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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In re Applications of)	MM Docket No. 93-94
)	
Scripps Howard Broadcasting Company)	FCC File No. BRCT-910603KX
)	
For Renewal of License of Station WMAR-TV, Baltimore, Maryland)	
)	
and)	
)	
Four Jacks Broadcasting, Inc.)	FCC File No. BPCT-910903KE
)	
For a Construction Permit)	
For a New Television Facility on Channel 2 in Baltimore, Maryland)	

TO: The Honorable Richard L. Sippel
Presiding Administrative Law Judge

OPPOSITION TO FOUR JACKS BROADCASTING, INC.'S
PETITION TO ENLARGE THE ISSUES

**SCRIPPS HOWARD BROADCASTING
COMPANY**

BAKER & HOSTETLER
1050 CONNECTICUT AVENUE, NW
SUITE 1100
WASHINGTON, DC 20036
(202) 861-1500

Kenneth C. Howard, Jr.
Leonard C. Greenebaum
Sean H. Lane

Its Attorneys

Date: August 24, 1994

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To: The Honorable Richard L. Sippel
Presiding Administrative Law Judge

**OPPOSITION TO FOUR JACKS BROADCASTING, INC.'S
PETITION TO ENLARGE THE ISSUES**

Scripps Howard Broadcasting Company ("Scripps Howard"), by its counsel, hereby opposes the Petition to Enlarge the Issues (the "Petition") filed by Four Jacks Broadcasting, Inc. ("Four Jacks") on August 11, 1994. Four Jacks requests that the Presiding Judge add an issue based upon "recently adjudicated anticompetitive misconduct" by Sacramento Cable Television ("SCT"), a subsidiary of Scripps Howard. Petition at 2. The Petition must be denied because it is untimely and procedurally deficient. Furthermore, the Petition does not present a substantial and material question of fact or issue of law, which is necessary to support the addition of an issue.

I. BACKGROUND

1. On May 11, 1994, Scripps Howard filed a Motion for Acceptance of Amendment and an Amendment in which it reported a finding of a California state court that SCT had violated California laws prohibiting anticompetitive behavior. Motion for Acceptance of Amendment, filed May 11, 1994 ("Motion") (referring to California case titled Coleman v. Sacramento Cable Television). SCT is a partnership controlled by a corporate subsidiary of Scripps Howard.

2. Nine days later, Four Jacks filed a responsive pleading. See Comments on 'Motion for Acceptance of Amendment,' filed May 20, 1994 ("Comments"). In its Comments, Four Jacks suggested that the Presiding Judge should revisit the issue of Scripps Howard's license qualifications based on the Coleman decision. Comments, ¶¶ 5-6.

3. Subsequently, the Presiding Judge granted Scripps Howard's Motion and accepted the amendment (the "Amendment"). Order, FCC 94M-402 (released June 14, 1994). At Scripps Howard's request, the Presiding Judge also struck Four Jacks' Comments as an improper pleading. Order, FCC 94M-401 (released June 14, 1994).

4. On July 27, 1994, Scripps Howard filed an update to the Amendment. See Notice Pertaining To Earlier Filed Amendment To Application, filed July 27, 1994 ("Notice"). The Presiding Judge issued an order accepting the Notice. Order, FCC 94M-465 (released August 4, 1994).

II. THE PETITION IS PROCEDURALLY DEFICIENT.

A. The Petition was not filed within 15 days of the relevant newly discovered evidence and it is therefore untimely.

5. Motions to enlarge issues based upon "new facts or newly discovered facts shall be filed within 15 days after such facts are discovered by the moving party." 47 C.F.R. § 1.229(b)(3). Four Jacks cannot dispute that the Amendment set forth the facts of the Coleman case as well as the court's finding that SCT had violated two state laws and "the local cable ordinance" prohibiting anticompetitive practices.¹ See Amendment at 1-3. Thus, Four Jacks knew about the underlying facts that are the subject of Four Jacks' Petition in May 1994, three months prior to the filing of Four Jacks' Petition and well beyond the 15-day deadline. See Motion and attached Amendment.

6. In addition, Four Jacks has already availed itself of the opportunity to file a pleading responsive to the then newly discovered facts of the Coleman case by filing its Comments. In its Comments, Four Jacks requested that the Presiding Judge take action based upon the Coleman decision. Comments, at 4 ¶ 6 (suggesting that it was time "to take a fresh look at whether, on this independent ground, Scripps Howard is qualified to hold the license for WMAR-TV in Baltimore"). While Four Jacks may be unsatisfied that the Presiding Judge did not take the opportunity

¹ The relevant local ordinances only prohibit cable licensees or franchisees from engaging in anticompetitive behavior made illegal by state or federal law. A copy of the Sacramento County ordinance is attached.

to revisit the issue of Scripps Howard's qualifications, Four Jacks cannot claim that it lacked the opportunity to seek additional issues in response to the Coleman decision. Four Jacks is not entitled to a second bite at the apple now.

7. Four Jacks argues that its late-filed Petition is timely by relying upon Scripps Howard's filing of the July 27, 1994 Notice. The Notice did not, however, contain any new facts regarding the underlying behavior of SCT. The Notice only reported on the status of the judicial proceeding and the relief ordered (principally restitution).² Therefore, the filing of the Notice did not provide any new facts for a motion to enlarge.

8. That the judgment in the Coleman case was not issued until after the Amendment was filed is not relevant. An opposing party's obligation to file a timely motion to enlarge is triggered expressly under the rules by its discovery of the new or newly discovered facts, not by the timing of the entry of judgment by a court. See 47 C.F.R. § 1.229(b)(3). While a finding by an ultimate finder of fact is a precondition to exploring a character issue, Four Jacks itself has asserted the adequacy of the Coleman decision as reported in the Amendment to warrant the addition of an issue. In connection with asking the Presiding Judge to act, Four Jacks stated:

there appears to be nothing "tentative" about the finding that Scripps Howard's Sacramento Cable subsidiary engaged in violations of California anticompetition statutes. According to the

² Four Jacks' Petition does not even attempt to rely on the type of relief ordered as a basis for its motion.

amendment, the only issue yet to be resolved is the restitution to be paid by the Scripps Howard-controlled franchisee. Amendment to Renewal Application at 1.

Comments at 4, n.1. **Four Jacks is thus estopped from now asserting that it was the entry of judgment on these facts that is the appropriate triggering event for the filing of a motion.** Since Four Jacks has not provided any good cause for the late filing of a motion resting on previously disclosed facts, the Petition should be denied pursuant to Section 1.229(b)(3) of the Rules.

B. The Petition does not demonstrate an issue of probable decisional significance or substantial public interest importance and thus it should not be granted.

9. As the Petition is untimely, it can be "considered fully on its merits if (and only if) initial examination of the motion demonstrates that it raises a question of probable decisional significance and . . . substantial public interest importance." 47 C.F.R. § 1.229(c). As demonstrated in Section III below, the Petition does not present a substantial and material question of fact or issue of law and therefore cannot approach meeting this test.

III. THE PETITION IS WITHOUT MERIT BECAUSE IT DOES NOT PRESENT A SUBSTANTIAL AND MATERIAL QUESTION OF FACT OR ISSUE OF LAW.

10. In order to justify the addition of an issue, there must be specific allegations of fact sufficient to support the action requested. 47 C.F.R. § 1.229(d). Four Jacks has failed to make such specific allegations of fact and it has not raised a substantial question of law concerning Scripps Howard's

qualifications. See Washoe Shoshone Broadcasting, 5 F.C.C. Rcd 5561, 5562 (1990).

11. Four Jacks fails to allege, much less demonstrate, any nexus between the conduct at issue in the Coleman decision and the day-to-day broadcast operations of WMAR-TV. It does not allege any involvement by WMAR-TV personnel, or Scripps Howard employees involved in the day-to-day operation of WMAR-TV (which was acquired in 1991), with the 1988-89 events at issue in Coleman. As discussed below, without such specific allegations, the Petition must be denied.

12. This is the same type of deficiency that led the Presiding Judge to reject Four Jacks' attempt in 1993 to enlarge the issues in this proceeding based upon allegations concerning SCT. See Memorandum Opinion and Order, FCC 93M-445 (released July 8, 1993) ("Prior Opinion"). The Presiding Judge held, inter alia, that the failure to demonstrate the nexus between the conduct of SCT, as a Scripps Howard subsidiary, and that of WMAR-TV was a fatal defect precluding the addition of an issue. Id. at ¶¶ 20-21. The Presiding Judge determined that Four Jacks had not alleged the involvement of common principals in both the relevant misconduct and the day-to-day operations of WMAR-TV. Prior Order at ¶ 20.³ In rejecting Four Jacks' attempt to add an

³ The Presiding Judge stated:

There is a lack of specificity in the pleadings which makes any assessment of the scope of the proceeding with such an added issue difficult to ascertain, i.e. Scripps Howard's corporate structure vis a vis SCT,

issue based on the conduct of SCT, the Presiding Judge concluded that:

The Commission expects that such showings will be made with specificity before a case is expanded to such length by adding an issue. See 47 C.F.R. § 1.229 (d). Four Jacks' motion has been found lacking in such specificity. The Commission will not permit issues to be added out of curiosity. Priscilla L. Schweir, 4 FCC Rcd 2659, 2660 (Comm'n 1989).

Prior Order at ¶ 20.⁴ In its current Petition, Four Jacks has again requested the addition of an issue based upon misconduct by a subsidiary without any attempt to link this conduct, or the personnel involved, to the day-to-day operations of WMAR-TV. Accordingly, Four Jacks' current Petition must be denied.

the partnership that received the cable franchise in Sacramento. Nor are the common principals/employees of SCT and the Scripps Howard counterparts at WMAR-TV described for attribution purposes. Where there is a parent/subsidiary relationship, the Commission "will focus on the actual involvement of the common principals in both the misconduct and in the day to day activities of the broadcast subsidiary."

Id. at ¶ 20 (quoting Character Qualifications, 102 F.C.C.2d 1179, 1218-19 (1986)). The same standard is applied for imputing the misconduct of a non-broadcast subsidiary, such as SCT, to a parent corporation such as Scripps Howard. Character Qualifications, 102 F.C.C.2d at 1219.

⁴ The Presiding Judge likewise rejected an attempt to add an issue against WMAR-TV based on past conduct at Scripps Howard's then-owned WMC-TV based, inter alia, on a lack of any showing of a connection in the two stations' management. Id. at ¶ 21.

IV. FOUR JACKS' PETITION RELIES UPON BLATANT MISSTATEMENTS OF MATERIAL FACTS.

13. Four Jacks' Petition relies on prejudicial misstatements of the relevant facts even though the Presiding Judge recently cautioned Four Jacks about this exact misconduct. Specifically, the Petition continues to use the erroneous and prejudicial terms "guilty" and "convicted" in describing the Coleman and PacWest decisions. See Petition at ¶¶ 4, 7. For example, the Petition states "a jury in PacWest found Scripps Howard's cable subsidiary guilty of illegal conduct," Petition at ¶ 7. In fact, there have been no criminal proceedings involving Scripps Howard's subsidiary. As Scripps Howard explained earlier in this proceeding, PacWest was a civil action against a municipality, and Scripps Howard's subsidiary was not even a party to that action. See Opposition to Petition to Enlarge Issues Against Scripps Howard Broadcasting Company, at 2-8, filed May 26, 1993. Four Jacks knew full well that this alleged fact is patently false.

14. Furthermore, when Four Jacks' Petition applies inaccurate and prejudicial terminology to the Coleman civil proceeding's facts--saying Scripps Howard has been "convicted," Petition at ¶ 4, and that a "court has found Scripps Howard guilty," id. at ¶ 7--Four Jacks' conduct flies in the face of an express and recent reprimand from the Presiding Judge. In striking Four Jacks' Comments on the Coleman Amendment, the Presiding Judge stated:

The use of the term "guilt" in a lawyers pleading implies (if not outright states) a criminal guilt. There has been no criminal proceeding identified which connects a Scripps Howard related entity to any criminal conduct. Such mischaracterized language in a pleading also can have the effect of inviting a reply in kind.

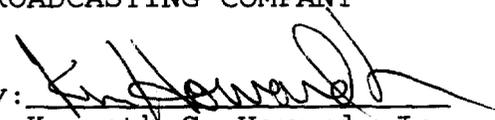
Order, FCC 94M-401, at 2 (released June 14, 1994). Such continued misbehavior by a litigant after an express correction should not be tolerated, and it warrants striking the Petition's false and prejudicial assertions.

V. CONCLUSION

15. Four Jacks' Petition is untimely filed and substantively defective. Further, Four Jacks has doubly ignored the Presiding Judge's orders by offering none of the specificity that a motion to enlarge issues must contain to warrant exploration of an issue and by restating and relying upon the exact same "mischaracterized language" that the Presiding Judge recently condemned.

WHEREFORE, Scripps Howard Broadcasting Company hereby requests that the Petition to Enlarge the Issues filed by Four Jacks Broadcasting, Inc. BE DENIED.

SCRIPPS HOWARD
BROADCASTING COMPANY

By: 

Kenneth C. Howard, Jr.
Leonard C. Greenebaum
Sean H. Lane

Its Attorneys

BAKER & HOSTETLER
1050 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036
(202) 861-1500

Date: August 24, 1994

**SCRIPPS HOWARD'S OPPOSITION
TO PETITION TO ENLARGE THE ISSUES**

ATTACHMENT

AN ORDINANCE ADDING CHAPTER 5.50 TO THE SACRAMENTO COUNTY CODE
RELATING TO CABLE TELEVISION FRANCHISES

The Board of Supervisors of the County of Sacramento, State of California, does ordain as follows:

SECTION 1. Chapter 5.50, Section 5.50.010 through 5.50.046 are hereby added to Title 5 of the Sacramento County Code to read as follows:

CHAPTER 5.50

CABLE TELEVISION ORDINANCE

SUB-CHAPTER 1

GENERAL PROVISIONS

5.50.010 PURPOSES. The purposes of this Chapter include, but are not limited to, the promotion of the general welfare of the citizens of the Sacramento Community by:

- a. Establishing a master-plan for the franchising of cable television services within the Sacramento Community;
- b. Establishing a regulatory framework for the administration of franchises in order to insure that the potential recreational, educational, social, economic and other advantages of cable television will in fact inure to the benefit of the Sacramento Community and the citizens thereof;
- c. To provide for the unified administration of cable television franchises in order to reduce the danger that the nature and extent of services received and benefit derived therefrom will be dependent upon the jurisdiction in which a citizen of the Sacramento Community resides; and
- d. Regulate the operations of Franchisees for the purpose of protecting and promoting the public health, peace, safety, and welfare.

The provisions of this Section shall not be deemed to confer any right upon a Franchisee which is not otherwise conferred by another express provision of this Chapter.

5.50.012 DEFINITIONS. As used in this Chapter, the following terms, phrases, and words shall be ascribed the following meanings, unless the context indicates otherwise. The word "shall" is mandatory, and the word "may" is permissive. Words not defined herein shall be given their common and ordinary meanings, consistent with the context in which such words are used and the purposes of this Chapter.

a. "Basic Service" --shall mean:

(1) a single Tier of Service provided in connection with each residential hookup for a uniform monthly charge, if any, which includes the following:

(1) Reception of all local television broadcasting stations as prescribed by applicable FCC Regulations (47 C.F.R. 76.51 through 76.67, inclusive) as said regulations exist on March 1, 1981;

5.50.512 REGULATION OF EDUCATIONAL AND ENTERTAINMENT SERVICES. No home educational or entertainment service provided through a Cable Television System, shall be provided or operated in a manner which is detrimental to the public peace, health, safety or welfare. The provisions of this Section shall not be self-executing, shall not be deemed to authorize the Cable Television Commission or any other public authority to establish bans upon services in advance of the offering thereof, and may be invoked solely pursuant to the following procedure.

If the Board of Directors of the Cable Television Commission determines that there is reason to believe that a particular service provided through a Cable Television System is of a type or is otherwise provided in a manner which is detrimental to the public peace, health, safety or welfare, the Board shall schedule a public hearing. Written notice identifying the service or services or method of provision subject to the determination shall be mailed to the Franchisee not later than thirty (30) days in advance of the hearing. Notice of the hearing shall be given in the manner prescribed by Section 5.50.024 in Sub-Chapter 1. If at the conclusion of the public hearing, the Board determines that a service is being provided of a type or in a manner which is detrimental to the public peace, health, safety or welfare, the Board may enact regulations which prohibit the services or otherwise regulate the manner of the provision thereof, as the case may be, and may enforce the regulation by appropriate action in the courts of this state.

The powers of the Board of Directors of the Commission under this Section are coextensive with those which are authorized by laws of the State of California or United States and with those defined by the police power expressed by Article XI, Section 7 of the California Constitution. A Franchisee shall not in relation to this Section be deemed to have contractually or otherwise waived any constitutional right which would otherwise be applicable to a franchised cable television operator.

5.50.514 SUBSCRIBER ANTENNAS. No Franchisee shall remove or offer to remove any potential or existing Subscriber antenna, or provide any inducement for removal as a condition respecting the provision of service.

5.50.516 ANTI-COMPETITIVE PRACTICES. No franchise issued pursuant to the provisions of this Chapter shall be deemed to expressly or impliedly authorize the Franchisee to utilize its Cable Television System to provide any service in such a manner as to unlawfully damage any business competitor or other third party or violate any statutes or regulations of the United States or State of California. Nor shall any Franchisee, by act or omission, engage in any anti-competitive practice in violation of any statutes or regulations of the United States or State of California. The provisions of this Section shall be enforceable in courts of competent jurisdiction against a Franchisee by any party who alleges injury as a result of an alleged violation thereof.

Each Franchisee shall hold harmless, indemnify and defend the County, Cities and Cable Television Commission, and their officers, agents and employees from and against any and all suits, claims and liability for damages, penalties, fines, or other relief arising out of, resulting from or in any manner relating to any act or omission by the Franchisee the allegation of which would constitute a violation of the provisions of this Section.

5.50.518 POST FRANCHISE SERVICE. In the event the Cable Television Commission fails to renew a franchise, a franchise is cancelled in advance of the expiration of its term, or a new operator succeeds to the franchise by assignment or otherwise, the preceding Franchisee shall, without compensation, cooperate with the Cable Television Commission, new operator or new Franchisee in maintaining continuity of service to all Subscribers and Users. Such cooperation shall include, but not be limited to, making records available for inspection and review, the provision of advice and other assistance as requested.

Upon written notice mailed by the Commission to the Franchisee for the purpose of insuring continuity of service to Subscribers and Users, a Franchisee, without compensation or other special consideration, shall operate the Cable Television System during the period subsequent to the termination of the

AN ORDINANCE ADDING CHAPTER 5.75 TO THE
SACRAMENTO COUNTY CODE RELATING TO
CABLE TELEVISION LICENSES AND AMENDING
CERTAIN SECTIONS OF CHAPTER 5.50 OF THE
SACRAMENTO COUNTY CODE

The Board of Supervisors of the County of Sacramento, State of California, does ordain as follows:

SECTION 1. Chapter 5.75, Section 5.75.010 through Section 5.75.712 are hereby added to Title 5 of the Sacramento County Code to read as follows:

"CHAPTER 5.75

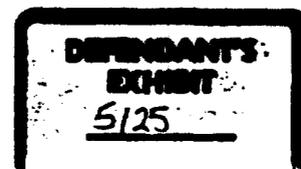
CABLE TELEVISION LICENSING ORDINANCE

SUB-CHAPTER 1

GENERAL PROVISIONS

5.75.010 PURPOSES. The purposes of this Chapter include, but are not limited to, the promotion of the general welfare of the citizens of the County by:

- a. Establishing a plan for the licensing of cable television services within the County and the Cities;
- b. Establishing a regulatory framework for the administration of licenses in order to insure that the potential recreational, technical, educational, social, economic and other advantages of cable television will in fact inure to the benefit to the citizens of the County and the Cities;
- c. To provide for the equal and uniform provision of cable television services throughout the County and the Cities;
- d. To insure that Licensees have the requisite financial qualifications to promptly complete and operate the Cable Television System proposed to be constructed hereunder.
- e. To allow a mechanism whereby Licensees may provide certain limited types of cable television service with lesser public benefits and burdens than they would incur if they chose to obtain a Franchise pursuant to the provisions of Chapter 5.50.



CABLE TELEVISION LICENSING ORDINANCE

of a breach by a Licensee of any of the provisions of this Chapter at the prescribed period following mailing of the notice of violation, or to prevent a determination that a Licensee has breached any of said Sections in advance either of the ten (10) days following the mailed notice or in advance of mailing of the notice or any communication pursuant to this Section to the Licensee. Nor shall the provisions of this Section be so construed as to relieve the Licensee from liability for any damages which may arise out of and be proximately caused by breach by a Licensee of any of the provisions of said provisions.

SUB-CHAPTER 5

SERVICES

5.75.400 SYSTEM OWNERSHIP. Legal and equitable title to the Cable Television System, including any and all studio facilities and production equipment provided for public, educational, and governmental access, and all channels of whatever kind or nature shall be vested in the Licensee.

5.75.402 SERVICES. Within a License Area services provided by a Licensee through its Cable Television System shall be offered uniformly upon nondiscriminatory terms to Subscribers and Users, and shall not differ based upon geographical location, income levels, racial or ethnic composition.

5.75.404 SUBSCRIBER ANTENNAS. No License shall remove or offer to remove any potential or existing Subscriber antenna, or provide any inducement for removal as a condition respecting the provision of service.

5.75.406 ANTI-COMPETITIVE PRACTICES. No License issued pursuant to the provisions of this Chapter shall be deemed to expressly or impliedly authorize the Licensee to utilize its Cable Television System to provide any service in such a manner as to unlawfully damage any business competitor or other third party or violate any statutes or regulations of the United States or State of California. Nor shall any Licensee, by act or omission, engage in any anti-competitive practice in violation of any statutes or regulations of the United States or State of California. The provisions of this Section shall be enforceable in courts of competent jurisdiction against a Licensee by any party who alleges injury as a result of an alleged violation thereof.

5.75.408 MAINTENANCE AND REPAIR. During the term of each License, the Licensee shall maintain its Cable Television System in good condition and repair, render efficient service, make repairs promptly, and interrupt service only for good cause and for the shortest time possible.

5.75.410 DISCRIMINATION IN SERVICE PROHIBITED. No License shall deny service, deny access or otherwise discriminate against Subscribers, channel Users or general citizens on the basis of race, color, religion, national origin or sex.

Certificate of Service

I, Ruth E. Omonijo, a secretary in the law offices of Baker & Hostetler, hereby certify that I have caused copies of the foregoing "**OPPOSTION TO FOUR JACKS BROADCASTING, INC'S PETITION TO ENLARGE THE ISSUES**" to be sent this 24th day of August, 1994, via United States First Class Mail, postage prepaid, to the following:

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

Martin R. Leader, Esq.
Kathryn R. Schmeltzer, Esq.
Gregory L. Masters, Esq.
Fisher, Wayland, Cooper, Leader & Zaragoza
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, DC 20006
Counsel to Four Jacks
Broadcasting, Inc.

Robert Zauner, Esq.*
Hearing Branch-Mass Media Bureau
Federal Communications Commission
2025 M Street, NW
Room 7212
Washington, DC 20554


Ruth E. Omonijo

* By Hand.