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

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|-------------------------------|---|----------------------------|
| 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 COMMENTS
IN SUPPORT OF MOTION FOR SUMMARY DECISION

1. On February 10, 1994, Scripps Howard Broadcasting ("Scripps Howard"), filed a motion for summary decision in its favor of the two misrepresentation issues specified against Scripps Howard in Memorandum Opinion and Order ("Order"), FCC 94M-50, released February 1, 1994. On February 17, 1994, Scripps Howard filed two supplements to its motion for summary decision. For the reasons stated, infra, the Mass Media Bureau supports Scripps Howard's motion, as supplemented.

Background

2. Both misrepresentation issues were first raised in a petition to enlarge filed by Four Jacks Broadcasting, Inc. ("Four

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Jacks") on December 8, 1993. On December 22, 1993, Scripps Howard and the Bureau each filed an opposition to Four Jacks' motion. On January 5, 1993, Four Jacks filed a consolidated reply to the oppositions filed by the Bureau and Scripps Howard. Scripps Howard contends that, in designating the misrepresentation issues, the Order relied repeatedly on incorrect factual statements contained in the Four Jacks reply pleading. Scripps Howard correctly notes that, under the Commission's Rules, it did not have a right to respond to Four Jack's reply pleading. See Section 1.229(d) of the Commission's Rules.

3. The designated issues seek to determine whether Scripps Howard misrepresented facts or lacked candor with regard to its failure to produce two distinct sets of documents; those relating to Emily Barr's 1992 correspondence with NBC, and those relating to 1992 notes made by Janet Covington for use in preparing Scripps Howard's ascertainment exhibit. In its reply, Four Jacks contended that the documents in question were subject to disclosure by Scripps Howard pursuant to Request (b) of Four Jack's document production request filed on December 22, 1993. According to the Four Jacks reply:

Request (b) of Four Jacks' original document production request asked, among other things, for "Documents reflecting the compilation of responsive programming lists." See Scripps Howard Opposition, Exh. B at 5. "Responsive programming lists are precisely what Ms. Barr requested and received from NBC in the summer of 1992, and thus the NBC correspondence falls squarely within the scope of Four Jacks' document production

request. That Scripps Howard chooses to ignore this plain language in its opposition underscores that pleading's disingenuity, if not outright deceit.

(Four Jacks' reply, para. 6). With regard to the Covington notes, also prepared in 1992, the Four Jacks reply stated:

Again Scripps Howard is simply wrong in alleging that the "second type of notes . . . did not fall within the confines of Four Jacks' discovery requests or the Presiding Judge's discovery Order." Scripps Howard Opposition at 10. Request (b) of Four Jacks' motion for production of documents squarely seeks "Documents describing the conduct and results of ascertainment efforts."

(Four Jacks' reply, footnote 8). Generally, Four Jacks accused Scripps Howards and its representatives of lying and concealing facts "throughout the course of this proceeding as to both the nature and the very existence of those documents." Four Jacks also accused Scripps Howard of "arrogant gamesmanship" in attempting to conceal these documents.

Motion for Summary Decision

4. In its Motion for Summary Decision, Scripps Howard contends that Four Jacks' reply misrepresented the scope of Request (b). According to Scripps Howard, Four Jacks' document production request covered only documents related to the preparation of WMAR-TV's 1991 issues/programs lists (which were prepared in 1991) and that, therefore, Scripps Howard was not requested or required to produce documents created in 1992. Scripps Howard further points out that, in deciding to enlarge the issues against Scripps Howard, the Presiding Judge relied heavily on Four Jacks' claim that the 1992 documents were

squarely within the scope of Request (b) of Four Jacks' document request.

Analysis

5. Four Jacks' June 11, 1993, document request sought, inter alia, the following documents:

- (a) All Issues/Programs Lists covering the relevant period.
- (b) All Documents relating to the preparation of the above Issues/Programs Lists, including Documents describing the conduct and results of ascertainment efforts, general public surveys (if any) and Documents reflecting the compilation of responsive programming lists.

The "relevant period" referred to in Request (a) was defined in Definition 8 of the document request as "May 30, 1991 to September 3, 1991 and any evidence showing the implementation of Scripps Howard's programming plans from May 30, 1991 through September 30, 1991." Thus, it appears clear that Four Jacks' Request (b) does not require the production of either the NBC or Covington documents each of which came into existence subsequent to the relevant time period. It also appears obvious that Scripps Howard did not believe that Four Jack's document request included documents created in 1992.

6. In adding the issue relating to the NBC documents, the Presiding Judge faulted Scripps Howard for having represented to him on October 26, 1993 (See Scripps Howard's Opposition to Request for Permission to File an Appeal of the Order Denying the

Request for Issuance of a Subpoena Duces Tecum), that the NBC documents were not in its possession and that a search for them was likely to take some time and cause delay. At a conference held on October 27, 1993, Scripps Howard stated that it had located the NBC documents and agreed to produce them forthwith. The Presiding Judge appears to have concluded that Scripps Howard lacked candor because it produced the next day documents it said were likely to take some time to search for and that were not in its possession. He also appears to have added the issue based on his belief that the NBC documents were covered by Four Jacks' document request and therefore should have been disclosed months earlier.

7. To the extent that the Presiding Judge added the issue based on his understanding that the NBC documents should have been produced in response to Four Jacks' document request, he was under an erroneous impression. As noted, supra, the NBC documents were created in 1992 and, therefore, were outside the scope of Four Jacks' request. That being the case, the first time that Scripps Howard became aware that it might have to produce the documents was when it received notice that Four Jacks was seeking to subpoena the documents from NBC. See Order, FCC 93M-672, released October 22, 1993. On October 26, 1993, Emily Barr discovered the NBC documents and at 5:45 p.m. faxed them to Scripps Howard's attorney. See Scripps Howard's First Supplement. Scripps Howard was not ordered to produce the

documents until the October 27, 1993, hearing conference. At that conference Scripps Howard agreed to produce them subject to a claim of work product. None of this demonstrates bad faith on the part of Scripps Howard in producing the NBC documents.

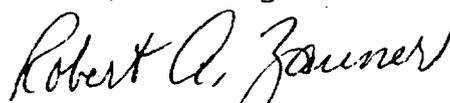
8. In adding the issue relating to the Covington documents, the Presiding Judge found that Scripps Howard was not forthcoming in its July 13, 1993, letter concerning the unavailability of Covington's personal notes because the letter did not distinguish between (1) Covington's 1991 calendar notes and (2) notes she made in 1992 from her 1991 calendar. This conclusion too is based on the assumption that Four Jacks' document request covered both sets of notes. As shown, supra, this is not the case. The only notes requested were Covington's 1991 calendar notes. In that context, it is clear that the notes referred to in Scripps Howard's July 13, 1993, letter were Covington's 1991 calendar notes. The alleged ambiguity in the July 13, 1993, letter exists only when viewed from the high hill of hindsight. It was only after Barr testified in November of 1993 that she had relied on notes other than those on Covington's calendar, that the July 13, 1993, letter could be construed as ambiguous. On July 13, 1993, of course, the only set of notes which had been inquired about were the notes on Covington's calendar. Thus, Scripps Howard's July 13, 1993, letter was clearly referring to Covington's 1991 calendar notes and, consequently, was neither ambiguous nor misleading.

Conclusion

9. Summary Decision is warranted when the moving party has demonstrated that no genuine issue of material fact exists for determination at the hearing. Section 1.251(a)(1) of the Commission's Rules; Big Country Radio, Inc., 50 FCC 2d 967, 968 (Rev. Bd. 1975). In the Bureau's opinion, Scripps Howard has met this test. It is now clear that issues were added against Scripps Howard based upon a misleading statement contained in Four Jacks' reply pleading. Scripps Howard has now shown that it was in compliance with Four Jacks' document request and that it did not engage in a misrepresentation of facts in its July 13, 1993, letter. Consequently, the Bureau supports Scripps Howard's motion for summary decision.

Respectfully submitted,
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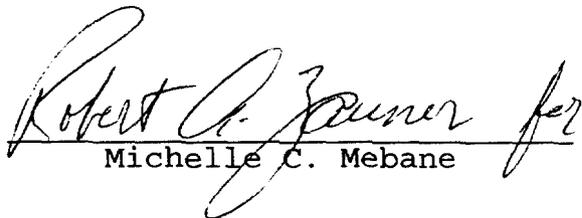
February 28, 1994

CERTIFICATE OF SERVICE

Michelle C. Mebane, a secretary in the Hearing Branch, Mass Media Bureau, certifies that she has on this 28th day of February, 1994, sent by regular United States mail, U.S. Government frank, copies of the foregoing **"Mass Media Bureau's Comments in Support of Motion for Summary Decision"** to:

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