

43). He conceded that he supposed he knew it was there since he put it there. (Tr. 1543).

69. The box of non-produced documents was a box of about 8-1/2 x 11 x 2 containing about 30 to 40 pages of documents. The memo from Emily Barr, dated June 25, 1993, was in the middle of the box. (Tr. 1543). When asked if he had found the document he was looking for because it had the correct date, he said "pretty much." (Tr. 1544). At his deposition, Mr. Kilbourne had stated that he knew he found the correct memo "because it had the proper date on it." (Tr. 1545). At his deposition, Mr. Kilbourne was asked, "And in your mind there was only one memo to Mr. Roberts from Ms. Barr dated June 25, 1993?" He responded, "In my mind, yeah. There weren't that many going back and forth." (Tr. 1545).

70. Mr. Kilbourne took the June 25, 1993 memo to Mr. Howard, who asked where he had gotten it. When Mr. Kilbourne told him, Mr. Howard asked him to retrieve the entire box of non-produced documents. (Tr. 1546). Mr. Kilbourne then brought the box to Mr. Howard, whereupon Mr. Howard discovered the original Covington notes in the box. (Tr. 1547-48).

(b) The NBC Correspondence

71. One of the projects that Emily Barr undertook at the request of Baker & Hostetler in the summer of 1992 entailed gathering materials to demonstrate the issues-responsive programming that WMAR-TV had aired during the License Term. It was not WMAR-TV's practice to retain detailed records of the NBC network programming that was broadcast on the station after the

programming aired so Emily Barr needed to contact NBC to obtain copies of certain network programming records. (Scripps Howard Ex. 36, pp. 1-2).

72. 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 written records of certain news stories and entertainment programming that NBC had aired from June 1 through September 30, 1991. The purpose of this request was to help Ms. Barr identify the NBC network programming aired by WMAR-TV during the license term (May 30 - September 30, 1991) that addressed issues identified by WMAR-TV in 1991 to be of concern to the Baltimore community. (Scripps Howard Ex. 36, p. 2; Tr. 1722).

73. Ms. Cole and Ms. Anderson separately called Ms. Barr back to verify that the information she had requested was available. On August 10, 1992, a few days after her telephone conversations with Ms. Cole and Ms. Anderson, Ms. Barr sent the same memorandum by facsimile to each of them. The August 10, 1992 facsimile from Emily Barr stated:

Re: ARCHIVE REQUESTS

It was a pleasure speaking to both of you on Friday about WMAR-TV's need for some archival information from NBC. As I explained over the phone, we are in the midst of a license challenge and need information about specific NBC programming (both news and non-news) for our attorneys.

As I mentioned on Friday, we are looking for examples of programming, both network and local that dealt with the ascertained issues we identified through interviews with local community leaders. The period in question is

June 1, 1991 through September 30, 1991 and the issues are as follows:

- 1) Education
- 2) Unemployment
- 3) Race Relations/Minority Concerns
- 4) Metropolitan/State Concerns
- 5) Crime & Criminal Justice
- 6) The Media
- 7) Environmental Concerns
- 8) Social Welfare/Societal Concerns
- 9) Child Abuse
- 10) Health & Safety
- 11) Drug & Alcohol Abuse
- 12) Government Affairs/Legislation (Maryland only)
- 13) Performing Arts/Entertainment/Recreation
- 14) Literacy
- 15) Economic Development
- 16) Homelessness
- 17) Redistricting (Maryland only)
- 18) The Supreme Court
- 19) Cultural Development
- 20) Youth Concerns

(Scripps Howard Ex. 36, p. 2 and Tab A; Four Jacks Ex. 19). The issues of unemployment, the media, social welfare and child abuse were on WMAR-TV's second quarter 1991 issues/programs list but not on the third quarter list. The issues in the third quarter list were not written down until the end of the third quarter of 1991, i.e., October 10, 1991 (after the license renewal period) and contained seven new issues -- literacy, economic development, homelessness, redistricting, the Supreme Court, cultural development and youth concerns. (Scripps Howard Ex. 3, Att. F; Tr. 614-15).

74. In the end, Ms. Barr received two sets of programming documents from NBC, one from New York relating to NBC news programming and one from Los Angeles relating to NBC entertainment programming. She made a copy of each set of documents and forwarded the originals to Baker & Hostetler,

although she did not recall when she forwarded the documents. These documents, which Ms. Barr characterized as totalling nearly two thousand pages, were produced to Four Jacks.^{12/} Scripps Howard Ex. 36, p. 3).

75. On July 16, 1993, Ms. Barr was deposed in connection with this proceeding. When Ms. Barr was asked if she gave NBC a list of issues, she responded "Yes," but when asked if that was in writing, she stated, "No, it was not. Actually, it was faxed to them." (Tr. 1683). When asked if she had a copy of that fax, Ms. Barr responded, "No, I don't." Ms. Barr claims that at the time of her deposition, she "believed that the testimony [she] gave was true and accurate" and "[she] did not give any further thought to this matter because the facsimile was not a 'document' relating to ascertainment or programming during the License Term, but simply a request for information that [she] had described fully and accurately." (Scripps Howard Ex. 36, p. 3).^{13/}

76. Ms. Cole responded to Ms. Barr in a message sent by facsimile. 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. Ms. Barr informed Ms. Cole by telephone that they would, and Ms. Cole agreed to send

^{12/} Scripps Howard called counsel for Four Jacks after Ms. Barr's deposition to claim that a number of these documents were inadvertently produced and ask for their return. When Four Jacks declined to do so, Scripps Howard did not press the point by filing a motion. (Tr. 1563).

^{13/} Four Jacks' Motion to Enlarge also pointed out that at page 105 of her deposition, when she was asked if she wrote any kind of a letter to NBC asking for the information produced in the Scripps Howard documents, she answered "No, I did not. I made a phone call." Ms. Barr has not addressed this answer. See Scripps Howard MO&O, n.1.

Ms. Barr all of the documents in NBC News Archives' records relating to the issues Ms. Barr had specified. Ms. Anderson also responded, although Ms. Barr did not recall whether she telephoned or simply sent the records, with a cover memorandum stating that she was responding to Ms. Barr's request and enclosing the network records. (Scripps Howard Ex. 36, pp. 2-3).

77. As noted earlier, on October 26, 1993, Scripps Howard filed an "Opposition to Request for Permission to File an Appeal of the Order Denying the Request for Issuance of a Subpoena Duces Tecum," which represented that the NBC correspondence was "not in the possession of WMAR-TV over three (3) months ago;" that the "subpoena seeks documents for a broad time period that may or may not exist;" and that "a search for the documents is likely to take some time and cause delay." (Scripps Howard MO&O, para. 7).

78. According to Ms. Barr's direct case testimony, on October 26, 1993, Kenneth C. Howard, Jr., an attorney with Baker & Hostetler, telephoned her and requested that she review her files to confirm that she had not misspoken during her deposition about her correspondence with NBC. (Scripps Howard Ex. 36, pp. 3-4). She did not remember at what time Mr. Howard called her. (Tr. 1709). When asked if she had previously reviewed her files to confirm that she had not misspoken during her deposition about her correspondence with NBC, Ms. Barr responded that she had previously reviewed her files on a couple of occasions, not specifically to look for any one document but to look for everything that may be relevant. (Tr. 708).

79. After Mr. Howard's request, Ms. Barr immediately began to look for the NBC correspondence. She did not recall how soon

she found the documents but admitted that they were in the top drawer of her file cabinet and that they "took less than a day to find." (Tr. 1710-12). Ms. Barr located the document that she had sent by facsimile to NBC and the document that she received back from Ms. Cole by facsimile, attaching a sample of the type of information that was available from NBC News Archives. (Scripps Howard Ex. 36, p. 4; Tr. 1709-10).

80. Ms. Barr claimed that immediately after she located the NBC correspondence, she sent a copy of the document that she had faxed to NBC to Mr. Howard via facsimile. She stated that to the best of her knowledge, the date on the facsimile cover sheet and the line on the top of the facsimile received by Mr. Howard (Tab A) accurately represent the date and time that she sent him the documents. There is no cover sheet in Tab A. The document itself indicates a fax date and time of October 26, 1993, 17:45. Shortly thereafter, at Mr. Howard's request, Ms. Barr sent him a copy of the document that she had received from NBC in response to the message she faxed. (Scripps Howard Ex. 36, p. 4, Tabs A and B). The time the document was faxed is not legible. (Id. at Tab B).

81. Although Scripps Howard's representations in the October 26, 1993 Opposition are integrally related to the issues that were added (Scripps Howard MO&O, para. 12), at the hearing Scripps Howard objected vigorously to cross-examination concerning the statements in the Opposition. (Tr. 1697-1706). Counsel for Scripps Howard stated as follows:

[The] question assumes that the presence or absence of the document at WMAR-TV is a -- was an issue with respect to this document,

and that is not the case. This was a subpoena to be issued that requested records in the possession of NBC, not of WMAR.

(Tr. 1700). He continued:

The documents that were being sought were from NBC. We still don't know whether NBC has or -- doesn't have these documents. We still don't know whether NBC would have taken a lengthy time to do the search.

(Tr. 1701).^{14/}

B. THE ISSUE AGAINST FOUR JACKS

1. Integration and Diversification Pledges

82. The four officers, directors and shareholders of Four Jacks -- David D. Smith, Robert E. Smith, Frederick G. Smith, and J. Duncan Smith -- are officers, directors and shareholders of Sinclair Broadcast Group, Inc. ("Sinclair" or "SBG"). (Four Jacks Ex. 1 at 2). Through various subsidiaries, Sinclair owns and operates television stations WBFF(TV), Baltimore, Maryland; WPGH-TV, Pittsburgh, Pennsylvania; WTTE(TV), Columbus, Ohio; WTTO(TV), Birmingham, Alabama; and WCGV-TV, Milwaukee, Wisconsin. (Four Jacks Ex. 1 at 2; see also Tr. 1793-94).^{15/}

83. In Four Jacks' FCC Form 301 application, in its subsequent Integration and Diversification Statement, and in its direct hearing testimony, Four Jacks' principals proposed to

^{14/} No opposition to the subpoena request was ever filed by NBC.

^{15/} Stations WTTO(TV), Birmingham, Alabama and WCGV-TV, Milwaukee, Wisconsin were acquired by Sinclair subsidiaries subsequent to the Phase I hearing in this case. See Petition for Leave to Amend filed by Four Jacks on June 17, 1994. On November 22, 1994, the Commission granted an application for consent to the acquisition by a Sinclair subsidiary of television station WLFL(TV), Raleigh, North Carolina (File No. BALCT-940817KE).

divest, in a manner which will be in compliance with Section 73.3555 of the Commission's Rules and Regulations, all of their interests in and sever all connections with WBFF(TV), Channel 45, Baltimore, Maryland. (Four Jacks Ex. 1 at 1-2; Four Jacks Ex. 2 at 1-2; Four Jacks Ex. 3 at 1-2; Four Jacks Ex. 4 at 1-2; Four Jacks Ex. 26 at 1; Four Jacks Ex. 27 at 1; Four Jacks Ex. 28 at 1; Scripps Howard Ex. 47 at 3; Scripps Howard Ex. 46 at Exhibit 4). The HDO in this case acknowledged that "the principals of Four Jacks have pledged to divest their interests in WBFF(TV) if Four Jacks is the successful applicant." HDO, para. 3.

84. In the event that the Four Jacks application is granted, David, Robert and Frederick Smith will each be integrated into the day-to-day management of the Baltimore television station on a full-time basis (at least 40 hours per week). David D. Smith will be the General Manager, Robert E. Smith will be the Station Manager, and Frederick G. Smith will be the Operations Manager of the Baltimore television station. (Four Jacks Ex. 1 at 1).

85. In their individual direct case testimony dated September 13, 1993, David, Robert and Frederick Smith each stated that "[i]n the event of a grant of Four Jacks' application, to fulfill my integration commitment, I will resign from my then-current employment and will limit or terminate any other activities that might interfere with my integration commitment." (Four Jacks Ex. 2 at 1; Four Jacks Ex. 3 at 1; Four Jacks Ex. 4 at 1).

2. The Ability of David, Robert and Frederick Smith to Fulfill Their Full-Time Integration Commitments

86. Each of the stations owned (or to be acquired) by SBG has a professional General Manager who is fully responsible for each station's day-to-day operations. (Four Jacks Ex. 2 at 2; Four Jacks Ex. 3 at 2; Four Jacks Ex. 4 at 2; Tr. 1144, 1250, 2107). If David, Robert and Frederick Smith talk to the station general managers once a week, "that's a lot." (Tr. 2111; see also Tr. 1334-35 (as much as two months go by without any communication by any of the brothers with any station)). Moreover, SBG has a full-time Comptroller who handles SBG's financial and business operations on a daily basis. (Four Jacks Ex. 2 at 2; Four Jacks Ex. 3 at 2; Four Jacks Ex. 4 at 2; Tr. 1145, 1250). Each of Sinclair's stations has its own business manager and business department. (Tr. 1145, 1250).

87. In both phases of the hearing, David, Robert and Frederick Smith were cross-examined extensively on their ability to accommodate their pledges to work full-time in the management of Four Jacks' proposed Channel 2 station in light of their positions with Sinclair. David Smith testified that, while he was involved in the purchase of syndicated programming for Sinclair's stations, syndication contracts are "boilerplate" with only two real elements. (Tr. 1993-94). Negotiating such contracts is "usually a very quick process" lasting from five minutes to an hour or two. (Tr. 1999). David Smith testified that if he spends an hour a week meeting with syndicators, "it's a lot." (Tr. 1143). Moreover, Sinclair's general managers can acquire certain kinds of programming without David Smith's

approval. (Tr. 1782). To the extent that the purchase of syndicated product interferes with his Four Jacks integration commitment, David Smith can easily delegate that function to existing personnel at the stations. (Tr. 1998-99).

88. David Smith testified that his only involvement in the hiring and firing of personnel at the Sinclair stations is down to the level of general sales manager. (Tr. 1991; see also Tr. 2106 (Robert Smith testimony to same effect)). There have been very few changes in these personnel since Sinclair was formed in 1986, probably no more than three. (Tr. 1992). In eight years, only two general managers have been hired; mostly, they are promoted from within. (Tr. 2000). Frederick Smith testified that it takes 20-30 minutes to make a firing decision; the brothers listen to the recommendation of the general manager, then make a decision. (Tr. 1332-33).

89. Expenditures for the Sinclair stations operate under a "PO" system whereby purchase orders are approved first by a department head, then by the station general manager, then forwarded to Sinclair's home office. Orders are sent to the Smiths' office periodically, and it takes "as much as two minutes at a time" to review them. (Tr. 1992-93; see also Tr. 2068). Stations with financial questions generally contact Sinclair's chief financial officer or accounting office, but not the Smiths directly. (Tr. 1335).

90. David Smith does not review sales contracts, barter arrangements, or rate cards for the Sinclair stations. Rate changes are "delegated to the people capable of running [the] day-to-day business of the company." (Tr. 1994-95). David Smith

is not involved in the purchase of insurance. (Tr. 1996). His involvement in negotiation of Program Service Agreements is in the initial negotiations, then renegotiating "some things" every five years. Id. Nielsen ratings contracts are negotiated once every seven years. (Tr. 1997). National advertising rep contracts are negotiated once every five years, and David Smith gets involved only in "the final deal and the economics of that deal." (Tr. 1998). Moreover, he "can step out of [negotiations] totally or I can be into it totally." (Id.)

91. David Smith is involved in the strategic planning of Sinclair, including the acquisition of new stations. He testified, however, that "there aren't a lot of television stations out there for sale or otherwise, so . . . the opportunities are very limited in terms of what you can do going forward in terms of growth." (Tr. 1996). Moreover, new acquisitions are "not something that I need to sit at a desk at and do. . . . [I]t's not really a desk job per se where you sit there and -- on a daily basis or weekly or monthly basis contemplate or analyze, well, I'm going to go out and buy this business or that business or whatever." (Tr. 2000-01).

92. Robert Smith testified that his involvement with Sinclair's stations was in a "supervisory overhead . . . role." He occasionally signs off on batch logs and purchase order requests and discusses personnel problems with the general manager if he is there. (Tr. 2065, 2107-09). David handles most of the syndication negotiations, and Robert will "pass on" the buying decision. (Tr. 2108). Robert does not usually review individual station sales reports. (Tr. 2106).

93. In the Phase I hearing, Frederick Smith testified that he spent "several hours a week" in connection with Sinclair's stations. (Tr. 1331-32). He stated that the stations "run an autonomous operation," and have "extremely good personnel." (Tr. 1336-37). At the Phase II hearing, Frederick testified that he had since cut back his time physically at Sinclair to 2 and 1/2 days per week: "Everything is very organized, and I'm out doing other things." (Tr. 2150). He is presently involved with a company airplane and is building a house. (Tr. 2224-25). The amount of decisions he is actually performing is very limited. (Tr. 2226). If Four Jacks is successful in its Channel 2 challenge, the primary Sinclair function Frederick would have to continue to perform is that of director for a board meeting once a year. (Tr. 2228).

94. David, Robert and Frederick Smith were also cross-examined as to their involvement in television stations WIIB(TV), Indianapolis, Indiana and WTTA(TV), St. Petersburg, Florida. Each of these stations is also run by a general manager. (Tr. 1139). David Smith testified that these stations are "so relatively small and so insignificant in terms of the scale of things that we do that I don't focus any real serious time or any measurable time on it at all." (Tr. 1138-39). He guessed that he spends five hours a year collectively on these two stations. (Tr. 1139). Similarly, Robert Smith testified that WIIB(TV) and WTTA(TV) are "small operation[s]." He talks to the general manager "usually once a week about what's going on." (Tr. 2108-09). Robert estimated that he spends "a couple of hours per week" on WIIB(TV) and WTTA(TV) combined. (Tr. 1256). Frederick

Smith testified that he spends a half an hour a month on the Indianapolis station. (Tr. 1342-43). As to the St. Petersburg station, he visits it once a year for about six hours (plus 10 hours transportation time). (Tr. 1344-45). He does nothing else in connection with the station. (Tr. 1345). Most of the involvement with WIIB(TV) and WTTA(TV) is left to David, Robert and Frederick Smith's brother, J. Duncan Smith. (Tr. 1140-41, 1345).

95. David, Robert and Frederick Smith also were asked about time spent with various other S-corporations in which they own interests. David Smith testified that these S-corporations "are primarily collection points for rental income. They are not active promoted businesses. In other words, we don't advertise the business. We don't solicit tenants for any of our businesses. They are primarily nothing more than collection points." (Tr. 2001; see also Tr. 1119, 1124-25, 1237).

96. For instance, Cunningham Communications, Inc. ("Cunningham") owns and leases space on two towers in the Baltimore area. (Tr. 1118-19, 1320). Cunningham has no employees. (Tr. 1124). David Smith's duties and responsibilities with respect to Cunningham are "to take phone calls . . . involving people who wish to rent space, negotiate contracts. That's essentially it." (Tr. 1118). Accountants collect information for tax reporting purposes; they file the company's tax returns. (Tr. 1125). Monitoring of the towers is done by county personnel, and the Smith brothers perform no maintenance on the towers. (Tr. 1119, 1125-26; see also Tr. 1230 (tower companies perform maintenance and painting)). David Smith

stated that on a yearly basis, Cunningham takes him no more than 25 hours "if that." (Tr. 1120). Similarly, Robert Smith has "very little duties at all" with respect to Cunningham; it occupies "a couple hours a month." (Tr. 1229-1230). Frederick Smith spends about five minutes per month on Cunningham. (Tr. 1319).

97. Keyser Investments owns the studio site that houses Sinclair and WBFF(TV). (Tr. 1126-27). It has one lease, which David Smith essentially negotiated with himself. (Tr. 1129). David Smith testified that if Keyser Investments takes him one hour a year, "it's a lot." (Tr. 1128). Robert Smith spends no time in terms of day-to-day management of Keyser Investments; it is basically a "compan[y] that write[s] us checks." (Tr. 1237). Other than signing its incorporation document, Frederick Smith has spent no other time on Keyser Investments whatsoever. (Tr. 1322).

98. Keyser Communications manages a single contract for inventory on a Pittsburgh, Pennsylvania television station. (Tr. 1111, 1113-14). It is "effectively a passive company." (Tr. 1112). The negotiating and management rights of the contract are assigned out; David Smith does "essentially nothing" in connection with Keyser Communications' management of the contract. (Tr. 1114, 1116). David Smith testified that if Keyser Communications takes a half hour a year, "it's a lot." (Tr. 1114). Robert Smith spends no time on Keyser Communications; it is a company that we "just basically collect checks on." (Tr. 1233, 1237-38; see also Tr. 1116 (David Smith testimony that Keyser Communications is "basically a dormant

company. I collect a check. That's it.")). Frederick Smith has spent "minimal" time on Keyser Communications -- a couple of minutes per month. (Tr. 1323-24).

99. Keyser Electric is a company owned by the four Smith brothers that employs one electrician and an assistant electrician to take care of electrical problems at the WBFF(TV) transmitter. (Tr. 1315-16). J. Duncan Smith has primary responsibility for this company. (Tr. 1317). Frederick Smith testified that Keyser Electric takes him five minutes a month in cursory discussions with his brother Duncan. (Tr. 1316-17).

100. Gerstell Development Limited Partnership ("Gerstell") "does essentially what Keyser does in Baltimore in terms of the studio space and what Cunningham does in terms of the tower space" with respect to Sinclair's Pittsburgh station. (Tr. 1130-31, 1318). It is contemplated to be no more active than the Smith brothers' other S-corporations. (Tr. 1133). David Smith would not be involved in negotiations with tenants; that would be handled locally. (Tr. 1133, 1136). His financial officer handles the company's bank loan. (Tr. 1133). David Smith's best estimate is that Gerstell will take "a couple hours a year." (Tr. 1136). Robert Smith spends "very little time" on Gerstell; a couple of hours a month at the most. (Tr. 1225-26). Frederick Smith stated that he plays no role in the day-to-day business of Gerstell; he spends "zero" time on it in the average week. (Tr. 1318).

101. David, Robert and Frederick Smith each made clear that they have sufficient time to devote to full-time management of Four Jacks' proposed station. None of them has set hours with

respect to their involvement in Sinclair; they can work at the office as much or as little as they see fit. (Four Jacks Ex. 26 at 3; Four Jacks Ex. 27 at 3; Four Jacks Ex. 28 at 3; see also Tr. 1990, 2063, 2105). Frederick Smith, for example, testified that "lunch is a big part" of his day, and that the 2 and 1/2 days a week he is at Sinclair are spent "reading, just sitting around . . . with nothing to do basically." (Tr. 1338, 2227). David, Robert and Frederick Smith spend their days reading the trade press, responding to phone calls, talking among themselves, contemplating business decisions, and talking to people around the WBFF(TV) facility. (Tr. 1143-44, 1248, 1338-39, 2226).

102. In response to cross-examination from the Judge, Robert Smith summarized his and his brothers' roles in Sinclair, and their ability to fulfill their Channel 2 integration commitments, as follows:

The time will be there for us by virtue -- we have top-notch guys running each one of these stations that really doesn't need our input on a day-to-day basis. So, our thing that we're -- we've been doing is concentrating on growing the business. It's just as simple as that. Our time is there. We have the time.

* * *

[JUDGE SIPPEL]: You mean you can -- doing what you are today and doing what you've been doing over the past several years, you could plug in a 40-hour a week job and it wouldn't affect you as far as your time commitments in any --

[ROBERT SMITH]: Not one bit. There is no question about that in my mind. It's just --

[JUDGE SIPPEL]: All right. That's your answer.

[ROBERT SMITH]: It's just the way -- I know it's very hard to understand and to believe, but the bottom line is, and the crux of this whole matter is, we have guys that handle all those day-to-day headaches in each one of these stations so that we don't have to. We can do what we want to do. If we want to talk about growing the business or buying other stations, we'll talk about it. If we want to go, you know, go to lunch for four hours and talk about something else, we'll do that too. It's, it's just the way we operate.

[JUDGE SIPPEL]: And you would intend to continue to operate that way if you got Channel 2? Or would you?

[ROBERT SMITH]: Well, we would have to do whatever we have to do, the 40 hours a week to run Channel 2. And like I said, that won't interfere with whatever we have to do with SBG. That's, that's just not -- that's not -- it's a non-issue.

(Tr. 2111, 2113-14).

3. The Matter of "Management Committee"

103. It has always been the intention of David, Robert and Frederick Smith to work a minimum of forty (40) hours per week carrying out their proposed roles as General Manager, Station Manager, and Operations Manager of Four Jacks' proposed Channel 2 station. (Four Jacks Ex. 26 at 4; Four Jacks Ex. 27 at 4; Four Jacks Ex. 28 at 4).

104. David, Robert and Frederick Smith each distinguished the meaning of the term "management committee," as it related to the operation of Four Jacks' proposed Channel 2 station, from the "executive committee" approach by which the Smith brothers make decisions concerning Sinclair. (See Tr. 2101, 2205-06). In contrast to the "executive" or "management committee" of the

Smith brothers which reviews the operations of Sinclair's stations, the "management committee" in connection with Four Jacks' proposed station will be a team of department heads with David as General Manager, Robert as Station Manager, and Frederick as Operations Manager being part of that team. (Tr. 2100, 2112, 2205-07, 2209-10). The General Manager will have the final say on disputed issues -- just as with Sinclair's individual stations. (Tr. 2100-01, 2115-16).

4. David, Robert and Frederick Smiths' Intentions With Respect to Their Ownership and Executive Positions With Sinclair

105. It has never been the intention of David, Robert or Frederick Smith to give up their ownership and executive positions with Sinclair. There will be no trust arrangement or any mechanism by which they would retain "interests" in Sinclair while still effectively resigning from the company. It has always been the intention of David, Robert and Frederick Smith to retain their executive and ownership positions with Sinclair while fulfilling their pledges to work full-time in the management of Four Jacks' proposed Baltimore television station. Neither David, Robert, nor Frederick Smith intended to mislead anyone into believing they had different intentions. (Four Jacks Ex. 26 at 4; Four Jacks Ex. 27 at 4; Four Jacks Ex. 28 at 4).

106. On cross-examination at hearing, David, Robert and Frederick Smith each reiterated that they never had any intention of leaving Sinclair. (Tr. 1909, 2003 (David); 2090 (Robert); 2191, 2197 (Frederick)). While they understand that they have pledged to divest WBFF(TV) in Baltimore, they have never

understood that divestiture pledge as having anything to with Sinclair. (Tr. 2091, 2198).

107. In their prior direct case testimony in this proceeding, David, Robert and Frederick Smith each acknowledged that he is an officer, director and shareholder of Sinclair, and that Sinclair owns other media interests. After discussing their pledges to divest WBFF(TV) in Baltimore in the event Four Jacks' application is granted, David, Robert and Frederick Smith each stated as follows:

Each of the other stations owned (or to be acquired) by SBG has a professional General Manager who is fully responsible for each station's day-to-day operations. Moreover, SBG has a full-time Comptroller who handles SBG's financial and business operations on a daily basis. Thus, notwithstanding SBG's other media interests, I am able and committed to carrying out my pledge to manage, on a full-time basis, a VHF television station in Baltimore, Maryland, the community where I was born and have lived virtually all my life.

(Four Jacks Ex. 2 at 1-2; Four Jacks Ex. 3 at 1-2; Four Jacks Ex. 4 at 1-2 (emphasis added)). Had David, Robert and Frederick Smith intended to give up their ownership and executive positions with Sinclair, they would not have made it a point, as shown above, of describing how they could accommodate their ownership and executive positions with Sinclair with their pledges to manage Four Jacks' proposed station full-time. (Four Jacks Ex. 26 at 2; Four Jacks Ex. 27 at 2; Four Jacks Ex. 28 at 2).

5. The Pledges to Resign "Then-Current Employment"

108. By stating that they would resign their "then-current employment" in the event Four Jacks was successful in obtaining the Channel 2 construction permit, David, Robert and Frederick Smith never intended to convey that they would resign their ownership and executive positions with Sinclair, for they understood that retaining these positions would not be a bar to a grant of Four Jacks' application. (Four Jacks Ex. 26 at 3; Four Jacks Ex. 27 at 3; Four Jacks Ex. 28 at 3; cf. HDQ, para. 3).

109. David, Robert and Frederick Smith did not at the time they gave their direct case testimony, and still do not, consider themselves "employees" of Sinclair in the traditional sense. They are owners and executive officers of that company. (Four Jacks Ex. 26 at 3; Four Jacks Ex. 27 at 3; Four Jacks Ex. 28 at 3; see also Tr. 1919, 2009, 2133). As Robert Smith testified in an earlier phase of the proceeding, "[w]e're not like a secretary who has to be there 9:00 to 5:00. We're a management team that manages stations that have professional and general managers already in place. Basically if we weren't there at all for a month, the tasks at those stations would still get done because they are managed by other people." (Tr. 1246).

110. David Smith explained that "I consider myself to be an officer/director [of Sinclair], not an employee in the normal sense of the word." (Tr. 1762, 1764). He testified that "I don't work 9:00 to 5:00. I don't have a boss that tells me what my job description is. I create my own job functions as a principal and owner of the business. So I don't necessarily view

myself as a, per se, employee. So it isn't necessarily the most appropriate characterization. I think owner/operator would be a more appropriate characterization." (Tr. 1771; see also Tr. 1822 ("I . . . don't consider myself to be an employee in the normal sense because I don't come to work in . . . a normal fashion like normal people do in terms of a 9:00-to-5:00 job, I have no immediate supervisor"))).

111. Robert Smith likewise testified that he does not consider himself an employee of Sinclair in the traditional sense. (Tr. 2036). He explained that "I don't have a boss. I don't have a time clock I punch into. I report to myself." (Tr. 2010; see also Tr. 2036 (Robert does not have a work schedule); Tr. 2075 ("true employees" have managers that supervise them)).

112. Frederick Smith also testified that he has no specific assigned job duties at Sinclair. (Tr. 2137-38). He explained that "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 director." (Tr. 2139).

113. Compensation paid by Sinclair to David, Robert and Frederick Smith is reflected on the company's corporate income tax returns as "Compensation of Officers." (Scripps Howard Ex. 40, Tab 1). Minutes of a Sinclair Board of Directors Meeting on September 20, 1993 authorize the payment of certain bonuses to David, Robert and Frederick Smith "[i]n an effort to partially compensate the executive officers." The minutes cite "the combined effort of the executive officers/principals in the development of each of the Company's markets," and "recognizes

that the individual accomplishment of the executive officers has been significant." (Scripps Howard Ex. 40, Tab 25 (emphases added)). Moreover, minutes of a Sinclair stockholders meeting on February 2, 1993 reflect that "[t]he Board members authorized a bonus to the owners of 20% of the 1992 excess cash flow." (Scripps Howard Ex. 40, Tab 27 (emphasis added)). Registration statements filed by Sinclair with the Securities and Exchange Commission ("SEC") cite compensation made to David, Robert and Frederick Smith as "Executive Compensation." (See, e.g., Scripps Howard Ex. 26, p. 55; Scripps Howard Ex. 31, p. 57; Scripps Howard Ex. 34, p. 58; Scripps Howard Ex. 40, Tab 18, p. 21).^{16/} David, Robert and Frederick Smith are enrolled in a Sinclair health plan which is for "Officers Only." (Four Jacks Ex. 40, Tab 29, p. 1; Tr. 2027-28, 2040).

114. David, Robert and Frederick Smith each testified that they intended their pledges to resign from "then-current employment" to address the potential of their acquiring in the future an employment commitment that would take away from their commitment to Channel 2. For instance, David Smith testified that the pledge to resign "then-current employment" "was more intended to deal with the potential if I might cite as an example if Sumner Redstone were to call me and ask me to go work for him during the context of this process." (Tr. 1909-10, 1913-14,

^{16/} Unless otherwise indicated, references to page numbers in the SEC documents refer to the pagination in the original documents themselves (the center number at the bottom of the page).

2003-04).^{17/} Robert Smith stated that he would view "then-current employment" as "working for McDonald's or a lemonade stand." (Tr. 2092). Frederick Smith explained his reference to resigning "then-current employment" as follows:

And the issue of then current employment, my, my thought process on that was is that gee, let's say we apply in 1991 for WMAR. In that interim, 6 months, a year, now it's been 3 years, I get a job, another job. I may be flying commercial aviation. Or I may have a television station that I've bought on my own that now may preclude me from doing this. And then if I was in that kind of employment, I would stop that to come back to MAR. That's what that means.

(Tr. 2198).

115. David, Robert and Frederick Smith also intended to make clear that they would give up all responsibilities with respect to WBFF(TV), since they understood that they would be required to divest WBFF(TV) before Four Jacks' Channel 2 station could commence program tests. (Four Jacks Ex. 26 at 2-3; Four Jacks Ex. 27 at 2-3; Four Jacks Ex. 28 at 2-3; see also Tr. 1917, 1919).

6. SEC Filings

116. Beginning in September 1993, a number of filings were made with the Securities and Exchange Commission ("SEC") in connection with a \$100 million public debt offering by Sinclair. An S-1 Registration Statement was filed with the FCC on September 28, 1993. (See Scripps Howard Ex. 26). Amendments to the S-1

^{17/} The Presiding Judge may take official notice of the fact that Sumner Redstone is CEO of Viacom, Inc.

Registration Statement were filed, inter alia, on November 9, 1993 and December 2, 1993. (See Scripps Howard Exs. 31, 33). In addition, a Prospectus was filed with the SEC on December 6, 1993. (See Scripps Howard Ex. 34).

117. Sinclair's September 28, 1993 S-1 Registration Statement and the Amendment filed November 9, 1993 each state that "Four Jacks Broadcasting, Inc. ("Four Jacks"), a company wholly owned by the Current Stockholders, has filed a competing application with the FCC for the broadcast license for VHF Channel 2 in Baltimore, Maryland." (Scripps Howard Ex. 26, p. 16; Scripps Howard Ex. 31, p. 16). Moreover, the September 1993 S-1 and the November 9, 1993 Amendment each state the following:

In addition to their respective interests in the Company [Sinclair] and the subsidiaries, members of the Smith Family hold ownership interests in various non-Company entities which are involved in businesses related to the business of the Company. . . . Members of the Smith Family are free to continue to own these interests and to acquire additional interests in television industry enterprises, including interests in enterprises that are competitive with the Company or the Subsidiaries. Such activities could present a conflict of interest with the Company in the allocation of management time and resources of executive officers and in diversion of corporate opportunities.

(Scripps Howard Ex. 26, p. 15; Scripps Howard Ex. 31, pp. 15-16).

118. The December 2, 1993 Amendment to the Sinclair Registration Statement contains the following additional language:

In addition, each of David D. Smith, Robert E. Smith and Frederick G. Smith, executive officers of the Company, has made certain commitments in the application filed with the

FCC by Four Jacks, including the commitment to work on a full-time basis (40 hours or more per week) in the operations of Channel 2 in Baltimore in the event that Four Jacks is awarded such channel by the FCC. However, David D. Smith has informed the Company that in neither the application nor the FCC proceeding with respect to Four Jacks has he committed to resign his official positions with, or dispose of his ownership interests in, the Company in the event that Four Jacks is awarded such channel by the FCC. Moreover, the Company believes that each of David D. Smith, Robert E. Smith and Frederick G. Smith will be able to perform all of his current duties with the Company while fulfilling his commitment to work for Channel 2.

(Scripps Howard Ex. 33, p. 19).

119. The December 6, 1993 Prospectus contains the following similar language:

In addition, each of David D. Smith, Robert E. Smith and Frederick G. Smith, executive officers of the Company, has made certain commitments in the application filed with the FCC by Four Jacks, including the commitment to work on a full-time basis (40 hours or more per week) in the operations of Channel 2 in Baltimore in the event that Four Jacks is awarded such channel by the FCC. In the FCC application, David D. Smith, Robert E. Smith and Frederick G. Smith further stated that each of them would resign from their then-current employment and limit or terminate any other activities that might interfere with their commitments to Four Jacks. The Company does not believe that such commitment of resignation requires them to resign as officers or directors of the Company or to dispose of their ownership interests in the Company. Further, the Company has been informed by its FCC regulatory counsel and each of these officers that in neither the application nor the FCC proceeding with respect to Four Jacks has any of these officers committed to resign his official positions with, or dispose of his ownership interests in, the Company in the event that Four Jacks is awarded such channel by the FCC. Moreover, the Company believes that each of David D. Smith, Robert E. Smith and Frederick G. Smith will be able to perform all of his current duties with the Company while fulfilling his commitment to work for Channel 2.

(Scripps Howard Ex. 34, p. 19).