

FCC MAIL SECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

SEP 15 4 27 PM '94

DISPATCHED BY MM Docket No. 93-94

In re Applications of

SCRIPPS HOWARD File No. BRCT-910603KX
BROADCASTING
COMPANY

For Renewal of License of
Station WMAR-TV
Baltimore, Maryland

and

FOUR JACKS File No. BPCT-910903KE
BROADCASTING, INC.

For a Construction Permit for a
New Television Facility on
Channel 2 at Baltimore, Maryland

MEMORANDUM OPINION AND ORDER**Adopted: September 8, 1994; Released: September 15, 1994**

By the Commission:

I. INTRODUCTION

1. By this Memorandum Opinion and Order, we deny the Petition for Expedited Order Authorizing Deposition of Commission Employee, filed April 26, 1994, by Four Jacks Broadcasting, Inc. (Four Jacks).¹ Pursuant to 47 C.F.R. §1.311(b)(2), which provides that Commission personnel may be questioned by deposition for purposes of discovery only on special order of the Commission, Four Jacks seeks to depose a Commission attorney concerning his activities while employed at the law firm that represents Scripps Howard Broadcasting Company in this proceeding. It claims that the FCC attorney has direct personal knowledge of facts that are critical to the resolution of post-hearing character issues specified against Scripps Howard. We find, for the reasons set forth below, that section 1.311(b)(2) was intended to require an order of the Commission to permit the deposition of FCC personnel only to the extent that a party seeks to depose such personnel concerning matters related to their employment at the agency. We clarify that, even with respect to requests to depose FCC personnel that are clearly within the intended

scope of the rule, we would not entertain such a request in the absence of an affirmative finding of relevance by the ALJ. Since the ALJ has ruled that there is no need to take the deposition of this or any other attorney that was employed by the law firm representing Scripps Howard, we will deny Four Jacks' petition.

II. BACKGROUND

2. Scripps Howard Broadcasting Company (Scripps Howard) is the licensee of station WMAR-TV in Baltimore, Maryland. Its renewal application is mutually exclusive with Four Jacks' application for a construction permit to construct a new television station on Channel 2 in Baltimore, Maryland. By Memorandum Opinion and Order, FCC 94M-50 (Feb. 1, 1994), Administrative Law Judge Richard Sippel added issues against Scripps Howard to determine whether it had made material misrepresentations or lacked candor with respect to certain documents concerning WMAR-TV's claimed renewal expectancy.

3. The licensee filed a motion for summary decision on the character issues. In support of the motion Scripps Howard submitted a declaration under penalty of perjury from the law firm employee (now an FCC attorney), which, *inter alia*, reflects that during his tenure at the law firm he assisted in reviewing the documents concerning WMAR-TV's claimed renewal expectancy.

4. By Memorandum Opinion and Order, FCC 94M-177 (Mar. 18, 1994), the ALJ denied Scripps Howard's motion for summary decision without prejudice to its consideration after further discovery and testimony. At the same time, the ALJ noted that the character issue was framed in terms of Scripps Howard's candor and that the advice of counsel with respect to this matter would not be attributed to Scripps Howard to support an adverse finding under that issue. *Id.* at ¶ 11. Accordingly, the ALJ ruled that "there was no basis for discovery of any of Scripps Howard's attorneys." *Id.*

5. Notwithstanding that ruling, Four Jacks sought to depose, *inter alia*, the attorney now employed by the FCC concerning his activities while employed as an associate at the licensee's law firm.² Ruling on oppositions to the Notice of Deposition, the ALJ indicated that, pursuant to section 1.311(b)(2) of the rules, he "w[ould] not order [the FCC attorney's] deposition or testimony without an order of the Commission." Memorandum Opinion and Order, FCC 94M-268 ¶ 6 (Apr. 15, 1994). Alternatively, the ALJ concluded that, given his earlier ruling that there was no basis for discovery of any of Scripps Howard's attorneys, taking the deposition would be "unlawful and oppressive." *Id.* at ¶ 6 & n.2.

6. Four Jacks requests that the Commission authorize the taking of the deposition. In support of that request, Four Jacks urges that the FCC attorney has direct personal knowledge of facts that are critical to the resolution of the character issues against Scripps Howard. Four Jacks cites the FCC attorney's declaration under penalty of perjury reflecting his intimate involvement in this matter. According to Four Jacks, Scripps Howard has waived any attorney-client privilege with respect to any facts contained in

¹ The following pleadings are also pending before the Commission: (a) an Opposition, filed May 6, 1994, by Scripps Howard Broadcasting Company; (b) an Opposition, filed May 6, 1994, by the Mass Media Bureau; and (c) a Consolidated Reply, filed May

18, 1994, by Four Jacks Broadcasting, Inc.

² Four Jacks also sought to depose a station employee, a former station employee, and a paralegal at the licensee's law firm.

the declaration by submitting the declaration to support its motion for summary decision on the character issues. Based upon the attorney's involvement in this matter Four Jacks claims to have an "immense" need for his deposition testimony.

III. DISCUSSION

7. We will deny Four Jacks' request for an expedited order authorizing the deposition of the FCC attorney. By its express terms, section 1.311(b)(2) provides that a Commission employee may not be deposed for discovery purposes concerning any matter except on special order of the Commission.³ The rule, however, was not intended to require Commission authorization for depositions of FCC personnel where the request to depose arises out of circumstances totally unrelated to their Commission employment.

8. Turning to the facts in this case, the ALJ has determined that there is no basis for discovery of any of Scripps Howard's legal counsel, including an FCC attorney and former associate of the law firm that represents Scripps Howard. Without considering the propriety of that ruling, which is not properly before us, we would not order the deposition at this time even if the request concerned matters directly related to the attorney's employment at the agency.⁴ To the extent that Four Jacks claims that the attorney has personal knowledge warranting the taking of his deposition, its pleading is in effect an unauthorized appeal of the ALJ's interlocutory ruling that there is no reason to permit discovery of any of Scripps Howard's legal counsel. Under these circumstances, no further consideration of Four Jacks' contentions is warranted at this time.⁵

IV. ORDER

9. ACCORDINGLY, IT IS ORDERED That the petition for expedited order authorizing deposition of Commission employee, filed April 26, 1994, by Four Jacks Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



William F. Caton

Acting Secretary

³ See *Amendment of Part 1 Rules of Practice and Procedure To Provide for Certain Changes in the Commission's Discovery Procedures in Adjudicatory Hearings*, 91 FCC 2d 527, 530-31 ¶ 12 (1982), in which the Commission indicated its continued belief that it would not "be sound policy to authorize the judges to order depositions of Commission personnel." It explained that this could subject the Commission's staff to 'a multiplicity of demands' because '[t]he Commission is ... in a different position from that of private parties, who will normally be called upon to give depositions only in the single case in which it is participating,' citing *Report and Order on Discovery Procedures*, 11 FCC 2d at 188.

⁴ The ALJ's ruling is an interlocutory ruling that would not be appealable as a matter of right under 47 C.F.R. § 1.301(a), and, unless the ALJ authorized appeal of that ruling pursuant to 47 C.F.R. § 1.301(b), the merits of that ruling would be ripe for consideration only upon appeal of the initial decision. See 47 C.F.R. § 1.301(b).

⁵ In those situations in which the presiding judge has made an affirmative finding that there is a basis for discovery as to matters that are clearly within the scope of a Commission employee's employment at the FCC, the Commission will entertain a request to depose that Commission employee pursuant to section 1.311(b)(2) of the Commission's rules.