

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In re Applications of)	MM Docket No. 93-94
)	
SCRIPPS HOWARD BROADCASTING)	File No. BRCT-910603KX
COMPANY)	
)	
For Renewal of License)	
Station WMAR-TV)	
Baltimore, Maryland)	
)	
and)	
)	
FOUR JACKS BROADCASTING, INC.)	File No. BPCT-910903KE
)	
For Construction Permit for a)	
New Television Facility on)	
Channel 2 at Baltimore,)	
Maryland)	

To: Administrative Law Judge
Richard L. Sippel

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MASS MEDIA BUREAU'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

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SUMMARY

There is no evidence that Scripps Howard intentionally sought to deceive the Commission with regard to either the existence or production of a facsimile sent to NBC or notes made by Janet Covington. In both instances the documents in question were insignificant and consequently no motive to conceal is apparent.

There is also no evidence that Four Jacks' integrated principals intentionally sought to deceive the Commission when they stated that they would resign from their "then-current employment" if Four Jacks is successful in this proceeding. The Four Jacks principals are "employees" of Sinclair only in the technical sense of that word. They are owners of the company who work only when they want to. The evidence is that they did not consider themselves employees of Sinclair in the sense that that word is commonly used. In any case, the integration statement in which the pledge is made contains language which implies that, if the Four Jacks application is granted, the principals will continue to perform their duties as owners of Sinclair. Finally, no motive to deceive is apparent because the ownership duties of the integrated principals are not inconsistent with their integration pledges in this proceeding.

**MASS MEDIA BUREAU'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

Preliminary Statement

1. By Hearing Designation Order, 8 FCC Rcd 2326 (1993) (HDO), the Chief, Audio Services Division, designated the above-captioned applications of Scripps Howard Broadcasting Company (Scripps Howard) and Four Jacks Broadcasting Company (Four Jacks) for hearing in a consolidated proceeding. Issues specified in the HDO were tried during the months of October and November 1993. No date has been set for the filing of proposed findings of fact and conclusions of law regarding those issues because the Commission has frozen all comparative proceedings. Public Notice (FCC Freezes Comparative Proceedings), FCC 94-41, released February 25, 1994, and Public Notice (Modification of FCC Comparative Freeze Policy), FCC 94-204, released August 4, 1994.

2. By Memorandum Opinion and Order, FCC 84M-50, released February 1, 1994, the Presiding Judge enlarged the issues against Scripps Howard to include the following:

A. To determine whether Scripps Howard Broadcasting Company misrepresented or was lacking in candor in connection with deposition testimony and/or pleadings and/or delayed production in discovery relating to NBC documents used in connection with preparing a hearing exhibit that was relevant to renewal expectancy.

B. To determine whether Scripps Howard Broadcasting Company misrepresented or was lacking in candor in connection with deposition testimony and/or pleadings and/or correspondence served on the Commission relating to the status of Janet Covington's diary of 1991 and/or Janet Covington's

notes of 1992 which were used in connection with preparing a hearing exhibit that was relevant to the renewal expectancy.

C. To determine the effect of the foregoing issues on the qualifications of Scripps Howard Broadcasting Company to hold a Commission license for Channel 2 in Baltimore.

Also, on February 1, 1994, the Presiding Judge released a Memorandum Opinion and Order, FCC 94M-51, in which he enlarged the issues against Four Jacks to include the following:

A. To determine whether Four Jacks Broadcasting, Inc. misrepresented or lacked candor before the Commission in its application, pleadings, documents and/or testimony regarding its integration commitment to resign then current employment positions of David D. Smith, Robert E. Smith, and/or Frederick G. Smith.

B. To determine the effect of the foregoing issue on the qualifications of Four Jacks Broadcasting, Inc. to receive a Commission license for Channel 2 in Baltimore, MD.

3. Hearing sessions on the enlarged issues were held on September 7, 8, 12, 13, and 14, 1994.

Proposed Findings of Fact

Scripps Howard Issues¹

NBC Facsimiles

4. During the late summer and early fall of 1992, Emily L. Barr, Assistant General Manager of Station WMAR-TV, spent "a great deal of time" gathering documentation at the request of Scripps Howard's legal counsel, Baker and Hostetler (counsel).

¹Unless otherwise specified, page and tab references in this section are to Scripps Howard Exhibit 36.

Among the documents she gathered were materials related to the issues-responsive programming that WMAR-TV had broadcast during the license term. As part of her effort, she contacted NBC to obtain copies of network programming records which would identify network programming aired during the license period that was responsive to issues of concern to the Baltimore community. (Pp. 1 and 2).

5. After speaking on the telephone to two NBC employees, one in New York and one in Los Angeles, Barr sent them each the same facsimile message, dated August 10, 1992. The facsimile stated that WMAR-TV was "looking for examples of programming, both network and local that dealt with the ascertained issues we identified through interviews with local community leaders." The time period in question was identified as June 1, 1991 through September 30, 1991. The facsimile identified 20 issues that had been ascertained. (Tab A). In response Barr received two sets of programming information from NBC; one set from New York and the other from California. Barr sent the two sets of documents she received from NBC to Scripps Howard's legal counsel. (Pp. 2 and 3; Tab A).

6. Barr was deposed on July 16, 1993. At her deposition Barr stated that she did not have a copy of the facsimile that she had sent to NBC in August 1992. She described the facsimile as listing the issues that "were on our programs issues lists

from second quarter and third quarter 1991." Barr was not asked to search her files for a copy of the facsimile. Barr did not give any further thought to the facsimile she had sent to NBC because she did not consider it a document relating to ascertainment or programming during the license term, but simply a request for documentation. (P. 3; Tr. 1741-42).

7. A little over three months after her deposition, on October 26, 1993, in response to a request from counsel that she review her files for the facsimile, Barr located a copy of it in a file between other documents. After locating the facsimile, she immediately (the same day) sent a copy of it to counsel. (Pp. 3 and 4). At a conference in this proceeding held the next day, October 27, 1993, counsel for Scripps Howard informed the Presiding Judge and opposing counsel that Scripps Howard had located the NBC facsimile. He also explained that Scripps Howard had not supplied the facsimile earlier because counsel did not believe it had been called for in discovery requests filed by Four Jacks. (Tr. 410).

The Covington Notes

8. During the summer of 1992, Barr was also involved in gathering and memorializing information about WMAR-TV's ascertainment contacts between May 30, 1991, and September 30, 1991. As part of her effort, she asked employees who had assisted in the station's ascertainment efforts during that

period of time to provide her with their 1991 calendars. Barr wanted the calendars to assist her in identifying the ascertainment meetings and interviews in which they had participated. One employee, Janet Covington, had retired from WMAR-TV. Barr contacted Covington and asked her for her calendar. Covington offered instead to write out notes of the meetings she had attended, using her calendar to refresh her recollection. (Pp. 5 and 6).

9. Covington subsequently prepared notes from her calendar and provided them to Barr. On at least one occasion, Barr discussed the notes, in person, with Covington. Barr then used Covington's notes in preparing Attachment E to Scripps Howard's ascertainment exhibit. (Pp. 6 and 7).

10. After completing Attachment E, Barr left the materials she had used in preparing it, including the Covington notes and the other employees' calendars, in a pile on the floor in her office. Sometime in 1993, Barr obtained a filing cabinet to store the material related to this case. By late 1993, the files relating to this case had become so voluminous that she had to obtain a larger file cabinet. Barr turned over to counsel more than ten thousand pages of documents in connection with this proceeding. (Pp. 7, 8 and 12).

11. In the spring or summer of 1993, Barr was asked by

counsel to review her files for any documents that might be responsive to a document request filed by Four Jacks on June 11, 1993. Barr provided counsel with all of the documents she considered relevant. Counsel also asked Barr to forward copies of the calendars she had used in preparing Attachment E. In response, Barr, under covering memorandum dated June 25, 1993, sent counsel the calendars and Covington's notes. Barr also had her June 25, 1993, memorandum to counsel photocopied and placed in her file. After sending the memorandum and Covington's notes to counsel, Barr forgot that she had sent them. (P. 8).

12. Subsequently, counsel requested that Barr obtain from Covington a copy of her calendar. Barr contacted Covington and requested that Covington provide her with a copy of her calendar, but Covington was unable to locate it. (Pp. 8 and 9).

13. On February 9, 1994, counsel met with Barr in her office. During that meeting, Barr went through her files to look for a memorandum she had sent to counsel. While looking through her "MEMOS TO B & H" file of documents sent to counsel, Barr discovered the memorandum she had written dated June 25, 1993. Attached to that memorandum was a photocopy of the notes Covington had prepared for Barr from her calendar. Until the time she discovered the photocopy of Covington's notes in her file, Barr believed that she had thrown the notes away without retaining a copy. She had not looked in the "MEMOS TO B & H"

file earlier because all of the documents contained in that file had already been sent to counsel. (Pp. 10, 11 and 13).

14. After discovering the notes, Barr gave a copy of them to counsel. Shortly thereafter, Barr was informed that the original Covington notes had been located in counsel's files. (Pp. 12 and 13).

15. Barr's covering memorandum and the original Covington notes were found in counsel's files on February 10, 1994, by a legal assistant who had been asked to search for them. He discovered the notes in a box that had been labeled "Documents sent by station but not produced because outside time period or because work product." (Four Jacks Ex. 29). On the same day (February 10) that the notes were discovered, Four Jacks was informed of the existence of the notes and the notes were produced to Four Jacks. (Tr. 1743).

Four Jacks Issue

Integration Commitment

16. In their direct written cases Four Jacks principals, Messrs. David D. Smith, Robert E. Smith and Frederick G. Smith, each represented the following:

In 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.

As set forth herein, I have proposed to divest all of my interests in and sever all connections with WBFF(TV), Baltimore, Maryland, should Four Jacks' application for channel 2 at Baltimore be granted. 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, 3 and 4).

17. Each of the three Smiths who made the above pledge is a principal of Sinclair Broadcast Group, Inc. (Sinclair). Sinclair is a holding company which owns and operates three Fox affiliated independent UHF stations. In a Form S-1 filing with the Securities Exchange Commission filed on September 28, 1993, by which Sinclair sought to raise \$200 million by the sale of bonds to the public, Sinclair stated:

The loss of services of any of the present officers, especially its President and Chief Executive Officer, David D. Smith, may have a material adverse effect on the operations of the Company.

(Scripps Howard (SH) Ex. 26 at Pp. 3 and 44). David D. Smith is President, a Director and 25% shareholder of Sinclair. (Four Jacks Ex. 26, p. 1). Robert E. Smith is Vice President, Treasurer, a director and 25% shareholder of Sinclair. (Four Jacks Ex. 27, p. 1). Frederick G. Smith is Vice President, Assistant Treasurer, a director and 25% shareholder of Sinclair.

(Four Jacks Ex. 28, p. 1). Each of the Smiths is paid a substantial salary by Sinclair and each has shared in a \$10 million bonus. (SH Ex. 31, Pp. 55-56).

18. On December 2, 1993, Sinclair filed a Registration Statement with the SEC in which it disclosed that its three principals had made commitments to work full time at WMAR-TV should they be successful in this proceeding. Specifically, Sinclair stated:

David D. Smith has informed the Company [Sinclair] that in neither the application nor the FCC proceeding with respect to Four Jacks had he committed to resign his official positions with, or dispose of his ownership interests in, the Company [Sinclair] in the event that Four Jacks is awarded such channel by the FCC. Moreover, the Company [Sinclair] 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 [Sinclair] while fulfilling his commitment to work for Channel 2.

(SH Ex. 33).

19. On December 6, 1993, after the Smiths had testified in this proceeding, Sinclair filed its proposed "Prospectus" with the SEC. In that document Sinclair disclosed:

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 interfere with their commitments to Four Jacks. The Company [Sinclair] does not believe that such commitment of resignation requires them to resign as officers or directors of the Company [Sinclair] or to dispose of their ownership interests in the Company [Sinclair]. Further, the Company [Sinclair] 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 [Sinclair] in the event that Four Jacks is awarded such channel by the FCC. Moreover, the Company [Sinclair] believes that each of the [Smiths] will be able to perform all of his current duties with the Company [Sinclair] while fulfilling his commitment to work for Channel 2.

(SH Ex. 34).

20. Each of the Smiths states that at no time has it ever been his intention to resign his ownership and executive positions with Sinclair. Each states that the divestiture pledge made in the Four Jacks application and in subsequent hearing exhibits and testimony has been limited to WBFF(TV), Baltimore. The Smiths contend that the description in their direct case exhibits of how Sinclair operated (See para. 17, supra) was provided to show how they could accommodate their ownership and executive positions with Sinclair with their integration pledges in this proceeding. (Four Jacks Ex. 26, 27 and 28, Pp. 1 and 2 respectively). Each of the Smiths also states that when he said he would give up his "then-current employment" he was referring to giving up all responsibilities with respect to WBFF, not his ownership or positions with Sinclair. (Four Jacks Ex. 26, 27 and 28, Pp. 2 and 3, respectively).

21. The Smiths do not consider themselves to be "employees" of Sinclair in the normal sense of that word. As owners of Sinclair, they have no set hours. They are not obligated to work on any given day. They can work at the office as much or as

little as they want. The day-to-day operation of the stations is generally left to the general managers and other on-site personnel. (Four Jacks Ex. 26, 27 and 28, p. 3, respectively).

22. Although the Smiths do not consider themselves employees in the usual sense of the word, they are treated as employees by Sinclair for administrative purposes. Thus, they are compensated with a salary that is paid through the same payroll system that administers the payment of compensation to the rest of Sinclair's employees. They are enrolled in the company's health plan and Sinclair prepares W-2 and W-4 tax forms for them just as it does for other employees. (Four Jacks Exs. 26, 27 and 28, p. 3).

23. In addition to being treated as employees by Sinclair, each of the Smiths performs certain duties on behalf of Sinclair. David Smith is responsible for Sinclair's long term strategic planning, including financial matters such as borrowing money for the company. He is also responsible for supervision of the general managers who run Sinclair's wholly owned stations and he participates in the purchase of syndicated programming for the stations. (Tr. 1989-90). David Smith spends 20-40 hours a week at the Sinclair office, but not all this time is devoted to Sinclair business. He could not say with accuracy how many hours he spends on Sinclair business. (Tr. 1989-91). If Four Jacks is successful in this proceeding, David Smith will perform those

functions he is able to on behalf of Sinclair and still meet his commitment to Four Jacks. If necessary he would delegate some of his functions. David Smith plans to continue to perform other functions such as negotiating programming contracts and, when the opportunity arises, making new acquisitions on behalf of Sinclair. Neither of these activities occupies much time. (Tr. 1999-2001).

24. Currently Frederick Smith spends approximately three days a week at the office. This is down from his previous 40 hours a week, because he is building a house and learning to fly a corporate airplane. If Four Jacks is successful in this proceeding, he would still be available to make decisions which occupy about two hours a week of his time. Much of the time he sits around the office with nothing specific to do and reads. (Tr. 2224-27). Similarly, Robert Smith comes to the office when there is something pressing for him to do, such as a Board meeting. (Tr. 2105). He is not involved in the day-to-day operation of the stations. (Tr. 2107).

25. Each of the Smiths attests that he reaffirms his commitment to work full-time in the management of Four Jacks' proposed Baltimore station in the event that the Four Jacks application is granted. Each states that he believes he has ample flexibility to do so and meet his obligations as an officer of Sinclair. (Four Jacks Exs. 26, 27 and 28, p. 4).

Conclusions

Scripps Howard Issues

1. It is well established that misrepresentation and lack of candor each require an intent to deceive. Fox River Broadcasting, Inc., 93 FCC 2d 127, 129 (1983). There is no evidence here of any intent to deceive on the part of Scripps Howard or any of its agents. Barr's deposition testimony concerning the content of her facsimile to NBC was accurate and reveals no attempt to dissemble concerning the subject matter of the document. Moreover, the document itself was insignificant because it merely requested information from NBC and was not itself a primary source from which exhibits were prepared. In any case, even if the document is somehow considered significant, there is no evidence that the information concerning NBC programming which appears in Scripps Howard's exhibits is inaccurate in any way. Thus, no motive to deceive or dissemble is apparent on the part of Scripps Howard or Barr concerning the existence of the NBC facsimile. In sum, when Barr testified at her deposition that she did not have a copy of the facsimile, she was simply mistaken. A mistake does not constitute misrepresentation or lack of candor. Cf. High Country Communications, 4 FCC Rcd 6327, 6328 (1989), quoting Kaye-Smith Enterprises, 7 FCC 2d 1402, 1415 (1979). When a copy of the facsimile was located, it was promptly provided (the next day) to counsel for Four Jacks. Nothing more was required.

2. The evidence with regard to the Covington notes is similar. Again no motive to deceive is apparent or has been shown to exist. In fact, the evidence is that Barr did provide a copy of Covington's notes to counsel and it was counsel that determined that the notes did not have to be provided pursuant to discovery requests filed by Four Jacks. There is no evidence that Scripps Howard misused the Covington notes to misrepresent or falsify information contained in its ascertainment exhibits. Finally, there is no evidence that any of the leader interviews reflected in either Scripps Howard's exhibits or in Covington's notes did not, in fact, occur. In sum, in light of the absence of any motive to conceal or misrepresent concerning the existence of the Covington notes, this issue must be resolved in Scripps Howard's favor.

Four Jacks Issue

3. This issue concerns the apparent inconsistency between a representation made by each of the three Four Jack's principals in their direct written case exhibits that "[i]n the event of a grant of the Four Jacks application, I will resign from my then-current employment and will limit or terminate any other activities that might interfere with my integration commitment," and statements made in various filings by Sinclair with the SEC. Each of the three integrated principals of Four Jacks is an officer and director of Sinclair, which owns and operates three UHF television stations. In a Form S-1 filing with the SEC on

September 28, 1993, Sinclair stated that the loss of any of its present officers, especially David D. Smith, may have a material effect on the operations of the company. In a Registration Statement filed on December 2, 1993, Sinclair stated that David D. Smith had informed the company that "in neither the application nor the FCC proceeding with respect to Four Jacks had he committed to resign his official positions with, or dispose of his ownership interests in, the Company." Sinclair also stated that it believed the other two integrated principals would be able to perform all their current duties with the company while fulfilling their commitment to work for Channel 2. Finally, on December 6, 1993, Sinclair filed a "Prospectus" with the SEC in which it disclosed that the Smiths had stated in their FCC application that they would resign from their then-current employment and limit or terminate any other activities that interfere with their commitments to Four Jacks. Sinclair went on to state that it did not believe that their commitment to Four Jacks required that they resign as officers or directors of Sinclair.

4. The Smiths are legally employees of Sinclair. They are paid a salary, they are enrolled in the company's health plan and Sinclair prepares W-2 and W-4 tax forms for them just as it does for other employees. When the Smiths said they would resign their "then-current employment," that pledge could be construed as indicating an intent to sever their relationship with

Sinclair, their "then-current" employer. Their pledge, however, is not company specific and, although the Smiths may be legally employed by Sinclair, their relationship to that company is far different from the normal employer-employee relationship. The Smiths are not just employees of Sinclair, they are the company's owners. The work they perform on behalf of Sinclair is consistent with their ownership role and nowhere in their integration or diversification pledges did the Smiths indicate that they would divest themselves of their respective ownership interests in Sinclair.

5. In addition, other language in their direct written testimony supports the conclusion that the Smiths did not intend to include resignation from their duties at Sinclair in their pledge to resign from their "then-current employment." In their written testimony, the Smiths distinguish their duties with regard to WBFF(TV), of which they will divest if they are successful in this proceeding, and Sinclair's other businesses, which have professional managers. "Thus," each of the Smiths states, "notwithstanding [Sinclair'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 implication of this statement is that, because of the management structure of Sinclair, the Smiths will be able to meet their integration commitment to Four Jacks while continuing their duties as owners of Sinclair.

6. As a final matter, the amount and nature of the work performed by the Smiths on behalf of Sinclair does not appear to preclude them from meeting their integration pledges. As owners of Sinclair they are not obligated to do any specific work on behalf of the company. They can work as much or as little as they want with day-to-day matters delegated to hired staff. This being the case, there does not appear to be any motive for the Smiths to dissemble regarding their intent to continue to meet their Sinclair ownership duties and obligations, should the application of Four Jacks be granted.

Ultimate Conclusion

7. It is ultimately concluded that neither Scripps Howard nor Four Jacks should be disqualified under the issues added against them.

Respectfully submitted,
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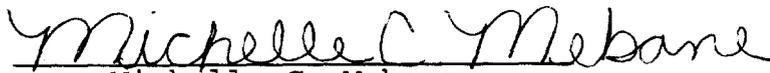
December 23, 1994

CERTIFICATE OF SERVICE

Michelle C. Mebane, a secretary in the Hearing Branch, Mass Media Bureau, certifies that she has on this 23rd day of December 1994, sent by regular United States mail, U.S. Government frank, copies of the foregoing **"Mass Media Bureau's Proposed Findings of Fact and Conclusions of Law"** to:

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