

overall supervision of the general managers who run the wholly owned subsidiaries. T. at 1989. He is involved in the interviewing, hiring and firing of employees at the stations such as general managers and general sales managers. T. at 1991-92.

161. David Smith's duties also include the long-term strategic planning of the company. T. at 1989. He spends an "awful lot of time" trying to determine how they are "going to complete in the 500-channel universe of the company." T. at 1144. Acquisitions are a continuing part of the business to the extent that the Smiths are "always reviewing the landscape to determine whether there's any particular business out there that might bring some benefit to us as a group." T. at 1996. As a result, David Smith spends "a lot of time contemplating the business reasons why we should go one direction versus another direction and things of that nature." T. at 1144. In the last two years Sinclair has, in fact, acquired two additional television stations as subsidiaries and has recently filed an Application for an additional station.

162. David Smith is also responsible for the financial end of the company, including raising high-yield debt and things of that nature. T. at 1989. In fact, in the last 18 months Sinclair has made an offering of securities to raise capital and has made numerous SEC filings related to this offering. See, e.g., SH40, Tabs 14-18. Sinclair has also entered into Programming Services Agreements (PSAs) with respect to WNUV and

WVTV. T. at 1797; 1184.²⁰ David Smith did the negotiating on behalf of himself and his brothers in connection with these PSAs. T. at 1184; 1996. The PSAs provide that WCGV in Milwaukee and WBFF in Baltimore will provide programming for WVTV in Milwaukee and WNUV in Baltimore, respectively. T. at 1176-78. David's brothers also play a role in Sinclair's PSAs to the extent that they are involved in the ultimate decision making. T. at 1798.²¹

163. David Smith is one of the people responsible for acquiring programming for the Sinclair stations. T. at 1141-42; 1780-81; 1989. He is involved in negotiating the price of syndicated product and buying these products is a "continual activity." T. at 1993-94. David Smith has dinners with syndicators regarding programming, after regular business hours. T. at 1775-78.²² He reviews locally produced programming of the Sinclair stations such as the Baltimore hour newscast; if he has comments, he will call the general manager and "basically run the business." T. at 1995. David Smith also periodically attends conventions of program producers. T. at 1994.

²⁰ A PSA is a contract that permits a company like Sinclair the option to acquire inventory on other television stations in the market, which, in turn, permit Sinclair to program the station and sell the inventory. T. at 1997.

²¹ According to the termination provision in the WNUV PSA, however, the Smiths have the power to unilaterally terminate the WNUV PSA with 30 days notice but are under no obligation to do so. SH40, Tab 34. Furthermore, there is no future bar against future potential business of that nature by virtue of Four Jacks' diversification pledge in this proceeding. T. at 1178-79.

²² David Smith makes himself available to syndicators if they wish to meet outside of normal working hours and makes himself available to accommodate their schedules. T at 1144.

164. David Smith plays a role in the acquisition of programming for WNUV and WVTM in connection with the PSAs, the same role that he does in acquisition of programming for other stations. T. at 1797-98.

165. David Smith also reads the Nielsen ratings books periodically, which come out six times a year and is involved in the negotiation of Sinclair's contract with Nielsen. T. at 1997. He is involved in the hiring of Sinclair's national sales representative to the extent that he may weigh other possible deals available to the company. He may, in fact, negotiate the deals himself. T. at 1997-98.

166. After the issue was added, David Smith testified that if Four Jacks' Application for Channel 2 is granted, he will continue to perform whatever functions he is able to at Sinclair. T. at 1998. While he would delegate functions concerning the purchases of film product, id., he would not forgo his responsibilities of reviewing the contracts or the film sales. T. at 1999-2000. Similarly, he would not delegate his duties regarding the hiring and firing of general managers or his involvement in the acquisition process. T. at 2000-01.

c. Robert Smith Testified That, Along With His Brothers, He Manages Sinclair's Subsidiary Television Stations

167. Robert Smith is Vice President, Treasurer and a Director of Sinclair. He has held the same title at Sinclair since 1988. T. at 2062. Robert Smith's duties at Sinclair are to manage, with his brothers, the Fox affiliate stations that

Sinclair owns. T. at 1239-40. At the 1993 Hearing, Robert Smith testified that his duties vary from day to day but include discussions about "programming, personnel, hiring, and firing thereof, finances, future of the business, the future of the company, and making decisions acting on those parts of the business." T. at 1241, 2107-08. He reviews sales reports and is involved in Sinclair's acquisition process. T. at 2106-07.²³

168. At the 1993 hearing, Robert Smith testified that his typical day at Sinclair is atypical but his regular work hours are from 9:00 to 5:00. T. at 1244. He also testified that his brothers have the same work hours as he does, T. at 1244-45, and that generally everybody is working regularly. T. at 1248.²⁴

169. Robert Smith testified that, in regards to WTTO, he has signed off on purchase order requests and worked on the supervisor's manual. T. at 2065-66. Robert Smith testified that the purchase orders were of all types, including equipment and supplies. T. at 2066.

d. Frederick Smith Testified That He Is Available Full Time to Do Whatever Is Needed at Sinclair

²³ At the 1994 hearing, Robert Smith testified that he has no specific duties on a day to day basis as Vice President and Treasurer of Sinclair. T. at 2062.

²⁴ At the 1994 hearing, Robert Smith testified that he does not have any regular working hours but that there was nothing inaccurate about his answers at the 1993 hearing. T. at 2063, 2065. He further testified that, in his mind, nine to five is a generic term and sometimes his hours are noon to eight. T. at 2065. He testified that he make his own hours and comes into the office when something is pressing. T. at 2105.

170. Frederick Smith is Vice-President, Assistant Treasurer, and Director. T. at 1296. At the 1993 hearing, Frederick Smith testified that during the day, when he is not at his dental practice, he is generally at the offices of Sinclair. T. at 1295-96. His office hours at Sinclair are usually 9:00 a.m. until about 5:00 p.m. Sometimes he stays at Sinclair until 5:30 or 7:00 p.m. T. at 1296. He works approximately 40 hours a week at Sinclair. T. at 1298.²⁵ At the 1993 hearing, Frederick Smith testified that the most he has worked in a week at Sinclair during the last year or so is "[m]aybe 50 hours, 55 hours." T. at 1300.

171. Four Jacks' Application states that Frederick Smith became a full-time employee of Sinclair on July 1, 1991 and that, for a year prior to that time, he worked approximately 25 to 30 hours a week for Sinclair. SH46 (Exh. 6 at 3). Frederick Smith testified that the term "full-time" as used in the Application means that he was working 40 hours a week at Sinclair after July 1, 1991. T. at 2223-24. He has had work to do at Sinclair since

²⁵ Similarly, at the 1994 hearing, Frederick Smith testified that he typically spends six days per week in the building where Sinclair's offices are located, working for Sinclair and its subsidiaries. T. at 2155.

He also testified that he has never had specific duties at Sinclair, and that he currently is "spending less time on a day-to-day basis [at the offices] there. I'm not there 5 days a week necessarily." T. at 2137. He estimated that he now averages approximately 2 1/2 days per week working at the offices of Sinclair. T. at 2146. He cited two reasons for the decrease in hours at Sinclair's offices: 1) he has been learning to pilot Sinclair's corporate aircraft, and 2) he is building a house. T. at 2224-25.

he first began working there on a regular basis in June or July 1990. T. at 1312-13. He considers his roles with Sinclair and the Smiths' other television businesses to be a full-time responsibility "[i]n the sense that I'm available all the time." T. at 2158.

172. As vice president of Sinclair, Frederick Smith "performs whatever is needed."²⁶ He has been involved in the hiring and firing of personnel at all of the Sinclair's stations. T. at 1329-30.²⁷

173. In connection with his position at Sinclair, Frederick Smith might have discussions with the general managers, sales managers, evaluate the retirement plan or health plan, and "things like that." T. at 1331. Frederick Smith participates with all of his brothers in any ongoing issues that have to be explored or discussed and any decisions that are made on a regular basis. T. at 1331.²⁸

174. Frederick Smith estimates that he spends several hours a week at least on the television stations owned by Sinclair. T.

²⁶ For example, Frederick Smith is currently working on the 401K retirement plan for Sinclair. T. at 1298.

²⁷ Frederick Smith testified at the 1994 hearing, however, that although he is available for these duties, he no longer routinely performs them. T. at 2159.

²⁸ When asked what functions he performed as director of Sinclair, Frederick Smith testified "[p]articipate as director." Similarly, when asked what function he performed as assistant treasurer of Sinclair, Frederick Smith testified "[p]articipate as assistant treasurer." T. at 1298.

at 1332. He also spends much of his time reading to update his knowledge of the broadcasting business. T. at 2226.

175. Some weeks, he has spent his entire week working outside of the office going, for example, to conventions of buyers in various cities, such as San Diego and Florida. T. at 1300. He attends national meetings of the National Association of Broadcasters and the National Association of Television Programming Executives, both of which last a couple of days. T. at 1340-41.²⁹ He also attends Fox network meetings approximately twice a year and these meetings last a couple of days. T. at 1341.

e. Sinclair's Corporate Tax Returns Represent That the Three Smiths Spent 90% of Their Time on Sinclair in 1992

176. In its corporate tax return for 1992, Sinclair represented to the United States Internal Revenue Service (IRS) that the three Smiths spent 90% of their time on the business of Sinclair and its subsidiaries. Exhibit 40, Tab 1 at FJS0013. In its corporate tax return for 1991, Sinclair represented to the IRS that David and Robert Smith spent 100% of their time on the business of Sinclair and its subsidiaries while Frederick Smith spent 75% of his time. Id. at FJS0015. David Smith testified that there is no reason to doubt the accuracy of what is reported on these Sinclair corporate tax returns. T. at 1785-86, 1789.

²⁹ Generally speaking one or two of the Smith brothers go on these trips. T. at 1341. Frederick Smith believes those meetings are important. T. at 1342.

9. Four Jacks Offers Various Positions To Support Its Contention That It Has Not Lacked Candor Before the Commission

177. Four Jacks has maintained that this issue should never have been added. See, e.g., Four Jacks' Motion for Summary Decision, at iii-iv (filed Feb. 28, 1994); Memorandum Opinion and Order, FCC 94M-246 at ¶ 6 (released April 11, 1994).

a. Four Jacks Contends That the Three Smiths Are Not Employees of Sinclair and Never Intended to Resign Their Positions at the Company

178. The three Smiths testified that they do not consider themselves employees of Sinclair. FJ26, 27, 28, at ¶ 6. For example, David Smith does not consider himself an employee of Sinclair in the "normal sense of the word." T. at 1762.

179. When asked at the 1994 hearing what he was trying to convey when he testified at the 1993 hearing that he worked as "an employee of Sinclair," David Smith testified that this was "a narrative interpretation" and that he doesn't view himself as an employee of Sinclair. T. at 1771. He stated that "owner/operator" was a more appropriate characterization. T. at 1771.

180. When asked at the 1994 hearing "[w]here and in what capacity are you employed," however, David Smith responded that "I'm an officer and director of Sinclair Broadcast Group which is a holding company that is the sole stockholder in a number of television stations." T. at 1762.

181. David Smith testified that he has not had a job where he was an employee since he was 23 years old and that he has

never had a boss since that time. T. at 1767-68. David Smith later admitted on cross examination that he was an employee of WPTT in Pittsburgh as general manager in 1984. T. at 1768. David Smith also had previously testified at his deposition of July 29, 1993, that he stopped his employment at Comark in 1984, T. at 1768-69; at the 1994 hearing he testified that this statement was "a poor choice of words." T. at 1769.

182. Frederick Smith considers his status as a Sinclair employee to be "a semantics issue in my mind." T. at 2141. He testified that he does not consider himself "an employee in a conventional sense." T. at 2133. At the 1994 hearing, however, Frederick Smith testified that the statement contained in the Application that he became a full time employee of Sinclair in 1991 was not incorrect. T. at 2142. He testified that the statement was, however, incomplete. T. at 2143. His rationale is that

I don't have anyone telling me what to do. I go and come as I please. I have no specific job description. I'm specifically an officer and a director.

T. at 2139.

183. Previously, however, Frederick Smith was an officer, director, and the sole stockholder of Frederick G. Smith, M.S., D.D.S., P.A., a Professional Corporation. T. at 2131. Frederick Smith testified that he considered himself an employee of that corporation, even though he did not have to "answer" to anyone. T. at 2131, 2133. In fact, Frederick Smith has changed his testimony regarding whether Sinclair has any employees at all.

At his deposition, he testified that Sinclair does not have any employees. T. at 2136. Subsequently, at the 1994 hearing, Frederick Smith testified that Sinclair does have employees. T. at 2136.

184. In their frozen direct testimony of September 1994 ("1994 Direct"), the three Smiths state that it has never been their intention to resign their executive positions with Sinclair. See, e.g., FJ26 at ¶¶ 3, 5. David, Robert, and Frederick Smith all testified that they have not made any pledge or commitment during the course of this proceeding which would obligate them to resign from Sinclair in any respect if Four Jacks is successful in obtaining Channel 2. T. at 1921 (David Smith), 2090 (Robert Smith); 2191 (Frederick Smith). David Smith further testified that he does not see any reasons at this point in time to suggest that he would have to leave Sinclair. T. at 1911.

b. Four Jacks Attempts to Distinguish the Three Smiths as Not Being "True Employees" of Sinclair

185. The 1994 direct case testimony of the three Smiths states that:

[i]t is true that payments to my brothers and me from our television business generally come through the same payroll system that administers compensation to employees of Sinclair and its subsidiaries. That is simply the mechanism my brothers and I have chosen to receive money from our company. For ease of administration, my brothers and I are enrolled in Sinclair insurance and benefit plans, just as are true employees of the company.

Id. at ¶ 7.

186. David Smith testified that all of the people listed on Sinclair's unemployment insurance forms, other than the Smith brothers, are the "true employees" of Sinclair. T. at 1813-14. He conceded, however, that he was treated as an employee of Sinclair for purposes of Maryland state unemployment. T. at 1814. He further testified that somebody at Sinclair made the decision to list him as an employee on these filings and that this was the only way to get the benefit of Maryland unemployment insurance coverage. T. at 1814-15.³⁰

187. David Smith also testified that if one were to look at the records that reflect who the employees of Sinclair are his name and his brothers' names would appear on those records. T. at 1763. He also testified that he views regular full-time employees and anybody who receives compensation as "one and the same." T. at 1847-48; see T. at 1856. He similarly equates the terms compensation, wages and salary. T. at 1858.

188. Robert Smith testified that he used the term "true employees" to distinguish the difference between how they view themselves, as owners and officers of Sinclair, and everyone else at Sinclair. T. at 2075. Robert Smith testified that everyone else at Sinclair, other than the four Smiths, would be considered a true employee of Sinclair in "that they punch a time clock."

³⁰ At the same time, he testified that by filing these unemployment insurance documents he was intending to suggest that he received compensation from Sinclair. T. at 1815.

T. at 2075.³¹ Robert Smith subsequently testified that David Amy, Sinclair's Controller, does not punch a time clock and that neither did any of Sinclair's other employees. T. at 2073-76.

189. Robert Smith could not recall having ever seen the term "true employees" used in connection with the business records of Sinclair at any time, under any other circumstances, other than in the three Smiths' direct case statements of September 1994. T. at 2075.

190. Frederick Smith testified that he considers everyone at Sinclair, other than the Smith brothers, to be the "true employees" of Sinclair. T. at 2182.

c. Four Jacks Has Contended That the Pledge to Resign Pertains to the Three Smiths' Full Time Presence at WBFF

191. In their Summary Judgment declarations, the three Smiths each testified that:

[b]y virtue of the nature of my relationship with Sinclair, the words 'then current employment' did not refer to my ownership or executive position at Sinclair but rather to any future employment or consulting contracts that I might have at the time that the Four Jacks Application is granted and to my full-time presence at WBFF(TV).

See, e.g., SH45 at ¶ 6 (David Smith); SH35 at ¶ 5 (Robert Smith).

192. When asked at his deposition of July 20, 1994 what the phrase "full time presence at WBFF" was intended to convey as used in the declaration in support of Four Jacks' Motion for Summary Decision, Robert Smith testified as follows:

³¹ Robert Smith also testified that true employees had managers that supervised them. T. at 2075.

Q. I'm trying to get your understanding of the phrase "current full-time presence at WBFF(TV)" as used in that sentence or paragraph.

A. Yes, it's just a matter of semantics. I mean full-time. I'm employed full-time.

Q. Are you employed by WBFF-TV?

A. Sinclair Broadcasting Group is my employer.

Q. That's what I thought. Now, do you have a full-time presence at any other entity or subsidiary of Sinclair?

A. Well, you could say I'm full-time by virtue I'm with SBG. Those are wholly-owned subsidiaries, so yes and no.

Q. So, you exercise your presence by virtue of your employment with Sinclair Broadcasting Group, Inc.? Is that correct?

A. That's correct.

T. at 2024 (emphasis added). At the 1994 hearing, Robert Smith testified that he recalled being asked all of those questions and that his answers were true at the time and remain true. T. at 2021-24.

193. On cross examination at the 1994 hearing, David Smith stated that he does not have a full-time position at WBFF. T. at 1910. David Smith also testified that he does not equate employment with ownership and that he was not employed at WBFF at the time of the February declaration. T. at 1910, 1919. He testified that he is "not employed [at WBFF] so [he] can't resign." T. at 1920. David Smith testified that as he divested himself of WBFF, he wouldn't have any employment to resign from there because he would resign from being an officer and director if he sold his stock in the company. T. at 1920.

194. David Smith also testified that, in the context of his February declaration, full time presence meant as a principal of the company, T. at 1917, and that he will not be involved in the business anymore because he will be divesting himself of the company, T. at 1919, which is something he is required to do. T. at 1917-18. Both David and Robert testified that the statement concerning WBFF in their declarations in support of Summary Decision was merely intended to convey their physical presence in the building. T. at 2005, 2021.

d. Four Jacks Contends That the Pledge to Resign Pertains to Future Employment

195. At the 1994 hearing, David Smith testified that in his view the term "then-current employment" extends to things other than any companies in which he might be a stockholder. T. at 1913. When he made his pledge to resign, David Smith did not consider himself employed by anyone at that time and considered the pledge to apply only to future employment. T. at 1915. As an example, he cited that it would apply if Sumner Redstone were to call him and ask him to come run Paramount Studios. T. at 1909-10, 1913-14; 2003-04.

196. Similarly, Robert Smith testified that: "If you take it one at a time, '... resign from his then-current employment' - I could view that as, you know, working for McDonald's or a lemonade stand." T. at 2092.

197. Frederick Smith similarly testified that:

And the issue of the then current employment, my, my thought process on that was is that gee, let's say we apply in 1991 for WMAR. In the interim, 6

months, a year, now it's been 3 years, I get a job, another job. I may be flying commercial aviation.

T. at 2198.

e. Four Jacks Contends That the Three Smiths' Intention to Remain at Sinclair Was Made Clear Throughout This Proceeding

198. In declarations filed in support of their Motion for Summary Judgment, the three Smiths state that they "believe that our filings with the FCC made our intention [to remain at Sinclair] clear. See, e.g., SH35 at ¶ 6. In their 1994 direct case testimony, the three Smiths similarly contend that they "believe that this intention [to remain at Sinclair] was made clear in Four Jacks' filings to the FCC throughout the course of this proceeding. FJ26 at ¶ 8.

199. Robert Smith testified that he believes that every filing by Four Jacks with the FCC in this proceeding makes "crystal clear" that he intends to remain with Sinclair if Four Jacks' Application is granted: "in my mind, its 100 percent affirmative that that's what that says when I read it." T. at 2095-96.

200. Frederick Smith testified that his use of the phrase "then-current employment" made clear his intent to stay with Sinclair if Four Jacks' challenge in this proceeding were successful. T. at 2199. Asked if any filings with the Commission specifically expressed his intent to retain his position with Sinclair, Frederick Smith responded: "I'm not sure where it says that. It doesn't say we won't." T. at 2198. He

later added: "I never thought that SBG had anything to do with respect to this whole thing. This is a BFF issue in my mind." T. at 2198.

f. Robert Smith Contends That He Is Self Employed As a Corporation

201. At the 1994 hearing, Robert Smith testified that he considers himself self-employed. T. at 2010, 2012-14. More specifically, Robert Smith testified that he is self employed in the television business as a corporation. T. 2014-15. He also testified that he is self-employed in other companies as well, including Cunningham Communications, Keyser Communications, and Keyser Investments. T. at 2015. David Smith testified, however, that the officers of Sinclair are elected by and serve at the will of the board of directors, T. at 1767, 2025, and can be removed by the board. T. at 1766.³²

202. Robert Smith also testified that he did not know if he filed any form with the federal government that would suggest that he is self-employed. T. at 2017.

10. Frederick Smith Recognized That Others Might View Their Status at Sinclair as Employees

a. Frederick Smith Testified That the Average Person Might Conclude That He Is an Employee of Sinclair

203. When asked at the 1994 hearing about his status at Sinclair, Frederick Smith testified as follows:

I think the issue here, Judge, is, is that counsel, Mr. Greenebaum, keeps wanting me to say that I'm an

³² Robert Smith testified that he did not know whether he could be fired from his position at Sinclair. T. at 2025-26.

employee of Sinclair Broadcast Group. and in the sense that we get a W-2, get health insurance, that's a traditional relationship. But the reality of it is I'm not really an employee in the sense that I don't have anyone telling me what to do. I go and come as I please. I have no specific job description. I'm specifically an officer and a director.

And it's -- thinking about this it's sort of like the, the sea with fish in it. If you look at fish and sharks, and you ask the average person is that -- are they fish? Yeah, they're all fish. But the reality is a shark is not a fish. A shark is an elasmobranch. It's not related to the fish. It's not like a fish. From a biology standpoint. but if the outside person is looking, that's a fish. That's not a fish.

So from an outside standpoint, the average person is looking at me, they might say hey, that guy is an employee because he has a W-2, he has retirement, and he has health insurance.

T. at 2138-39 (emphasis added).³³

- 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

204. No plans have been made as to who would take care of the rest of the Smiths' interests if Four Jacks is successful in obtaining Channel 2. T. at 1149. Robert Smith testified that the three Smiths have time to add a 40 hour a week commitment to their existing responsibilities but he recognized that this is "very hard to understand and to believe." T. at 2111-13.

³³ In fact, according to the American Heritage Dictionary, a shark is a fish and an elasmobranch is a type of fish. American Heritage Dictionary, Second College Edition, at 442, 1127 (1985).

11. The Three Smiths' Testimony Is Inconsistent Regarding Whether Four Jacks Will Run Channel 2 by Management Committee

a. The Three Smiths Have Pledged to Each Work 40 Hours a Week at Management Positions at Channel 2

205. In its Application, Four Jacks represented that it will integrate 3 of its 4 shareholders into the full-time management of Channel 2 at Baltimore, Maryland: David Smith, Robert Smith and Frederick Smith (the "Integration principals" or the "three Smiths"). See SH46 (Exh. 6); T. at 1148.

206. David D. Smith, a 25% shareholder of Four Jacks, proposes to devote a minimum of 40 hours a week to the position of General Manager of Channel 2 in Baltimore. In that position, his responsibilities will include supervision of the day-to-day operation of the station, supervision of the hiring and firing of personnel, formulation of all station policies, oversight of station finances, selection, development and procurement of the station's entertainment programming, and implementation of the station's EEO program. FJ2 at 1. As general manager, David Smith would be responsible for the overall operation of the company, including "every facet" of the company. T. at 1148.³⁴

207. Robert Smith proposes to work on a full-time basis (a minimum of forty (40) hours per week) as Station Manager of Channel 2 in Baltimore. In that position, his responsibilities

³⁴ David Smith testified that, to the extent that he wants to be involved as a general manager, it's a 24 hour a day job. T. at 1072. At the very least, it is an eight hour a day job. T. at 1070-71.

will include ascertainment of community needs and concerns, oversight and maintenance of the station's public inspection file, selection and development of the station's public affairs and news programming, and ensuring community awareness of the station through promotions and charitable projects. FJ3 at 1.

208. Frederick Smith proposes to work on a full-time basis (a minimum of forty (40) hours per week) as Operations Manager of Channel 2 in Baltimore. In that position, he will have direct responsibility over the news, programming, engineering, and traffic departments and that he will be responsible for the scheduling and training of personnel, as well as the supervising of the station's technical operations. In that position, he will also review film contracts and be involved with his brothers in the hiring and firing of station personnel. FJ4 at 1.

- b. Four Jacks' Application States That, Notwithstanding Their Individual Titles, the Four Jacks' Principals Will Run Channel 2 as a Management Committee

209. The Four Jacks' Application states that:

[t]hough they will carry, respectively, the titles of General Manager, Station Manager, and Operations Manager, they will run the proposed family owned station as a management committee, ultimately sharing responsibilities for all aspects of station management and operations.

SH46 (Exh. 6 at 4) (emphasis added).

- i. David and Robert Smith Testified That They Have Not Discussed Whether They Will Have a Management Committee in Place at Channel 2

210. David, Robert, and Frederick Smith all stated that they had not discussed whether they will have some overall management

committee in place, formally or informally, in connection with the operation of the station if Four Jacks is successful in obtaining Channel Two. T. at 1149; 1271-72; 1924; 2210. David Smith testified at his deposition of July 29, 1993, that no final decision had been made as to whether they will have a formal committee to oversee the operation of the business on a day-to-day basis. T. at 1927.

- 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

211. The Smith brothers operate Sinclair on a management by committee approach. T. at 1147.³⁵ They do not have any formal structure where people are assigned written responsibilities and delegated duties. T. at 1147. David, Robert, Frederick and Duncan Smith all sit in a room and everyone does whatever comes to their attention at that time, regardless of which entity is involved. T. at 1137, 1161-62, 1262-63, 1324; 1923. The Smiths attend to the business of all of their entities during their normal working hours at Sinclair. T. at 1264.³⁶ They all run

³⁵ There are no written guidelines for the organization. T. at 1262.

³⁶ Sinclair, Gerstell, Keyser Investments, Keyser communications, and Cunningham communication are all located at the same facility at 2000 West 41st Street, Baltimore, Maryland. T. at 1134-35, 1263, 1325. There is one phone system for all these companies. T. at 1325, 1263. To the extent that David Smith gets calls about all of these companies, he receives them during the normal working day or when ever somebody calls. T. at 1135.

the business regardless of each person's title. T. at 1152. Their corporations are run on "a management by committee scenario." T. at 1224; see T. at 1924, 2203. Whoever is there might deal with whatever matter that arises, depending on the severity of it. T. at 1242. What they do is geared to their interests as opposed to what their titles are. T. at 1253. "Titles don't mean anything to [them]." T. at 1253.³⁷ Under the management committee approach, decisions are reached by consensus, with each of the four Smith brothers having an equal voice. T. at 2204.

212. At his deposition on July 27, 1993, Frederick Smith testified that Sinclair has a management committee type of environment, whereby each brother has an equal vote and the same voice as each other brother. T. at 2203-2205. Frederick Smith testified that the Smiths plan to have such a committee at Channel 2 if they are successful. T. at 2204-05.³⁸

Robert Smith testified that he could not break down how much time he spends on the Smiths' various business entities, including Sinclair, on a daily basis and that his brothers schedules were able the same as his. T. at 1266.

³⁷ For example, to the extent that Frederick Smith does work on Keyser or Cunningham, he does that work at the offices of Sinclair. T. at 1337.

³⁸ At the 1994 hearing, Frederick Smith distinguished the management committee to be used at Channel 2 from the management committee used to run Sinclair in that David would have the ultimate decision making power as general manager of Channel 2. T. at 2206; 2115-16. Both Frederick and Robert Smith testified that WMAR would be run by a management committee, with input from all of the station's department heads. T. at 2206, 2115.

213. At his deposition on July 29, 1993, David Smith testified that how the Smiths will conduct their operation of Channel 2, "isn't radically dissimilar from how [they] do things today. [They] don't view [themselves] as officers in, you know, one category and employees in another and then act accordingly." T. at 1927-28.³⁹

B. PROPOSED CONCLUSIONS OF LAW

1. Introduction

214. The burden of proceeding and the burden of proof on the misrepresentation issue against Four Jacks has been assigned to Four Jacks. Memorandum Opinion and Order, FCC 94M-51 (released Feb. 1, 1994).

215. Lack of candor exists when an applicant breaches its duty "to be fully forthcoming as to all facts and information relevant to a matter before the Commission, whether or not such information is particularly elicited." Silver Star Communications-Albany, Inc., 3 F.C.C. Rcd 6342, 6349 (Rev. Bd. 1988), modified, 6 F.C.C. Rcd 6905 (1991); Fox River Broadcasting, Inc., 93 F.C.C.2d 127, 129 (1983). Misrepresentation is defined as "an intentional misrepresentation or act intended to deceive." Silver Star, 3 F.C.C. Rcd at 6349.

216. Intent to deceive is an "essential element" of a

³⁹ On the other hand, David Smith subsequently testified at the 1994 hearing that when he sits down at a holding company level he views himself as a principal while if he were to sit down as general manger of a station along with other operational people of the company then he would consider himself an employee because he is operating at that level. T. at 1928.

misrepresentation or lack of candor finding. Weyburn Broadcasting Ltd. Partnership v. FCC, 984 F.2d 1220, 1232 (D.C. Cir. 1993).

217. For the reasons set forth below, it is concluded that Four Jacks misrepresented and lacked candor in its Application, pleadings and testimony before the Commission regarding its integration commitment to resign the then-current employment of David, Robert and Frederick Smith. More specifically, it is concluded that the three Smiths lacked candor and made a material misrepresentation to the Commission by pledging to resign their then-current employment while intending to remain at their positions as officers of Sinclair. Four Jacks' misrepresentation and lack of candor is confirmed by Four Jacks' inconsistent, unbelievable, and shifting explanations of the pledge and the employment status of the three Smiths. In fact, the evidence shows that Four Jacks' characterization of these facts very much depends upon what position is advantageous for Four Jacks to take at any given time.

218. It is therefore concluded that Four Jacks has not met its burden to show, by a preponderance of the evidence, that it was candid with the Commission regarding the true meaning of the three Smiths' pledge to resign. See Memorandum Opinion and Order, FCC 94M-51 at 6 (released Feb. 1, 1994). On the contrary, the evidence leads to the inescapable conclusion that Four Jacks misrepresented and lacked candor before the Commission. Accordingly, based on the clear weight of the evidence, Four

Jacks is disqualified as an applicant in this proceeding and its Application for Channel 2 is denied.

2. Representations Contained in the Four Jacks Application Are Inconsistent With the Three Smiths' Belatedly Revealed Intention to Remain at Sinclair

219. In light of the three Smiths' now-evident intention to remain at their positions at Sinclair, inconsistent statements in the Application are sufficient to support a finding of lack of candor. In its Application, Four Jacks volunteered that both Robert and Frederick Smith became "full-time employee[s]" of Sinclair. SH46 (Exh. 6 at 2-3) (emphasis added). In the very same Application, only a few pages away, is Four Jacks' pledge that each of the three Smith brothers will resign from their "then-current employment." Id. (Exh. 6 at 4-5) (emphasis added). Thus, in its Application, Four Jacks itself identified the full time employment that Robert and Frederick Smith pledged to resign; the only possible conclusion to draw from the Application is that Robert and Frederick Smith intended to resign their employment at Sinclair. No other position is credible.

220. Relatedly, the language of the Application also discredits Four Jacks' contention that the Smiths are not employees of Sinclair because the Application explicitly refers to Robert and Frederick Smith as employees of Sinclair.⁴⁰

⁴⁰ There is an abundance of evidence, other than the Application, which confirms that the three Smiths are employees of Sinclair. This evidence includes the testimony of the three Smiths and Sinclair's representations to federal and state government agencies. See infra Section 3; see also Memorandum and Order, FCC 94M-51, at 4 (released Feb. 1, 1994) (Presiding Judge concluding, based on record before him, that circumstances

221. It is, therefore, concluded that the statements contained in the Application, which represent that Robert and Frederick Smith will resign their then-current employment, are directly contrary to the three Smiths' belatedly disclosed intent to remain at their current positions as officers of Sinclair. As a direct misrepresentation or omission to the Commission can result, by itself, in disqualification, the Application provides sufficient evidence upon which to base a finding of misrepresentation and lack of candor against Four Jacks. See Swan Creek Communications v. FCC, 1994 U.S. App. Lexis 33055 at *7 (D.C. Cir. Nov. 22, 1994) (copy attached) (citing Old Time Religion Hour, Inc., 95 F.C.C.2d 713, 719 (Rev. Bd. 1983)).

222. The representations contained in the Application are particularly reliable evidence upon which to base a finding of lack of candor. First, the Application is the crucial cornerstone document upon which the grant of any construction permit or license is based, as Four Jacks knows. Second, Four Jacks admits that, even after the addition of this issue, it has never amended the representations contained in the Application relied upon above. T. at 2231; see Garden State Broadcasting Ltd. Partnership v. FCC, 996 F.2d 386, 394 n.9 (D.C. Cir. 1993) ("each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application") (quoting 47 C.F.R. § 1.65(a)).

show Sinclair to be the three Smiths "then-current employment").