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TRANSCRIPT OF PROCEEDINGS

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

NOV 18 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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IN THE MATTER OF:

DOCKET NO. 93-94

**SCRIPPS HOWARD BROADCASTING COMPANY
and
FOUR JACKS BROADCASTING, INC.**

Baltimore, Maryland

DATE OF CONFERENCE: October 27, 1993

VOLUME: 6

PLACE OF CONFERENCE: Washington, D.C.

PAGES: 405-420

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D.C. Area (301) 261-1902
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25	Conference Began: 9:30 a.m.	Conference Ended: 9:45 a.m.

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P R O C E E D I N G S

1
2 JUDGE SIPPEL: Good morning. This conference is
3 pursuant to my order to address a request that's been made by
4 Four Jacks that I certify a discovery issue for an
5 interlocutory appeal to the Review Board. I want to say right
6 up front that I don't want to spend too much time talking
7 about the legal standards with respect to the certification of
8 these questions.

9 The standard is clear that there has to be a new or
10 novel question of law or policy and that the ruling is such
11 that error would likely require a remand and I don't see this
12 to be in the context of a new or novel question of law or
13 policy that I'm involved with here.

14 However, having said that up front, I do want to get
15 into the facts of what's involved -- exactly what is involved
16 here. Would you explain to me, Ms. Schmeltzer, what exhibit
17 of Ms. Barr does -- this documentation that you're seeking
18 from NBC, does it -- do you feel that it's relevant to?

19 MS. SCHMELTZER: Let me give you just a little
20 background, Your Honor. The renewal application, as you know,
21 was filed in 1991. We filed our competing application on
22 September 3, 1991. In the fall of 1992, a year later
23 according to Ms. Barr's deposition, she communicated with NBC
24 to ask them about what programming might have been responsive
25 to Baltimore issues.

1 It's those communications that we seek to get
2 because we feel that this is very relevant to how Scripps
3 Howard went about doing its ascertainment and so it relates to
4 several of the attachments and it also relates to the
5 testimony of Ms. Barr. Now, I do think that this meets the
6 second standard that you just discussed and that is whether
7 this -- if we don't get this material and such, that it would
8 require a remand.

9 Scripps does not contest that the documents would be
10 material and relevant. Their only objection is a question of
11 timeliness. Now, they tried to assert a claim of timeliness
12 on behalf of NBC saying NBC might want to quash the subpoena.
13 We have no indication that NBC would want to quash the
14 subpoena. As far as we're concerned, NBC has been very
15 cooperative. They've provided us with the name of the person
16 at NBC to whom the subpoena should be directed and when we
17 obtained that name, we put it on the subpoena request that you
18 were delivered.

19 So we really feel that timeliness is not an issue in
20 this case. The question is whether NBC has the document and
21 when we get the document. We contend that this document is
22 material and relevant, regardless of when we get it. This is
23 a document that could come in as a business record after the
24 record is closed. Obviously we hope to get the material
25 sooner so that we will have it no later than the rebuttal

1 | phase, but actually this document could come in after the
2 | record was closed.

3 | And the case I would cite on that is Signal
4 | Ministries, Inc. which is 104 FCC 2nd, 1481 --

5 | JUDGE SIPPEL: And you're citing this for what
6 | proposition?

7 | MS. SCHMELTZER: Well, let me give you a little
8 | background on Signal Ministries. The initial decision -- the
9 | Review Board decision is at 1481 and I'm actually referring to
10 | the -- to both that and the initial decision which follows it
11 | in the FCC record. In Signal Ministries, Inc., there was a
12 | question as to the broadcast experience of one of the
13 | applicant's principles and she maintained that she had had
14 | check writing authority and that that showed her broadcast
15 | experience. But she was unable to come up with any checks at
16 | the time of the hearing.

17 | After the record was closed, she sought to reopen
18 | the record to introduce one check dated 12/24/19-- whatever,
19 | in a small amount that was to a charity and the judge
20 | permitted that to come into the record. He -- there was no
21 | further cross examination. That particular check which
22 | evidenced her check writing authority ended up being a
23 | significant element in his deciding that she did merit
24 | broadcast experience.

25 | Now, the situation is a little different in terms of

1 | the documents that we're seeking here. We're seeking
2 | documents related to ascertainment. But those documents are
3 | records that we believe NBC may have. Certainly if Scripps
4 | Howard had the documents, they would be relevant and
5 | producible. We received documents from Scripps Howard
6 | throughout the summer and early fall of this year, long past
7 | the document production date, but we never received the
8 | communications with NBC and so now we're seeking to get those
9 | and obviously we want to get them on a timely and efficient
10 | basis. But we contend that no matter when we get them, they
11 | are relevant.

12 | JUDGE SIPPEL: Well, there's several things that I
13 | want to go back on with you. First of all -- and I'm going to
14 | hear from Mr. Howard -- well, let me take Mr. Howard now. Go
15 | ahead, sir.

16 | MR. HOWARD: I just wanted to note, Your Honor, on a
17 | related matter, that Scripps Howard has not been asked to
18 | produce these documents by Four Jacks and that the -- in doing
19 | a search of trial preparation materials, Scripps Howard has
20 | located correspondence between NBC and WMAR that would be
21 | responsive to the subpoena request. But they have not been --
22 | Four Jacks has never asked Scripps -- I just want it to get
23 | noted that Four Jacks has not asked Scripps Howard for those
24 | documents.

25 | MS. SCHMELTZER: No, I -- well, I -- A, we think it

1 comes within our document production request and B, when this
2 came up at Ms. Barr's deposition, she responded that the
3 documents didn't exist.

4 MR. HOWARD: She was asked if she had a copy of the
5 document and she said no and that she believed that to be true
6 at the time. There was no request to look through the files
7 or to examine to see whether this event, which is as they've
8 described, took place a year after the renewal period and
9 related to getting ready for trial, to ask them for
10 information from NBC about programming that was, as Ms. Barr
11 testified, responsive to the issues, programs, lists, issues
12 that had been produced and identified to Four Jacks in a
13 variety of ways including through the issues, programs, lists
14 themselves.

15 And then when she said no, they didn't say, "Did you
16 search for that document?" They did not say, "Would you give
17 us that document if you --" you know, "Are you sure you don't
18 have it?" She just made a mistake, stated that she did not
19 have it, and a search was not made for this document with
20 these -- in these materials that Scripps Howard has in trial
21 preparation until this week when Scripps Howard became aware
22 that this was a document that has some importance to Four
23 Jacks.

24 MS. SCHMELTZER: In that event, Your Honor, it seems
25 that this can be easily resolved.

1 JUDGE SIPPEL: Hold it just one minute. Let me go
2 off the record for just a minute.

3 (Off the record.)

4 (On the record.)

5 JUDGE SIPPEL: Ms. Schmeltzer, have you got the
6 documents then?

7 MS. SCHMELTZER: It seems -- no, I don't have the
8 documents.

9 JUDGE SIPPEL: I mean -- well, you have a -- go
10 ahead.

11 MS SCHMELTZER: If they exist -- if Scripps Howard
12 has them, we can resolve this very easily and we don't have to
13 subpoena documents.

14 JUDGE SIPPEL: Well, then maybe this is a worthwhile
15 meeting this morning. This is, what one would say, would be
16 much ado about nothing. Hopefully.

17 MR. HOWARD: Perhaps, Your Honor, as we say, we do
18 not regard -- they are not within the scope of any document
19 production request that was served on Scripps Howard. There
20 is the argument that it's untimely, that discovery's closed,
21 and to make this request now is untimely. But the only
22 concern that Scripps Howard would have in this matter is that
23 this was a request made to NBC who was acting as an agent of
24 Scripps Howard in preparation for the trial and providing
25 information to Scripps Howard and that there's a work product

1 type of argument that could be raised with respect to that.
2 And if you directed us to provide these documents, we would
3 ask that it be done without any waiver or that that be
4 accomplished -- that would not constitute any waiver of work
5 product.

6 JUDGE SIPPEL: Well, that issue did cross my mind
7 when you were making the argument on it being a business
8 record because it seemed that it did come up in the context of
9 a request from counsel to get this documentation to her. But
10 you know, again, I don't want to -- I don't want to get into
11 those waters if we don't have to. Are you -- are you prepared
12 to make this documentation available to Ms. Schmeltzer today?
13 I mean, sometime before the close of business today?

14 MR. HOWARD: Yes, Your Honor.

15 JUDGE SIPPEL: And now what about the issue of work
16 product? Is that being -- is that being waived? Are you
17 reserving rights on that?

18 MR. GREENEBAUM: We would make it available as long
19 as they agree that there's no waiver.

20 MR. HOWARD: We would either make it available if
21 they agree that there's no waiver or if you directed that it
22 be produced to them. Then that would not constitute a waiver.

23 MR. LEADER: May I just ask a question?

24 JUDGE SIPPEL: Mr. Leader?

25 MR. LEADER: Thank you. Would you just refresh my

1 | recollection on the work product argument here? I mean, whose
2 | work product are we claiming this is, yours -- Scripps
3 | Howard's or NBC's?

4 | MR. HOWARD: Yes. And NBC is --

5 | MR. LEADER: Whose? You said yes to both. Whose
6 | work product --

7 | MR. HOWARD: Yes, with an explanation. Yes, it is
8 | Scripps Howard's work product and NBC's in connection with
9 | their acting as the agent of Scripps Howard in this matter.
10 | There's an affiliate relationship with the network. They
11 | provided this programming to the agency.

12 | MR. LEADER: It's not an agency relationship,
13 | though. It's a contractual relationship.

14 | JUDGE SIPPEL: Well, wait. This is not going to be
15 | used as a forum for a discussion of the -- I under-- all I'm
16 | trying to do is -- I've now discovered -- I found out and now
17 | these documents exist and that Scripps Howard has control over
18 | them and that Scripps Howard is going to turn them over to
19 | Four Squares (sic) counsel sometime today.

20 | What remains to be addressed is whether or not these
21 | are going to come into evidence without an objection on the
22 | work product privilege. Now, where do you stand on asserting
23 | the work product privilege before we get into its application?
24 | Where do you stand, on its assertion?

25 | MR. HOWARD: Our position, Your Honor, is that we

1 | would be happy to produce the document so long as there's an
2 | agreement from Four Jacks that that does not constitute a
3 | waiver of the work product.

4 | JUDGE SIPPEL: Well, I will -- let me -- let me put
5 | it in -- here's the context in which I'm going to leave it
6 | today. I'm issuing an order right now from the bench that
7 | those documents be produced to Four Jacks. If at such time
8 | that Four Jacks seeks to introduce them into evidence and
9 | there's an objection on a work product basis, I will consider
10 | it at that time. Any -- in other words, any privilege that
11 | may apply to those documents are not being waived by your
12 | complying with my order.

13 | MR. HOWARD: Very good.

14 | JUDGE SIPPEL: At least that gets us now to Step
15 | Two. Now, Mr. Leader, I didn't mean --

16 | MR. LEADER: No, I just wanted to know what we were
17 | being requested to waive and right now, I understand it's
18 | nothing. We'll decide that later.

19 | JUDGE SIPPEL: That it will be raised at -- now, I
20 | am going to require, however, that I want some advance notice
21 | if that objection is going to be raised. In other words, I
22 | don't want to have to -- I don't want to have to stop the
23 | hearing and get into a debate on the applicability of the work
24 | product doctrine in the middle of the hearing. Now, we can
25 | work out a schedule on this. I'm inclined to leave that one,

1 right now for the time being, up to counsel and somebody come
2 back to me and tell me what's going to be going on. Otherwise
3 I'll issue an order with respect to a schedule, a briefing
4 schedule. I mean, what I'd like is to get some kind of a
5 bench memo in advance on it.

6 MR. HOWARD: We won't be introducing the documents.
7 It'll be Four Jacks -- so will you let us know if you intend
8 to --

9 MR. LEADER: Well, we have to receive them first.

10 MS. SCHMELTZER: Receive --

11 JUDGE SIPPEL: That answers --

12 MR. GREENBAUM: Tell me --

13 JUDGE SIPPEL: They may just hand them back and say
14 these are no good. All right, that --

15 MR. LEADER: I'm sorry I asked for them.

16 JUDGE SIPPEL: I'm sorry I asked -- Well put, Mr.
17 Leader. Then as far as I'm concerned then, we really don't
18 have an issue to resolve here today. The request for the
19 interlocutory appeal is moot.

20 MS. SCHMELTZER: May I just inquire though as to
21 whether Scripps Howard has discovered any other documents
22 since the deposition?

23 JUDGE SIPPEL: On what, on anything in general?

24 MS. SCHMELTZER: Well, specifically on the documents
25 that had disappeared from 1992.

1 MR. HOWARD: You're referring to the matters -- to
2 Janet Covington's notes?

3 MS. SCHMELTZER: Right.

4 MR. HOWARD: No.

5 JUDGE SIPPEL: What I would suggest that you do if
6 there -- because these -- sometimes these little sidebar
7 requests get a little bit lost in the shuffle. I would
8 suggest that you put together a letter to Mr. Howard and you
9 go down a list of things that you think may have -- that may
10 be something that was not looked for or that was left open on
11 the record in some way. Do you know what I mean?

12 MS. SCHMELTZER: Yeah. I don't have any reason to
13 believe anything was left open.

14 MR. LEADER: Except when we hear the -- you know,
15 they didn't have this and now that they have it, we just
16 question what else do they have that --

17 MR. HOWARD: Your Honor, I think that's an unfair --

18 JUDGE SIPPEL: No, I -- perhaps I'm letting this go
19 longer than I need to. I think I've said everything that I
20 need to say, but I do need a date certain on which Ms.
21 Schmeltzer will let me know whether or not they intend to use
22 -- you intend to use this evidence and if you get it today --
23 I did not bring my calendar with me this morning. But if you
24 get it today -- this is Wednesday. Certainly by next
25 Wednesday, I expect to hear from you as to whether or not you

1 intend to use this evidence.

2 MS. SCHMELTZER: In a letter form?

3 JUDGE SIPPEL: Letter form will be fine and of
4 course, with copy to counsel, and if you do, then we go to
5 hearing on the 8th. By Friday, mid-day Friday of the week
6 before, which would be the --

7 UNIDENTIFIED SPEAKER: The 5th.

8 JUDGE SIPPEL: Thank you, which would be the 5th. I
9 want a bench memo from Scripps Howard on the applicability of
10 the work product doctrine. And if you care, I will certainly
11 -- unless I need it, I'm not going to ask for a responsive
12 pleading to the bench memo. But you know, certainly you'll be
13 in court prepared with the cases, I'm sure, that you're going
14 to rely on. And if I need anything more, I'll let you know.
15 That's it. That's all that I have today. Does the Bureau
16 have anything more?

17 MR. ZAUNER: No, Your Honor.

18 JUDGE SIPPEL: I would've gotten around to your side
19 of the table, but all of a sudden, it becomes moot. Any other
20 order of business that anybody anticipates?

21 (No response.)

22 JUDGE SIPPEL: I do have two motions. I know
23 there's a motion to strike some testimony that Scripps Howard
24 has filed against Four Jacks and there's also a question about
25 the -- whether or not The Today Show qualifies as "news" and

1 the Bureau, I take it, is going to participate in that motion.
2 Am I correct on that?

3 MR. ZAUNER: Yes, Your Honor. I anticipate we'll
4 file a pleading by the end of the week.

5 JUDGE SIPPEL: Well, I have a schedule -- I have a
6 date schedule worked out in my order, so you've been notified
7 to what date -- if you do file something, what date it's to
8 come in. But I'm just confirming my understanding that I will
9 be receiving something from the Bureau on that point.
10 Anything else?

11 MS. SCHMELTZER: We would just note for the record
12 that we exchanged our hearing exhibit which included the
13 letters from the public that were not favorable.

14 JUDGE SIPPEL: I received that copy yesterday.

15 MS. SCHMELTZER: Right. And we will, at the --
16 probably at the opening of the hearing, we will move that into
17 evidence and give the reporter copies.

18 JUDGE SIPPEL: Well, I'd like -- I don't want to
19 spend a lot of time on that because we're going to have Emily
20 Barr on the stand ready to go. Do you expect -- do you
21 anticipate many objections to that? Can you -- or is this
22 going to just be something that can come right in?

23 MR. HOWARD: Your Honor, I haven't had a chance to
24 even look at those letters yet, so --

25 MS. SCHMELTZER: We can take that up at any time.

1 JUDGE SIPPEL: We'll take it up at another time.
2 Fine, all right. Then right now we're in recess until the 8th
3 of November.
4 (Whereupon, at 9:45 a.m. on Wednesday, October 27,
5 1993, the prehearing conference was adjourned.)
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IN RE SCRIPPS HOWARD BROADCASTING COMPANY
Name and FOUR JACKS BROADCASTING, INC.

MM DOCKET NO. 93-94
Docket No.

WASHINGTON, D.C.
Place

OCTOBER 27, 1993
Date

We, the undersigned, do hereby certify that the foregoing pages, numbers 405 through 420, inclusive, are the true, accurate and complete transcript prepared from the reporting by MARYKAE FLEISHMAN in attendance at the above identified proceeding, in accordance with applicable provisions of the current Federal Communications Commission's professional verbatim reporting and transcription Statement of Work and have verified the accuracy of the transcript by (1) comparing the typewritten transcript against the reporting or recording accomplished at the proceeding and (2) comparing the final proofed typewritten transcript against the reporting or recording accomplished at the proceeding.

November 8, 1993
Date

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Date

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NOV 18 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554 OFFICE OF THE SECRETARY

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In the matter of:)
SCRIPPS HOWARD BROADCASTING COMPANY) MM DOCKET 93-94
and)
FOUR JACKS BROADCASTING, INC.)
Baltimore, Maryland)
-----)

The above-entitled matter came on for prehearing conference pursuant to notice before Judge Richard L. Sippel, Administrative Law Judge, at 2000 L Street, N.W., Washington, D.C., in Courtroom No. 4, on Wednesday, October 27, 1993 at 9:30 a.m.

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