

CORRESPONDENCE
FILE

ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In re Applications of)	MM Docket No. 93-94
)	
SCRIPPS HOWARD)	File No. BRCT-910603KX
BROADCASTING COMPANY)	
)	
For Renewal of License of)	
WMAR-TV, Baltimore, Maryland)	
)	
and)	
)	
FOUR JACKS BROADCASTING, INC.)	File No. BRCT-910903KE
)	
For Construction Permit for a)	
New Television Facility on)	
on Channel 2 at)	
Baltimore, Maryland)	

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 FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF SECRETARY

To: The Honorable Richard L. Sippel
Administrative Law Judge

**RESPONSE TO OPPOSITIONS TO
NOTICE OF DEPOSITIONS**

Four Jacks Broadcasting, Inc. ("Four Jacks"), by its attorneys and pursuant to Section 1.315(b)(2) of the Commission's Rules, hereby responds to (i) the "Objections by Scripps Howard Broadcasting Company ["Scripps Howard"] and Janet Covington to Notice of Depositions and Request for Protective Order," and (ii) the "Mass Media Bureau's Opposition to Notice of Deposition," both filed on April 1, 1994.

Janet Covington

1. Scripps Howard and Covington object to Four Jacks' notice of deposition to depose Janet Covington on two grounds: (i) Ms. Covington will not appear at deposition absent the

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issuance of a subpoena; and (ii) it would be burdensome for Ms. Covington to be deposed at the offices of Four Jacks' counsel in Washington.

2. As to the first of these objections, Four Jacks will be applying shortly for the issuance of a subpoena to compel Ms. Covington's attendance at deposition.^{1/} As to the second ground for objection, Four Jacks does not believe that it would be overly burdensome for Ms. Covington to appear for deposition in Washington, D.C. At the very worst, this would require Ms. Covington to take a train and taxi service for a deposition in Washington. Compared with the burden of having a number of Washington lawyers travel to Baltimore for this single deposition, the hardship on Ms. Covington would be relatively insignificant. This is particularly the case since Four Jacks will be subpoenaing Ms. Covington, and thus will be bearing Ms. Covington's travel costs to appear at the deposition. Nonetheless, should the taking of Ms. Covington's deposition in Washington prove an insurmountable inconvenience, Four Jacks is willing to make alternate arrangements to accommodate Ms. Covington.

David N. Roberts and Brett W. Kilbourne

3. None of the objections to the depositions of Mr. Roberts and Mr. Kilbourne have any merit. Scripps Howard and

^{1/} Such a subpoena will be a subpoena duces tecum which will require Ms. Covington to bring with her all documents in her possession responsive to Four Jacks' March 25, 1994 Motion for Production of Documents by Scripps Howard Broadcasting Company.

Covington cite to the Judge's statement that "there is no basis for the discovery of any of Scripps Howard's attorneys." Mr. Roberts, however, is not presently an attorney representing Scripps Howard, and Mr. Kilbourne is not an attorney at all. Thus, neither can be considered to be within the scope of the Judge's instruction.

4. Even more fundamentally, Scripps Howard has submitted the sworn testimony of Mr. Roberts and Mr. Kilbourne in support of its motion for summary decision on the character issues against it. See Attachments to Letter from Kenneth C. Howard to Judge Sippel, dated February 15, 1994. By affirmatively proffering the testimony of Mr. Roberts and Mr. Kilbourne, Scripps Howard has waived any attorney-client privilege that it might have had. See Georgia Public Telecommunications Commission, 5 FCC Rcd 4560 (1990) ("any voluntary disclosure of information constitutes a waiver of the right to claim that the information is protected by the [attorney-client] privilege"); Welch Communications, Inc., 4 FCC Rcd 3979 (Rev. Bd. 1989) (where applicant disclosed substance of conversation with his attorney, he waived attorney-client privilege, and attorney was permitted to be deposed).

5. Moreover, Four Jacks has a right to cross-examine all witnesses whose testimony Scripps Howard offers. See Local Morgan Hill Radio Associates, 4 FCC Rcd 2404 (Rev. Bd. 1989) (upholding ALJ's ruling that "it is axiomatic that in an adversary proceeding the testimony of a witness ought to be subject to cross-examination"), rev. denied, 5 FCC Rcd 498

(1990). In short, because Scripps Howard has voluntarily submitted sworn testimony by Mr. Roberts and Mr. Kilbourne, the Judge is compelled to permit their depositions.

6. Both the Bureau and Scripps Howard/Covington also oppose Mr. Roberts' deposition on the basis of Section 1.311(b)(2) of the Rules, which generally prohibits the depositions of Commission personnel. That objection might have some merit were Mr. Roberts to be deposed about his present duties as a Commission employee. But as Four Jacks emphasized in its Notice of Depositions, it does not intend in any way to question Mr. Roberts concerning his present employment with the Commission. The rationale for Section 1.311(b)(2) is to protect Commission personnel participating in hearing cases from the demands of being deposed in every hearing proceeding in which they participate. Amendment of Part I of the Rules of Practice and Procedure to Provide for Discovery Procedures, 11 F.C.C.2d 185, 188 (1968). That rationale clearly does not contemplate precluding the deposition of Commission employees who do not represent the Commission in hearing cases, on unrelated matters having solely to do with the employee's prior non-Commission employment. Were it otherwise, any person having knowledge of unlawful activity could avoid questioning about that activity simply by joining the Commission's staff.

7. Section 1.311(b)(2) cannot be applied to prevent the deposition of a person with personal knowledge of the facts at issue who has voluntarily testified in this proceeding in connection with a motion for summary decision, on the basis of

the fortuitous fact that the witness has since moved on to work at the Commission. Indeed, the Commission has held that Section 1.311(b)(2) "does not prevent parties from legitimately discovering facts from Commission personnel in appropriate circumstances." Amendment of Part I, Rules of Practice and Procedure To Provide for Certain Changes in the Commission's Discovery Procedures in Adjudicatory Hearings, 91 F.C.C.2d 527, 532 n.8 (1982). The circumstances here are clearly "appropriate" to permit Mr. Roberts' deposition. Thus, even should Four Jacks' notice of Mr. Roberts' deposition be subject to Section 1.311(b)(2), Four Jacks requests the Presiding Judge to order that the deposition be taken. See 47 C.F.R. § 1.311(b)(2) (depositions of Commission personnel may be authorized "upon special order of the Commission").

The Scope of Discovery

8. Finally, Scripps Howard and Covington object to Four Jacks' intention to depose the witnesses on all matters calculated to lead to the discovery of admissible evidence as it relates to the issues added against Scripps Howard. That is the scope of discovery authorized in Section 1.311(b) of the Rules. Scripps Howard and Covington cite to what they perceive as the "limited scope of discovery authorized" by the Judge's Memorandum Opinion and Order, FCC 94M-177 (released March 18, 1994) ("MO&O").

9. The Judge's MO&O, however, in no way purports to limit discovery only to a portion of the added issues. The MO&O's only

limitation, and the only one cited by Scripps Howard and Covington, is that no discovery can be taken of Scripps Howard's attorneys^{2/} -- and, in fact, Four Jacks' March 25, 1994 Notice does not propose the depositions of any of Scripps Howard's present attorneys. Other than that limitation, there is nothing in the MO&O to preclude questioning on "all matters calculated to lead to the discovery of admissible evidence" relating to the issues against Scripps Howard.

For all the above reasons, Four Jacks respectfully requests the Presiding Judge to order the taking of all depositions noticed by Four Jacks.

Respectfully submitted,

FOUR JACKS BROADCASTING, INC.

FISHER, WAYLAND, COOPER,
LEADER, & ZARAGOZA
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20006
(202) 659-3494

By: 

Martin R. Leader
Kathryn R. Schmeltzer
Gregory L. Masters

Its Attorneys

Dated: April 8, 1994

^{2/} Indeed, Scripps Howard's/Covington's objection on this point amounts to an admission that evidence of the conduct of Scripps Howard's attorneys is within the scope of the added issues.

CERTIFICATE OF SERVICE

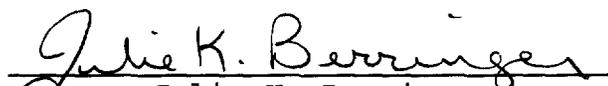
I, Julie K. Berringer, a secretary in the law firm of Fisher, Wayland, Cooper, Leader, & Zaragoza, do hereby certify that true copies of the foregoing **"RESPONSE TO OPPOSITIONS TO NOTICE OF DEPOSITIONS"** were sent this 8th day of April, 1994, by first class United States mail, postage prepaid, to the following:

* The Honorable Richard L. Sippel
Administrative Law Judge
Federal Communications Commission
2000 L Street, N.W., Room 218
Washington, D.C. 20554

* Robert A. Zauner, Esq.
Hearing Branch
Enforcement Division
Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W., Room 7212
Washington, D.C. 20554

Kenneth C. Howard, Jr., Esq.
Leonard C. Greenebaum, Esq.
Baker & Hostetler
1050 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036
Counsel for Scripps Howard Broadcasting Co.

* Hand Delivered


Julie K. Berringer