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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Application 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

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File No. BPCT-910903KE

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

SCRIPPS HOWARD BROADCASTING COMPANY'S PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW
FOR MISREPRESENTATION ISSUES AGAINST SCRIPPS HOWARD
BROADCASTING COMPANY AND FOUR JACKS BROADCASTING, INC.

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Dated: December 23, 1994

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TABLE OF CONTENTS

SUMMARY	ix
I. PRELIMINARY STATEMENT	1
II. MISREPRESENTATION ISSUES PENDING AGAINST SCRIPPS HOWARD	5
A. PROPOSED FINDINGS OF FACT	5
1. Scripps Howard Gathered Documentation in 1992 to Support WMAR-TV's Ascertainment Efforts and Issues-Responsive Programming	5
2. Ms. Barr Contacted NBC to Obtain Documentation About Issues-Responsive NBC Programming	6
a. Ms. Barr Obtained Information From NBC	6
b. Ms. Barr Accurately Described Her Facsimile Correspondence to NBC at Her Deposition, and It Was Produced to Four Jacks Prior to the Hearing	8
3. Scripps Howard's Handling of Janet Covington's Notes Has Been Explained, and Scripps Howard Had No Motive to Conceal Those Notes	11
a. Ms. Barr Obtained Notes Documenting Janet Covington's Ascertainment Efforts	11
b. Scripps Howard Has Explained the Subsequent Discovery of the 1992 Covington Notes	18
c. The Contents of the 1992 Covington Notes Are Consistent With Scripps Howard's Ascertainment Exhibit	22
d. Ms. Barr Did Not Review the July 13, 1993 Letter to Martin Leader	26
e. The Incorrect Statement in Footnote 6 of Ms. Barr's 1993 Direct Testimony Was Not Intended to Mislead	27
B. PROPOSED CONCLUSIONS OF LAW	28

1.	Evidence of Deceptive Intent is a Prerequisite to a Finding of Misrepresentation	28
2.	The Testimony of Ms. Barr and Mrs. Covington Are Accepted As Credible	28
3.	Scripps Howard Did Not Commit Misrepresentation or Lack Candor With Respect to the NBC Facsimiles	29
4.	Scripps Howard Did Not Commit Misrepresentation or Lack Candor With Respect to the 1992 Covington Notes	32
5.	Disqualification Against Scripps Howard Is Not Warranted	35
III.	MISREPRESENTATION ISSUES PENDING AGAINST FOUR JACKS	36
A.	PROPOSED FINDINGS OF FACT	36
1.	Business Holdings	36
a.	Four Jacks	36
b.	Sinclair Broadcast Group, Inc.	36
2.	Four Jacks' Three Integrated Principals Promise to Resign from Their Then-Current Employment	39
a.	Four Jacks' Application Represents That the Three Smiths Will Resign Their Then-Current Employment	39
b.	The Three Smiths' Promise to Resign Their Then-Current Employment Is Confirmed in Four Jacks' Integration and Diversification Statement	40
c.	The Pledge to Resign Is Also Confirmed in the Direct Case Testimony of the Three Smiths	41
3.	Prior to the Addition of the Misrepresentation Issue, Four Jacks Repeatedly and Consistently Represented That the Three Smiths Are Employees of Sinclair	41

a.	Four Jacks' Application Represents That Robert and Frederick Smith Are Employees of Sinclair	41
b.	Each of the Three Smiths Testified That They Are Employees of Sinclair	41
c.	David Smith Testified That Sinclair's September 28, 1993 SEC Filing Warned the Public That He Will Resign From Sinclair	42
d.	Sinclair's November 9, 1993 SEC Filing Identifies the Three Smiths As "Key Personnel" of Sinclair	45
4.	Sinclair's December 1993 SEC Filings State, For the First Time, That the Three Smiths Will Retain Their Positions at Sinclair and Continue to Perform All Their Duties as "Key Personnel" If Four Jacks' Application for Channel 2 Is Granted	45
5.	Based on Sinclair's December 1993 SEC Filings, the Presiding Judge Concluded That There Is a Material Issue of Fact Regarding the Candor of Four Jacks' Integration Commitment	46
6.	The Three Smiths Have Consistently Held Themselves Out As Employees of Sinclair to Federal and State Government Agencies and to the Public	47
a.	Sinclair's Annual EEO Reports to the FCC List the Three Smiths As Employees	47
b.	The Three Smiths Receive W-2 Forms As Employees of Sinclair	48
c.	Robert and Frederick Smith Executed W-4 Forms As Employees of Sinclair	49
d.	The Three Smiths Admitted That They Do Not Know Anything About the United States Internal Revenue Code, Despite Their 1994 Direct Case Testimony About Why Sinclair Has W-2 and W-4 Tax Forms for the Three Smiths	49
e.	In Its Maryland State Unemployment Insurance Filings, Sinclair Has	

	Represented That the Three Smiths Are Sinclair Employees	51
7.	The Three Smiths Participate in Every Employee Benefit Provided by Sinclair	52
	a. The Three Smiths Receive a Set Salary Every Two Weeks With Related Deductions	52
	b. The Three Smiths Participate in Sinclair's Executive Bonus Plan for Eligible Employees	52
	c. The Three Smiths Participate in Sinclair's Health, Life Insurance, and 401(k) Plans Which Are Limited By Their Terms to Employees	54
	i. Sinclair's Health Care Plan	54
	ii. Sinclair's Group Life Insurance Plan	56
	iii. Sinclair's Long-term Disability Plan	56
	iv. Sinclair's 401(k) Plan	56
	d. Sinclair Protected Its Discretion to Make Loans to the Smiths Through an Indenture Provision Protecting Its Ability to Make Loans to "Employees"	58
	e. David and Frederick Smith Have Corporate Credit Cards From Sinclair	58
8.	Before the Misrepresentation Issue Was Added, the Three Smiths Testified That They Work Full Time as Officers of Sinclair	58
	a. The Three Smiths Supervise the Three General Managers at Sinclair's Five Stations	59
	b. David Smith Testified That He Has a Full Day at Sinclair and Is Responsible for the Growth, Strategic Planning, and Financing of the Business	60
	c. Robert Smith Testified That, Along With His Brothers, He Manages Sinclair's Subsidiary Television Stations	64

d.	Frederick Smith Testified That He Is Available Full Time to Do Whatever Is Needed at Sinclair	65
e.	Sinclair's Corporate Tax Returns Represent That the Three Smiths Spent 90% of Their Time on Sinclair in 1992	68
9.	Four Jacks Offers Various Positions To Support Its Contention That It Has Not Lacked Candor Before the Commission	68
a.	Four Jacks Contends That the Three Smiths Are Not Employees of Sinclair and Never Intended to Resign Their Positions at the Company	69
b.	Four Jacks Attempts to Distinguish the Three Smiths as Not Being "True Employees" of Sinclair	71
c.	Four Jacks Has Contended That the Pledge to Resign Pertains to the Three Smiths' Full Time Presence at WBFF	73
d.	Four Jacks Contends That the Pledge to Resign Pertains to Future Employment	75
e.	Four Jacks Contends That the Three Smiths' Intention to Remain at Sinclair Was Made Clear Throughout This Proceeding	76
f.	Robert Smith Contends That He Is Self Employed As a Corporation	77
10.	Frederick Smith Recognized That Others Might View Their Status at Sinclair as Employees	77
a.	Frederick Smith Testified That the Average Person Might Conclude That He Is an Employee of Sinclair	77
b.	Robert Smith Testified That He Knows It Is "Hard to Understand and Believe" That the Three Smiths Can Continue to Honor Their Commitments to Sinclair, If Four Jacks Is Awarded Channel 2	78
11.	The Three Smiths' Testimony Is Inconsistent Regarding Whether Four Jacks Will Run Channel 2 by Management Committee	79

a.	The Three Smiths Have Pledged to Each Work 40 Hours a Week at Management Positions at Channel 2	79
b.	Four Jacks' Application States That, Notwithstanding Their Individual Titles, the Four Jacks' Principals Will Run Channel 2 as a Management Committee . . .	80
i.	David and Robert Smith Testified That They Have Not Discussed Whether They Will Have a Management Committee in Place at Channel 2 . . .	80
ii.	At His Deposition in 1993, Frederick Smith Testified That the Smiths Would Run Channel 2 the Same Way They Run Sinclair, With Each Brother Having an Equal Voice . . .	81
B.	PROPOSED CONCLUSIONS OF LAW	83
1.	Introduction	83
2.	Representations Contained in the Four Jacks Application Are Inconsistent With the Three Smiths' Belatedly Revealed Intention to Remain at Sinclair	85
3.	The Overwhelming Evidence in the Record Confirms That Four Jacks Misrepresented and Lacked Candor Before the Commission Regarding the Three Smiths' Pledge to Resign Their Then-Current Employment	87
a.	At the 1993 Hearing, the Three Smiths Characterized Themselves as Employees of Sinclair in Name and Deed	87
b.	Documentary Evidence and Testimony Presented During the 1994 Hearing Confirms That the Smiths Are Employees of Sinclair and That They Lacked Candor Before the Commission	91
c.	The Representations in the Documentary Evidence That the Three Smiths Are Employees of Sinclair Are Entitled to Substantial Weight . . .	92

i.	Sinclair's Characterization of the Smiths as Employees for 401(k) Purposes is Probative of the Smiths' Employment Status Because a 401(k) Plan That Includes Non-Employees is Void	92
ii.	Sinclair's Characterization of the Smiths as Employees of Sinclair Resulted in Unemployment Insurance, a Benefit Unavailable to Non-Employees	93
d.	The Smiths Have Simultaneously Represented to the Commission That They Both Are and Are Not Employees of Sinclair	93
e.	Documentary Representations That the Smiths Are Employees of Sinclair Are Entitled to Substantial Weight as Many of These Representations Were Made Under Penalty of Perjury or Similar Oath	94
4.	The Three Smiths' Explanations, Proffered After the Addition of the Issue, Regarding the Meaning of the Pledge and Their Employment Status at Sinclair Are Inconsistent, Unbelievable, and Inadequate to Resolve the Misrepresentation Issue in Four Jacks' Favor	95
a.	Four Jacks' Interpretations of the Meaning of the Pledge Are Without Merit	96
i.	Four Jacks' Claim That the Pledge Applies to the Three Smiths' Full Time Presence at WBFF Is Flatly Contradicted by David and Robert Smith's Testimony	96
ii.	Four Jacks' Claim That the Pledge to Resign Is Merely Inartful Is Not Credible	98
iii.	Four Jacks' Claim That the Pledge Applies Only to Future Employment Is Rejected as Contrary to the Record and Common Sense	100

b.	The Three Smiths' Explanations, After the Addition of the Issue, Regarding Their Employment Status Are Rejected as Contrary to the Three Smiths' Prior Characterizations of Themselves as Employees of Sinclair	101
i.	Four Jacks' Claim That the Three Smiths Are Owners of Sinclair, But Not Employees, Is Contrary to the Evidence	102
ii.	Four Jacks' Claim That the Smiths Are Not True Employees Is Rejected for Lack of Any Supporting Evidence	103
iii.	Frederick Smith Was Inconsistent Regarding Whether Sinclair Has Any Employees	103
c.	Four Jacks' Remaining Explanations Are Dubious and Unworthy of Belief	104
d.	The Three Smiths' Testimony Before the Addition of the Added Issue Is Credible, But Their Subsequent Self Serving Testimony at the 1994 Hearing Is Not	105
5.	Four Jacks Lacked Candor Regarding Its Intention to Manage Channel 2 as a Management Committee	106
6.	Four Jacks Had a Motive to Deceive the Commission Regarding the Three Smiths' Pledge to Resign Employment	107
7.	Ultimate Conclusions	109
IV.	CONCLUSION	111

SUMMARY

This proceeding involves claims of misrepresentation and lack of candor by each of the competing applicants in this matter, Scripps Howard Broadcasting Company ("Scripps Howard") and Four Jacks Broadcasting, Inc. ("Four Jacks"), against the other. The record reveals, however, that only Four Jacks, and not Scripps Howard, should be disqualified.

Disqualification of Scripps Howard Is Not Warranted

Scripps Howard's failure to initially disclose certain documents in discovery, as well as several apparent misstatements about these documents, required a full examination of the facts and circumstances surrounding these events. Upon examination, it is evident that there was no misrepresentation or lack of candor.

Scripps Howard's initial failure to produce in discovery copies of certain facsimiles that had been sent to and received from NBC in the course of seeking information from the network about issues-responsive programming for this proceeding was the result of Scripps Howard's good-faith belief that these documents fell outside the scope of Four Jacks' document request.

Furthermore, Emily Barr's erroneous 1993 deposition testimony that she had not retained copies of these facsimiles was plainly an unintentional misstatement of fact and was not intended to deceive. Scripps Howard had no plausible motive to conceal the facsimiles since Ms. Barr accurately described the contents of the facsimiles at her 1993 deposition. Finally, Scripps Howard

immediately disclosed the facsimiles when it became aware that Four Jacks was interested in them.

Additionally, Scripps Howard's initial failure to produce ascertainment notes prepared by Janet Covington in 1992, and certain erroneous statements in attorney correspondence and Ms. Barr's testimony in the 1993 hearing concerning these notes, are the result of: a determination by Scripps Howard's counsel that the documents were not within the scope of Four Jacks' document request; a misunderstanding by counsel about the distinction between the 1992 notes and Mrs. Covington's 1991 notations in her calendar; and the misplacement of the 1992 notes in Station WMAR-TV's files. No evidence of intentional misrepresentation or lack of candor exists. Ms. Barr's explanation for her failure to discover the copy of the notes at WMAR-TV is both credible and understandable, and is not contradicted by any evidence in the record. Further, intentional concealment of the 1992 Covington notes is extremely implausible given that the contents of these notes do not reveal any motive for Scripps Howard to fail to produce them.

Four Jacks was afforded a complete opportunity to explore these discovery-related matters, and no evidence of wrongdoing was uncovered, while Scripps Howard's explanations of these events are fully credible. Accordingly, the Presiding Judge declines to find misrepresentation and lack of candor against Scripps Howard.

Disqualification of Four Jacks Is Warranted

The record mandates the disqualification of Four Jacks Broadcasting, Inc. as an applicant for the license of WMAR-TV, Baltimore, Maryland, because the principals of Four Jacks misrepresented and lacked candor regarding their individual pledges to resign from their then-current employment if Four Jacks should be successful in its Application for Channel 2.

Four Jacks contends that David, Robert and Frederick Smith made clear to the Commission their intent to remain at their positions at Sinclair Broadcast Group, Inc. from the outset. Such a contention is, however, incredible and unsupported by any evidence in the record except the principals' own self-serving statements after the addition of the issue. Furthermore, Four Jacks' position ignores the plain language of David, Robert and Frederick Smith's pledges to resign their employment and their own use of the term "employee" and "employment" with respect to their positions at Sinclair during this proceeding. The most glaring example of this is the fact that Four Jacks' own Form 301 Application volunteers that both Frederick and Robert Smith are employees of Sinclair and only a few pages separate these representations from the Smiths' pledge to resign from their then-current employment. Furthermore, the Smiths all stated at the November 1993 hearing that they were, in fact, employees of Sinclair.

Four Jacks' principals had a strong motive to misrepresent and lack candor in connection with the pledge to resign their

then-current employment and the representations regarding their employment status. That is, Four Jacks wished to gain integration credit while still intending that the three Smiths would in reality retain their current positions at their family-run communications business, Sinclair.

The Smiths made their implausible claim that they are not employees of Sinclair only when confronted in this proceeding with assurances, made by Sinclair to the Securities and Exchange Commission, that the Smiths would retain their positions as officers of Sinclair.

Four Jacks has failed to provide any credible explanation for its contention that the Smiths are not employees of Sinclair, much less presented sufficient evidence to meet its burden of proceeding on this issue. On the contrary, the explanations offered on Four Jacks' behalf are inconsistent and have changed repeatedly over time as they have been confronted with evidence to rebut their claims. Indeed, the changing nature of Four Jacks' explanations strongly confirm its intent to deceive the Commission.

In fact, all of the evidence adduced in Phase II of this proceeding confirms that the Four Jacks principals held themselves out to the world as employees of Sinclair and took every advantage of every benefit of their status as employees, including participation in all Sinclair health and benefit plans. Even more importantly, the Smiths (and Sinclair) represented that David, Robert, and Frederick Smith were employees of Sinclair to

every government agency with whom they had dealings, including the SEC, the IRS, the state of Maryland, and even the Federal Communications Commission itself. In fact, they have continued to hold themselves out as Sinclair employees to these government agencies at the same time as they argue in this proceeding that they are not employees. The record also reflects that the Smiths work at Sinclair on a full-time basis on a variety of tasks and are responsible for its success.

Unlike the tangential inconsistencies in discovery compliance for which misrepresentation was alleged against Scripps Howard, Four Jacks' conflicting representations with respect to their intentions regarding Sinclair went to the central issue of their comparative case--their effort to obtain integration credit. Further, the conflicting representations on this issue were repeated, willful, and supported by motive. Finally, the explanations offered for the conflict were patently unworthy of belief. Accordingly, the Four Jacks principals' actions easily and unquestionably rise to a level of a lack of candor and affirmative misrepresentation that mandates Four Jacks' disqualification.

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

**SCRIPPS HOWARD BROADCASTING COMPANY'S PROPOSED
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FOR MISREPRESENTATION ISSUES AGAINST SCRIPPS HOWARD
BROADCASTING COMPANY AND FOUR JACKS BROADCASTING, INC.**

Scripps Howard Broadcasting Company ("Scripps Howard"), by its attorneys, hereby respectfully submits its Proposed Findings of Fact and Conclusions of Law in response to the misrepresentation issues added to this proceeding against Scripps Howard by Memorandum Opinion and Order, FCC 94M-50 (released Feb. 1, 1994), and against Four Jacks Broadcasting, Inc. ("Four Jacks"), by Memorandum Opinion and Order, FCC 94M-51 (released Feb. 1, 1994).

I. PRELIMINARY STATEMENT

1. This proceeding involves the application of Scripps Howard for renewal of license of television Station WMAR-TV,

Baltimore, Maryland ("WMAR-TV") and the mutually exclusive application of Four Jacks for construction permit for a new television station to operate on the frequency now utilized by WMAR-TV.

2. Scripps Howard filed this application on June 3, 1991, and Four Jacks filed its competing application on September 3, 1991. By order released April 1, 1993, the two applications were designated for hearing on the following issues:

1. To determine with respect to Four Jacks whether there is reasonable possibility that the tower height and location proposed would constitute a hazard to air navigation.
2. To determine which of the proposals would, on a comparative basis, better serve the public interest.
3. To determine in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

Hearing Designation Order, DA 93-340 (released April 1, 1993).

3. By order released June 1, 1993, summary decision for Four Jacks was granted on the first designated issue. Memorandum Opinion and Order, FCC 93M-315 (released June 1, 1993).

4. Pre-hearing conferences were held on October 5, 6, and 27, 1993, and hearings were held on November 8, 9, 10, 12, 15, and 16, 1993, in Washington, D.C..

5. On February 1, 1994, the Presiding Judge added the following qualifying issues to this proceeding with respect to Scripps Howard's application:

- A. To determine whether Scripps Howard Broadcasting Company misrepresented or was lacking in candor in connection with deposition testimony and/or

pleadings and/or delayed production in discovery relating to NBC documents used in connection with preparing a hearing exhibit that was relevant to the renewal expectancy.

- B. To determine whether Scripps Howard Broadcasting Company misrepresented or was lacking in candor in connection with deposition testimony and/or pleadings and/or correspondence served on the Commission relating to the status of Janet Covington's diary of 1991 and/or Janet Covington's notes of 1992 which were used in connection with preparing a hearing exhibit that was relevant to the renewal expectancy.
- C. To determine the effect of the foregoing issues on the qualifications of Scripps Howard Broadcasting Company to hold a Commission license for Channel 2 in Baltimore.

Memorandum Opinion and Order, FCC 94M-50 (released Feb. 1, 1994).

6. Also on February 1, 1994, the Presiding Judge added the following qualifying issues to this proceeding with respect to Four Jacks' application:

- A. To determine whether Four Jacks Broadcasting, Inc. misrepresented or lacked candor before the Commission in its application, pleadings, documents and/or testimony regarding its integration commitment to resign then current employment positions of David D. Smith, Robert E. Smith, and/or Frederick G. Smith.
- B. To determine the effect of the foregoing issue on the qualifications of Four Jacks Broadcasting, Inc. to receive a Commission license for Channel 2 in Baltimore, MD.

Memorandum Opinion and Order, FCC 94M-51 (released Feb. 1, 1994).

7. The comparative hearing issues have been frozen by Commission order pursuant to Public Notice FCC 94-41 (released Feb. 25, 1994).

8. Scripps Howard filed a Motion for Summary Decision contending, inter alia, that the documents involved in the

misrepresentation issue against it fell outside the scope of Four Jacks' request for documents and that therefore production of the documents had not been required. See Motion for Summary Decision (filed Feb. 10, 1994). The Mass Media Bureau supported Scripps Howard's reading of Four Jacks' document production request and the grant of Scripps Howard's Motion in comments filed on February 28, 1994.

9. In acting on Scripps Howard's Motion, the Presiding Judge ruled that additional testimony was required to ensure the completeness of the relevant evidence, but that Scripps Howard's attorneys' reading of the Four Jacks document production request was a possible, if overly narrow and technical, one. See Memorandum Opinion & Order, FCC 94M-177 (March 18, 1994), at 3 n.2. The Presiding Judge held that the advice of counsel on the scope of the Four Jacks discovery request "will not be attributed to Scripps Howard to support a finding of lack of candor." Id. at 5. The Presiding Judge further held that on the basis of the record as then developed, the conduct by Scripps Howard's counsel with respect to discovery "is not disqualifying as a matter of law," Id. at 2, and that there was "no basis for the discovery of any of Scripps Howard's attorneys." Id. at 5.

10. Four Jacks also filed a Motion for Summary Decision with respect to the misrepresentation issues against it. See Motion for Summary Decision (filed Feb. 28, 1994). The Mass Media Bureau, in comments filed March 14, 1994, supported denial of this motion. The Presiding Judge subsequently denied Four

Jacks' motion. See Memorandum Opinion and Order, FCC 94M-246 (released April 11, 1994).

11. Hearings on the misrepresentation issues against Scripps Howard were held on September 7-8, 1994, in Washington, D.C. Hearings on the misrepresentation issues against Four Jacks were held on September 12-14, 1994, in Washington, D.C.

12. Pursuant to the order of the Presiding Judge, these proposed findings of fact and conclusions of law are limited to the issues added by FCC 94M-50 and FCC 94M-51. T. at 2232.

II. MISREPRESENTATION ISSUES PENDING AGAINST SCRIPPS HOWARD

A. PROPOSED FINDINGS OF FACT

1. Scripps Howard Gathered Documentation in 1992 to Support WMAR-TV's Ascertainment Efforts and Issues-Responsive Programming

13. During the License Term at issue in the comparative proceeding, May 30 through September 30, 1991, WMAR-TV's management and staff participated in various activities described in the station's comparative case as community ascertainment efforts. SH36 at 1.¹ In the late summer and early fall of 1992, Emily L. Barr, who was then the Director of Broadcast Operations of WMAR-TV, began gathering documentation in an effort to demonstrate the station's ascertainment efforts, its issues-responsive programming, and other relevant matters related to

¹ It is unnecessary at this time to address the impact of these efforts on WMAR-TV's renewal expectancy. Accordingly, references herein to "ascertainment efforts," "ascertainment," and "issues-responsive programming" are made solely to identify the acts and programming claimed by WMAR-TV in its comparative case to be such.

Four Jacks' license renewal challenge, at the request of Scripps Howard's counsel, Baker & Hostetler. SH36 at 1.²

2. Ms. Barr Contacted NBC to Obtain Documentation About Issues-Responsive NBC Programming

14. One of the projects that Ms. Barr undertook at the request of Baker & Hostetler in the summer of 1992 entailed gathering materials demonstrating the issues-responsive programming that WMAR-TV had aired during the License Term, including both locally produced and network programs. SH36 at 1. Although WMAR-TV maintained records of its locally produced programming, it was not the station's practice to retain detailed records of the NBC network programming broadcast on WMAR-TV after that programming had aired. SH36 at 1-2. Ms. Barr therefore needed to contact NBC to obtain copies of certain network programming records. SH36 at 2.

a. Ms. Barr Obtained Information From NBC

15. In August 1992, Ms. Barr telephoned Nancy Cole, Director of Archives, NBC News, New York, and Vicki Anderson, an archivist for NBC Entertainment in Los Angeles, to request a written record of certain news stories and entertainment programming that NBC had aired from June 1 through September 30, 1991. SH36 at 2. The purpose of this request was to help Ms. Barr identify the NBC network programming aired by WMAR-TV during

² Ms. Barr was the Assistant General Manager of WMAR-TV at the time of the September 1994 hearing. SH36-1. [She has subsequently left the employ of Scripps Howard to take a promotion to General Manager of Capital Cities/ABC, Inc. Station WTVD, Raleigh-Durham, North Carolina.]

the License Term that addressed issues identified by WMAR-TV in 1991 to be of concern to the Baltimore community. SH36 at 2.

16. Ms. Cole and Ms. Anderson separately called Ms. Barr back to verify that the information she had requested was available. SH36 at 2. On August 10, 1992, a few days after her telephone conversations with Ms. Cole and Ms. Anderson, Ms. Barr sent to each of them the same facsimile, which listed the issues about which WMAR-TV was seeking records. SH36 at 2. These issues were the issues identified on WMAR-TV's issues and programs lists for the second and third quarters of 1991. T. at 1690.

17. Ms. Cole responded by facsimile. SH36 at 2. Her response included examples of the types of documents available in her archives and inquired as to whether they would satisfy Ms. Barr's request. SH36 at 2. After receiving the facsimile, Ms. Barr informed Ms. Cole by telephone that these documents were appropriate. SH36 at 2. Ms. Cole then agreed to send Ms. Barr the documents in NBC News Archives' records relating to the issues that Ms. Barr had specified. SH36 at 2.³

18. Ms. Barr ultimately received a set of programming documents from NBC in New York relating to NBC news programming and a separate set of programming documents from Los Angeles relating to NBC prime time and entertainment programming. SH36 at 3. Ms. Barr made a copy of both sets of programming documents

³ Ms. Anderson also responded to Ms. Barr's request by sending her a cover memorandum with the requested network records from Los Angeles. SH36-3.

and forwarded the originals to Baker & Hostetler. SH36 at 3. All of these programming documents, totaling nearly two thousand pages, were timely produced to Four Jacks in discovery. SH36 at 3. Only the NBC news programming documents received from New York were eventually utilized in preparing Scripps Howard's issues-responsive programming exhibit, Attachment J to Ms. Barr's testimony. T. at 751-52.

b. Ms. Barr Accurately Described Her Facsimile Correspondence to NBC at Her Deposition, and It Was Produced to Four Jacks Prior to the Hearing

19. On July 16, 1993, in response to a question at deposition, Ms. Barr stated that she had not retained a copy of the facsimile she sent to NBC in August 1992 listing the issues about which WMAR-TV was seeking records. SH36 at 3. Ms. Barr subsequently testified without contradiction that at the time she made this statement, she believed it to be true and accurate. SH36 at 3; T. at 1708. There is no evidence in the record tending to suggest that Ms. Barr was aware during her deposition that a copy of the facsimile had been retained. Also at her July 16, 1993, deposition, Ms. Barr was asked to describe the facsimile, and she did so. SH36 at 3; see also T. at 1741-42; SH36 at 17-18.

20. Ms. Barr testified at the 1994 hearing that she did not give additional thought to this matter after her 1993 deposition because she had not considered the original facsimile she sent to NBC to be a "document" relating to ascertainment or programming during the License Term, but simply a request for information

that she had described fully and accurately. SH36 at 3. There is no evidence in the record contradicting Ms. Barr's testimony.

21. At her 1993 deposition, Ms. Barr did, in fact, describe the contents of the facsimile she had sent to NBC fully and accurately. Compare SH36 at 17-18 with T. at 1741-42. The issues identified on the facsimile to NBC were taken directly from WMAR-TV's issues and programs lists, just as Ms. Barr had testified at her deposition. See SH36 at 17-18. Further, the text of the facsimile confirms that it was merely a request for information, and not a substantive document describing ascertainment efforts or programming that aired during the License Term. SH36 at 17-18.

22. On Friday, October 22, 1993, Scripps Howard became aware that Four Jacks was seeking to subpoena NBC in order to obtain a copy of the facsimile Ms. Barr had sent to the network. The Presiding Judge had rejected the subpoena. Order, FCC 93M-672 (released Oct. 22, 1993). The Presiding Judge, by telephone on Monday, October 25, 1993, scheduled a pre-hearing conference on Four Jacks' request for permission to appeal his order. Order, FCC 93-678 (released Oct. 27, 1993). On Tuesday, October 26, 1993, Kenneth C. Howard, Jr., an attorney with Baker & Hostetler, telephoned Ms. Barr and requested that she review her files to confirm that she had not misspoken during her deposition about not having retained her facsimile correspondence with NBC. SH36 at 3-4.

23. In response to Mr. Howard's request, Ms. Barr immediately began a search for this facsimile. SH36 at 4. She unexpectedly discovered the facsimile that she had sent to NBC and the facsimile that she had received back from Ms. Cole attaching a sample of the type of information that was available from NBC News Archives. SH36 at 4. These facsimiles were located, in Ms. Barr's words, "in a file stuck in between some pieces of paper in with all the other papers that were in that file" T. at 1724.

24. Immediately after she discovered the facsimiles, Ms. Barr forwarded a copy of the facsimile that she had sent to NBC to Mr. Howard via facsimile. SH36 at 4. Mr. Howard received this facsimile at approximately 5:45 p.m. on October 26, 1993. SH36 at 17. Shortly thereafter, at Mr. Howard's request, Ms. Barr also sent him a copy of the facsimile that she had received from NBC in response to her facsimile. SH36 at 4.

25. The next morning, at the scheduled conference on Four Jacks' request for permission to appeal, Mr. Howard informed the Presiding Judge and Four Jacks that copies of the facsimiles had been located and agreed to produce them to Four Jacks. T. at 410-15. Mr. Howard noted at that time that Four Jacks had never asked Scripps Howard to produce the facsimiles, that Ms. Barr had simply been mistaken when she had testified that she did not have a copy of the facsimile that she had sent to NBC, that Four Jacks had not asked her to search for this facsimile, and that a search had not been undertaken specifically for the facsimile until

Scripps Howard had become aware that week of Four Jacks' interest in the facsimile. T. at 410-11. Once Scripps Howard knew that Four Jacks wanted a copy of the facsimile and determined that it had a copy, Scripps Howard agreed to produce it even though Scripps Howard considered it outside the scope of Four Jacks' document request. T. at 412-13.

3. Scripps Howard's Handling of Janet Covington's Notes Has Been Explained, and Scripps Howard Had No Motive to Conceal Those Notes

26. Another project Ms. Barr undertook in the summer of 1992 at the request of Baker & Hostetler entailed gathering and memorializing information about WMAR-TV's ascertainment contacts between May 30 and September 30, 1991, and the programming aired by WMAR-TV during that period (and at other times) addressing those ascertained issues. SH36 at 5. Ms. Barr later used the information that she obtained to prepare an initial draft of Attachment E to her written direct testimony of September 13, 1993, on the now-frozen comparative renewal issue. SH36 at 5.

a. Ms. Barr Obtained Notes Documenting Janet Covington's Ascertainment Efforts

27. As part of her efforts during the summer of 1992 to document ascertainment, Ms. Barr had asked present and former WMAR-TV employees for their 1991 personal calendars. SH36 at 5. Three individuals, in addition to Ms. Barr, had retained their calendars: Arnold J. Kleiner, Maria Velleggia, and Janet Covington. SH36 at 5. The purpose of Ms. Barr's request was to assist her efforts to document WMAR-TV's ascertainment contacts during the License Term; her intention was to use the calendars