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TRANSCRIPT OF PROCEEDINGS

SEP 26 1994

Before the
FEDERAL COMMUNICATIONS COMMISSION FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554 OFFICE OF THE SECRETARY

IN THE MATTER OF:

SCRIPPS HOWARD BROADCASTING COMPANY
For Renewal of License of Station
WMAR-TV, Baltimore, Maryland

MM DOCKET NO. 93-94

and
FOUR JACKS BROADCASTING, INC.
For a Construction Permit for a New
Television Facility on Channel 2 at
Baltimore, Maryland

DATE OF CONFERENCE: September 2, 1994
PLACE OF CONFERENCE: Washington, D.C.

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FREE STATE REPORTING, INC.
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D.C. Area (301) 261-1902
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OFFICE OF THE SECRETARY

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)
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and)
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FOUR JACKS BROADCASTING, INC.)
For a Construction Permit for a New)
Television Facility on Channel 2 at)
Baltimore, Maryland)

The above-entitled matter came on for pre-hearing conference pursuant to Notice before Judge Sippel, Administrative Law Judge, at 2000 L Street, N.W., Washington, D.C., in Courtroom No. 4, on Friday, September 2, 1994, at 10:00 a.m.

APPEARANCES:

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I N D E X

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24	Conference began: 10:00 a.m.	Conference Ended: 10:27 a.m.
25	Lunch Break Began:	Lunch Break Ended:

P R O C E E D I N G S

1
2 JUDGE SIPPEL: Good morning. I'm assuming
3 everybody's given their name to the court reporter or will do
4 so before you leave. We'll go right into the business at
5 hand. I called this conference primarily to determine the
6 status of Ms. Covington as a, as a witness. Before I, before
7 I get into that, however, I do want to note that I have
8 received copies of correspondence which, correspondence which
9 appear to me to reflect that a stipulation can be worked out
10 with respect to the tax returns. Am I --

11 MR. HOWARD: Yes, Your Honor. We're prepared to
12 stipulate that -- well, they've agreed to the stipulation we
13 requested back in July and we're prepared to go forward with
14 that stipulation.

15 JUDGE SIPPEL: All right. Then that's -- I won't
16 have to address anything further on that. I'll just wait
17 until I receive the stipulation. It could -- we could do it
18 the first item of business when we start with the Four Jacks
19 testimony.

20 MR. HOWARD: Would that be --

21 JUDGE SIPPEL: That would be fine. Yeah, that would
22 be fine.

23 MR. HOWARD: The other matter, with respect to the
24 documents we've got a counter-proposal from Four Jacks on that
25 and we have -- we've offered a counter-proposal back to, to

1 Four Jacks this morning that we need to talk about a little
2 bit.

3 JUDGE SIPPEL: All right. Well, that has to do with
4 the, with the 34-some-odd documents?

5 MR. HOWARD: Yes.

6 JUDGE SIPPEL: Those are not contested items.
7 That's just a question of --

8 MR. HOWARD: There certainly will be a stipulation
9 --

10 JUDGE SIPPEL: All right.

11 MR. HOWARD: -- I believe.

12 Mr. GREENEBAUM: I believe there's a 12:00 time
13 limit you've given us so we may need a little relief from that
14 to work it out. I think that's why we're raising it, Your
15 Honor.

16 JUDGE SIPPEL: That's no problem.

17 MR. GREENEBAUM: Thank you.

18 JUDGE SIPPEL: That's no problem. Now, getting back
19 to the, the matter of -- which is obviously a matter of
20 concern to everybody, I have, I have reviewed the transcript
21 of the deposition as well as, of course, the pleadings of
22 parties and I find as a, as a matter of law -- now, just from
23 a plain legal analysis of the issue including having
24 considered the statement of the physician, Dr., Dr. Choate --
25 am I pronouncing that right?

1 MR. HOWARD: Yes.

2 JUDGE SIPPEL: -- the provision for the use of the
3 deposition in lieu of live oral testimony does not apply. The
4 criteria do not apply to this situation in a strict legal
5 sense. And I -- now, I realize that I do have some discretion
6 under this. There's kind of a general provision at the end
7 that's been argued at the end of that section and I've been
8 trying to think that through as best I can, but after having
9 read the transcript under all the circumstances here I'm -- my
10 conclusion is, is that she's going to be required to appear as
11 a witness in this case. However, I am very concerned about
12 her situation and in order to accommodate her I will permit
13 her to pick a day in the month of September when she's able to
14 find somebody, to locate somebody, who will be able to be with
15 her husband.

16 MR. ZAUNER: Your Honor, I just want to state
17 something. I just find this outrageous that you're going to
18 require her to come here to testify. She has been deposed.
19 It was a full deposition. She answered all the questions that
20 were put to her. I understand -- I did not attend the
21 deposition but I understand that she was quite candid in
22 replying. I can't imagine -- I read her deposition, too. I
23 can't imagine what other information could be requested from
24 Janet Covington that was not requested and obtained at that
25 deposition and I cannot see any reason why we have put that

1 woman through the burden of coming here to testify again after
2 she's given a full deposition in this proceeding, and not only
3 that, but the people who took her deposition knew darn well at
4 the time they took it that that deposition might well be used
5 in lieu of her live testimony here in this proceeding. They
6 knew that when they went in and they had the opportunity to
7 ask all of their questions and they took that opportunity, and
8 I think it's atrocious that we're sitting here talking about
9 requiring this woman who has what I consider to be only
10 marginal information in this proceeding to come here under
11 these circumstances, under the circumstances that she's
12 facing, to give testimony on this issue. The issue here as I
13 see it does not concern Janet Covington and her notes and what
14 she wrote or didn't write or where she was sitting when she
15 wrote her notes, but the issue concerns in this proceeding, as
16 you've added it, is what Scripps Howard did with those notes
17 after they received them. They didn't turn them over in a
18 timely fashion. They didn't disclose them to the other
19 parties, whatever it is that they didn't do. The issue is not
20 what Janet Covington did or didn't do. Nobody is challenging
21 her notes. Nobody is saying that the interviews that were
22 reflected on her calendar and subsequently reflected in her
23 notes were not conducted. Janet Covington's role in this
24 thing is diminished. We've had a full deposition of Janet
25 Covington and my opinion and the opinion of my office and the

1 opinion of Chuck Dziedzic who attended the deposition is that
2 there's no need for Janet Covington to come in under --
3 considering the circumstances that she's under to testify in
4 this proceeding.

5 JUDGE SIPPEL: Mr. Leader?

6 MR. LEADER: Well, I'm not as outraged as Mr.
7 Zauner, but I do think there's a difference between taking
8 somebody's deposition. A deposition is to try and obtain
9 information and there's a difference between asking people for
10 information in a deposition and cross-examining them on what
11 is their testimony. And it would seem to me that if Scripps
12 wants to rely upon Ms. Covington's deposition's testimony we
13 have a right to cross-examine her. If they -- if, as Mr.
14 Zauner says, Ms. Covington -- you know, if Scripps makes the
15 determination and ratifies what Mr. Zauner said, that Ms.
16 Covington is peripheral to the issue and doesn't rely on her
17 testimony, then there's no need to cross-examine her, but I
18 think administrative due process requires that if her
19 testimony is used in the findings to be submitted by Scripps
20 we have an absolute right to cross-examine. We're very
21 sympathetic to her position, but I note that in the doctor's
22 statement there's nothing about her condition.

23 JUDGE SIPPEL: That was one of the points that I
24 acknowledged right up front and as I understand it from the
25 motion, Scripps Howard's motion, that, that Scripps Howard

1 believes her testimony to be important. I mean, you want her
2 testimony in?

3 MR. HOWARD: In light of the comments that you've
4 made in conference calls in this proceeding, Your Honor, where
5 you do want to get further information about the renewal
6 expectancy since Ms. Covington was there and certainly has
7 confirmed everything that you've been told by Ms. Barr with
8 respect to how that process occurred to the -- solely to
9 assuage your concerns about the reliability of the, of the
10 exhibits which, as Mr. Zauner notes, there's -- Four Jacks has
11 yet to raise any question about the substantive accuracy of
12 those exhibits. But, yes, Your Honor, we think that it's --
13 as a corroborating witness she has a limited degree of, of
14 importance to this case to the extent that there's concern in
15 your mind about the reliability of Emily Barr, which we don't
16 think there's any cause for such and we submitted a Motion for
17 Summary Decision on this point, so we're certainly not
18 concerned about it as meeting the burden we see as necessary
19 in this case.

20 MR. GREENEBAUM: If I could add to that, Your Honor.

21 JUDGE SIPPEL: Mr. Greenebaum?

22 MR. GREENEBAUM: I have another concern. I would
23 agree that live testimony's always better than, than
24 deposition. On the other hand, there are circumstances when
25 the gain -- the advantage of the live testimony doesn't really

1 outweigh the advantage of the deposition. There's no real
2 gain. If you read this deposition, and I can give you the
3 specific pages that I have in mind, it becomes fairly clear
4 that Ms. Covington became increasingly impatient and upset by
5 what she perceived to be the same questions being asked over
6 and over again. The Mass Media Bureau made a point that just
7 because you change the form of the question doesn't mean
8 you're changing the subject matter and that you aren't
9 revisiting.

10 JUDGE SIPPEL: Yes. I read, I read that.

11 MR. GREENEBAUM: And she to come -- to bring her
12 here in her frame of mind may not be the best way to get the
13 truth, and that's what we're really talking about here. We
14 have a witness who's upset, who's worried about her husband.
15 This is not a woman who wants to go on a vacation. This is a
16 woman with a life and death situation at home. If something
17 happened to her husband while we were here we'd never forget
18 it the rest of our lives. That's why I feel an obligation to
19 fight with you in a collegial manner --

20 JUDGE SIPPEL: Yes, sir.

21 MR. GREENEBAUM: -- to try and protect her in this
22 process. And if you're going to compel her to testify then I
23 think the least we could do is go to Baltimore because for her
24 to come here you're talking about a whole day. I can't
25 imagine as -- echoing Mr. Zauner's sentiments, what it is that

1 they want to ask her. Now, I'd like to have some proffers,
2 anything that they forgot, anything they want to ask her. I
3 mean, this is a complete deposition. They have spent more
4 time on her than they spent on Emily Barr the first time is my
5 recollection. These depositions -- this was as complete a
6 deposition as we've had in this case. These are longer than
7 I've spent on the Smith brothers on an individual basis. I
8 wouldn't swear to that, but that's my best recollection.
9 Other people here can contest that. You're talking about four
10 hours and we did break with 125 pages and if Your Honor wants
11 the pages where she grows impatient and complains I'll be glad
12 to give them to you.

13 JUDGE SIPPEL: Well, that's all right. As I said, I
14 read it on a, on a flight back from California and most of
15 that -- most of the flight time was taken reading it. I'm
16 not, I'm not quarreling with, with the quantity of the, of the
17 deposition. My ruling has been a very narrow one.

18 MR. GREENEBAUM: If the Court felt that it couldn't
19 make a determination without testing her -- viewing her and
20 having her -- getting a chance to judge her credibility that
21 way, I mean we could have solved that problem with video
22 taping it. I mean, there are a lot of things we could have
23 done. Everybody knew the situation. We tried to avoid the
24 thing in the first place. The point was made by someone, this
25 was the last deposition taken. There's been no information

1 that's come in since then that could have been added to this
2 deposition. Everybody had fair warning and everybody knew,
3 and I believe the Court has the inherent power in the interest
4 of justice to expedite these proceedings in a fair way, and if
5 there's any legitimate reason for having her here I will
6 withdraw my comment. I'm -- I think we're going through a
7 form of resubstance here and I don't think that serves the
8 interests of the Court or the litigants or the process, so
9 that's my argument.

10 JUDGE SIPPEL: Okay, Mr. Greenebaum.

11 MR. GREENEBAUM: Thank you.

12 JUDGE SIPPEL: Is there anything more, Mr. Leader,
13 that you have? I mean, do you honestly feel that your case is
14 going to be denied the consideration that it deserves if we
15 just take her deposition?

16 MR. LEADER: Yes, and I do not want to have to retry
17 this case by having it remanded by either the Review Board or
18 the full Commission. I think that would be a terrible thing
19 after, after all the delay in this proceeding.

20 JUDGE SIPPEL: Well, I don't think that there's been
21 any delay in this proceeding in the sense that somebody hasn't
22 been doing what they're supposed to do.

23 MR. LEADER: I didn't mean it in that sense. I mean
24 we did file an application in 1991. It's now 1994 and we're
25 still on the hearing and there are a lot of reasons for that,

1 | but I think administrative due process would be served if it
2 | were remanded because a reviewing authority, whether it's at
3 | the Commission or the U.S. Board of Appeals, thought that we
4 | were denied the opportunity to cross-examine someone and I
5 | think that's a very important issue. If it wasn't important
6 | you wouldn't have added the issue, sir.

7 | JUDGE SIPPEL: Mr. Zauner pointed out --

8 | MR. GREENEBAUM: That was -- evident.

9 | JUDGE SIPPEL: Well, the --

10 | MR. LEADER: I'm not going to restate what I said
11 | and I -- because you're a very able trial counsel, Mr.
12 | Greenebaum. You know that taking somebody's deposition and
13 | cross-examining them at a trial are two different things and
14 | two different strategies, so we were -- as -- someone made the
15 | comment, we were on notice that she wouldn't be available as a
16 | witness when we took the deposition. She'd been scheduled as
17 | a witness for September 8th, 8th or 9th, so that -- so there
18 | was -- so I think it's not quite accurate to say that we knew
19 | that she wasn't going to be at deposition and this was the
20 | only shot we were getting.

21 | MR. ZAUNER: Nobody has said that.

22 | MR. HOWARD: I would like to say that.

23 | JUDGE SIPPEL: Wait just a minute. Mr. Zauner, you

24 | --

25 | MR. ZAUNER: That concludes all I have to say. You

1 have to make a ruling and we'll abide by your ruling.

2 JUDGE SIPPEL: Let me hear from Mr. Howard.

3 MR. HOWARD: Just to cite from the transcript of the
4 pre-hearing conference that was held the day before Ms.
5 Covington's deposition was taken your words, Your Honor, "As I
6 see it, the reasons that you're giving, that is that Ms.
7 Covington would not be available in September," I have said so
8 expressly and could go back to that page if need be, "are all
9 the more reason as to why Ms. Covington's deposition should be
10 taken now. This, the discovery of this issue, should be
11 completed with some degree of diligence between now and
12 September. Whether Ms. Covington can appear as a witness in
13 September is a different consideration, but at least we will
14 have her testimony. We will have her sworn testimony with
15 respect to the issue, and if we don't do it now come September
16 time if, if the worse case scenario develops we may not have
17 Ms. Covington's testimony neither by deposition nor in person.
18 So, I mean, I think -- I see the urgency here to go forward in
19 light of Ms. Covington's condition as it has been explained to
20 me by Ms. Abrutyn."

21 JUDGE SIPPEL: Well --

22 MR. HOWARD: They had express notice that Ms.
23 Covington --

24 MR. ZAUNER: No, because we had an off-the-record
25 discussion that we had with -- on the same subject on which

1 | this was raised and the, and the -- I remember saying to Your
2 | Honor in the off-the-record discussion that we would have to
3 | put the deposition testimony into the record, and counsel who
4 | is sitting here now was present at that discussion.

5 | JUDGE SIPPEL: Well --

6 | MR. LEADER: I would only add --

7 | JUDGE SIPPEL: Yes, Mr. Leader.

8 | MR. LEADER: -- that after the pre-hearing
9 | conference you did issue an order scheduling her as a witness
10 | in this proceeding.

11 | JUDGE SIPPEL: That's correct and my, my comment at
12 | that -- that you read, which you accurately read, was, was
13 | premised on the, on the unknowable. I mean, as we sat there
14 | and talked about -- after I had asked your associate a number
15 | of questions with respect to what her condition was there was
16 | no imminence shown at that time to postpone her as a witness
17 | or her deposition or otherwise. However, obviously the
18 | situation is a very, very serious situation. One doesn't know
19 | from week to week what her availability would be, so I said
20 | -- that's exactly what my point was, was that we better get
21 | her testimony while she's available because we never know what
22 | it's going to be like in the future.

23 | MR. HOWARD: Your Honor, I had argued that she had
24 | told us that her husband's schedule would mean that she would
25 | be unavailable for the hearing on the scheduled dates in

1 September. That's at page 1474 of the transcript. It was
2 certainly in there.

3 MR. ZAUNER: That was the basis of your comments
4 when you --

5 MR. HOWARD: That was the exact basis of your
6 comment, was based on -- you turned my argument that she
7 shouldn't have to be deposed because the hearing date would
8 have to be postponed to the other side and said that, in fact,
9 Mr. Howard, your argument goes exactly the other way. We've
10 got to go forward because she may not be available in
11 September.

12 JUDGE SIPPEL: All right. Well, yes, that was the
13 bottom line, was that I was concerned that she may not be
14 available at a later time. No question about that. I'm not
15 changing my, I'm not changing my position on that in any way,
16 shape or form.

17 MR. HOWARD: May I just get into the record also,
18 You Honor, I spoke to Ms. Covington this morning and the
19 conditions that we've described in our motion are exactly the
20 case and there's been no change in that situation. Her
21 husband is home. She is his sole care giver. There's a
22 visiting nurse that's coming in for a few minutes and then --
23 that's supposed to stop on Monday is the schedule, but there's
24 upcoming chemotherapy or radiation therapy. The decision has
25 not yet been made. But she will not be available to set out a

1 day in September to appear in this proceeding.

2 MR. ZAUNER: Your Honor, I'm willing to --

3 JUDGE SIPPEL: Yes.

4 MR. ZAUNER: -- say if you direct this woman to
5 appear that I will not be present during her examination. I
6 will not participate in that.

7 JUDGE SIPPEL: Well, this is a very difficult
8 situation for me obviously, whether I -- I am -- as I've said,
9 I've been through all the material. I've been through the
10 deposition. I've been -- I've looked at the cases that have
11 been cited. I don't -- and I think the law is as I've seen it
12 -- as I see it. However, in light of what I'm hearing this
13 morning, the arguments this morning and the intensity of the
14 arguments, I'm going to, I'm going to give this further
15 reflection and I'll let you know by the -- at least by mid-
16 afternoon or the end of the day. Is there anything else?

17 MR. HOWARD: We were discussing the direct case
18 testimony of Ms. Covington if she did come in, but I -- we
19 really can't -- if you were to order her to pick the date and
20 appear we would have to give -- you know, consult with her
21 about our continued -- there are a number of issues that we
22 would then have to address, so we're really not prepared to
23 talk about what the -- our response would be.

24 JUDGE SIPPEL: Well, maybe Mr. Greenebaum could give
25 me the -- do you have the page references --

1 MR. GREENEBAUM: Yes, Your Honor, I do.

2 JUDGE SIPPEL: -- so that --

3 MR. GREENEBAUM: I can do better than that. I've
4 got a clean copy of the deposition, only a couple of lines
5 underlined. They're all marked. I'll just give it to you.

6 JUDGE SIPPEL: All right. Any objection to that,
7 Mr. Leader?

8 MR. LEADER: I'd like to have a copy of it.

9 MR. GREENEBAUM: Well, I'll --

10 JUDGE SIPPEL: If you'll just give me the pages, Mr.
11 Greenebaum, I can -- because I'm going to go back and read it
12 again.

13 MR. GREENEBAUM: Page 5, like 7, Your Honor.

14 JUDGE SIPPEL: I hear you.

15 MR. GREENEBAUM: Page 33, line 13.

16 JUDGE SIPPEL: All right.

17 MR. GREENEBAUM: Page 86, line 17. Page 90, line
18 19. On many of these, Your Honor, I'm just giving you the key
19 line. You may want to start a few lines earlier.

20 JUDGE SIPPEL: I will. I will. I'll read around
21 it.

22 MR. GREENEBAUM: Page 91, line 3 -- line 2, I guess,
23 line 2 and 3. Page 93, top of the page. Page 106, line 20.
24 Page 110, line 14. Line 112 (sic), line 12.

25 MS. ABRUTYN: Is that page 112?

1 MR. GREENEBAUM: Page 112, line 12 and line 15.
2 There are two issues on that page. Page 113, line 12. Page
3 117, line 5 and line 21. And the course of that's in
4 reference as to what people think you said and you'll be the
5 best judge of that.

6 MS. ABRUTYN: Can I just add one to that also?
7 MR. GREENEBAUM: Yes.
8 JUDGE SIPPEL: Yes, ma'am.
9 MS. ABRUTYN: Page 35, line 24.
10 JUDGE SIPPEL: Page 35?
11 MS. ABRUTYN: Line 24.
12 JUDGE SIPPEL: Okay. I hear -- I have those noted
13 and I'm going to look at that plus the pages around them again
14 and, and the notes that I made when I was flying in yesterday
15 from California.

16 MR. GREENEBAUM: That's all we can ask you to do.
17 JUDGE SIPPEL: Beg your pardon?
18 MR. GREENEBAUM: That's all we can ask you to do. I
19 appreciate it.
20 JUDGE SIPPEL: I will. I am very -- this is -- to
21 me it's a very difficult decision to make and in light of the,
22 the intensity of this morning's arguments on it, I'm going to,
23 I'm going to take a look at it again and I will let you know
24 by -- certainly by the end of the day and hopefully before
25 then.

1 MR. HOWARD: Ms. Abrutyn suggests that I raise the
2 point of she has directed the Court that we would need relief
3 from the 12:00 deadline for her direct case.

4 JUDGE SIPPEL: Listen. I -- Ms. Covington's
5 situation is so -- if I do persist in requiring her to come
6 forward it's going to be as I said, on a day that she can
7 select in September, but let's not get to that yet. Let's --
8 let me please focus on this and I will get back to you. Is
9 there anything -- any other business that we can conduct this
10 morning with respect to what's going to happen next week?
11 1:00 we start on the 7th and then Ms. Barr's going to come in
12 the next day?

13 MR. HOWARD: Yes, Your Honor.

14 JUDGE SIPPEL: And then we have the Four Jacks
15 testimony the following week. And then I'm going to be
16 receiving copies of some sworn written testimony today. All
17 right. That's it. We're in recess.

18 (Whereupon, the conference was adjourned at 10:27
19 a.m.)

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CERTIFICATE OF REPORTER, TRANSCRIBER, AND PROOFREADER

IN RE APPLICATIONS OF BALTIMORE, MD.

Name

MM DOCKET NO. 93-94

Docket No.

WASHINGTON, D.C.

Place

SEPTEMBER 2, 1994

Date

We, the undersigned, do hereby certify that the foregoing pages, numbers 1488 through 1506, inclusive, are the true, accurate and complete transcript prepared from the reporting by Barbara Lord in attendance at the above identified proceeding, in accordance with applicable provisions of the current Federal Communications Commission's professional verbatim reporting and transcription Statement of Work and have verified the accuracy of the transcript by (1) comparing the typewritten transcript against the reporting or recording accomplished at the proceeding and (2) comparing the final proofed typewritten transcript against the reporting or recording accomplished at the proceeding.

9/1/94
Date

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Free State Reporting, Inc.

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