scripps Howard was permitted to introduce thirty two such letters. Four Jacks thereafter sought to offer a compilation of eighty three letters from viewers which were proffered as negative evidence of the renewal expectancy as rebuttal to Scripps Howard's letters. Thus, it is evident that Four Jacks would not have offered such evidence had the Presiding Judge sustained the objection to Scripps Howard's evidence. The eighty three letters offered by Four Jacks were rejected in the discretion of the Presiding Judge to control the scope of the record of relevant evidence. See FRE 403 (trial judges may exclude even relevant evidence on grounds of waste of time).¹ Reasons for rejecting the evidence are stated below.

4. Four Jacks accurately notes that "the letters are highly critical of WMAR-TV's decision to preempt important NBA playoff games to air the telethon." But this is hardly a criticism of Scripps Howard's efforts to meet a community need through the broadcast of a children's telethon. It merely shows that some listeners griped about the loss of an opportunity to view a sports event on WMAR-TV; there was no complaint about the merits of the telethon. Thus the probative value of the letters are neutralized. Four Jacks also relies heavily on one letter that criticizes WMAR-TV's coverage of a "C&P technical failure." But the letter concedes that the event actually was covered by WMAR-TV and does not criticize the accuracy of the reportage. And only one viewer, who happened to be an employee of C&P, was not satisfied with the quality of that coverage. Any conclusion made with respect to the quality of the actual coverage of such an important local news event would be based on evidence that was biased, speculative and subjective and therefore would not be an appropriate subject for a finding.

5. Also, receipt and consideration of Four Jacks' evidence would require describing the letters, parsing their relevance and evaluating their weight. Such an undertaking would consume considerable time with little or no return to be realized. As indicated above, some of the letters show individual preferences of some viewers for professional basketball games which were preempted by a telethon for the benefit of children. There would be no decisional significance for that evidence. Similarly, letters which showed that some viewers preferred a soap opera to a talk show does not assist the record or the fact-finder. As noted earlier, forty one of the letters bear dates outside of the relevant renewal period and therefore those letters would not be considered.² Scripps Howard notes that there is one letter from Texas and one letter from Kentucky, areas far from the local viewers of Baltimore,

¹ The Federal Rules of Evidence generally govern Commission hearing proceedings. 47 C.F.R. §1.351. See also Newton TV, Ltd., 3 F.C.C. Rcd 553, 557 (Review Bd 1988).

² Letters that were written after the challenging application was filed would present the opportunity for fabrication. Because of their lesser reliability, the weight of that evidence is lessened. Such less reliable evidence will not be considered here in rebuttal. Four Jacks noted that Scripps Howard was permitted to introduce seven letters which have the same or similar infirmity. Those letters will be given a lesser weight if the dates support Four Jacks' assertion.

Maryland. Scripps Howard also notes there are eighteen additional letters which do not reflect a return address which would lessen the weight of those letters.³ And as was also noted earlier, one of the letters is illegible totally and one is illegible in part. This rebuttal evidence offered by Four Jacks would need to be weighed in its totality. In view of the defects and delicts noted in a substantial number of the letters, that assessment of evidentiary weight would be a waste of the Commission's adjudicatory time.

6. The applicable law supports the ruling. For reasons which were unique to other cases, adverse letters from members of the public have been received in evidence in the discretion of the trial judge. See e.g. Video 44, 3 F.C.C. Rcd 3587, 3591 (Review Bd 1988) cited by Four Jacks in its Request For Permission To File Appeal.⁴ But that case only supports the general proposition that it may not be error for a trial judge to exercise discretion to consider such evidence. That case does not require the receipt and consideration of that type of rebuttal evidence in each case scenario. Rather, as FRE 403 provides, the receipt and the scope of such evidence is left to the discretion of the judge. Cf. Fox TV Stations, Inc., 8 F.C.C. Rcd 2362, 2389 (Review Bd 1993) (trial judge's decision to reject adverse letters not reversed on appeal and no remand was ordered). That recent Decision of the Review Board shows a disinclination to remand for a ruling that excludes such evidence, even if the Review Board should disagree with the evidentiary ruling here.

7. Finally, the Presiding Judge agrees with the Bureau's conclusion that Four Jacks' Request For Permission To File Appeal fails to meet the Commissions's standard for an interlocutory appeal in that it fails to show a new or novel question of law or policy and that the ruling of the Presiding Judge is such that error would be likely to require remand should the appeal be deferred and raised as an exception. This is a particularly sound argument, which goes beyond the narrower rulings under FRE 403 supra, since a station's entertainment programming decisions, as reflected in the rejected letters, are not relevant to the criteria of programming that meets the needs, problems and interests of the community. Metroplex Communications, 4 F.C.C. Rcd 8149, 8151 (Comm'n 1989).

³ The letters were discovered in the public letter file that is maintained by Scripps Howard which is the same source of the thirty two letters that were offered by Scripps Howard and that were received in evidence. This circumstance carries a presumption that the letters are from viewers of WMAR-TV. But the absence of a local address on letters selected by Four Jacks as rebuttal evidence would impact adversely on the weight to be accorded those eighteen letters. The same assessment of weight would be accorded any similar letter relied on by Scripps Howard.

⁴ Four Jacks appears to have abandoned reliance on another case that was cited to earlier (Tr. 916) in support of its motion to receive the evidence: Cf. Seattle Public Schools, 4 FCC Rcd. 625, 636 (Review Bd. 1989) (trial judge received in evidence several letters of listeners' complaints).

Ruling

For the forgoing reasons, the Request For Permission To File Appeal filed on November 22, 1993, by Four Jacks Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script, appearing to read "Richard L. Sippel".

Richard L. Sippel
Administrative Law Judge