

DOCKET FILE COPY ORIGINAL
FCC MAIL SECTION

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

SEP 7 2 56 PM '94

FCC 94M-512

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

42776

MEMORANDUM OPINION AND ORDER

Issued: September 2, 1994 ; Released: September 7, 1994

1. On August 30, 1994, Scripps Howard Broadcasting Company ("Scripps Howard") filed a Motion For Acceptance Of Deposition Testimony Into Evidence. On September 1, 1994, an Opposition was filed by Four Jacks Broadcasting, Inc. ("Four Jacks"). The issue under consideration concerns the need for Ms. Janet Covington ("Covington"), a former employee of Scripps Howard, to appear as a hearing witness and to be cross-examined or whether, under the circumstances, her deposition testimony of August 17, 1994, should be received in evidence in lieu of requiring her hearing testimony.

2. Ms. Covington was the Public Affairs Director of Station WMAR-TV during the relevant renewal period. After her retirement in late 1991, she provided information to Scripps Howard that was used in the preparation of its renewal expectancy exhibit. Scripps Howard concedes her importance as a witness:

The Commission should not be denied the benefit of Ms. Covington's knowledge about her role at WMAR-TV and the preparation of Attachment E to Emily Barr's testimony. Indeed, Scripps Howard could be prejudiced if her testimony were not considered.

See Motion For Acceptance Of Deposition Testimony Into Evidence at 5-6.

3. Scripps Howard asks that this evidence be considered in deposition form and that, because of a personal hardship, Ms. Covington should not be required to be examined on this evidence in open court. To the

contrary, Four Jacks argues that her appearance as a hearing witness must be required:

It would be highly prejudicial to Four Jacks, and detrimental to the pursuit of the truth in this case, for Ms. Covington's deposition to be admitted into evidence without the opportunity to cross-examine her at hearing.

See Opposition To Motion For Acceptance Of Deposition Testimony Into Evidence at 3. Counsel for Four Jacks also asserted at the conference that this case may be remanded if Ms. Covington's deposition is received in evidence without her live testimony. The Bureau has not filed any pleading. However, Bureau counsel appeared at the Prehearing Conference on September 2, 1994,¹ and argued strenuously in favor of Scripps Howard's motion.

4. The Presiding Judge concluded at the conference that the strict legal standard that authorizes the receipt of a deposition in lieu of live testimony had not been met. See 47 C.F.R. §1.321(d)(3)(iii). Ms. Covington would not be unable to appear as a witness because of "age, sickness, infirmity or imprisonment." Id. Nor was it shown that her attendance as a witness must be excused as an "exceptional circumstance."² However, a physician's statement that was presented on Ms. Covington's behalf concluded that her role as primary care giver is important to her husband's recovery from cancer surgery. Four Jacks also acknowledges its sympathy with Ms. Covington's current situation.

5. A re-review of the deposition transcript, which consists of 124 pages, was made by the Presiding Judge at the request of counsel for Scripps Howard. All substantive questions were asked by counsel for Four Jacks. There were no unreasonably repetitious questions asked of Ms. Covington. Counsel asked focused questions (Four Jacks) and Ms. Covington's counsel refrained from unwarranted objections (Scripps Howard). There also were helpful comments from Bureau counsel on the propriety of multiple questions. And the deposition was sufficiently comprehensive to cover the relevant information in reasonable detail. Ms. Covington did express concern for her husband and there were times that she felt she was being asked to answer questions that were asked previously. However, there did not appear to be any imposition of an undue hardship.

6. The most significant loss to the record would be the inability of the Presiding Judge to observe the witness's demeanor. However, when weighed against the acknowledged severe inconveniences and hardships to

¹ The Presiding Judge called the conference sua sponte in connection with a ruling which denied a subpoena request for Ms. Covington that had been submitted by Four Jacks. See Order FCC 94M-506, released August 30, 1994. There the Presiding Judge noted that Ms. Covington's "availability is under advisement in light of the adverse health of her spouse." Id.

² Cf: Valley Broadcasters, Inc., 57 Radio Reg. 2d (P&F) 1273 (Review Bd. 1985) (a daughter who was being treated for psychiatric depression required the father's continuous attendance).

Ms. Covington and her spouse that would result from requiring her further participation as a hearing witness, the Presiding Judge will exercise his discretion in favor of Ms. Covington.³

Rulings

Accordingly, IT IS ORDERED that the Motion For Acceptance Of Deposition Testimony Into Evidence that was filed by Scripps Howard Broadcasting Company on August 30, 1994, IS GRANTED.

IT IS FURTHER ORDERED that counsel for Scripps Howard Broadcasting Company SHALL OFFER the deposition transcript into evidence (with appropriate exhibit number) during the next hearing session.

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Administrative Law Judge

³ The Presiding Judge had instructed all counsel at an earlier prehearing conference held on August 16, 1994, that in view of Ms. Covington's situation and the uncertainty of her future testimony, the deposition schedule for August 17, 1994, should not be postponed. Therefore, the notice requirement for use of the deposition in lieu of live testimony has been substantially met. 47 C.F.R. §1.321(d)(3)(iii).