

120. David Smith testified that this language in the December 1993 SEC filings was added at the SEC's request, to clarify for the benefit of investors the intentions of David, Robert and Frederick Smith with respect to the proposed Channel 2 facility. (Tr. 1908-09; see also Tr. 2187 (language was "a clarification issue"))).

7. Sinclair Business Documents

121. Payments to David, Robert and Frederick Smith from their television business generally come through the same payroll system that administers compensation to employees of Sinclair and its subsidiaries. Thus, David, Robert and Frederick Smith are paid by Sinclair every two weeks, just as are "employees" of the company. (Four Jacks Ex. 26 at 3; Four Jacks Ex. 27 at 3; Four Jacks Ex. 28 at 3; see also Tr. 1798, 2016, 2071-72). That is simply the mechanism they have chosen to receive money from the company. (Four Jacks Ex. 26 at 3; Four Jacks Ex. 27 at 3; Four Jacks Ex. 28 at 3).

122. David, Robert and Frederick Smiths' names are on a list of employees submitted along with a check to the Maryland Unemployment Insurance agency. (Scripps Howard Ex. 40, Tab 2). David Smith did not personally sign that check. (Tr. 1811-12). He testified that "the extent to which the state considers us an employee is not worth arguing with them about," and observed that they are "not left with much alternative in terms of what the form says or doesn't say." (Tr. 1813-14; see also Tr. 2073 (Robert Smith testimony that "this is the way the form is")). David Smith did not make the decision to list himself as an

employee on this form; that decision was made by his financial person. (Tr. 1815).

123. Sinclair has W-2, W-4, and Maryland "Withholding Exemption Certificates" for David, Robert and Frederick Smith. (See Scripps Howard Ex. 40, Tabs 3-10). David Smith testified, however, that his W-2s are sent directly to his accountant; he has "no recollection of really paying attention to them." (Tr. 1804-05). His W-4 was signed in 1984, when he was an employee of WPTT(TV), Pittsburgh, Pennsylvania. (Tr. 1807). David Smith does not know the definition of the terms "employer" or "employee" for tax purposes, and was never advised that a corporate officer is an "employee" for purposes of the Tax Code. (Tr. 1821). Robert Smith likewise does not pay attention to his W-2 forms. (Tr. 2080). He gives them to his accountant, who tells him what his taxes are and what he has to pay. (Tr. 2017, 2079, 2082). Robert Smith does not know how compensation is reflected on his tax return. (Tr. 2016). He executed his W-4 form "because my tax man told me to." (Tr. 2083). Frederick Smith does not remember seeing his W-2 and W-4 forms before he was shown them at his deposition in this proceeding. (Tr. 2179).

124. David, Robert and Frederick Smith participate in Sinclair insurance and employee benefit plans. (Four Jacks Ex. 26 at 3; Four Jacks Ex. 27 at 3; Four Jacks Ex. 28 at 3; Scripps Howard Ex. 40; Tr. 1764, 2027-28, 2041, 2172). At hearing, however, David Smith testified that he had not read Sinclair's 401(k) plan, noting his "reliance on people who manage the day-to-day functions of these types of things to do that." (Tr. 1851-52, 1857, 1859). When asked about language in the 401(k)

plan description indicating that the plan is for the exclusive benefit of "eligible employees and their beneficiaries," Robert Smith stated: "My guess is that's boilerplate language. Anyone who does a 401(k), probably all say the same thing." (Tr. 2043). Frederick Smith also testified that he did not know what the eligibility requirements of the 401(k) plan are. (Tr. 2174).

125. David Smith had not seen either of the Sinclair health plan descriptions contained in Tabs 30 and 31 of Scripps Howard Ex. 40 before being deposed in this proceeding. (Tr. 1848-49, 1850). He had never seen the First Health invoice contained in Tab 32 of Scripps Howard Ex. 40 until this proceeding. He does not know what Sinclair's different insurance coverages are. (Tr. 1853-54). Similarly, Robert Smith did not read Sinclair's health care plan when he enrolled in it. (Tr. 2033). He did not know what was required for eligibility for participation in these plans. (Tr. 2040). Frederick Smith believed that to be eligible for Sinclair's health plan, one had to be an employee or an officer or director. (Tr. 2162).

IV. PROPOSED CONCLUSIONS OF LAW

A. The Issues Against Scripps Howard

126. In its Character Policy Statement, 102 F.C.C.2d 1179 (1986), the Commission emphasized that "the trait of 'truthfulness' is one of the two key elements of character necessary to operate a broadcast station in the public interest." Id. at 1210. The other key element is reliability in complying with the Communications Act and Commission requirements. Id. at 1209-10. The reason for the Commission's emphasis on these two

elements is simple and has been carefully explained by the Commission over the years in cases involving broadcast applicants and licensees. As the Commission has advised:

If the Commission cannot believe and rely on what applicants and licensees tell it, it cannot maintain the integrity of its processes. Thus, applicants' or licensees' intentional deceptions of the Commission by providing either false information (misrepresentation) or incomplete and misleading information (lack of candor) are viewed as 'serious breaches of trust' for which the Commission has broad discretion in choosing remedies and sanctions. . . . Where inaccurate information results from an intent to deceive rather than carelessness, exaggeration, faulty recollection, or merely falling short of the punctilio normally required by the Commission, the remedy may be total disqualification, even if the fact concealed does not appear to be particularly significant. In making its determination, the Commission will look at all of the facts of the case.

Standard Broadcasting, Inc., 7 FCC Rcd 8571, 8573-74 (Rev. Bd. 1992); see also Tri-State Broadcasting Co., Inc., 5 FCC Rcd 1156, 1173 para. 114 (Rev. Bd. 1990), recon. denied, 5 FCC Rcd 3727 (Rev. Bd. 1990), rev. denied, 6 FCC Rcd 2604 (1991).

127. In Standard, supra, the Review Board affirmed the Judges's conclusion that Standard made repeated misrepresentations concerning the preparation of its issues/programs lists and that it had a motive for providing false information about the lists. In discussing the element of intent to deceive, the Board stated:

Intent is a factual question that, like other factual questions, can be found from evidence that affords a reasonable inference. See California Public Broadcasting Forum v. FCC, 752 F.2d 670, 679 (D.C. Cir. 1985). It can be found, for example, from a showing of motive or "a logical reason or desire to

deceive." Scott & Davis Enterprises, Inc., 88 FCC 2d 1090, 1100 para. 18 (Rev. Bd. 1982), see Imagists, 6 FCC Rcd 7440, 7445 para. 22 (Rev. Bd. 1991) (motive or intent to deceive is essential element), Coastal Bend Family Television, Inc., 94 FCC 2d 648, 659 para. 16 (Rev. Bd. 1983) (motive found from desire to avoid financial issue).

Standard, 7 FCC Rcd at 8576 para. 18. The Board also affirmed the Judge's conclusion that Standard had failed to meet its burden of establishing its qualifications by a preponderance of the record evidence. Id. at 8574.

128. When the facts presented here are analyzed under the relevant case precedent, it is patently clear that Scripps Howard must be disqualified under the misrepresentation/lack of candor issues. First, the facts demonstrate that Scripps Howard had a clear motive to deceive. For the renewal period in question (May 30, 1991 - September 3, 1991), Scripps Howard had no documentation of its ascertainment process that was prepared contemporaneously. Accordingly, during the summer of 1992, Scripps Howard commenced a massive reconstruction effort to try to formulate exhibits for a hearing that would enable it to obtain a renewal expectancy. The primary exhibit, Attachment E to Scripps Howard Exhibit 3, was formulated by Ms. Barr, who obtained the 1991 calendars from Arnold Kleiner and Maria Velleggia and used her own calendar. Ms. Barr also asked the former Public Affairs Director, Janet Covington, for her 1991 calendar and since Ms. Covington's calendar contained only names and times of meetings, Ms. Covington agreed to write up notes which attempted to recall what had transpired at meetings over a year earlier.

129. In addition to Attachment E, Scripps Howard prepared other exhibits in the late summer and fall of 1992 based on documents it obtained from the news and entertainment divisions of NBC. Because Scripps Howard lacked information as to what programming it had run in response to community issues, Ms. Barr wrote a letter to NBC advising NBC that Scripps Howard "[was] looking for examples of programming, both network and local that dealt with the ascertained issues." Given the massive nature of the reconstruction project that Scripps Howard performed in 1992, and the importance of the exhibits it was preparing to Scripps Howard's contention that it was entitled to a renewal expectancy, there is no question that Scripps Howard had a motive to deceive.

130. Second, the Scripps Howard MO&O adding the issues against Scripps Howard placed both the burdens of proceeding and proof on Scripps Howard. Yet Scripps Howard voluntarily chose to present only one witness, Emily Barr, to testify at the hearing. The testimony given by Ms. Barr was neither credible nor supported by other evidence. Her testimony conflicts in important respects with the deposition testimony of Janet Covington, and Ms. Barr's testimony at hearing substantially contradicted her February 15, 1994 Declaration concerning the purported discovery of the Covington notes. Scripps Howard simply failed to carry its burdens under the specified issues.^{18/}

^{18/} Although David Roberts, formerly an associate at Baker & Hostetler, was involved in the circumstances surrounding addition of the issues and although Scripps Howard tendered a Declaration of David Roberts when it attempted to obtain summary decision on the issues, thereby waiving any
(continued...)

131. Third, at no time while Four Jacks' motion to enlarge was pending did Scripps Howard produce the Covington notes prepared in 1992. It was only after the Judge added the issues (with the assumption that the notes had indeed been destroyed) that the notes were miraculously and very easily discovered. Indeed, they were discovered in not one but two places -- in Ms. Barr's office at WMAR-TV and in the offices of Baker & Hostetler in Washington, D.C. Similarly, it was not until the Judge called a prehearing conference to discuss Four Jacks' interlocutory appeal of its subpoena request for Ms. Barr's August 1992 correspondence with NBC that Scripps Howard miraculously discovered the NBC correspondence in the top drawer of Emily Barr's file cabinet. The circumstances surrounding the discovery of the Covington notes are highly reminiscent of the circumstances in WWOR-TV, Inc., 7 FCC Rcd 636, 642 (1992), aff'd sub. nom. Garden State Broadcasting Limited Partnership v. FCC, 996 F.2d 386 (D.C. Cir. 1993), where the Commission found that "Garden State violated its duty of candor by failing to produce evidence demonstrating the date of the April 30 meeting at the original hearing. See RKO General, Inc. v. FCC, 670 F.2d 215, 229-30 (D.C. Cir. 1981), cert. denied, 456 U.S. 927, 457 U.S.

18/(...continued)

attorney/client privilege, Scripps Howard refused to produce Mr. Roberts for a deposition and did not present any testimony from him at the hearing. Moreover, though Four Jacks was permitted to depose Ms. Covington, the Judge sustained Scripps Howard's attempts to preclude Ms. Covington from testifying at the hearing -- although he held that Ms. Covington's husband's health problems constituted insufficient justification to permit the receipt of her deposition in lieu of her live hearing testimony. See Memorandum Opinion and Order, FCC 94M-512 (released September 7, 1994).

1119 (1982) (licensee disqualified for failing to come forward with a candid statement of relevant facts after another party put a question before the Commission)." In WWOR-TV, Inc., Garden State's failure to produce documents from its law firm's records in response to a document production request directly contributed to the Judge's original inability to fix the date of a dinner meeting. Here, Scripps Howard's failure to produce the Covington notes in response to Four Jacks' request and its subsequent evasive and false testimony directly contributed to the Judge's assumption in the Scripps Howard MO&O that "the 1992 notes had been discarded."

132. As demonstrated below, the numerous questions which led the Presiding Judge to add the misrepresentation/lack of candor issues have not been answered. Indeed, the further facts that have emerged demonstrate that Scripps Howard willfully withheld relevant documents and then covered up the fact of their existence. Moreover, there was a pattern of misconduct by Scripps Howard as evidenced by its withholding not only of the 1992 Covington notes but also of the 1992 NBC correspondence.

1. The Covington Notes

133. As the Scripps Howard MO&O adding the issues sets forth, Scripps Howard was ordered to produce "copies of all documents relating to the Issues/Programs lists" and a variety of other documents relating to ascertainment efforts. No timely claim of attorney/client privilege, work product doctrine or any other excuse was ever advanced by Scripps Howard for withholding

the documents in question. The chronology of events is enlightening in evaluating Scripps Howard's conduct.

- June 11, 1993 - Four Jacks' Motion to Produce Documents filed.
- June 24, 1993 - Order, FCC 93M-400, released ordering Scripps Howard to produce documents on June 28, 1993.
- June 25, 1993 - Ms. Barr wrote a memo to David Roberts at Baker & Hostetler forwarding her original 1991 calendar and those of Mr. Kleiner and Ms. Velleggia. She also forwarded the original copy of Ms. Covington's notes, stating in the memo that "Janet Covington's notes to me were prepared specifically for this license challenge but she did not save her actual calendar." A "post-it" note handwritten by Ms. Barr reiterates that Covington "did not save her original calendar."
- June 1993 - Ms. Barr has a conversation with counsel concerning whether the document request included handwritten notes. She also tells counsel that she did not have Ms. Covington's calendar but she did have the 1992 notes. Counsel tells her to ask Ms. Covington for the calendar.
- June 28, 1993 - Scripps Howard produces documents to Four Jacks. No mention is made of, nor is any work-product claim asserted for, the Covington notes. Documents produced include the 1991 calendars of Barr, Velleggia and Kleiner.
- July 13, 1993 - Additional documents are forwarded to Four Jacks with a letter stating that "Janet Covington . . . at one time possessed personal notes that recorded various ascertainment meetings in which she participated during the relevant period. These notes were not retained in any files at WMAR-TV. Scripps Howard recently contacted Ms. Covington to ascertain whether she possessed any of these notes and determined that she did not."
- July 16, 1993 - Ms. Barr's deposition

- Sept. 13, 1993 - Ms. Barr's direct testimony at footnote 6 states that Ms. Covington "had kept these notes in her possession when she left the station. It did not occur to me to preserve Ms. Covington's handwritten notes after our discussions."
- Nov. 8-9, 1993 - At hearing, Barr reveals for the first time that the Covington notes were prepared in 1992, and that Barr retained the notes at WMAR-TV for some time thereafter. Barr testifies repeatedly that the Covington notes were discarded and no longer exist.
- Dec. 1993 - Four Jacks files a Motion to Reopen the Record and Enlarge the Issues concerning the Covington notes.
- Dec. 22, 1993 - Scripps Howard files an Opposition to the Motion to Reopen the Record and Enlarge the Issues in which it argues that the references to "notes" in the July 13, 1993 letter and in footnote 6 of Barr's direct testimony meant references to Ms. Covington's 1991 calendar.
- Feb. 1, 1994 - The Judge releases his Scripps Howard MO&O adding the misrepresentation/lack of candor issues.
- Feb. 9, 1994 - At a meeting at WMAR-TV with Baker & Hostetler attorney Stephanie Abrutyn, Ms. Barr "discovers" the Covington notes in a file cabinet in her office. Attached to the Covington notes are copies of Barr's June 25, 1993 memo to Roberts and Barr's "post-it" note stating that Covington "did not save her original calendar."
- Feb. 10, 1994 - Baker & Hostetler paralegal Brett Kilbourne is asked to look in the law firm's files for Barr's June 25, 1993 memo to Roberts. Within an hour, Kilbourne locates the memo in a box of "non-produced" documents. Shortly thereafter, Kenneth C. Howard, Jr. locates the original Covington notes in the same box.
- Feb. 15, 1994 - Ms. Barr signs a Declaration in connection with Scripps Howard's Motion

for Summary Decision in which she states that on February 9, 1994 she was looking for the June 25, 1993 memo. A copy of the memo is attached to her Declaration.

- Feb. 28, 1994 - Four Jacks files an Opposition to Scripps Howard's Motion for Summary Decision. At pages 32-33, Four Jacks notes that Barr's June 25, 1993 memo to Roberts and accompanying Covington notes have "profound ramifications for Scripps Howard's candor and truthfulness."
- Sept. 2, 1994 - Ms. Barr admits in her direct case testimony that the July 13, 1993 letter incorrectly implied that Ms. Covington had prepared her notes in 1991 rather than 1992, and that footnote 6 of her September 13, 1993 written direct testimony contained an incorrect statement that Ms. Covington "kept these notes in her possession when she left the station." Ms. Barr also states that she was not specifically looking for the June 25, 1993 memo on February 9, 1994.
- Sept. 8, 1994 - Ms. Barr admits at the hearing that on February 9, 1994 she was looking for the June 25, 1993 memo.

134. The June 25, 1993 memo simply destroys Scripps Howard's feeble justifications for the numerous misrepresentations it made concerning the Covington notes. That memo, which was not produced until after the issues were added, provides documentary proof that Scripps Howard knew precisely where the Covington notes were. Ms. Barr not only had a discussion with counsel in June 1993 concerning whether handwritten notes fell within the document request; she also discussed with counsel the fact that she did not have Ms. Covington's calendar but did have the notes, and she also wrote a memo to counsel transmitting the notes and placed a handwritten "post-it" on the notes stating precisely why she was sending them. Significantly, the June 25, 1993 memo was

copied to Scripps Howard corporate officers Frank Gardner and Terry Schroeder.

135. A mere eighteen days later, on July 13, 1993, Four Jacks, the Bureau and the Judge received a letter which contained serious misstatements. The letter stated:

Finally, Janet Covington, the former public relations director of WMAR-TV who retired in December, 1991, at one time possessed personal notes that recorded various ascertainment meetings in which she participated during the relevant period. These notes were not retained in any files at WMAR-TV. Scripps Howard recently contacted Ms. Covington to ascertain whether she possessed any of these notes and determined that she did not.

Every one of these statements is false and misleading, as revealed by the June 25, 1993 memo. While Ms. Covington at one time did possess the notes (when she prepared them), they were quickly turned over to Ms. Barr in 1992 and retained by Ms. Barr. On June 25, 1993, Ms. Barr had forwarded the original notes to Baker & Hostetler. A copy of the notes was retained in the files at WMAR-TV, and, moreover, the original notes were at Baker & Hostetler. Thus, Scripps Howard's statement that it had recently contacted Ms. Covington to ascertain whether she possessed the notes is patently misleading, because Scripps Howard knew that Ms. Barr, not Ms. Covington, was in possession of the notes as of July 13, 1993. Indeed, the originals had been transmitted to counsel just eighteen days earlier. Despite the fact that Scripps Howard has had ample opportunity to come clean, the most Ms. Barr conceded in her direct case testimony was that the July

13, 1993 letter incorrectly implied that Ms. Covington had prepared her notes in 1991.

136. Similarly, the June 25, 1993 memo also reveals the false statements in Ms. Barr's September 13, 1993 direct written testimony. Ms. Barr's statements that Ms. Covington "had kept these notes in her possession when she left the station" and "[i]t did not occur to me to preserve Ms. Covington's handwritten notes after our discussions" were blatantly false. Once again, Ms. Barr's September 1994 direct testimony only conceded that the footnote incorrectly stated that Ms. Covington "kept these notes in her possession when she left the station." Significantly, Ms. Covington disputes that there were discussions between herself and Ms. Barr concerning the 1992 notes. She did not recall either a personal meeting or telephone discussions concerning the notes. While Ms. Barr claimed that she and Ms. Covington discussed the programming that resulted from Ms. Covington's contacts, Ms. Covington stated that she and Ms. Barr never had such discussions.

137. When asked about the circumstances surrounding her "throwing away" the Covington notes during the November 1993 hearing, Ms. Barr maintained that Ms. Covington's handwriting "was difficult to read." (Tr. 582-83). When the notes were finally produced, however, Ms. Covington's handwriting was neat and legible. This is yet one more instance of Barr's dubious credibility.

138. The "discovery" of the Covington notes is one more example of Scripps Howard's misrepresentations and lack of candor. Amazingly, while Four Jacks' motion was pending, no

attempt at all was apparently made to locate the notes. The only logical explanation is that Scripps Howard knew it had the notes all along. At the first meeting between Scripps Howard's counsel and Ms. Barr after the issues were added, Ms. Barr readily located a copy of the notes in a file cabinet in her office. Indeed, she admitted on February 15, 1994 that she opened the file cabinet "to look for a memo that I had sent to Baker & Hostetler in order to refresh my recollection as to the date that I had sent the memorandum and other materials to Baker & Hostetler." (Four Jacks Ex. 32). Indeed, the June 25, 1993 memo to Roberts was attached to her Declaration. By the time of direct case exhibits, however, Ms. Barr realized that her knowledge of the memo was a handicap^{19/} and she attempted to disclaim that she had been looking for the June 25, 1993 memo. On the witness stand, Ms. Barr dissembled in almost comical fashion before finally conceding that the February 15, 1994 Declaration was correct.

139. Ms. Barr's testimony concerning the discovery of the notes is implausible for other reasons as well. She obtained a two-drawer file cabinet in early 1993 to organize the documents connected with this case. She put the personal calendars in a file. She reviewed the files in 1993 and at other times. Mr. David Roberts visited Ms. Barr's office in June or July 1993 to review the files. Ms. Barr had at least two conversations with Mr. Roberts in June 1993 about the Covington notes, personal

^{19/} This realization was undoubtedly spurred by Four Jacks' February 28, 1994 Opposition to Motion for Summary Decision, which pointed out the vastly adverse implications of Barr's June 25, 1993 correspondence with Baker & Hostetler.

calendars and "handwritten notes." Ms. Barr subsequently obtained a larger file cabinet for the purpose of organizing the documents. Moreover, it was Ms. Barr's practice to send original documents to counsel and keep copies and that practice was apparently uniformly followed in all other instances.

140. The circumstances surrounding the "discovery" of the original Covington notes are equally incredible. Since Ms. Barr had a copy of the June 25, 1993 memo on February 9, 1994, it is inconceivable that Ms. Kilbourne would be told simply to look for memo with a "rough date" without being given a copy of what he should look for. Moreover, it is inconceivable that Mr. Kilbourne was just looking for the memo and not the Covington notes. In any event, the ease with which Mr. Kilbourne found the memo and the original Covington notes is telling.

141. In his Scripps Howard MO&O adding the issues, the Judge stated, inter alia,

the ambiguous disclosure to the parties and to the Presiding Judge on July 13, 1993, may have been calculated to mislead the Bureau and Four Jacks in their questioning on renewal ascertainment at the Barr deposition. The significance of this ambiguous and/or misleading representation is the fact, then unknown to Four Jacks and the Bureau who were preparing for the Barr deposition, that Scripps Howard was relying on discarded notes (a secondary source) to prepare its renewal exhibit. The apparent deliberate effort in the July 13 letter to obscure or conceal the use of the discarded notes by referring to "notes" but meaning notations on Covington's 1991 calendar to the exclusion of her 1992 notes would, without further explanation, under the circumstances, raise a substantial question of an absence of candor.

142. As the facts unfolded, Scripps Howard abandoned its coy attempt to claim that the reference to "notes" in the July 13th

letter meant Ms. Covington's 1991 calendar. Instead, Scripps Howard embarked on one cover-up after another to hide the true facts. At no time has Scripps Howard admitted that it wrongfully withheld documents and made repeated misrepresentations concerning that fact.

2. The NBC Correspondence

143. Scripps Howard's conduct with respect to the NBC correspondence illustrates that its conduct concerning the Covington notes was not an isolated incident. There is a startling pattern of withholding documents on the part of Scripps Howard.

144. At her July 16, 1993 deposition, when questioned about NBC documents produced by Scripps Howard, Ms. Barr was asked if she had the letter she had forwarded to NBC requesting the documents. She first denied that she had sent a letter, stating that she had made a phone call. Later, when asked if she gave NBC a list of issues in writing, she stated "No, it was not. Actually, it was faxed to them." When asked if she had a copy of that fax, Ms. Barr said that she did not. (Tr. 1683, 1686).

145. Once again, Scripps Howard did not voluntarily produce a copy of her fax to NBC until Four Jacks sought to subpoena the documents from NBC. Moreover, Scripps Howard represented to the Commission in a pleading filed October 26, 1993 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). Just as with the statements in the July 13, 1993 letter, each of the representations in the October 26, 1993 Opposition pleading was false. The documents were in the possession of WMAR-TV. Indeed, they were quickly "discovered" in the top drawer of Emily Barr's file cabinet on October 26, 1993 (the very file cabinet in which the Covington notes were discovered). The documents certainly existed and the search did not take any time or cause delay. Perhaps most telling is the significant admission of Scripps Howard's counsel at hearing. For the first time, he attempted to argue that the presence or absence of the documents at WMAR-TV was not an issue; that the subpoena requested documents in the possession of NBC, not WMAR-TV, and that "we still don't know whether NBC would have taken a lengthy time to do the search." Nowhere did Scripps Howard offer this belated excuse earlier, but the excuse evidences Scripps Howard's willingness to play fast and loose with the Commission.

146. Commission case precedent firmly supports disqualification of Scripps Howard. In Garden State Broadcasting Limited Partnership v. FCC, 996 F.2d 386 (D.C. Cir. 1993), the D.C. Circuit affirmed the Commission's disqualification of Garden State under a lack of candor issue where Garden State deliberately withheld evidence establishing the date of its organizational meeting. Here, Scripps Howard's misrepresentations were much more extensive. In Omaha Channel 54 Broadcasting Group Ltd. Partnership, 3 FCC Rcd 870 (Rev. Bd. 1988), rev. denied, 3 FCC Rcd 6136 (1988), the Review Board held that Channel 54's repeated failure to respond truthfully to valid

discovery requests demonstrated a disqualifying intent to deceive the Commission. The Board stated that "the submission of misleading, or untruthful responses to discovery requests is fully as serious as an untruthful response made directly to the Commission and, standing alone, can lead to disqualification." Id. at 874. Here, Scripps Howard has not only submitted misleading and untruthful responses to discovery requests but has also made serious misrepresentations and lacked candor in written and oral testimony in its ill-conceived attempts to cover up its wrongdoing.

B. The Issue Against Four Jacks

147. The post-hearing issue against Four Jacks stands in stark contrast to the character issues designated against Scripps Howard. Unlike the issues against Scripps Howard, the issue of Four Jacks does not involve a lengthy history of concealment and sudden "discovery" of relevant documents, weak and varying rationalizations and defenses of those events, and implausible and inconsistent testimony of witnesses. Instead, the issue against Four Jacks merely concerns the intentions behind the use of one single phrase -- "then-current employment" -- in the direct testimony of Four Jacks' three integrated principals. Stated more simply, the issue against Four Jacks is not about a maze of unanswered questions about what was not stated or provided to the Commission, as is the case with the issue against Scripps Howard. To the contrary, the issue against Four Jacks is about what was said to the Commission, and amounts to little more than mere quibbling over the language used to say it.

148. As shown above, in the case of Scripps Howard there is ample evidence that Scripps Howard intentionally concealed and misled the Commission about the existence of critically relevant documents, and willfully lied and dissembled in an attempt to cover up its deceit. In sharp contrast, Scripps Howard attempted to adduce no evidence at hearing as to David, Robert and Frederick Smith's intentions with regard to their integration commitments, or the states of mind of each principal in making the precise statements at issue. Instead, Scripps Howard tried this issue as if its complete resolution rode on the "official" meaning of the term "employment." Over Four Jacks' objections on relevance grounds, Scripps Howard was permitted to fill the record with various unrelated business documents in an attempt to show that by some objective definition of the word, David, Robert and Frederick Smith are "employees" of Sinclair Broadcast Group, Inc., and, therefore, that these principals automatically pledged to give up their executive positions with Sinclair when they proposed to resign their "then-current employment" if successful in obtaining a construction permit for Channel 2 in Baltimore.

149. The issue against Four Jacks, however, was not designated in order to determine some "official" definition of the term "employment." Rather, the issue was added to determine whether, in stating that they would resign their "then-current employment," Four Jacks' three integrated principals intentionally made misrepresentations or lacked candor concerning their intentions to work full-time in the management of Four Jacks' proposed television station. That issue is one of state of mind -- it cannot be resolved by resort to some extrinsic

definition of "employment" derived from some source or sources that had nothing to do with the making of the statements in question.

150. In other words, Four Jacks cannot legally be disqualified merely because its three integrated principals, in using the term "then-current employment" in describing their integration pledges, intended that term to have a meaning that might not dovetail with the scope of "employment" that might be defined by the Internal Revenue Code, a W-2, an income tax return, or a health plan summary. Rather, for Four Jacks to be disqualified, the record evidence must show -- by evidence that is "clear, precise, and indubitable"^{20/} -- not only that David, Robert and Frederick Smith intended the term "then-current employment," as used in their integration pledges, to encompass a pledge to resign their ownership and executive positions with Sinclair, but that they intended to deceive the Commission by making such a pledge.

151. The record in this hearing supports neither conclusion. Instead, the overwhelming weight of the evidence supports the following, quite contrary, conclusions:

1. David, Robert and Frederick Smith had no plausible motive to misrepresent or conceal their integration intentions, for they have at all times been both willing and able to fulfill their integration commitments while continuing to serve as owners and executives of Sinclair.

^{20/} Riverside Broadcasting Co., 56 R.R.2d 618, 620 (1984) (citing Overmyer Communications Co., 56 F.C.C.2d 918, 925 (1974)).

2. Consistent with point #1 above, David, Robert and Frederick Smith never intended to give up their ownership and executive positions with Sinclair. They cannot even remotely be found to have misrepresented or lacked candor concerning a "contrary true intent" that they did not possess.
3. By pledging to resign their "then-current employment" in the event of a Four Jacks grant, David, Robert and Frederick Smith did not intend to pledge to resign from their executive or ownership positions from Sinclair. Not only does this conclusion follow from points 1 and 2 above, but regardless of whether David, Robert and Frederick Smith can be considered "employees" of Sinclair in some respects, there is ample evidence in the record to support their explanation that they do not consider themselves "employees" of Sinclair in the conventional sense.

Accordingly, the misrepresentation/lack of candor issue must be resolved favorably to Four Jacks.

1. **Because David, Robert and Frederick Smith Have Always Been Capable of Carrying Out Their Pledges to Work Full-Time in the Management of Four Jacks' Proposed Channel 2 Station, They Had No Motive to Misrepresent or Conceal Their Intentions Concerning Integration**

152. A finding of misrepresentation or lack of candor requires evidence of a motive to mislead or conceal. Where such a motive is lacking, the Commission has refused to find misrepresentation or lack of candor. See, e.g., Valley Broadcasting Co., 4 FCC Rcd 2611, 2614-15 (Rev. Bd. 1989), rev. denied, 5 FCC Rcd 499 (1990).

153. As noted above, Scripps Howard sought and litigated the issue against Four Jacks as if it were purely one of definition. Under Scripps Howard's theory, if David, Robert and Frederick Smith are objectively defined as "employees" of Sinclair, then their pledges to resign from "then-current" employment must perforce have encompassed their executive and ownership positions at Sinclair -- regardless of what David, Robert and Frederick Smith actually intended to convey by the phrase, and regardless of whether they had any conceivable motive to lie or conceal facts from the Commission. At no time in this proceeding has Scripps Howard even articulated, much less proven, any logical reason why David, Robert and Frederick Smith would have wished to mislead the Commission about their intentions with respect to integrating into the full-time management of Four Jacks' proposed Channel 2 station.

154. Judging from his discussions in the course of adding the Four Jacks issue and later denying summary decision thereunder, it would appear, however, that the Presiding Judge is primarily concerned about the ability of David, Robert and Frederick Smith to fulfill their full-time Channel 2 integration pledges in light of their positions as executives of a company that owns and operates several other television stations. For instance, in paragraph 8 of his Four Jacks MO&O adding the issue, the Judge observed that "[w]hile it is recognized that Sinclair is a holding company for the three Fox affiliates and that day-to-day operations are conducted by individual station managers who are answerable to the Smiths, the full-time and attention of the three Smiths are at Sinclair, including its ongoing

acquisition program." In short, the unstated concern that appears to underlie the issue against Four Jacks is that David, Robert and Frederick Smith never intended to fulfill their integration pledges because they were too busy being executives of Sinclair.

155. This line of reasoning could conceivably provide support for a motive to deceive -- if the facts supported such thinking. On the other hand, if (as is the case) David, Robert and Frederick Smith always have been able to occupy their positions with Sinclair and serve as full-time managers of Four Jacks' proposed Channel 2 station, there would be absolutely no reason for them to mislead the Commission into thinking that they would give up their Sinclair positions. The Mass Media Bureau, therefore, was absolutely right in noting that

the real question here is not whether the Smiths characterized themselves or should be characterized by others as "employees" of Sinclair, but whether the duties they would perform for Sinclair if the Four Jacks application were granted, are of such a nature that they would interfere with the integration commitment in this proceeding.

Mass Media Bureau's Comments on Motion for Summary Decision
(filed March 14, 1994), at 4.^{21/}

^{21/} It is ironic that, except for its pertinence to the designated misrepresentation/lack of candor issue against Four Jacks, the ability of David, Robert and Frederick Smith to fulfill their full-time integration pledges notwithstanding their other business activities is presently immaterial to this case. This is because the United States Court of Appeals for the District of Columbia Circuit, in Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993), invalidated the integration criterion under which such inquiries have been undertaken in past cases. While Four Jacks recognizes that the Presiding Judge has designated a basic qualifying issue, it is worth noting that the underlying premise for
(continued...)

156. The record evidence overwhelmingly compels the conclusion that Sinclair (and the other businesses in which David, Robert and Frederick Smith are involved) will not interfere with the fulfillment of their pledges to manage Four Jacks' proposed stations on a full-time basis -- and, therefore, that they had absolutely no reason to falsely state to the Commission that they would resign their positions with Sinclair. Over and over again, in both phases of the hearing, David, Robert and Frederick Smith were cross-examined at length about their time commitments to Sinclair and other companies in which they have interests. In every instance, their testimony established that the time they spend on Sinclair and their other businesses is so limited, and so flexible, that their ability to integrate full-time into the management of Four Jacks' proposed station is, in Robert Smith's words, a "non-issue." (Tr. 2114).

157. The record shows that each of Sinclair's stations has a professional General Manager who runs the station's operations on a day-to-day basis. Sinclair has a full-time Comptroller that handles the company's day-to-day financial and business operations. In addition, each of SBG's stations has a business manager and business department of its own. David, Robert and Frederick Smith are not involved in reviewing individual station sales contracts, barter arrangements, or rate cards.

21/(...continued)

the issue -- the integration pledges of Four Jacks' three integrated principals -- is a matter which at this time legally cannot form the basis of any comparative decision in this case.

158. By and large, hiring and firing at the Sinclair stations is handled locally. Only for the position of General Sales Manager and above do David, Robert and Frederick Smith become involved at all. On the rare occasions where they become involved in personnel decisions, the brothers spend very little time in making a decision, placing great stock in the recommendation of the general manager.

159. Likewise, day-to-day expenditures at Sinclair's stations are handled through a purchase order system that minimizes David, Robert and Frederick Smith's involvement. Expenditures are first cleared through a local department head, then through the general manager, then forwarded to Sinclair headquarters for a routine final approval that takes "as much as two minutes at a time." Moreover, stations with financial questions generally deal with Sinclair's Comptroller and accounting office, not with the brothers themselves.

160. Among the brothers, David Smith is the one primarily involved in the purchase of syndicated programming for Sinclair's stations. As David testified, however, syndication contracts are standard, with only two real elements for negotiation. The process of negotiating a deal is usually "very quick," lasting from five minutes to an hour or two. Moreover, David does not handle all syndication deals; Sinclair's general managers can acquire certain kinds of programming without his approval. In any event, David's function in syndication negotiation is easily delegable to existing personnel at the stations.

161. Other contracts in which David is involved come up very infrequently. Programming Services Agreements are initially