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

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: April 07, 1994 ; Released: April 11, 1994

Background

1. This is a ruling on a Motion For Summary Decision that was filed on February 28, 1994, by Four Jacks Broadcasting, Inc. ("Four Jacks"). An Opposition was filed on March 14, 1994, by Scripps Howard Broadcasting Company ("Scripps Howard").<sup>1</sup> The Mass Media Bureau's Comments On Motion For Summary Decision was also filed on March 14, 1994. On March 28, 1994, Four Jacks filed a Response to Scripps Howard's Cross-Motion For Summary Decision.<sup>2</sup>

<sup>1</sup> Scripps Howard also included a Cross Motion For Summary Decision. At the prehearing conference of February 15, 1994, the Presiding Judge warned Four Jacks of the possible risk of such a cross motion if Four Jacks persisted with its motion for summary decision. (Tr. 1411-12.) Four Jacks stated that it would later decide on whether to go forward with a motion. After the conference the Presiding Judge issued an order which noted that he had "reconsidered the authorization to file a Cross Motion for Summary Decision" and therein prohibited the filing of Cross Motions. See Order FCC 94M-81, released February 18, 1994. See also 47 C.F.R §§ 251(a)(2) and (f) (judge may rule in advance that the proceeding is not appropriate for summary decision.) The matters submitted by Scripps Howard relating to its Cross Motion [pp.22-25] will only be considered with respect to the merits of its Opposition. However, Four Jacks is permitted to respond to those allegations.

<sup>2</sup> Four Jacks has opposed the Cross-Motion as an improperly filed pleading under the Commission's rules. The Presiding Judge has ruled that the Cross-Motion will not be considered on summary relief against Four Jacks. See fn. 1, supra. Therefore, the Response of Four Jacks is considered only for

Facts

2. The facts are straightforward on the misrepresentation/lack of candor issue that was added against Four Jacks. See Memorandum Opinion and Order, FCC 94M-51, released February 01, 1994. Each of the three principals of Four Jacks proposed for integration, David D. Smith, Robert E. Smith and Frederick G. Smith (hereafter the "principals"), represented in their sworn testimony 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.

Each of the three principals also is an officer, director and a controlling shareholder of Sinclair Broadcast Group, Inc. ("Sinclair"), a holding company which, inter alia, operates three independent UHF stations.<sup>3</sup>

3. After the exchange of the sworn testimony on September 13, 1993, Sinclair disclosed in a filing at the U.S. Securities and Exchange Commission ("SEC") in connection with a proposed public debt offering, that Sinclair did not believe that the three commitments to resign from current employment would require them to resign from Sinclair. Sinclair also had stated in other SEC filings that the loss of any of the three principals may have a material adverse effect on Sinclair's operations. But Sinclair further represented in SEC filings that it did not believe that the commitment of resignation requires the principals to resign as officers or directors of Sinclair. Thus, it appears that the three principals would not resign from Sinclair or give up or materially curtail their duties and responsibilities at Sinclair if Four Jacks receives the grant for Channel 2. A genuine issue of material fact is framed by Four Jacks which now contends that the three principals of Four Jacks are merely executives of Sinclair but not employees.

4. One of the three UHF stations is Station WBFF(TV) in Baltimore. When Four Jacks disclosed its integration to the Commission for the second time on May 7, 1993,<sup>4</sup> it represented that should it receive the grant for Channel 2 the Four Jacks principals have committed to divest in accordance with Section 73.3555 of the Rules "all of their interests in and sever all connections with

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the limited purpose of stating its position on the procedural defect.

<sup>3</sup> Sinclair, through subsidiaries, owns Chesapeake Television Licensee, Inc., the licensee of WBFF(TV), Baltimore, MD; WITE, Channel 28 Licensee, Inc., the licensee of WITE(TV), Columbus, Ohio; and WPGH License, Inc., the licensee of WPGH TV, Pittsburgh, PA.

<sup>4</sup> The designation order was adopted by the Commission on March 22, 1993, and was released on April 1, 1993. See Hearing designation Order DA 93-340, released April 1, 1993. There was integration disclosure made in Exhibit E to Four Square's Form 301 which was filed on September 03, 1991. But that disclosure differs in certain respects from the disclosure of May 07, 1993.

WBFF(TV), Channel 45, Baltimore, Maryland." Four Jacks contends that the "employment" of the principals is limited to the tasks they perform at Station WBFF(TV) and that since that station will be divested, all of the "then-current employment" will have been terminated. However, the rule cited pursuant to which WBFF will be divested prohibits multiple ownership within the same television market. It has no bearing on a divestiture commitment that is necessary in order to fulfill an integration pledge.

5. Four Jacks observes in its Motion the Presiding Judge's statement on-the-record that the divestiture pledge only covers Channel 45 in Baltimore and that the pledge does not disclose "other properties that may also be violative of the diversification policy." (Tr. 1179.) But there the Presiding Judge isolated Station WBFF(TV) as the only TV station in the Baltimore market that would conflict with the Commission's policy against multiple ownership. See 47 C.F.R. §73.3555. There was no suggestion made by the Presiding Judge that the divestiture would alone resolve the integration pledge. In fact, an integration pledge does not require divestiture. Only a showing of the feasibility of an integration commitment is required to be shown by an applicant where there is a job or enterprise that would appear to conflict with the promise for integration. See Radio Naguabo Broadcasting Co., 6 F.C.C. Rcd 4879, 4880 (Comm'n 1991) (integration pledge must contain a specific credible plan for accommodating existing interests with integration plans.) Such feasibility could be shown by a pledge to resign from current employment as was represented by the Four Jacks principals, so long as the pledge extended to positions held at Sinclair. The issues of fact are whether Four Jacks' resignation promise extended to Sinclair and, if not, whether the Sinclair committee form of management was intended to be used at Channel 2.

#### Discussion

6. The standard for resolving an issue by summary decision assigns a substantial burden to the proponent of the motion:

The party filing the motion may not rest upon mere allegations or denials but must show, by affidavit or by other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing.

47 C.F.R. §1.251(a)(1). Four Jacks makes lengthy argument that the Presiding Judge was misled by Scripps Howard or failed to understand the facts in setting the issue. As the presiding Judge stated at the prehearing conference (Tr.1421) and as the Bureau stated in its Comment, Four Jacks is seeking reconsideration of the ruling which added the issue. To the contrary, because of the facially conflicting statements made to the FCC and to the SEC regarding the three principals' continuing roles at Sinclair, there are genuine issues of material fact that remain unresolved.

7. In reaching the conclusion that genuine issues of material fact remain to be tried, the Presiding Judge has given full consideration to Four Jacks' cited authorities, documents and arguments. There are affidavits of the three principals that were executed on February 28, 1994. In these papers the principals continue to rely on their divestiture commitments as to

Baltimore Station WBFF(TV) as relevant evidence of the bona fides of their integration pledge. The principals then represent that there is no employment contact requiring them to remain with Sinclair. But there is no plan referred to or offered in the affidavits as to how they could rationally and totally leave Sinclair to work full-time at Channel 2. Only the following explanation is offered to rationalize their use of the term "then-current employment:"

By virtue of the nature of my relationship with Sinclair, the words "then-current employment" did not refer to my ownership or executive position in Sinclair but rather to any future employment or consulting contracts that I might have at the time that the Four Jacks application is granted and to my current full-time presence at WBFF(TV). I can easily limit and/or terminate my activities for Sinclair, while remaining an owner and officer, to accommodate my full-time integration proposal since I have the authority to do so.

Here the principals are giving a self-serving definition to the phrase "then-current employment." While the principals may have the "authority" to leave Sinclair at anytime, it would not be a reasonable act to leave without a plan that would assure continuity of Sinclair's business. And no plan is posited. That conclusion of unreasonableness is particularly applicable in light of the proposed offer to public investors who would be relying upon Sinclair's present management team.

8. The Four Jacks' definition of employee also lacks consistency. While Four Jacks had argued previously that the positions of officer/director of Sinclair would not be employment positions, now, in their recent affidavits, they contend that any consulting contract, which implies the concept of independent contractor, would mean "employee" under the Four Jacks' usage. And there is no recognition given to the fact that a person can be employed as a corporate officer, even without a written employment contract. This may be reflected in the benefits that a person receives in that capacity such as salary, bonuses, and health insurance. It can also be established by the manner in which the corporation treats those operating expenses on the company's books for accounting and tax purposes. These characteristics of the status of employee should be made a matter of record and explored on cross-examination as germane to the genuine issues of material fact.

9. In addition, there are admissions in Commission filings that indicate that the principals of Four Jacks are employees of Sinclair. In its Form 301 that was filed on September 3, 1991, for the Channel 2 allocation, Robert Smith and Frederick Smith were each described as a "full-time employee" of Sinclair. And after describing them as "employees of Sinclair", the application promises that the principals "will resign from their then-current employment" in order to manage Channel 2. See Four Jacks Application at Exh. 6. In that same disclosure, it is represented that if Four Jacks receives the grant for Channel 2, the principals "will run the proposed family-owned station as a management committee" and each will be a "full-time management employee of the applicant [Four Jacks] if its application for Channel 2, Baltimore, Maryland, is granted." But there is no evidence of a written employment contract with Four Jacks. Scripps Howard also cites to a portion

of the November 1993 hearing transcript in which Robert Smith identifies himself as Sinclair's vice-president and treasurer and wherein he admits several times under cross-examination that he considers himself to be an employee of Sinclair. (Tr. 1371).<sup>5</sup> And there were no representations made that the principals were or would be exclusively executives without having any of the attributes of employees. It is concluded that there exist, at a minimum, genuine issues of fact on the employment status of the principals at Sinclair.

10. Four Jacks asserts that the Presiding Judge was erroneous in his factual conclusion that there was not a factual basis in the record for concluding that the "employment" that the principals would forego would be their employment associated with Station WBFF (TV) in Baltimore. See Memorandum Opinion And Order, FCC 94M-51 supra at n.2. Four Jacks asserts that the Presiding Judge's inference was not supported by the record. Four Jacks refers to a reference in the hearing transcript [Tr.1356-69] that is "testimony of some of the activities the Smiths are presently involved in at WBFF." See Motion For Summary Decision at 13 n.2. A review of those transcript pages reflects the cross examination of Frederick Smith in which he discloses the identity of recipients of the Julian Smith Scholarship, a local Baltimore scholarship that had been established by the father of the Four Jacks' principals. Except for a few lines of testimony concerning the identification of recipients of the award, there is no substantive testimony on specific tasks performed by Frederick Smith at WBFF. Much of the transcript is devoted to clearing up an error in identification at the witness's earlier deposition. It may be that the principals performed more of the tasks associated with station management at WBFF than at the two out-of-town stations. But for purposes of this Motion, the transcript citations do not negate the inference that the Presiding Judge had drawn from his recollection of the testimony of the three principals and their reliance on station managers to perform and direct task oriented work at the three broadcast stations that are owned by Sinclair.

11. Also, the representation is made in the Form 301, supra that Sinclair, "the ultimate parent of television station, WBFF (TV), Baltimore, Maryland, is managed by a committee consisting of the four Smith brothers." Id. The Form 301 disclosure further states that "[a]ll decisions are made by them jointly and that they are involved in all aspects of the day-to-day operation of the station [WBFF (TV)]." If the Presiding Judge's conclusion that WBFF was run day-to-day by a general manager is not accurate, then the record should be made clear in Phase II that there was no station manager for WBFF of the same or similar qualifications and with substantially the same duties as the station managers for the Pittsburgh and Columbus stations. The record should also be clear as to whether the integration intended for Channel 2 would be the same committee of management employees referred to in Form 301

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<sup>5</sup> Four Jacks asserts that the word "employee" was used by the cross-examining attorney and that the word was not volunteered by the witness. But there was sufficient time for the witness to correct counsel and that was not done. The Bureau notes that the claim that Scripps Howard's attorney "stuck" the word "employee" in the mouth of Frederick Smith is "ridiculous."

as the day-to-day managers of Station WBFF. Because such a committee of management employees may be substantially different from the specific management positions that were assigned to each of the principals in the Integration And Diversification Statement that was filed on May 7, 1993, there remains a substantial issue of fact as to whether Four Jacks ever intended to carry out its integration pledge for Channel 2. It is also important to make clear from the record that the specific positions specified on May 7, 1993, are not merely executive titles that do not involve hands-on work on the station's premises. There is no showing from those pages of the transcript cited by Four Jacks that the Presiding Judge's preliminary conclusion was erroneous.

12. Four Jacks also asserts that there was another erroneous inference drawn by the Presiding Judge. The Presiding Judge had taken note of the fact that the argument asserted by Four Jacks in opposing the issue was not limited to one interpretation: The language was contained in Four Jacks' exchanged testimony:

[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.

The Presiding Judge, in looking at that language in the context of other language that each principal would resign his "then-current employment," posited the inference that if the principals were in earnest about such resignations, the functional equivalent of a resignation could be achieved by "a trust arrangement or some equally effective remedy that would functionally equate with 'resigning' from positions and responsibilities of employment with Sinclair." There was no reference made by the Presiding Judge to there being evidence of Four Jacks' principals adopting such a procedure. It was merely an observation that if the Four Jacks' principals wanted to assure the Commission that there was a genuine integration pledge by the use of the phrase "resign from then-current employment" there were recognized procedures that could have been adopted. It is an observation which illustrates that there is a genuine issue of material fact as to the scope and the bona fides of the "resignation" pledge when viewed amidst all the surrounding circumstances including the absence of evidence of the "specific credible plan" which is required under Radio Nacabo, supra and its progeny.<sup>6</sup> It is concluded that this observation of the Presiding Judge does not negate the existence of a genuine issue of material fact with regard to the bona fides of the pledges of the Four Jacks' principals to resign from their then-current employment.

13. Four Jacks asserts that the Presiding Judge misunderstood the post-testimony disclosure that was made to the SEC about the principals intentions to remain at Sinclair even after a grant of Channel 2 to Four Jacks. The Presiding Judge recognizes that the disclosure to prospective note purchasers must be full and complete with respect to all material facts that could effect

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<sup>6</sup> Cf. Gloria Bell Byrd, 8 FCC Rcd 7124, 712 (Comm'n 1993); Lowrey Communications, L.P., 8 FCC Rcd 6721, 6722-23 (Comm'n 1993).

an investment decision. Also, it is recognized that if the business of Sinclair suffers a financial loss after the offering is made and the principals have failed to disclose a material contingency, they could be held liable in damages for a failure to adequately disclose a material risk. Therefore, it would be reasonable to disclose as an investment risk, as did Four Jacks, that there is no formal employment contract between the principals and Sinclair in the same context as disclosing that in the event that the principals should leave Sinclair, then Sinclair could realize substantial losses.

14. The true import of the total SEC disclosure is that the principals, who are the controlling shareholders of Sinclair, probably are not going to leave Sinclair. And it is affirmatively represented to the note purchasers that any commitment to integrate made to the FCC in this case can be fully met without their resigning from Sinclair.<sup>7</sup> Therefore the affidavits of the principals in support of the Motion are not accepted to establish the proposition that the SEC disclosure does not commit the principals to remain with Sinclair notwithstanding the integration pledge in this case. The fact that the disclosure does not rigidly "state" that intention does not answer the genuine issue of material fact as to whether the principals were employees without formal employment contracts and/or whether they intend to operate and manage Channel 2 through the Sinclair management committee. The precision of the affidavits used in support of the Motion also can be explored on cross-examination.

15. Four Jacks asserts other error in the Presiding Judge's rulings which added the issues. Four Jacks contends that if the principals had intended to relinquish their positions in Sinclair, Four Jacks would have disclosed that fact in the integration statement and "that would have enhanced their comparative posture." But the facts need not establish that Four Jacks falsely represented an intention to relinquish in order to make adverse findings under the misrepresentation/lack of candor issue. If Four Jacks' disclosure is found to be misleading by an intended impression that relinquishment of Sinclair would be forthcoming if Four Jacks receives a grant, then there remains a genuine issues of material fact to be tried. Four Jacks also asserts that Scripps Howard and, by implication the Presiding Judge, misunderstood that a divestiture pledge does not disclose the assets that are being retained. But that argument begs the question. What remains to be tried is whether Four Jacks intended to mislead the Commission into believing that the resignation of then-current employment would extend to Sinclair. Since Four Jacks applied for the Channel 2 frequency knowing that the company that was the greatest user of the time of the three principals, then Four Jacks had the duty to make adequate disclosure so that there would be no erroneous conclusion drawn with respect to the broad resignation pledge.

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<sup>7</sup> That raises an additional substantial question referred to previously as to whether the integration intended is personal to each principal or is the committee of "management employees" used at Station WBFF to be the mode of integration at Channel 2. Cf. form 301 disclosure, supra.

16. The law provides for adding an issue of misrepresentation/lack of candor where the allegations in light of the opposition show there to be a substantial and material question as to whether the applicant deceived intentionally where the totality of the evidence alleged raises a sufficient doubt on that point so that further inquiry is called for. Cf. Astroline Communications Ltd. Partnership v. FCC, 857 F.2d 1556, 1561-62 (D.C. Cir. 1988). See also Frank Dicesu, Sr., 7 FCC Rcd 5459-60 (Comm'n 1992). That standard is met here based upon the conflicting evidence referred to above, and particularly the conflicts arising out of the evidence first seen at hearing with respect to SEC disclosures<sup>8</sup> and the cross examination admissions as to employment. A possible intent to deceive is found in the motive of Four Jacks to operate Channel 2 through Sinclair's committee method, as it discloses that it does with WBFF(TV), which would be consistent with its "belief" made known to prospective note purchasers that the "commitment of resignation" would not require them "to resign as officers or directors of [Sinclair] or to dispose of their ownership interests of [Sinclair]." (Scripps Howard Exh. 33 at 19 and Scripps Howard Exh. 34 at 19, cited and quoted in Motion at 8-9.)

17. This is not merely a test of whether the Four Jacks integration pledge is feasible and capable of being accomplished. See Motion at 13-16. There is more at stake because as noted by Four Jacks the Commission does not award integration credit where a principal is an officer or director of an entity but not involved in a specific day-to-day managerial role. See Motion at 15 citing Policy Statement On Comparative Broadcast Hearings, 1 FCC 2d 393, 395 (1965). Thus, it is necessary that the Four Jacks' principals who are represented to be essential to the success of the multiple business missions of Sinclair be able to be on-the-job at Channel 2 as fully integrated managers in carrying out their respective day-to-day managerial roles. To conceal a contrary true intent to manage Channel 2 through Sinclair's committee method

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<sup>8</sup> Scripps Howard asserts that Four Jacks had a duty to produce to its counsel in discovery the various SEC disclosures which were instrumental in raising the substantial questions of fact about the integration proposal. It is recognized that there were sufficiently broad document requests by Scripps Howard that would have reached those SEC documents. But there was no precision-type request for documents related to broadcasting that were filed with a government agency other than the FCC. Also, Scripps Howard would not have been entitled to the disclosure documents before they were filed at the SEC and, once they were filed, a law firm with resources could quickly locate through a file search those publicly available documents. In related discovery, Scripps Howard recently has suggested seeking to depose attorneys for Four Jacks and attorneys for Sinclair. Those depositions will not be permitted if the inquiry concerns any decision as to whether to turn over the SEC documents in discovery in this case. And the depositions of any counsel must be sought by a noticed motion, which can be opposed, and which would be limited to non-government attorneys who were responsible for the transactional legal services in connection with the SEC filings. There will be no depositions permitted of the Four Jacks' litigation counsel. Cf. Memorandum Opinion And Order, FCC 94M-177, released March 18, 1994 at n.6.

could be a significant act of misrepresentation and/or a lack of candor. For that type of conduct the Supreme Court has held:

The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones. We do not think it is an answer to say that the deception was unnecessary and served no purpose.

FCC v. WOKO, Inc., 329 U.S. 223, 227 (1946). As held by this Circuit:

[The Commission] must rely on the applicants who come before it for the truth of their representations; it cannot countenance willingness to mislead simply because there is no evidence that the Commission was in fact misled.

RKO General, Inc. v. FCC, 670 F.2d 215, 230-31 (D.C. Cir. 1981). Here there are allegations of substantial evidence that the Commission was misled by the unqualified promise to resign from employment and that the Commission would be misled if it assigns Channel 2 to Four Jacks to operate through Sinclair's committee rather than through the integrated managers who have pledged to hold and carry out the duties of the respective positions identified in the Integration and Diversification Statement.

#### Conclusion

18. It is concluded that Four Jacks' Motion For Summary Decision was a request for a reconsideration of the order in which the misrepresentation/lack of candor issues were added. The Bureau concurs in that conclusion noting that Four Jacks failed to raise any new facts. But the Bureau also suggested that the Presiding Judge use the Motion as an opportunity to consider whether the misrepresentation issue was warranted. While the Commission rules do not provide for reconsideration of interlocutory orders of presiding judges, it was deemed to be appropriate under all the circumstances and as a matter of discretion to address herein the questions raised by Four Jacks about factual accuracy in detail.

19. It is further concluded that issues of material fact remain to be decided after discovery by receiving and hearing evidence in open court to determine whether the Four Jacks principals are in fact employees of Sinclair and if so, whether they intended to leave such employment if the grant is awarded to Four Jacks. A corollary fact issue to be determined, that was posited by the Bureau, is whether the duties of the principals at Sinclair would interfere with the carrying out of the integration pledges made with respect to Four Jacks.<sup>9</sup>

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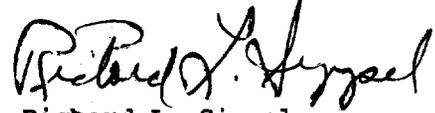
<sup>9</sup> However, the legal significance of that factual finding may not excuse any deliberate intent to mislead that may be found after all of the evidence is in. See WOKO, Inc., *supra*.

Ruling

IT IS ORDERED that the Motion for Summary decision filed on February 28, 1994, by Four Jacks Broadcasting, Inc. IS DENIED.

IT IS FURTHER ORDERED that the Cross Motion For Summary Decision filed on March 14, 1994, by Scripps Howard Broadcasting Company IS ALSO DENIED.<sup>10</sup>

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel  
Administrative Law Judge

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<sup>10</sup> Because the Cross-Motion was an improper and unauthorized pleading it has not been analyzed. However the nature of the evidence that would be applicable for the Cross-Motion would raise similarly substantial and genuine issues of material fact that must be tried through live testimony in open court.