

RECEIVED

FEB 11 1995

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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)	

DOCKET FILE COPY ORIGINAL

To: Administrative Law Judge
Richard L. Sippel

MASS MEDIA BUREAU'S REPLY

1. On December 23, 1994, Scripps Howard Broadcasting Company ("Scripps Howard") and Four Jacks Broadcasting, Inc. ("Four Jacks") filed their Proposed Findings of Facts and Conclusions of Law (PFCs). The Bureau hereby replies to their PFCs. The Bureau's failure to reply to any particular finding or conclusion contained in the PFCs should not be construed as a concession to its accuracy or completeness. The Bureau submits that its findings of fact are an accurate and complete presentation of the relevant record evidence and that its conclusions of law properly apply Commission precedent in light of the record.

No. of Copies rec'd 046
List A B C D E

Four Jacks' Conclusions

2. At paragraph 128 of its proposed conclusions, Four Jacks contends that Scripps Howard had a motive to deceive regarding the existence of the Covington notes because Scripps Howard had no contemporaneously prepared documentation of its ascertainment process. This argument is a non-sequitur. It simply does not follow that because Scripps Howard did not have documentation, that it would seek to deceive regarding the existence of the Covington notes. In fact, the Covington notes, when discovered, were consistent with the Scripps Howard exhibit which was based on them (See Attachment E to Scripps Howard's' ascertainment exhibit). Thus, in its ascertainment exhibit Scripps Howard had disclosed the essence of the Covington notes. This being the case, it is clear that Scripps Howard had no reason to hide the Covington notes and, consequently, that there was no motive to deceive on Scripps Howard's' part.

3. At paragraph 131 of its proposed conclusions, Four Jacks refers to the Covington notes as having been "miraculously" discovered. The discovery of the notes has been fully explored by Four Jacks in depositions and at the hearing. If Four Jacks intends to imply that Scripps Howard's' witnesses testified falsely regarding the discovery of the notes, it should say so and provide supporting record evidence. Four Jacks' reliance on WWOR-TV, Inc., 7 FCC Rcd 636, 642 (1992) for the proposition that an applicant that fails to produce relevant evidence lacks

candor, is misplaced. In the WWOR-TV case, the Commission found that the applicant had "deliberately avoided producing documents responsive to continuing discovery requests." 7 FCC Rcd at 643. Here, the Covington notes were not the subject of a discovery request and there is no reason to believe that Scripps Howard deliberately avoided producing them. Moreover, in the WWOR-TV case the document in question was critical to a determination of the case. In the instant case, the notes, which contain information which conforms to information contained in Scripps Howard's exhibits, are of no significance.

4. At paragraph 133 of its proposed conclusions, Four Jacks cites the "Scripps Howard MO&O" which added the instant issues against Scripps Howard for the proposition that Scripps Howard was ordered to produce "all documents relating to the Issues/Programs lists." Conspicuous by its absence from Four Jack's findings and conclusions, is the specific document request that required Scripps Howard to produce the Covington notes. In fact, in requiring Scripps Howard to produce "all documents relating to the Issues/Programs Lists," the Presiding Judge was granting Four Jack's motion to produce documents over the objection of Scripps Howard. Order, FCC 93M-400, released June 24, 1993. Although the Judge's Order does not make it clear, the document request he was ordering Scripps Howard to comply with (document request (b) of Four Jack's "Motion for Production of Documents by Scripps Howard Broadcasting Company," filed June 11,

1993) requested documents "relating to the *preparation of the ... Issues/Programs Lists.*" (emphasis supplied). Obviously, the Covington notes, which were prepared for litigation after the Issues/Programs lists were prepared, had nothing to do with the preparation of such Lists and consequently were not within the scope of Four Jack's discovery request. Even assuming that by his Order the Presiding Judge intended to expand the scope of the documents requested by Four Jacks, the record in this case is devoid of any evidence that Scripps Howard's attorneys understood this to be the case. That such was not the intent of the Presiding Judge is evidenced by his later recognition that, "A narrow literal reading of [Four Jacks'] discovery request by a trial advocate could result in turning over only those documents that were in existence or that were prepared between May 30-September 03, 1991." Memorandum Opinion and Order, FCC 94M-177, released March 18, 1994.

5. At paragraph 134 of its conclusions, Four Jacks contends that Barr's memorandum of June 25, 1993, "destroys Scripps Howard's feeble justifications for the numerous misinterpretations it made concerning the Covington notes." It does nothing of the sort. What it does is explain how the documents came to be located, and subsequently discovered, in the files of Scripps Howard's counsel. Furthermore, the fact that Covington's notes were located in a file in counsel's office labeled "Documents sent by station but not produced because

outside time period or because work product" (Four Jack's Ex. 19) is further evidence that Scripps Howard's counsel did not interpret the Presiding Judge's Order (discussed in para. 4, supra) as expanding Four Jacks' document request. Clearly, the notes were outside the time period of documents requested by Four Jacks because they were created subsequent to the preparation of the Issues/Programs Lists. Thus, it makes sense that Scripps Howard's counsel would place the document in a file labelled "outside time period."

6. At paragraph 135 of its conclusions Four Jacks attacks as false and misleading statements made by Scripps Howard's counsel in a letter dated July 13, 1993. In this letter, Scripps Howard's counsel states that Janet Covington at one time possessed personal notes of ascertainment meetings, but they were not retained in any files at WMAR-TV. The July 13, 1993, letter is not relevant to a determination of the issues in this proceeding. The Presiding Judge has already ruled that "the conduct with respect to discovery which is attributable to Scripps Howard's counsel is not disqualifying as a matter of law," and that "there is no basis for the discovery of any of Scripps Howard's attorneys." Memorandum Opinion and Order, FCC 94M-177, released March 18, 1994. In any case, the July 13, 1993, letter was not received into evidence for general purposes. It was received only for the purpose of completing Emily Barr's testimony that the letter contained an incorrect implication as

to the year in which Ms. Covington prepared her notes. Tr. 1583 and 1729. Objections to Four Jack's attempts to explore the letter further were sustained by the Presiding Judge. Objections sustained at Tr. 1584, 1585 and 1586.

7. At paragraphs 130-142 of Four Jacks' conclusions, Four Jacks finds Scripps Howard's description of the discovery of the Covington notes to be "incredible." The Bureau disagrees. For Scripps Howard to dissemble regarding this matter would require a conspiracy that would include Emily Barr and a number of the members of counsel's staff. This would be truly "incredible." Moreover, Scripps Howard's version of the events leading to the discovery of the Covington notes is plausible. See the Bureau's findings of fact at paragraphs 13 through 15.

Scripps Howard's Conclusions

8. At paragraph 219, et seq., of its conclusions, Scripps Howard contends that the representation in Four Jack's application that each of Four Jack's three integrated principals would resign his then current employment, is inconsistent with Four Jacks' subsequent disclosure that its three integrated principals intend to continue in a management role at Sinclair Broadcast Group, Inc. ("Sinclair"). Scripps Howard cites Swan Creek Communications, Inc. v. FCC, 1994 U.S. App. Lexis 33055 (D.C. Cir. 1994), for the proposition that an irremediable conflict between documents submitted by an applicant to the

Commission and the applicant's testimony offered at hearing, can form the basis for the applicant's disqualification. The Bureau agrees with Scripps Howard that disqualification would be warranted where an applicant offered testimony at hearing that was contrary to what was set forth in its application, if that testimony evidenced a lack of candor. But that is not the circumstance here. The evidence here is that the Smiths are not employees in the sense that that term is generally used. They are owners of Sinclair and employ others to do the day-to-day work of the Company. While they may be treated as employees by Sinclair for some administrative purposes, insurance, taxes, and other things, that does not change the reality that they are the owners of Sinclair. This reality means that they can work for Sinclair as much or as little as they want and they can delegate work to hired staff. This being the case, there is no discrepancy between the Four Jacks' pledge to resign their then current employment (referring to employment in the normal meaning of the term) and their later claim that they would continue to perform their ownership functions for Sinclair. In the absence of such a discrepancy, the Swan Creek case is inapposite.¹

¹ The Bureau notes that at paragraph 10 of its preliminary statement, Scripps Howard states that the Bureau "supported denial" of Four Jacks' Motion for Summary Decision filed February 28, 1984. In fact, the Bureau supported this motion.

Conclusion

8. The bureau submits that the record evidence supports a conclusion that neither Scripps Howard nor Four Jacks should be disqualified under the issues specified against them.

Respectfully submitted,
Roy J. Stewart
Chief, Mass Media Bureau



Charles E. Dziejcz
Chief, Hearing Branch



Robert A. Zauner
Attorney
Mass Media Bureau

Federal Communications Commission
2025 M Street, N.W.
Suite 7212
Washington, D.C. 20554
(202) 632-6402

February 1, 1995

CERTIFICATE OF SERVICE

Michelle C. Mebane, a secretary in the Hearing Branch, Mass Media Bureau, certifies that she has on this 1st day of February 1995, sent by regular United States mail, U.S. Government frank, copies of the foregoing "**Mass Media Bureau's Reply**" to:

Kenneth C. Howard, Esq.
Baker & Hostetler
1050 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036

Kathryn R. Schmeltzer, Esq.
Fisher, Wayland, Cooper
and Leader
2001 Pennsylvania Ave., N.W.
Suite 400
Washington, D.C. 20006-1851


Michelle C. Mebane