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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**

FCC 94M-51  
40794

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Washington, D.C. 20554

In re Applications of	)	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 1, 1994

1. This is a ruling on a Motion To Enlarge Issues And To Reopen The Record that was filed by Scripps Howard Broadcasting Company ("Scripps Howard") on December 9, 1993. An Opposition was filed by Four Jacks Broadcasting, Inc. ("Four Jacks") on December 22, 1993. An Opposition was also filed on that same day by the Mass Media Bureau ("Bureau"). A Consolidated Reply was filed on January 5, 1994.

2. Scripps Howard seeks to have issues added to determine whether Four Jacks has misrepresented facts in this proceeding and, if so, whether Four Jacks is qualified to receive a Commission license for Channel 2 in Baltimore.

3. Scripps Howard seeks the issues based on alleged "irreconcilable inconsistencies" between integration promises of principals of Four Jacks and disclosures made by a commonly controlled entity, Sinclair Broadcast Group, Inc. ("Sinclair"), in documents that were subsequently filed by Sinclair at the Securities & Exchange Commission ("SEC") incident to a proposed public offering, and in related testimony before the Presiding Judge.

**Facts**

4. At the time of the exchange of testimony on September 13, 1993, sworn statements of three of the Four Jacks' principals, Messrs. David D. Smith, Robert E. Smith and Frederick G. Smith, represented the following:

In the event of a grant of Four Jacks' application, to fulfill my integration commitment, I will resign from my then-current employment and will limit or terminate any other activities that might interfere with my integration commitment.

See Four Jacks Exhs. 2, 3, and 4.<sup>1</sup>

5. Sinclair is a holding company which owns and operates three Fox-affiliated independent UHF stations. Sinclair's operating strategy includes the acquisition of additional broadcast properties. See Sinclair's Form S-1 filed at SEC on September 28, 1993, Scripps Howard Exh. 26 at 3, 44. Sinclair now seeks to raise \$200 million for acquisitions and expansion through the public sale of debt securities. Id. The four principals of Four Jacks are also the controlling shareholders of Sinclair. Each of the principals of Four Jacks also is an officer and a director of Sinclair. Sinclair discloses:

The loss of services of any of the present officers, especially its President and Chief Executive Officer, David D. Smith, may have a material adverse effect on the operations of the Company.

Id. at 17. Each of the principals of Four Jacks is paid a substantial salary by Sinclair and each has participated in a \$10 million bonus. See Scripps Howard Exh. 31 at 55-56, Sinclair's Amendment No. 2 to Form S-1 filed at SEC on November 9, 1993.

6. On December 2, 1993, Four Jacks filed a Registration Statement with the SEC in which it was disclosed for the first time that its three principals made commitments to work full-time (40 hours or more per week) at the station. The following specific disclosure was made in that SEC filing:

David D. Smith has informed the Company [Sinclair] that in neither the application nor the FCC proceeding with respect to Four Jacks has he committed to resign his official positions with, or dispose of his ownership interests in, the Company [Sinclair] in the event that Four Jacks is awarded such channel by the FCC. Moreover, the Company believes that each of David D. Smith, Robert E. Smith and Frederick G. Smith will be able to perform all of his current duties with the Company [Sinclair] while fulfilling his commitment to work for Channel 2.

Scripps Howard Exh. 33.

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<sup>1</sup> It is noted that on June 18, 1993, at the direction of the Presiding Judge, Four Jacks filed and served a List Of Witnesses Sponsoring Exhibits Relating To Integration in which Four Jacks disclosed: (a) David D. Smith as the proposed full-time (40 or more hours per week) General Manager; (b) Robert E. Smith as the proposed full-time Station Manager; and (c) Frederick G. Smith as the proposed full-time Operations Manager of the station. The first disclosures of the integration promises were made in Exhibit 6 to the application of Four Jacks that was filed on September 3, 1991.

7. On December 6, 1993, Sinclair filed its proposed Prospectus with the SEC which also disclosed the commitments of the three principals of Four Jacks to work full-time at Channel 2. Sinclair made the following specific disclosure:

In the FCC application, David D. Smith, Robert E. Smith and Frederick G. Smith further stated that each of them would resign from their then-current employment and limit or terminate any other activities that interfere with their commitments to Four Jacks. The Company [Sinclair] does not believe that such commitment of resignation requires them to resign as officers or directors of the Company or to dispose of their ownership interests in the Company. Further, the Company [Sinclair] has been informed by its FCC regulatory counsel and each of these officers that in neither the application nor the FCC proceeding with respect to Four Jacks has any of these officers committed to resign his official positions with, or dispose of his ownership interests in, the Company in the event that Four Jacks is awarded such channel by the FCC. Moreover, the Company [Sinclair] believes that each of [the Smiths] will be able to perform all of his current duties with the Company while fulfilling his commitment to work for Channel 2.

See Scripps Howard Exh. 34. That disclosure was made after the Smiths had completed their testimony in this proceeding.

8. The record fairly establishes that since 1991, the Four Jacks' principals have been engaged full-time with the business and the day-to-day operations of Sinclair. (See, e.g., Tr. 1371.) While it is recognized that Sinclair is a holding company for the three Fox affiliates and that day-to-day operations are conducted by individual station managers who are answerable to the Smiths, the full-time and attention of the three Smiths are at Sinclair, including its ongoing acquisition program. Four Jacks argues that there was never any intention to "give up their official positions with or dispose of their ownership interests in Sinclair" and that, therefore, the premise of Scripps Howard's argument for the added issue is defeated. The Bureau agrees with Four Jacks.

9. Four Jacks argues that its argument is clearly disclosed in its exchanged frozen testimony and that the intentions of its principals to remain full-time with Sinclair are made clear by using the qualifying phrase:

[N]otwithstanding SBG's [Sinclair's] other media interests [each principal is] able and committed to carrying out [his] pledge to manage, on a full-time basis, a VHF television station in Baltimore, Maryland.

See Opposition at 5. Four Jacks argues that such language in the direct testimony of its principals is true and accurate and is not contradicted by the promise to "resign" from all employment that might interfere with the integration commitment. Four Jacks argues that its principals can continue

to conduct business at Sinclair as in the past and still meet the promises to leave present employment and integrate full-time at Channel 2. But the inference can reasonably be made that the qualifying phrase "other media interests" would be limited to ownership of controlling stock positions in Sinclair which could readily accommodate an integration pledge by a trust arrangement or by some equally effective remedy that would functionally equate with "resigning" from positions and responsibilities of employment with Sinclair.

10. Four Jacks' argument that there was never an intention to resign from Sinclair notwithstanding the language of the integration pledge, was attempted to be explicated by testimony of Mr. David D. Smith. According to Mr. D. Smith, the SEC filings, which at the time of his testimony had failed to disclose the integration commitment of the Sinclair principals, had implicitly so notified investors that the Smiths would not resign their offices at Sinclair because it was made clear to prospective investors that their remaining with Sinclair was essential to Sinclair's success. (Tr. 1096-97.) That inferential conclusion could not be accepted without an explication of the Four Jacks integration commitment to resign from all employment, a fact which was not made clear in the SEC filings prior to December 1993. With the expanded explanation in the two SEC filings made in December 1993, the question of a bona fide integration intent was heightened because it then became clear in the record of this case that the Four Jacks' principals would not resign from Sinclair even if Four Jacks receives a license for Channel 2.

11. In seeking to avoid the issue, Four Jacks also argues that Scripps Howard was quibbling with the language "then-current employment," a phrase which Four Jacks asserts does not apply to Sinclair since the Smiths are bosses and not employees. But as indicated above, the Four Jacks' principals have admitted to employment with Sinclair since 1991. Also, they receive substantial salaries from Sinclair. And there are references in the Four Jacks' application that reflect their employment with Sinclair. These are circumstances that show Sinclair to be "then-current employment." Four Jacks argues that the phrase does not apply to Sinclair but applies only to "any future employment" and to their "full time presence at WBFF(TV)," which is the station which Four Jacks has represented would be divested if Four Jacks wins.<sup>2</sup> But these are arguments which are offered to explain a material

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<sup>2</sup> Station WBFF-TV is one of three Sinclair-owned UHF stations and is located in Baltimore. The substance of the Four Jacks' testimony has been that the Smiths rely on station managers for the day-to-day operations of all of these stations, including WBFF-TV in Baltimore. It is difficult to square the interpretation which Four Jacks ascribes to these facts to make WBFF-TV a post hearing selection for a promise to leave employment in order to carry out an integration pledge. Certainly, if there were no employment of the Smiths at Sinclair, there would be even less employment of them at WBFF-TV.

ambiguity and apparent contradiction created by testimony.<sup>3</sup> As arguments, they do not eliminate the substantial question of fact raised about the candor of Four Jacks' integration commitment and the relevant documents, pleadings and testimony in which the integration commitment was made to the Commission.

#### Discussion

12. After having considered all of the pleadings and the relevant portions of the record noted above, it is concluded that the post hearing issue should be added to determine whether Four Jacks lacked candor in representations made in its application, pleadings, documents and testimony relating to integration pledges of the Four Jacks' principals. See RKO General, Inc. v. F.C.C., 670 F.2d 215-30 (D.C. Cir. 1981) (licensee disqualified for failing to come forward with a candid statement of relevant facts). See also Chicagoland TV Co., 5 F.C.C. 2d 154, 155 (Review Bd 1966) (issues added where facts were not fully disclosed until cross-examination and petition properly filed after receipt of transcript). Although added post hearing, the issue is one of decisional significance. See Frank Digesu, Sr., 7 F.C.C. Rcd 5459 (Comm'n 1992) (case remanded where there were conflicts found in testimony); and Omaha TV 15, Inc., 4 F.C.C. Rcd 730 (Comm'n 1988). Compare Weyburn Broadcasting Limited Partnership v. F.C.C., 984 F.2d 1220 (D.C. Cir. 1993) (error was made in not adding misrepresentation issue at trial where there were conflicting facts regarding the dates when stock which was marked fully paid in fact became fully paid).

#### Rulings

IT IS ORDERED that the Motion To Enlarge Issues And Reopen The Record that was filed by Scripps Howard Broadcasting Company on December 9, 1993, IS GRANTED.

IT IS FURTHER ORDERED that the following issues are added:

- A. To determine whether Four Jacks Broadcasting, Inc. misrepresented or lacked candor before the Commission in its application, pleadings, documents and/or testimony regarding its integration commitment to resign then current employment positions of David D. Smith, Robert E. Smith, and/or Frederick G. Smith.

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<sup>3</sup> It is noted that the clarifying SEC disclosure of the integration pledge was made at the SEC in two December 1993 filings which were made after the Four Jacks testimony in this proceeding. With the juxtaposition of the consequences of full-time integration set against the assurance to potential Sinclair investors that the Smiths would remain with Sinclair on a full-time basis, even if Four Jacks wins Channel 2, there is a substantial question of credibility raised.

- B. To determine the effect of the foregoing issue on the qualifications of Four Jacks Broadcasting, Inc. to receive a Commission license for Channel 2 in Baltimore, MD.

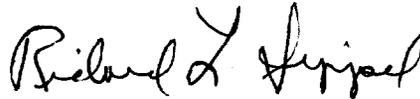
IT IS FURTHER ORDERED that the burden of proceeding and the burden of proof are assigned to Four Jacks Broadcasting, Inc.<sup>4</sup>

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 in the 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 brief written report of the meeting SHALL BE SUBMITTED to the Presiding Judge by 3:00 p.m. on February 3, 1994.<sup>5</sup>

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel  
Administrative Law Judge

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<sup>4</sup> See Heidi Damsky, 8 F.C.C. 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).

<sup>5</sup> Counsel were provided with copies of this ruling on the date of issuance at the office of the Presiding Judge.