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

FCC MAIL SECTION

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In re Applications of)
)
SCRIPPS HOWARD BROADCASTING COMPANY)
)
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: March 17, 1994 ; Released: March 18, 1994

Background

1. This is a ruling on a Motion For Summary Decision that was filed on February 10, 1994, by Scripps Howard Broadcasting Company ("Scripps Howard"). An Opposition was filed by Four Jacks Broadcasting, Inc. ("Four Jacks") on February 28, 1994. The Mass Media Bureau's Comments In Support Of Motion For Summary Decision was also filed on February 28, 1994.

2. The keystone events that underlay the adding of the issue were the manner and timing of Scripps Howard's production of certain documents and disclosure of information in prehearing discovery. There also are ancillary questions to consider with respect to the candor of related testimony in a deposition and at the hearing with regard to the status of the documents. What is ultimately to be determined is whether Scripps Howard was materially misleading through its representations and disclosures and failures to disclose the status of evidence in discovery.

3. A reason for adding the issue was a concern for the accuracy and precision of the evidence of the steps taken by Scripps Howard to assess and meet community needs. The completeness of the relevant evidence was a particular concern to the Presiding Judge because the ascertainment process was largely carried out by word of mouth and there was no formalized record keeping of the steps that were taken. Ascertainment efforts and the responsive broadcasting were matched after the fact by Ms. Barr's collection of calendars of those persons involved. The relevant calendar entries of several persons were incorporated in a schedule of responsive programming that is reflected in Attachment E to Ms. Barr's testimony. Ms. Covington had left

Scripps Howard's employ in 1991. Her notes of 1992, which reconstructed her 1991 calendar, were used by Ms. Barr in 1992 to create the renewal exhibit. The Covington notes were relevant and discoverable. By the time the notes were a special focus of discovery, i.e. October 27, 1993, the Bureau's counsel and the Presiding Judge were convinced that they were lost. However, after the issues were added, the notes were discovered in the files of Scripps Howard incident to a post hearing search.

4. Parties receiving document requests are obligated to assist the Commission's fact finder in establishing a full and complete record. See Garden State Broadcasting Limited Partnership v. FCC, 996 F.2d 386, 393-94 (D.C. Cir. 1993). It became necessary to inquire as to whether Scripps Howard was treating the proceeding with the candor required of Commission licensees so as to insure that there will be complete findings of fact. Opal Chadwell, 2 FCC Rcd 1197, 1198 (Rev. Bd. 1987), aff'd, 2 FCC Rcd 3458 (Comm'n 1987). But the focus of comparative proceedings is on the conduct or misconduct of the applicants. Counsel's conduct is tangential to that inquiry. Id. As of this time in the development the hearing record, the conduct with respect to discovery which is attributable to Scripps Howard's counsel is not disqualifying as a matter of law. However, the factual record is not yet complete. Therefore, a summary decision would not be appropriate at this time.

Facts

5. The factual analysis begins with Four Jacks' document request of June 11, 1993. Request III (b) asked for the following documents:

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.

In the instructions section of the request, Four Jacks focused its request on the relevant period which was defined as May 30, 1991 to September 3, 1991, but which also included :

any evidence showing the implementation of Scripps Howard's programming plans from May 30, 1991 through September 30, 1991 [and] documents concerning the preparation of other documents.

Also, the document request was specified by Four Jacks to be "continuing in nature."

6. The Presiding Judge did not limit his discovery order with any qualifier "relating to the preparation of" the lists. Rather, he ordered the facially more inclusive production of "all documents relating to the above Issues/Programs lists." See Order FCC 93-400, released June 24, 1993. Such expansive language required the production of documents describing the results of Scripps Howard's ascertainment efforts to which the listed programming was responsive which were categories of documents that had been specified by Four Jacks.

7. Scripps Howard argues that the document request is limited by its own terms to the documents "relating to the preparation of" the 1991 issues/programs lists.¹ The Bureau agrees with that restrictive interpretation. Four Jacks relies on the more expansive language regarding "implementation" and "preparation" that is quoted above. It is concluded as a finding of fact and as a conclusion of law that the Four Jacks interpretation under the terms of the discovery order of the Presiding Judge is correct and that Scripps Howard was on notice on June 11, 1993, that Four Jacks was requesting the NBC correspondence and the Covington notes. Such conclusion is based on the fact that both of those materials were used by Ms. Barr as primary sources for significant facts used in the preparation of her Attachment E which was a document "reflecting the compilation of responsive programming lists."²

8. Scripps Howard had a duty to produce the NBC correspondence and the Covington notes that were used in the preparation of Attachment E. Alternatively, counsel for Scripps Howard could have identified the documents and sought to claim a work product exemption and Four Jacks could have asked for an in camera review and determination.³ But Scripps Howard unilaterally chose to withhold the NBC documents, as well as the fact that they existed, until ordered to disclose them on October 26, 1993. Scripps Howard asserts

¹ Scripps Howard was required to maintain issues/programs lists. See 47 C.F.R. §73.3526(8) [quarterly lists of programs that provide the most significant treatment of community issues and which include a narrative describing the issues given significant treatment and the programming that provided the treatment].

² However, that conclusion does not support a finding that the interpretation of Scripps Howards' attorneys was meretricious or disingenuous. A narrow literal reading of the discovery request by a trial advocate could result in turning over only those documents that were in existence or that were prepared between May 30-September 03, 1991. The Bureau's counsel has so read the request. The Covington notes also could arguably be characterized as work product if they were requested by Scripps Howard's counsel to be constructed in the course of trial preparation. But the notes of Ms. Covington were requested by Ms. Barr and there is no evidence in the record that either person was acting on instruction of counsel.

³ Procedures for asserting a privilege, and the procedures for seeking an in camera review of any documents as to which privilege was asserted, were set forth in Prehearing Conference Order, FCC 93M-146, released April 6, 1993, at Para. 6. Bench rulings were made that there was a substantial need for the prior drafts of Attachment E. The same ruling would apply to the Covington notes which were thought to have been discarded but which since February 1994 are known to exist and which have been recently produced to Four Jacks. And there was never an issue of work product raised with respect to the NBC correspondence which was produced forthwith after the October 27 prehearing conference. Nor is there any dispute over the relevance of the NBC and Covington materials.

that it misplaced or overlooked the Covington notes. If Scripps Howard had known of the Covington notes on October 27, 1993, they would have been produced along with the NBC documents (Tr. 417) and Ms. Barr could have been cross-examined on the Covington notes at the hearing.⁴

9. There are other elements of proof that go beyond discovery compliance. There is a substantial question of fact raised between the testimony of Ms. Barr and her affidavit dated February 16, 1994, wherein she accounts for the Covington notes which were produced only after a posthearing search was made of Scripps Howard's files. Ms. Barr has repeatedly testified in her deposition of July 16, 1993, and in her hearing testimony on November 08-09, 1993, that she had used the Covington notes in preparing Attachment E, that the notes were difficult to read, and that she had thrown away the notes after using them. The notes appear to be reasonably readable and could have been used by Four Jacks to prepare for hearing at the deposition and to use in cross examination at the hearing. Four Jacks is entitled to a full hearing on the renewal expectancy issue and the credibility of the evidence pertaining to the renewal expectancy. That includes the right to depose Ms. Barr and to cross-examine her with respect to the Covington notes.

10. Four Jacks also is entitled to depose Ms. Covington. But it will be necessary for Four Jacks to apply for a subpoena. Scripps Howard is required to furnish Four Jacks with Ms. Covington's last known address and place of employment. After the deposition of Ms. Covington is taken, it will be necessary for Four Jacks to seek leave to cross examine her on the renewal issue. It may not be necessary to hear her testimony and the Presiding Judge will make that determination after the deposition. But if the motion should be granted, Four Jacks must apply for a hearing subpoena and call Ms. Covington as a hostile witness.⁵

⁴ In its motion, Scripps Howard repeats its position that it had no duty to turn over 1992 documents in response to Four Jacks' initial discovery request and that therefore it was proper to withhold the NBC correspondence. Scripps Howard then asserts that it "mistakenly told the Presiding Judge that it did not have such documents." Then Scripps Howard makes the argument that production of relevant documents is such an absolute good that the timing of their production cannot be considered as evidence of a lack of candor. That argument has been rejected by the Commission and the Court of Appeals in Garden State, *supra* at 394. However, it is a fact that within 10 days before the hearing Scripps Howard had produced the NBC correspondence which were business records of the network which corroborated entries made in Attachment E. This was not incriminating evidence that was being withheld to mislead the fact finder.

⁵ If the parties agree, Scripps Howard may sponsor Ms. Barr's and/or Ms. Covington's direct written testimony and Four Jacks may cross-examine that frozen testimony. See 47 C.F.R. §1.248 (d)(3). But if the parties cannot agree, Scripps Howard has the right to conduct its own examination and that questioning by Scripps Howard also may be in the form of cross examination.

11. The added issue is framed in terms of the candor of Scripps Howard. The adding of the issue has been remedially successful in effecting the location and the production of the Covington notes. But there is no basis for the discovery of any of Scripps Howard's attorneys. It is evident that counsel had concluded that disclosure of documents which were prepared in 1992 were not the subject of discovery because of counsel's adversarial interpretation of the Four Jacks document request. Such advice of counsel on the scope of Four Jacks' discovery request for documents that were used to prepare a renewal exhibit will not be attributed to Scripps Howard to support a finding of a lack of candor. Opal Chadwell, supra.⁶

12. Scripps Howard elected to proceed by motion for summary decision. While a summary resolution of the issue would be desirable, particularly in view of the ancillary problems that can arise from the discovery of attorneys and their work product, it cannot be assured. There will be no further consideration of summary decision until the discovery related to the Covington notes is completed and until after Ms. Barr is cross-examined on her use of the Covington notes. That evidence may be used by either or both parties to supplement the request for summary decision. In the meantime, the motion for summary decision will remain under advisement.

13. There are other factual issues that are developed in more detail in the Opposition of Four Jacks. Those issues of fact may not be decisionally significant if their relevance is limited to a failure by counsel to make full and timely discovery disclosures. However, before there is any further analysis of that evidence and the inferences sought, the record of the Covington notes must be completed. See Opal Chadwell, supra.

14. The Bureau refers to a letter of July 13, 1993, which appears to be ambiguous only "when viewed from the high hill of hindsight." But the discovery could only be assessed for candor after the attendant circumstances were disclosed. In any event, the view from the hill is presently a misty one. What remains to be seen may dispose of the issue. But there is insufficient evidence in the record to resolve the issue summarily at this time.

Ruling

IT IS ORDERED that the Motion For Summary Decision filed by Scripps Howard on February 10, 1994, IS DENIED without prejudice to its consideration after further discovery and testimony.

IT IS FURTHER ORDERED that the discovery authorized above SHALL BE COMMENCED by March 25, 1994.

⁶ If there appears to be a substantial question of an attorney's intentional misrepresentation of a material fact in the course of discovery, the Commission requires that such questions of counsel's conduct be referred to the General Counsel. Opal Chadwell, 2 FCC Rcd 3458 (Comm'n 1987). But the Presiding Judge sees no basis at this time to refer such an issue.

IT IS FURTHER ORDERED that Scripps Howard shall forthwith furnish Four Jacks with the last known residence and employment addresses of Janet Covington.

IT IS FURTHER ORDERED that any motion to reopen the record to hear the testimony of Janet Covington MUST BE FILED by May 09, 1994.

IT IS FURTHER ORDERED that any application for a hearing subpoena for Janet Covington MUST BE SUBMITTED to the Presiding Judge by May 23, 1994.

IT IS FURTHER ORDERED that any written testimony of Ms. Barr and/or Ms. Covington that is sponsored by Scripps Howard SHALL BE EXCHANGED by 4:00 p.m. on June 27, 1994.

IT IS FURTHER ORDERED that a hearing on the record SHALL BE HELD on July 12, 1994, at 10:00 a.m. at which the testimony of Emily Barr and, if authorized, the testimony of Janet Covington shall be heard.

Federal Communications Commission⁷



Richard L. Sippel
Administrative Law Judge

⁷ Copies of this ruling were made available to the parties' counsel on the date of issuance.