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

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FCC 94M-268
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DISPATCHED BY

In re Applications of)
SCRIPPS HOWARD BROADCASTING COMPANY)
For Renewal of License of Station WMAR-TV)
Baltimore, Maryland)
and)
FOUR JACKS BROADCASTING, INC.)
For a Construction Permit for a New)
Television Facility on Channel 2)
at Baltimore, Maryland)

MM DOCKET NO. 93-94
File No. BRCT-910603KX
File No. BPCT-910903KE

MEMORANDUM OPINION AND ORDER

Issued: April 14, 1994 ; Released: April 15, 1994

1. This is a ruling on an Opposition of Scripps Howard to a Notice of Deposition that was filed by Four Jacks on March 25, 1994. Four Jacks seeks to depose Emily L. Barr ("Barr"), Janet Covington ("Covington"), Brett W. Kilbourne ("Kilbourne") and David N. Roberts ("Roberts"). On April 1, 1994, Scripps Howard filed Objections to the depositions of Covington, Kilbourne and Roberts. On that same date, the Bureau filed an Opposition To Notice Of Deposition. A Response to the Objections was filed on April 8, 1994, by Four Jacks.

2. The depositions are sought in connection with the post-hearing misrepresentation/lack of candor issues that were added against Scripps Howard. See Memorandum Opinion And Order, FCC 94M-50, released February 1, 1994.

Emily L. Barr

3. There is no objection to the deposition of Ms. Barr. She was noticed for a deposition to be taken on April 19, 1994, at the offices of Four Jacks' attorneys in Washington, D.C. Ms. Barr had a conflict with that date but a new date was to be agreed upon. Therefore, there is no issue to resolve at this time with respect to the deposition of Ms. Barr which shall be taken in Washington, D.C. as agreed by the parties.

Janet Covington

4. There only are procedural objections to the deposition of Ms. Covington that also was noticed to be taken in Washington, D.C. on April 19, 1994. Ms. Covington is a prior employee of Scripps Howard who has information relevant to the added issue. According to Scripps Howard, she is not willing to testify without first receiving service of a subpoena. Four Jacks responds that it will present an application for a subpoena. Scripps Howard objects to Ms. Covington being deposed in Washington, D.C. because she lives in Baltimore

and she does not drive an automobile. Scripps Howard objects to the expense and the inconvenience. It is noted that there is no assertion that Ms. Covington has a physical condition that would make travel unreasonably burdensome for her. And as Four Jacks notes, the service of the subpoena will need to include a tendering of travel costs.

5. It is determined that Baltimore is not an excessive distance from Washington, D.C. so as to require a Baltimore deposition. Counsel for Scripps Howard and Bureau counsel are located in Washington, D.C. And Ms. Barr and the three principals of Four Jacks are being deposed in Washington, D.C. without objection. Ms. Covington is not employed and so it is not necessary for her to leave and return from her job. Thus, there is no undue hardship, expense or oppression shown for the relief requested by Scripps Howard on behalf of Ms. Covington. See 47 C.F.R. §1.313 (protective order). Therefore, the deposition shall be taken at the offices of counsel for Four Jacks at an agreed time and date.¹

David N. Roberts

6. Mr. Roberts is an attorney who was employed by Scripps Howard's law firm, Baker & Hostetler, during the discovery and first hearing phase of this case. Since November 1993, he has been employed with the Commission. The Presiding Judge will not order his deposition or testimony without an order of the Commission. See 47 C.F.R. §1.113 (b) (2) (Commission personnel may not be deposed for discovery except upon special order of the Commission).² The Bureau agrees with that conclusion. Alternatively, the Presiding Judge would deny the deposition because it would be unjustifiably disruptive of the Commission's work to require Mr. Roberts to be deposed when the Presiding Judge has already ruled that "there is no basis for the discovery of any of Scripps Howard's attorneys." Memorandum Opinion And Order, FCC 94M-177, released March 18, 1994. That ruling was based on a conclusion reached after considering an affidavit of Mr. Roberts so that the Presiding Judge could make

¹ Four Jacks represents that it is prepared to tender to Ms. Covington the cost of a railroad ticket (round trip) and taxi fare which would be needed at both ends. Ms. Covington is not a party to this case. But she is represented by Baker & Hostetler as her personal attorney. Therefore, Baker & Hostetler would be able to transport her to the deposition site. Alternatively, it would seem expedient for Four Jacks to offer to bring Ms. Covington to Washington, D.C. for the deposition and return her to Baltimore in a Sinclair van or limousine. Four Jacks should also consider the comparative cost of a round trip taxi from Baltimore in the interest of accommodating Ms. Covington. In view of the ruling herein, counsel for both sides should cooperate in making the deposition, and the attendant travel, as comfortable as possible for Ms. Covington.

² The rule also provides that discovery of Commission personnel can be taken through written interrogatories which would be served on a Bureau Chief. Id. That would be an oppressive imposition on the Commission in view of the ruling that denies discovery of Scripps Howard's counsel and Four Jacks is instructed not to utilize that remedy. 47 C.F.R. §1.313.

an informed decision.³ In either case, the taking of Mr. Roberts' deposition would be unlawful and oppressive. 47 C.F.R. §1.313.

Brett W. Kilbourne

7. Mr. Kilbourne is a legal assistant with Baker & Hostetler who would not have to reveal information that would be covered by the attorney-client privilege and possibly, in part, that would also be protected under the work product exemption. However, Mr. Kilbourne is not an attorney and he has not been rendering legal advice to Scripps Howard. Therefore, his participation as a witness would not disqualify Baker & Hostetler and would not otherwise disrupt the proceeding or be oppressive to any party. Mr. Kilbourne may be deposed on the matters that are contained in his affidavit of February 15, 1994, and may be asked fact questions as to his knowledge of the whereabouts of the Covington notes from the date of Four Jacks request in June 1993, to February 10, 1994. Thus, Mr. Kilbourne's deposition will be taken as limited. 47 C.F.R. §1.313.

Protective Order

8. Scripps Howard seeks miscellaneous protective relief with respect to the depositions. The Commission's rules provide for an appropriate protective order that "may specify any measure" that will "assure proper conduct of the proceeding or to protect any party or deponent from annoyance, expense, embarrassment or oppression." 47 C.F.R. §1.313. The general scope of discovery, which Four Jacks seeks to employ for all witnesses, is broad and would include "all matters calculated to lead to the discovery of admissible evidence." 47 C.F.R. §1.311(b). For the proper conduct of the proceeding, there will be no deposition taken of Mr. Roberts and the deposition of Mr. Kilbourne has been limited as stated above. Such protection is consistent with the restriction in the earlier ruling barring litigation here of "the ancillary problems that can arise from the discovery of attorneys and their work product." See Memorandum Opinion And Order, FCC 94M-177 at paras. 4, 12. But the depositions of Ms. Barr and Ms. Covington are not so limited and questions that are calculated to lead to discovery of admissible evidence as it relates to the issues added against Scripps Howard may be asked of those two witnesses. To the extent that questions are objected to on grounds of privilege, those objections may be noted and ruled upon at hearing or there may be a request for a ruling at the deposition by telephone.⁴

³ Four Jacks argues that the privilege is waived as to matters in Mr. Roberts' affidavit. But there was a recognition that Scripps Howard was submitting the affidavit without waiving the privilege, except for the facts disclosed in the affidavit, and the Presiding Judge accepted that limitation in the interest of making an informal decision. (Tr. 1390-93.)

⁴ It is the responsibility of the deposing counsel to coordinate dates and times with the Presiding Judge's Legal Technician at least 4 business days before the deposition is to be taken.

Rulings

IT IS ORDERED that the deposition of Janet Covington SHALL BE TAKEN in Washington, D.C., provided that she is served with a subpoena and that she is tendered the costs of transportation from and to Baltimore, Maryland.

IT IS FURTHER ORDERED that the deposition of David N. Roberts SHALL NOT BE TAKEN.

IT IS FURTHER ORDERED that the deposition of Brett W. Kilbourne SHALL BE TAKEN subject to the above limitations.

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Administrative Law Judge