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

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In re Applications BY)	MM DOCKET NO. 93-94
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-910903KE
For a Construction Permit for a New)	
Television Facility on Channel 2)	
at Baltimore, Maryland)	

MEMORANDUM OPINION AND ORDER

Issued: January 31, 1994 ; Released: February 01, 1994

Background

1. This is a ruling on a Petition To Reopen The Record And Enlarge The Issues that was filed by Four Jacks Broadcasting, Inc. ("Four Jacks") on December 8, 1993. An Opposition was filed by Scripps Howard Broadcasting Company ("Scripps Howard") on December 22, 1993. An Opposition was also filed on that same date by the Mass Media Bureau ("Bureau"). A Consolidated Reply To Oppositions To Petition To Reopen The Record And Enlarge The Issues was filed on January 5, 1994, by Four Jacks.

2. Four Jacks seeks to have issues added to determine whether Scripps Howard had misrepresented facts in testimony and, if so, whether Scripps Howard is qualified to have its license renewed for Channel 2 in Baltimore.

3. Four Jacks seeks the issues based on testimony received at the hearing and contained in the transcript which was delivered to counsel on November 23, 1993. The Petition under consideration was filed within 15 days of the delivery of the transcript. See 47 C.F.R. §1.229(b)(3). Four Jacks also alleges that the issues raise a question of a "probable decisional significance and such substantial public interest importance" as to independently warrant consideration. See 47 C.F.R. §1.229(c).

Facts

4. Scripps Howard had elected not to reduce to writing the ascertainment of local issues and interests and it has instead placed substantial reliance on NBC's retrieval of information on programming that would have relevance to Baltimore, and on a reconstruction of the calendar references of Scripps Howard's present and past employees. Such evidence was elicited through the

oral testimony of a Scripps Howard employee, Emily Barr, Director of Broadcast Operations. Ms. Barr had the responsibility for compiling an evidentiary hearing exhibit showing the efforts of ascertaining community needs and desires and related programming during the renewal period, May 30, 1991 through September 3, 1991. Stated briefly, Four Jacks asserts that Scripps Howard misled or lacked candor in two situations: first, when Ms. Barr did not disclose correspondence with NBC; and second, when Ms. Barr testified that a former employee, Janet Covington, had prepared notes of ascertainment in 1991 when in fact the notes were not prepared until 1992 and that Ms. Barr lacked candor in accounting for the notes which were never produced.

NBC Related Documents

5. Scripps Howard is an affiliate station of NBC. In August 1992, before this case was set for hearing, Scripps Howard's counsel instructed Ms. Barr to contact NBC in order for NBC to determine network programming during the renewal period that was relevant to Baltimore. (Barr Deposition, July 16, 1993 at Tr. 99-109). Ms. Barr asked NBC by telephone to furnish "a synopsis of news programming that related to issues and concerns that were relevant to the Baltimore market." (Barr Deposition, supra at 106.) That call was followed by Ms. Barr sending a list of issues to NBC by fax. Ms. Barr said she did not have a copy of the fax. (Id.) In the early Fall of 1992, NBC responded with documents (Id.) which were turned over to Scripps Howard's counsel. (Tr. 731)

6. The documents received from NBC were not readily produced in discovery. Prior to the Barr deposition, on June 11, 1993, Four Jacks served a Motion to Produce Documents which sought, inter alia, "documents reflecting the compilation of responsive programming lists." Certain of the requested documents were produced. Scripps Howard admits that Ms. Barr had contacted NBC for records of network programming that Scripps Howard had broadcast over WMAR-TV during the renewal period because the station did not maintain such records in the ordinary course of its business. Ms. Barr admitted in her deposition to receiving the documents from NBC.¹

7. But the Motion For Production Of Documents, which by specific instruction was continuing in nature, was still outstanding at and after the deposition. There were no additional documents produced by Scripps Howard. On October 20, 1993, Four Jacks requested a subpoena duces tecum for service on NBC. That relief was denied by the Presiding Judge as a matter of discretion because it was made late and could result in a delay of the hearing. See Order FCC 93M-672, released October 22, 1993. Four Jacks requested an interlocutory appeal. The Presiding Judge called a prehearing conference to further explore the issue and he expected to rule from the bench. At the conference held on October 27, 1993, Scripps Howard admitted having responsive

¹ Ms. Barr first answered that she had made the request for documents to NBC by telephone. She denied making the request in writing but, in the same sentence of the deposition, she admitted that she had sent a fax to NBC outlining the issues that she wanted addressed. (Tr. 109). Ms. Barr also testified that she did not retain a copy of the fax. There is no assertion that the latter statement was untrue or inaccurate.

documents and agreed to produce them forthwith. That disclosure mooted the appeal. See Order 93M-685, released October 29, 1993. Scripps Howard had filed a pleading responsive to Four Jacks' appeal pleading, which was requested by the Presiding Judge. See 47 C.F.R. §1.301 (b) On October 26, 1993, Scripps Howard represented to the Presiding Judge:

[T]hose documents were not in the possession of WMAR-TV over three months ago---.

Four Jacks' subpoena seeks documents for a broad time period that may or may not exist.

[A] search for the documents is likely to take some time and cause delay.

By those responses in a pleading that was requested by the Presiding Judge, Scripps Howard has raised a substantial question of candor inasmuch as the documents were apparently available for forthwith production and were in fact produced at noon of the next day, October 27, 1993. Also, the documents appear to have been in the possession or the ready control of Scripps Howard (i.e. readily available upon notification to NBC of their need) at a time within three months prior to the subpoena request.

8. It is noted that the NBC documents were identified by Ms. Barr and were received into evidence on November 9, 1993, as Four Jacks' Exh. 19. It is six pages of documents and the first document is a memorandum from Ms. Barr to NBC concerning "Archive Requests." It states in part:

As I mentioned on Friday, we are looking for examples of programming, both network and local that dealt with the ascertained issues we identified through interviews with local community leaders.

See Four Jacks Exh. 19. The relevant period is identified as June 1 to September 30, 1991, and 20 issues are set forth. Ms. Barr requested a "printout" by the end of August. NBC promptly responded on August 12, 1992, by fax which referred to 114 "spots" for education as an example of the kind of data available.² At the hearing, Ms. Barr testified that the NBC documents "went into the file at the station" until she was asked to produce the documents in October 1993. (Tr. 7690.) It was ruled to be relevant that Ms. Barr needed to ask NBC for ascertainment evidence. Therefore, the documentation that initiated the process was discoverable evidence. Ms. Barr testified that it was not kept at station WMAR-TV as a course of business. Counsel for Scripps Howard represented that "all the underlying documents are in counsel's hands." (Tr. 731.) These circumstances raise substantial

² Also attached to the NBC fax was a synopsis of the Governor of South Carolina on the topic of public school education and a critique on the University of Wisconsin. These reports did not relate to Baltimore but were furnished to Ms. Barr to illustrate the kind of information that was available from the NBC archives that would be selected for the Baltimore market.

questions of fact about whether Scripps Howard was being forthright in responding to Four Jacks' document discovery motion of June 11, 1993.

The Covington Notes

9. Ms. Janet Covington had served as the Director of Public Relations before leaving Scripps Howard in December 1991. Ms. Covington was one of several persons who were requested by Ms. Barr to retrieve personal calendars and any other information on ascertainment interviews. As indicated above, Four Jacks served its Motion For Production Of Documents on June 11, 1993. In a letter to Four Jacks' counsel dated July 13, 1993, Scripps Howard disclosed the following:

[Janet Covington] at one time possessed personal notes that recorded various ascertainment meetings in which she participated during the relevant period. These notes were not retained in any files at WMAR-TV. Scripps Howard recently contacted Ms. Covington to ascertain whether she possessed any of these notes and determined that she did not.

It appears from the testimony of Ms. Barr and from Scripps Howard's Opposition that there were two categories of relevant writings that were made by Ms. Covington: first, the notations made in 1991 on her calendar regarding ascertainment meetings ; and second, notes which Ms. Covington prepared in 1992 from her 1991 calendar notations at her own suggestion and with the concurrence of Ms. Barr.³ The 1992 notes were not prepared by Ms. Covington at the direction or the request of counsel. The July 13 letter did not indicate when Ms. Covington had prepared her notes. Although the letter is facially ambiguous on the point, Scripps Howard argues in its Opposition that the July 13 disclaimer applies only to the Covington calendar and that there was no duty to disclose the 1992 notes because they were never requested and because they constitute protected work product.

10. It was determined at the hearing in the cross examination of Ms. Barr that she never had access to Ms. Covington's 1991 calendar. Ms. Covington's notes were used by Ms. Barr to prepare Scripps Howard's extensive renewal expectancy exhibit [Exh. 3 at Tab E]. Ms. Barr discarded Covington's 1992 notes after the exhibit was prepared and she did not return a copy of the notes to Ms. Covington. Ms. Covington was never proposed as a prospective witness for Scripps Howard. The involvement of her notes in the preparation of the renewal exhibit was not disclosed until the exchange of testimony on September 13, 1993, in a footnote to Ms. Barr's frozen testimony. There is no evidence that Ms. Covington was requested by counsel to prepare a secondary

³ Ms. Barr explained in her testimony at hearing that in 1992, Ms. Covington had offered to prepare notes explaining her 1991 calendar notations because her calendar notations would probably be indecipherable to others. Ms. Barr had initially asked Ms. Covington for the calendar. But she later acceded to Ms. Covington's offer and received only the notes that were made in 1992 interpreting the 1991 calendar entries. Ms. Barr never received or saw Ms. Covington's 1991 calendar entries.

source of notes in 1992 for trial preparation and therefore there is no basis to assert a work product privilege. Also, any possible work product protection advanced by Scripps Howard in its Opposition was lost in view of Ms. Barr's testimony that she discarded the 1992 notes after the draft of the renewal exhibit was completed. And because counsel did not instruct Ms. Barr to obtain the notes, counsel never had custody of the notes, and there was no supervision of counsel over their retention.⁴

11. There also is a substantial question of candor raised with respect to the representation made in the letter of July 13, 1993 (copies of which were directed to Bureau counsel and the Judge), that Ms. Covington had been contacted to learn whether she possessed the notes. At that time, Scripps Howard knew that Covington's notes had been discarded by Ms. Barr. Yet that fact was not disclosed to the parties and the Presiding Judge prior to hearing. On June 13, 1993, Four Jacks served a Motion For The production of documents which requested: "documents describing the conduct and results of ascertainment efforts." In Order FCC 93M-400, released June 24, 1993, Scripps Howard was directed to produce:

copies of all documents relating to the above Issues/Programs lists.

The documents were required to be produced to Four Jacks on June 28, 1993. Id. Ms. Barr was scheduled to be deposed on July 16, 1993. Under those circumstances, Four Jacks and the Bureau were entitled to know before the deposition that Covington notes were prepared in 1992, that they were used to prepare an exhibit, and that they had been discarded. Scripps Howard was not authorized to determine for itself that the Covington notes were protected work product and that therefore the fact of their use in the preparation of the exhibit and their subsequent destruction need not be disclosed. Therefore, the ambiguous disclosure to the parties and to the Presiding Judge on July 13, 1993, may have been calculated to mislead the Bureau and Four Jacks in their questioning on renewal ascertainment at the Barr deposition. The significance of this ambiguous and/or misleading representation is the fact, then unknown to Four Jacks and the Bureau who were preparing for the Barr deposition, that Scripps Howard was relying on discarded notes (a secondary source) to prepare its renewal exhibit. The apparent deliberate effort in the July 13 letter to obscure or conceal the use of the discarded notes by referring to "notes" but meaning notations made on Covington's 1991 calendar to the exclusion of her 1992 notes would, without further explanation, under the circumstances, raise a substantial question of an absence of candor.

Discussion

12. The NBC documents were delivered within 24 hours of a conference which had been called to rule on a request for an appeal from a ruling that

⁴ There is also a showing of substantial need for the Covington notes on the part of Four Jacks since they were relied on by Ms. Barr as a secondary source to prepare the renewal exhibit and the primary source, Ms. Covington's 1991 calendar, was unavailable.

had denied a subpoena for those documents. It had been represented to the Presiding Judge in a pleading the day before the conference that the documents were not in Scripps Howard's possession, that they may not exist, and that a search for the documents would likely cause a delay of the hearing set for November 8, 1993. Yet the documents, which were responsive to a motion to produce that was filed on June 11, 1993, were admittedly placed in the files of WMAR-TV in 1992, were readily found before the conference and were delivered to Four Jacks by noon of the very next day. Based on the cross-examination testimony of Ms. Barr, it became evident that the NBC documents were essential to her preparation of the renewal expectancy exhibit. Her testimony at her deposition was not forthcoming with respect to the existence of the NBC documents. In view of the totality of the circumstances, Scripps Howard's deposition testimony and pleadings relating to the NBC documents, and the failure to timely produce the documents in response to the Motion To Produce, support the adding of an issue of misrepresentation or a lack of candor.

13. There was never any production of the Covington diary of 1991 or of the Covington notes of 1992. Both of those documents were used by Ms. Barr as data sources for the construction of the Scripps Howard renewal expectancy exhibit. The Covington calendar and the later notes were the subject of a document request of June 11, 1993. They were needed for the deposition of Ms. Barr set for July 16, 1993. Three days before the deposition, on July 13, 1993, Scripps Howard informed counsel for Four Jacks and Bureau counsel that Ms. Covington had none of the notes in her possession. But that representation was made without distinguishing between the 1991 calendar and the notes prepared from that calendar in 1992. Nor were the parties informed until Ms. Barr's cross-examination that the 1992 notes had been discarded. There was no effort made by Scripps Howard to gain custody of the 1991 calendar from Ms. Covington which now may be lost. Nor will Scripps Howard be heard to justify the failure to disclose the notes by asserting a work product privilege with respect to the 1992 notes which counsel did not request or give instructions with respect to preparation, custody or control.⁵ Scripps Howard was not forthcoming in deposition testimony or in its transmittal letter of July 13, 1993, with respect to the facts and circumstances regarding the Covington diary of 1991 and the Covington notes of 1992. In view of the totality of the circumstance, Scripps Howard's deposition testimony and correspondence with the Commission relating to the Covington diary and notes provide support for the adding of an issue of misrepresentation or a lack of candor.

14. These facts raise substantial questions of candor in a Commission hearing. A failure to candidly account for the status of relevant evidence could be the basis for a disqualification. RKO General, Inc. v. FCC, 670 F2d 215, 229-30 (D.C.Cir.1981) (licensee disqualified for failing to come forward with a candid statement of relevant facts after another party put question

⁵ The Presiding Judge had provided for a procedure for the assertion of privilege and a procedure for in camera review. See Prehearing Conference Order FCC 93M-146, released April 6, 1993 at 3-4. Scripps Howard did not utilize the procedure and therefore is precluded from asserting the work product privilege as a defense to a lack of candor issue.

before the Commission). A challenger was found to be disqualified for deliberately avoiding the production of documents that are responsive to a continuing discovery request. WWOR-TV, Inc., 7 F.C.C. Rcd 636, 643 (Comm'n 1991). The Commission has made note of its policy to accord with the federal practice requiring parties to supplement discovery responses known to be inaccurate or incomplete. Id. at 646 n.15. And there is an additional Commission duty to disclose matters of decisional significance which would require the disclosure of the loss of the Covington calendar and the discarding of the Covington notes. Id. See also 47 C.F.R. §1.65. Therefore, there is a substantial public interest for adding the issues.

15. It was necessary to have the testimony of Ms. Barr in open court to determine whether it is appropriate to add the issues sought by Four Jacks. And the issues raise questions of probable decisional significance and such substantial public interest importance as to warrant consideration in spite of any question of timeliness. 47 C.F.R. §1.229 (b) (3) (c). After having considered all of the pleadings and the relevant portions of the record as cited by all parties, it is concluded that posthearing issues should be added to determine whether Scripps Howard has lacked candor in representations made in testimony, in pleadings, and in correspondence sent to Bureau counsel and the Presiding Judge relating to documents which pertained to the preparation of the renewal expectancy exhibit of Scripps Howard. See Chicagoland TV Co., 5 F.C.C. 2d 154, 155 (Review Bd 1966) (posthearing issues added where facts were not fully disclosed until cross-examination and petition filed after receipt of transcript). Also, in view of the conflicts in the record with respect to evidence which is substantial to the renewal expectancy, posthearing issues will be added as to whether Scripps Howard misrepresented or was lacking in candor. See Breeze Broadcasting Co. Ltd., 8 F.C.C. Rcd 1835 1840 (Comm'n 1993) (remand for hearing on candor based on conflicting hearing testimony). See also Frank Digesu, Jr., 7 F.C.C. Rcd 5459 (Comm'n 1992) (case remanded where there were conflicts found in the hearing testimony).

Rulings

IT IS ORDERED that the Petition To Reopen The Record And Enlarge The Issues that was filed by Four Jacks on December 8, 1993, IS GRANTED.

IT IS FURTHER ORDERED that the following issues are added:

A. To determine whether Scripps Howard Broadcasting Company misrepresented or was lacking in candor in connection with deposition testimony and/or pleadings and/or delayed production in discovery relating to NBC documents used in connection with preparing a hearing exhibit that was relevant to the renewal expectancy.

B. To determine whether Scripps Howard Broadcasting Company misrepresented or was lacking in candor in connection with deposition testimony and/or pleadings and/or correspondence served on the Commission relating to the status of Janet Covington's diary of 1991 and/or Janet Covington's notes of 1992 which were used in connection with preparing a hearing exhibit that was relevant to the renewal expectancy.

C. To determine the effect of the foregoing issues on the qualifications of Scripps Howard Broadcasting Company to hold a Commission license for Channel 2 in Baltimore.

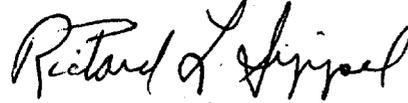
IT IS FURTHER ORDERED that the burden of proceeding and the burden of proof are assigned to Scripps Howard Broadcasting Company.⁶

IT IS FURTHER ORDERED that a prehearing conference to determine the scope and schedule for any discovery and the date for any hearing on the added issues SHALL BE HELD on February 4, 1994, at 9:00 a.m.

IT IS FURTHER ORDERED that sworn frozen testimony of witnesses may be utilized on direct examination of witnesses if the parties agree to that procedure [47 C.F.R. § 1.248 (d)(3)].

IT IS FURTHER ORDERED that counsel for the parties SHALL CONFER before the conference to reach agreement on whether discovery is needed, to arrive at a schedule and voluntary procedures to facilitate trial preparation, and to agree on a proposed hearing date. A written report of the meeting SHALL BE SUBMITTED to the Presiding Judge by 3:00 p.m. on February 3, 1994.⁷

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Administrative Law Judge

⁶ See Heidi Damsky, 8 FCC Rcd 6242, 6244-45 (Review Bd 1993) (party having peculiar knowledge of facts should be assigned the burden of proceeding and the burden of proof).

⁷ Counsel were provided with a copy of this ruling on the date of issuance at the office of the Presiding Judge.