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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of	)	MM Docket No. <u>93-94</u>
	)	
SCRIPPS HOWARD BROADCASTING	)	File No. BRCT-910603KX
COMPANY	)	
	)	
For Renewal of License	)	
Station WMAR-TV	)	
Baltimore, Maryland	)	
	)	
and	)	
	)	
FOUR JACKS BROADCASTING, INC.	)	File No. BPCT-910903KE
	)	
For Construction Permit for a	)	
New Television Facility on	)	
Channel 2 at Baltimore,	)	
Maryland	)	

To: Administrative Law Judge  
Richard L. Sippel

**MASS MEDIA BUREAU'S OPPOSITION TO  
PETITION TO REOPEN THE RECORD  
AND ENLARGE THE ISSUES**

1. On December 8, 1993, Four Jacks Broadcasting, Inc. (Four Jacks) filed a petition to reopen the record and enlarge the issues. The Mass Media Bureau hereby opposes Four Jacks' petition.

2. Four Jacks seeks the addition of a misrepresentation issue against Scripps Howard Broadcasting Company (Scripps Howard) based on the deposition testimony of Emily Barr. According to Four Jacks, Barr dissembled at her deposition when she testified that she did not have in her possession a copy of a FAX she had sent to NBC seeking information on programming broadcast by NBC which might be relevant to issues of importance

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to the Baltimore community. In fact, Barr later testified at the hearing that the correspondence with NBC on this matter had been kept in a file at the station (Tr. 769).

3. As the Commission noted in Washoe Shoshone Broadcasting, 5 FCC Rcd 5561 (1990):

It is well established that, to justify a reopening of the record, a petitioner must show unusual or compelling circumstances. WEBR Inc. v. FCC, 420 F.2d 158 (D.C. Cir. 1969); Kidd v. FCC, 302 F.2d 873 (D.C. Cir. 1962); Southeast Arkansas Radio, Inc., 61 FCC 2d 72, 74 (1976). A petition to reopen must be supported by a showing that the petitioner could not, through the exercise of due diligence, have discovered the facts relied upon at an earlier date, and that the new evidence, if true, would affect the ultimate disposition of the proceeding. Southeast Arkansas Radio, Inc., supra.

In the Bureau's opinion Four Jacks has failed to meet this test.

4. Barr's correspondence with NBC was the subject of a prehearing conference in this proceeding held on October 27, 1993. At that conference, counsel for Scripps Howard stated that Barr had made a mistake when she testified at her deposition that she did not have a copy of her FAX to NBC. He further stated that the document had been discovered that week in preparing for trial (Tr. 411). Counsel for Four Jacks then opined that this matter could be resolved very easily by Scripps Howard producing the documents relating to Barr's communications with NBC without the need for a subpoena (Tr. 412). The Presiding Judge directed Scripps Howard to provide the documents (Tr. 415). And, so the matter was concluded. Or, at least should have been.

5. It is apparent from the above that Four Jacks was on clear and unequivocal notice since at least October 17, 1993 (the date of the prehearing conference) that Barr's deposition testimony concerning the availability of her FAX to NBC was incorrect. Thus, Four Jacks knew the facts upon which its petition is based well before the hearing in this proceeding had begun and has proffered no excuse for waiting until December 8, 1993, to file its petition. Consequently, as to this matter, Four Jack's petition is woefully untimely and should be dismissed.

6. Even if it could be concluded that Four Jacks' petition was timely filed, the new evidence, if true, would not affect the decision in this proceeding. It is well established that misrepresentation and lack of candor each require an intent to deceive. Fox River Broadcasting, Inc., 93 FCC 2d 127, 129 (1983). A review of Barr's deposition testimony reveals that, although Barr claimed not to have a copy of the FAX she sent to NBC, in response to questions by Four Jacks' counsel she accurately described the FAX's content (Depo. Tr. 108-09). Barr's candor in describing the document and its contents belies any motive or intent on her part to deceive. Indeed, it is difficult to see how Four Jacks was in any way prejudiced in this case by Barr's erroneous deposition testimony as to the existence of the FAX when its contents were described. This is especially

so in light of the remedial action ordered by the Judge at the prehearing conference discussed, supra.<sup>1</sup>

7. Four Jacks also requests a misrepresentation issue based on statements made by Scripps Howard's counsel in a letter dated July 13, 1993. In that letter he stated that Janet Covington, a retired WMAR employee, at one time retained personal notes of ascertainment meetings, but "[t]hese notes were not retained in any files at WMAR-TV." Four Jacks faults Scripps Howard for failing to indicate either that Covington had prepared notes in 1992, or that Scripps Howard had prepared a listing of "purported ascertainment interviews" in 1992 based on Covington's notes before they were discarded.<sup>2</sup> Four Jacks, however, fails to even claim that Scripps Howard was required to provide this information concerning the 1992 notes in its July 1993 letter.

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<sup>1</sup> This matter is once again much to do about very little. Four Jacks' Ex. 19, which consists of communications between Barr and NBC, was only received for the limited purpose of showing that Barr had utilized a "very significant resource" in compiling her list of issue responsive programs. (Tr. 736-37). The Bureau believes that these communications are, in fact, irrelevant to a determination of whether programming broadcast by Scripps Howard's during the renewal period was responsive to the needs and interests of the Baltimore community.

<sup>2</sup> Four Jacks' references to Scripps Howard's interviews as "purported" is unwarranted. Four Jacks has had the names of the interviewees for some time and if Four Jacks had a sincere doubt as to whether these interviews had occurred, Four Jacks could have contacted the interviewees and ascertained whether or not they were interviewed. That Four Jacks has not done so speaks clearly as to its own motives. Four Jacks would rather sit back and argue from inferences than find out the truth.

8. Four Jacks further argues that Scripps Howard's claim that the notes had not been retained is contradicted by Barr's testimony that she retained Covington's notes after they were given to her, and that she never returned them to Covington. Barr testified that after retaining the notes for a period of time she threw them away (Tr.582-83; 666-67). This, however, does not contradict the July 13, 1993, claim that "[t]hese notes were not retained in any files at WMAR-TV." Four Jacks' provides no evidence that as of July 13, 1993, the date of the letter, the notes were retained in any WMAR-TV file.<sup>3</sup>

9. Finally, Four Jacks claims that Barr falsely testified that Covington had kept the notes in her possession when she left the station in December 1991, when in fact "Covington did not even prepare her notes until the summer of 1992, when Barr first began her search for Covington's calendar." Of course, the notes of ascertainment meetings which Covington had in her possession when she left the station in 1991, were the notes on her 1991 calendar. Obviously, she could not have left the station in 1991 with notes she made in 1992. Four Jacks appears to have simply confused the notes on Covington's calendar with those she subsequently prepared and provided to Barr in 1992.<sup>4</sup> In sum,

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<sup>3</sup> In any case, Four Jacks was permitted by the Presiding Judge to make a full inquiry into the matter of Covington's missing calendar and notes at hearing. (Tr. 670-71).

<sup>4</sup> Barr's testimony at footnote 6, of Exh. SH3-16, which Four Jacks cites, is indefinite as to which notes of Covington she relied upon in preparing attachment E to her testimony.

Four Jacks does not provide any basis for concluding that Barr's testimony that Covington took her notes with her in 1991 is not true and correct.

10. For the reason stated, the Bureau opposes reopening the record in this proceeding and the addition of a misrepresentation issue against Scripps Howard.

Respectfully submitted,  
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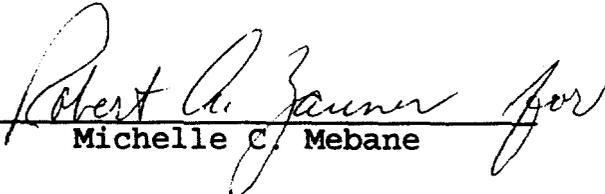
December 22, 1993

**CERTIFICATE OF SERVICE**

Michelle C. Mebane, a secretary in the Hearing Branch, Mass Media Bureau, certifies that she has on this 22nd day of December 1993, sent by regular United States mail, U.S. Government frank, copies of the foregoing **"Mass Media Bureau's Opposition to Petition to Reopen the Record and Enlarge the Issues"** to:

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