ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In re Applications of	)	MM Docket No. 93-94
SCRIPPS HOWARD BROADCASTING COMPANY	)	File No. BRCT-910603KX
For Renewal of License of 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	)	

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To: The Honorable Richard L. Sippel
Administrative Law Judge

REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW OF FOUR JACKS BROADCASTING, INC. ON ISSUES ADDED FEBRUARY 1, 1994

FOUR JACKS BROADCASTING, INC.

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Its Attorneys

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SUMMARY

Scripps Howard's proposed findings and conclusions depict a world that simply does not exist in the record of this case. Relying on its own self-serving direct testimony, Scripps Howard blithely contends that its concealment of the Covington notes and the NBC correspondence does not matter, and that its numerous misrepresentations concerning these documents were inadvertent mistakes. Scripps Howard reaches this conclusion, however, only by ignoring the wealth of testimonial and documentary evidence to the contrary.

For instance, with respect to the Covington notes, Scripps Howard chalks its misconduct up to (i) a determination by its counsel that the notes were not produceable; (ii) a misunderstanding by its counsel as to the nature of the notes vis-a-vis Covington's earlier calendar; and (iii) the alleged "misplacement" of the notes in WMAR-TV's files. Yet Scripps Howard raised no claim regarding the produceability of the Covington notes until after Four Jacks filed its motion to enlarge. Moreover, counsel's alleged misunderstanding about the "notes" vs. the "calendar," as well as the notion that Emily Barr somehow "misplaced" the notes in station files, are absolutely destroyed by Ms. Barr's memo of June 25, 1993 to Scripps Howard's counsel. In that memo -- written just three days before document production and less than three months before Ms. Barr's admittedly false direct hearing testimony -- Ms. Barr specifically sent the Covington notes to counsel and made clear

those notes had been prepared in lieu of Covington's "actual calendar," which she had not saved.

Scripps Howard's Findings simply choose to ignore this damning evidence. They also ignore Barr's repeated November 1993 testimony that she threw the notes away, as well as Barr's wildly inconsistent testimony as to the circumstances under which the notes were finally "discovered" -- apparently with ease -- eight days after the Judge added issues. With respect to the NBC correspondence, one would have expected Scripps Howard's Findings to explain why, just hours before producing the correspondence, Scripps Howard represented in a pleading that these documents "may or may not exist" and that "a search for the documents is likely to take some time and cause delay." Yet these representations go totally unaddressed, let alone explained.

Notwithstanding its self-serving contention, Scripps Howard's motive to lie and conceal concerning these documents is all too clear. The Commission has made clear that an incumbent licensee's entitlement to a renewal expectancy must be shown through contemporaneous documentation, not through unsupported recollection. The Covington notes and NBC correspondence make it obvious that Scripps Howard's renewal expectancy showing, far from being "contemporaneously" documented, was based substantially on material concocted one year after the fact. It is easy to see why Scripps Howard consciously singled out the Covington notes and NBC correspondence for concealment.

By contrast, this motive for deceit is absolutely lacking with respect to the issue against Four Jacks. In fact, the brief

discussion of motive that appears in Scripps Howard's Findings is based on the patently incorrect premise that Four Jacks' three integrated principals were required to pledge to resign their Sinclair positions. Such is not the case with respect to David, Robert and Frederick Smith, who have always been able to accommodate their full-time Four Jacks' integration commitments with their positions as owners and executives of Sinclair, and always intended to retain their Sinclair positions.

Indeed, despite Scripps Howard's strained attempts to prove otherwise, the plain fact is that David, Robert and Frederick Smith never specifically pledged to give up their ownership and executive positions with Sinclair. The notion that their promises to resign their "then-current employment" pertained to their Sinclair positions simply does not comport with logical thinking, and is specifically refuted by David, Robert and Frederick Smith's direct case testimony explaining how they can accommodate their Four Jacks integration proposals "notwithstanding [Sinclair's] other media interests." Even Scripps Howard obviously understood that the three Smiths had no intention of resigning from Sinclair; it cross-examined them at length in the first phase of this case on the time taken up by their Sinclair responsibilities. Moreover, had the Four Jacks principals proposed to resign from Sinclair, they logically would have proposed to divest their interests in all of Sinclair's stations, as opposed to just WBFF(TV), to gain a diversification benefit. Therefore, there was clearly no motive to hide the matter. Lacking any evidence of motive or intent to deceive on

the parts of David, Robert and Frederick Smith, Scripps Howard's Findings resort to piecemeal, flawed attacks on perceived inconsistencies in Four Jacks' filings and testimony which simply do not exist.

The record amply demonstrates that there is but one qualified applicant in this case. Scripps Howard should be disqualified, and the issue against Four Jacks should be resolved in its favor.

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To: The Honorable Richard L. Sippel
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REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW OF FOUR JACKS BROADCASTING, INC. ON ISSUES ADDED FEBRUARY 1, 1994

Four Jacks Broadcasting, Inc. ("Four Jacks"), by its attorneys and pursuant to Sections 1.263 and 1.264 of the Commission's rules, hereby submits its Reply to the Proposed Findings of Fact and Conclusions of Law on the issues added February 1, 1994 filed by Scripps Howard Broadcasting Company ("Scripps Howard") as well as the Proposed Findings of Fact and Conclusions of Law filed by the Mass Media Bureau (the "Bureau").[1/]

1/ For convenience, Scripps Howard's Proposed Findings of Fact and Conclusions of Law are referred to herein as the "Scripps Howard Findings," ~~and~~ the Bureau's Proposed Findings of Fact and Conclusions of Law are referred to herein as the "Bureau Findings."

1. This Reply is directed toward the most significant errors, omissions and arguments in the Scripps Howard Findings and the Bureau Findings. To the extent that any particular fact or argument may not be discussed herein, Four Jacks should not be deemed to have conceded any such fact or argument. Rather, Four Jacks submits that its own Proposed Findings of Fact and Conclusions of Law ("Four Jacks Findings") more fully and accurately set forth the record evidence in this proceeding.

I. Preliminary Statement

2. As a preliminary matter, Scripps Howard's Findings contain a number of procedural flaws. It is well established Commission policy that each party file proposed findings and conclusions which set forth that party's recitation of the record evidence. Scripps Howard's ultimate findings and conclusions, however, are posited as though they were the Judge's findings and conclusions. Scripps Howard has presumptuously usurped the Judge's role, and, therefore, those portions of its pleading which are framed as though they were written by the Judge should be stricken as inappropriate.

3. The proposed findings filed by Scripps Howard ignore substantial evidence and are interwoven with conclusory remarks. The proposed conclusions contain statements and arguments which are unsupported by the facts and indeed belied by the facts. The flaws are demonstrated below.

II. Scripps Howard's Proposed Findings and Conclusions on the Scripps Howard Misrepresentation/Lack of Candor Issues Are Riddled With Flaws

A. Scripps Howard Had a Clear Motive to Deceive the Commission and the Other Parties

4. Scripps Howard denies that it had any motive to conceal the existence of the 1992 Covington notes and the NBC facsimiles. In advancing this argument, Scripps Howard has totally ignored the whole point of the Commission's ascertainment process and the specific guidelines set forth by the Commission when it issued its decisions deregulating radio and television. See Deregulation of Radio, 84 F.C.C.2d 968 (1981) and Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1076 (1984) (hereinafter "Television Deregulation").

5. In Deregulation of Radio, supra, at pp. 984-999, the Commission specifically discussed the type of showing a license renewal applicant should make if faced with challenges at renewal time. It emphasized that the programming offered must be in response to the issues ascertained. According to the Commission, "[f]or renewal applicants, the public will have access to their programs/issues list to aid in assessing the station's responsiveness." Id. at 998. The Commission continued:

> The list required of renewal applicants need not be exhaustive or, indeed, be a complete recitation of either all of the issues covered or all of the programming offered in response to these issues. Rather, the list is intended to provide examples of both. If challenged at renewal, the licensee may point to both listed and unlisted programming to support any claim of compliance with the Commission's requirements. However, any

> programming upon which the licensee wishes to rely that was not contained on the issues/programs list must be supported by documentation that was prepared reasonably contemporaneously with the subject programming. Unsupported recollection that the station broadcast or probably broadcast other programming will not be considered by the Commission.

Id. at 999 (emphasis added).

6. In Television Deregulation, supra, the Commission revised the requirements pertaining to television stations in the same manner and for the same reasons that it had altered the requirements pertaining to radio stations. The Commission stressed that "a commercial television broadcaster will remain subject to an obligation to provide programming that is responsive to the issues confronting its community." 98 F.C.C.2d at 1091-92. According to the Commission, in a petition to deny context, the focus of its inquiry "can be expected to be whether the challenged licensee acted reasonably in choosing the issues addressed in its programming." Id. at 1094. In a contested license renewal, the Commission advised that "the burden of proving that programming relevant to public issues has been provided is on the licensee." Id. at 1110.

7. The case of Fox Television Stations, 8 FCC Rcd 2361 (Rev. Bd. 1993), aff'd in pertinent part, 9 FCC Rcd 62 (1993), contains a detailed analysis of prevailing precedent concerning a licensee's entitlement to a renewal expectancy. In that case, the Review Board noted the extraordinary measures KTTV-TV took to learn of the issues confronting the Los Angeles community and the assiduous process by which KTTV-TV keyed programming to those ascertained issues. Id. at 2418.

8. Scripps Howard's ascertainment for the May 30 - September 3, 1991 license renewal period was carried out by word of mouth without any formalized recordkeeping.[2/] Scripps Howard's witnesses admitted that when they spoke to community representatives between June 1 and September 3, 1991, they did not put anything in writing concerning any community issues. (See Tr. 563, 975). Janet Covington, who was Public Affairs Director of WMAR-TV during the renewal period, testified that she had never even seen the issues/programs lists that Scripps Howard introduced during the November 1993 hearing. (Scripps Howard Ex. 38, pp. 17-18).[3/]

9. Timely production of Ms. Covington's notes and the NBC facsimiles by Scripps Howard would have led to questions at the July 1993 depositions of Ms. Barr and Mr. Kleiner concerning their preparation and would have revealed (a) that the notes were prepared in 1992 and (b) that Scripps Howard's ascertainment showing had to be constructed in 1992 because contemporaneous documentation from 1991 was missing. Instead, the matter was not uncovered until Ms. Barr's testimony during the November 1993 hearing. Since the Commission's Deregulation decisions had stressed that any programming upon which the licensee wishes to

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2/ As the Presiding Judge observed, "the ascertainment methodology goes to the very heart of the [renewal expectancy] issue." (Tr. 950).

3/ Ms. Covington's testimony gives rise to a substantial question as to whether those lists were prepared in 1992 along with everything else. In any event, Scripps Howard's witnesses have conceded that the Issues/Programs list for the third quarter of 1991 was not prepared until October 1991 (Tr. 612), and there is no documentation to demonstrate that Scripps Howard had ascertained the issues on that list during the May 30 - September 3, 1991 period.

rely that was not contained on the Issues/Programs list must be contemporaneously documented and "[u]nsupported recollection that the station broadcast or probably broadcast other programming will not be considered by the Commission," Scripps Howard had a substantial motive to hide the Covington notes and the correspondence it sent to NBC in 1992 attempting to learn what NBC programming might have addressed issues in Baltimore in the summer of 1991.[4/]

10. Both the July 13, 1993 letter and footnote 6 of Ms. Barr's direct testimony were designed to hide the fact that the Covington notes were constructed in 1992 based on the unsupported recollection of Ms. Covington. The July 13, 1993 letter from Scripps Howard's counsel did not reveal that Ms. Covington's notes were prepared in 1992 based on unsupported recollection. The letter claimed that Ms. Covington did not possess the notes and that they "were not retained in any files at WMAR-TV" even though a mere 18 days earlier, Ms. Barr had forwarded the original notes to counsel (see Four Jacks Ex. 31), and the notes had been retained in the files at WMAR-TV as disclosed only after issues were added.

11. Ms. Barr's direct case testimony was equally misleading and failed to disclose that the Covington notes were prepared in

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4/ Indeed, Scripps Howard has misunderstood the very purpose of ascertainment. As described in the Fox Television Stations case, supra, the Commission expects licensees to learn the issues confronting their communities and then develop programming to meet those issues. In contrast to the Fox case, Scripps Howard's contacts with community leaders were fortuitous and, even when there were contacts, Scripps Howard made no attempts to list the issues discussed. There is no demonstrable nexus between any issues discussed and any programming aired.

1992 based on the unsupported recollection of Ms. Covington. In footnote 6 of Scripps Howard Ex. 3, Ms. Barr revealed that the material in Attachment E was originally prepared in 1992 from calendars of herself, Arnold Kleiner and Maria Velleggia and notes of Janet Covington but claimed that Ms. Covington "had kept these notes in her possession when she left the station" and that "it did not occur to [her] to preserve Ms. Covington's hand-written notes." This statement was prepared less than three months after Ms. Barr herself had forwarded Ms. Covington's notes along with the calendars to counsel. Ms. Barr had not only preserved the notes, but retained a copy in her office as well.

12. Scripps Howard would have the Judge believe that Ms. Covington could remember in 1992 the details of a large number of sparse calendar entries she made in 1991.[5/] Yet Ms. Covington's deposition testimony reveals that in August 1994 she could not recall any details concerning her first meeting with Scripps Howard's counsel on February 1, 1994 -- a mere six months earlier. (Scripps Howard Ex. 38, p. 107). Surely, the meeting with Scripps Howard's counsel concerning the issues the Judge had added would have more of an impact on Ms. Covington's memory than a series of calendar entries. Nor could Ms. Covington recall when she retained Baker & Hostetler or even when the question of representation came up. (Scripps Howard Ex. 38, pp. 6-7).

13. At her deposition, Ms. Covington revealed with regard to the notes she prepared in 1992 that "[e]verything is beyond recollection -- I mean is based on recollection." (Scripps

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5/ Ms. Covington testified that she did not write much in her calendar, just the person and date. (Scripps Howard Ex. 38, p. 120).

Howard Ex. 38, p. 120). This is precisely what the Commission was concerned about when it ruled that licensees who wish to earn a renewal expectancy must have "contemporaneous documentation."

14. Scripps Howard had the same motive for not disclosing the correspondence it sent to NBC in August 1992 in search of NBC programming that might have addressed local issues in the Baltimore area in the summer of 1991. The letter requesting NBC records was written long after the summer of 1991 and reveals that the programs could not possibly have been produced in response to ascertainment. The fact that Scripps Howard produced documents from NBC is irrelevant.[6/] It was the correspondence to NBC asking about which programs might have addressed local issues that demonstrated that Scripps Howard was in search of responsive programs in 1992!

B. Scripps Howard's Findings Completely Ignore Important Facts That Are Harmful to Its Case

15. The most substantial flaw in Scripps Howard's Findings is that they completely ignore evidence that is harmful to Scripps Howard's case. In those areas in which Scripps Howard has failed to propose findings, its silence is an admission, and Four Jacks' findings must be accepted. Scripps Howard cannot be permitted to propose new findings in its Reply. See Industrial Business Corp., 40 F.C.C.2d 69, 70 (Rev. Bd. 1973) (a party cannot cure a defective initial pleading by inserting information that has been readily available in its reply pleading).

6/ In any event, as noted in Four Jacks' Findings, much of the NBC documentation was produced inadvertently by Scripps Howard, whose counsel then asked to have Four Jacks return it.

16. Scripps Howard contends it has explained the handling of the 1992 Covington notes as well as their subsequent discovery after the misrepresentation/lack of candor issues were added. However, the proffered explanation is full of holes.

17. First, Scripps Howard maintains that on February 9, 1994, when Ms. Barr examined the "Memos to B&H" file in her office, "Ms. Barr was not looking for the 1992 Covington notes or anything that might help her locate the 1992 Covington notes, because at the time, she believed that she had thrown away the 1992 notes and not retained any copies of them." Scripps Howard Findings at 19, citing Ms. Barr's direct testimony at Scripps Howard Ex. 36, p. 10. This finding is completely contradicted by Ms. Barr's February 15, 1994 Declaration which was attached to Scripps Howard's Motion for Summary Decision as well as by Ms. Barr's admissions at hearing. Ms. Barr's February 15, 1994 Declaration represented as follows with respect to the discovery of the Covington notes on February 9, 1994:

> At one point during our meeting, I opened one of the file cabinets in my office to look for a memorandum 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. A copy of this memorandum is attached as Exhibit 1. [The June 25, 1993 memo was attached as Exhibit 1]. I immediately reached for the file entitled "MEMOS TO B&H to look for the memorandum.

(Four Jacks Ex. 32 (emphasis added)). There is no question that on February 9, 1994, Emily Barr turned immediately to the June 25, 1993 memorandum to find the 1992 Covington notes and easily found them.

18. Scripps Howard also ignores the internal contradictions in Ms. Barr's hearing testimony, the conflict between her hearing testimony and the February 15, 1994 Declaration, and her eventual admission, when pressed, that the February 15, 1994 Declaration was true and correct. During the hearing, when questioned about the discovery of the Covington notes on February 9, 1994, Ms. Barr claimed, "I just don't remember what it was that I was looking specifically for." (Tr. 1649, 1652). However, she also said, "I was looking for information in a memo, and then once I found that information I would know what the date of that memo was." (Tr. 1649). And she continued, "I remember Ms. Abrutyn asked me a question. I said: let me see if I can remember when I sent that to you, meaning to counsel." (Tr. 1652). Immediately thereafter, however, when asked if she remembered the subject of the memo she was looking for, Ms. Barr responded, "No. I just stated that I have no specific recollection as to what I was looking for. . . ." (Tr. 1653). Since Ms. Barr admitted she was looking for information in a memo that she had sent to counsel, clearly she did know what she was looking for. Moreover, Ms. Barr's hearing testimony that she had no specific recollection of what she was looking for conflicts with her February 15, 1994 Declaration that she "opened one of the file cabinets in my office to look for a memorandum that I had sent to Baker & Hostetler [a memo that she specifically attached to her Declaration] 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). Finally, when questioned about her February 15, 1994 Declaration, Ms. Barr conceded that the

facts set forth in that Declaration (which conflicted with her direct case exhibit and her earlier testimony) were true and that on February 9, 1994 she was looking for the June 25, 1993 memo. (Tr. 1655-57, 1665-66).

19. It is not surprising that Ms. Barr would change her story about the discovery of the June 25, 1993 memo after Scripps Howard filed her Declaration with its Motion for Summary Decision. When Four Jacks opposed the Motion for Summary Decision on February 28, 1994, it discussed the juxtaposition of (a) Ms. Barr's June 25, 1993 memo transmitting the Covington notes along with the calendars to counsel, (b) Scripps Howard's initial document production on June 28, 1993 and (c) Scripps Howard's July 13, 1993 letter which represented that Ms. Covington at one time possessed personal notes but these notes were not retained.

20. Just as Scripps Howard has ignored Ms. Barr's contradictory testimony concerning the discovery of the Covington notes, it has also ignored her testimony during the November 1993 hearing that she threw the notes in a wastebasket. Scripps Howard's Findings maintain at p. 18 that Ms. Barr believed she had discarded the 1992 Covington notes, referring to her direct case testimony at Scripps Howard Ex. 36, p. 12. In that exhibit, Ms. Barr stated, "I assumed I must have discarded them, and I so testified at the hearing."

21. In fact, at the November 1993 hearing, when questioned about the Covington notes, Ms. Barr very definitely testified that she "threw them in the wastebasket," that "it never occurred" to her to preserve them, and that she did not consult

with anybody before she threw them away "because it didn't occur to me." (Tr. 582-83). When the Judge himself stated that he did not understand how she threw the Covington notes away and questioned Ms. Barr, she replied that she made the assumption that she would be able to get Ms. Covington's calendar when and if she needed it. (Tr. 588). She maintained throughout the first day of her hearing testimony (November 8, 1993) that she had thrown the Covington notes away after she used them to arrive at some of the ascertainment interviews listed in Attachment E. (Tr. 592-93). By the end of the day, Ms. Barr's testimony led the Judge to order Scripps Howard to turn over that portion of earlier drafts of Attachment E that had the Covington information. (Tr. 593).

22. It was only on the next day of hearing (November 9, 1993), after Ms. Barr had an opportunity to discuss the matter with counsel and review documents, that Ms. Barr slightly changed her testimony. She continued to maintain that she threw the Covington notes away (Tr. 667), but when asked about the point when those notes were thrown away in relation to the preparation of Attachment E, she stated that she didn't "specifically recall throwing away the Covington notes but generally recalls getting rid of what she thought was unnecessary information." (Tr. 669). It is this testimony on which Scripps Howard solely relies -- without any discussion of the context or Ms. Barr's earlier repeated testimony that she threw the notes in the wastebasket. Once again, Ms. Barr's testimony is contradictory, and Scripps Howard has ignored substantial record evidence.

23. Scripps Howard also ignores the significant contradictions between Ms. Barr's and Ms. Covington's testimony as well as between Ms. Barr's testimony and the documentary evidence. Ms. Barr testified in November 1993 that Ms. Covington's handwriting and recordkeeping were "very unique and difficult to decipher." (Tr. 589). When Ms. Covington's notes were finally produced, her handwriting was very neat and legible, and the document was well-organized. (Scripps Howard Ex. 36, Attach. C).

24. At the November 1993 hearing, Ms. Barr also testified that she sat down with Ms. Covington to review her notes and discuss who she met with, what was discussed and what programming resulted (Tr. 664, 689). Ms. Covington, on the other hand, stated that she never discussed responsive programming with Ms. Barr, and did not recall sitting down with her at all to discuss the notes or having any further discussions. (Scripps Howard Ex. 38, pp. 44-48, 94). The conflict between the testimony of Ms. Barr and Ms. Covington is important because the pages of Attachment E purportedly attributable to Ms. Covington's notes contained numerous details that were not in the notes. See Section II(D) infra.

25. Scripps Howard's attempts to explain its failure to produce the correspondence Ms. Barr had with NBC concerning her efforts in 1992 to document NBC programming between June and September of 1991 are equally flawed. Although the Memorandum Opinion and Order adding the issues against Scripps Howard, FCC 94M-50, released February 1, 1994, at para. 7, specifically raised lack of candor questions concerning Scripps Howard's

representations on October 26, 1993 that "the [NBC] documents were not in the possession of WMAR-TV over three months ago;" that "Four Jacks' 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 chose not to address these questions at all. As the Presiding Judge stated in his Memorandum Opinion and Order, FCC 94M-177, released March 18, 1994, at para. 8, denying Scripps Howard's Motion for Summary Decision on the misrepresentation/lack of candor issues, "Scripps Howard unilaterally chose to withhold the NBC documents, as well as the fact that they existed until ordered to disclose them on October 26, 1993." Scripps Howard has failed to explain the circumstances surrounding its representations to the Commission. Counsel's admission at the hearing that the presence or absence of documents at WMAR-TV was not an issue because "we still don't know whether NBC would have taken a lengthy time to do the search" (Tr. 1700-1701) reveals that the representations made on October 26, 1993, just like the representations in the infamous July 13, 1993 letter, were deliberately designed to mask the existence of the documents.

C. Scripps Howard's Findings on the Misrepresentation/ Lack of Candor Issues Are Not Credible

26. As the Judge has previously noted in his Orders adding the issues against Scripps Howard and denying summary decision, there is no dispute over the relevance of the NBC and Covington materials, and Scripps Howard never timely raised any claims of attorney-client privilege or attorney work product with respect

to these documents. See, e.g., FCC 94M-50, para. 10 and n.5; FCC 94M-177, n.3.

27. A review of the Summary attached to Scripps Howard's Proposed Findings provides ample evidence of the lack of credibility of its explanations concerning the events in question. Scripps Howard now admits that there were "several apparent misstatements" about the NBC and Covington documents. With respect to the Covington notes, the following is stated:

> Scripps Howard's initial failure to produce ascertainment notes prepared by Janet Covington in 1992, and certain erroneous statements in attorney correspondence and Ms. Barr's testimony in the 1993 hearing concerning these notes, are the result of: a determination by Scripps Howard's counsel that the documents were not within the scope of Four Jacks' document request; a misunderstanding by counsel about the distinction between the 1992 notes and Mrs. Covington's 1991 notations in her calendar; and the misplacement of the 1992 notes in Station WMAR-TV's files.

Scripps Howard Findings, Summary, p. x. With respect to the NBC documents, Scripps Howard offers a similar excuse -- namely its "belief that these documents fell outside the scope of Four Jacks' document request." Id.

28. Despite the fact that Scripps Howard had the burdens of proceeding and proof on the added issues, these amazing statements are not supported by the remainder of its Findings or by the record evidence, i.e., the hearing exhibits and testimony! At no time prior to the filing of Four Jacks' Motion to Enlarge Issues did Scripps Howard raise any question about the scope of Four Jacks' Motion for Production of Documents or the Judge's Order concerning the Motion; at no time did Scripps Howard's

counsel timely assert a privilege or work product claim; and Scripps Howard's counsel vigorously opposed notices of deposition directed to present counsel and former counsel, David Roberts. Scripps Howard's counsel did not testify in this proceeding, and Ms. Barr's testimony does not address this area at all. There is no testimony about any misunderstanding by counsel about the distinction between Ms. Covington's 1991 calendar and her 1992 notes.[7/] Indeed, the record evidence dispels the notion that any misunderstanding existed. Thus, Scripps Howard cannot now lay the blame on counsel. Moreover, there is no evidence that the Covington notes were "misplaced" at Station WMAR-TV. Rather, the original notes were sent to counsel on June 25, 1993, a copy was made in conformance with Scripps Howard's policy to make copies of all the documents sent to counsel, and the copy of the Covington notes was retained at WMAR-TV. Nor is there any evidence of any good-faith belief on Scripps Howard's part that the NBC documents fell outside the scope of Four Jacks' document request. Once again, Ms. Barr offered no testimony at all to support this statement, nor was any documentary evidence offered, and Scripps Howard's counsel did not testify.

29. Numerous facts demonstrate the sheer lack of credibility in Scripps Howard's attempts to explain the events that led to addition of the issues. After the issues were added, the June 25, 1993 memo appeared. That memo revealed that in

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7/ Scripps Howard presumably is referring to the argument it made in its Opposition to the Petition to Enlarge Issues that there were two sets of notes -- notes in the 1991 calendar and notes prepared in 1992. This ridiculous argument has never been ratified by any witness, and is utterly destroyed by the June 25, 1993 memo.

response to Four Jacks' Motion for Production of Documents, Ms. Barr had forwarded the calendars of herself, Mr. Kleiner and Ms. Velleggia to Baker & Hostetler along with Janet Covington's original notes. The memo specifically noted the attachment of Ms. Covington's original notes. Just eighteen days later, Scripps Howard forwarded the July 13, 1993 letter representing that "these notes were not retained in any files at WMAR-TV" and that "Scripps Howard recently contacted Ms. Covington to ascertain whether she possessed any of these notes and determined that she did not." In fact, Scripps Howard knew that Ms. Covington did not have the notes because Ms. Barr had sent them to counsel, the original notes were in counsel's hands, and a copy of the notes was retained in the files in Ms. Barr's office at WMAR-TV. Ms. Barr's direct case testimony dated September 13, 1993, represented that "[i]t did not occur to me to preserve Ms. Covington's handwritten notes after our discussions." This statement was made less than three months after Ms. Barr had written her memo transmitting the original notes to counsel and after she had had a conversation with counsel in which he asked her to attempt to obtain Ms. Covington's 1991 calendar.

30. At the November 1993 hearing (at a time when neither the June 25, 1993 memo nor the Covington notes had been disclosed), Ms. Barr repeatedly maintained that she had thrown the notes away. Even when Four Jacks filed its Motion to Enlarge Issues, Scripps Howard did not come clean. Instead, Scripps Howard advanced the feeble and false argument that the Covington "notes" referenced in the July 13, 1993 letter and footnote 6 of Barr's direct testimony were really the 1991 calendar entries.