

This representation was not even consistent with Ms. Barr's hearing testimony, and the argument was quickly dropped by Scripps Howard.

31. It is patently incredible that no one knew about, searched for or found the Covington notes between June 25, 1993 and February 9, 1994. Statements were made about the Covington notes; Ms. Barr was questioned about the notes at the November 1993 hearing; and she admitted that she and counsel had reviewed documents in connection with this case on a number of occasions. Moreover, Scripps Howard certainly had a duty to look for the notes after the Motion to Enlarge was filed, yet Ms. Barr admitted that she made no such search. (Tr. 1669). The fact that no search was conducted and that the Opposition to the Motion to Enlarge was purely procedural in nature are consistent with the conclusion that Scripps Howard knew it had the Covington notes all along. The ease with which Ms. Barr ultimately "discovered" a copy of the notes in the top drawer of her office file cabinet, and the ease with which Mr. Kilbourne, the paralegal at Baker & Hostetler responsible for documents in this case, found the original copy, further supports the conclusion that Scripps Howard knew it had the documents.^{8/} It was only after issues were added that the 1992 Covington notes and the June 25, 1993 memo came to light!

32. Ms. Barr's contradictory testimony concerning the discovery of the Covington notes and the June 25, 1993 memo is the ultimate evidence that Scripps Howard consistently and

^{8/} Indeed, both Baker & Hostetler's files and Ms. Barr's files appear to have been very well organized.

repeatedly misrepresented and lacked candor in this proceeding. The July 13, 1993 letter contained misrepresentations; Ms. Barr's written direct case testimony at footnote 6 contained misrepresentations; Ms. Barr's hearing testimony contained misrepresentations; Scripps Howard's Opposition to the Motion to Enlarge lacked candor and contained misrepresentations, and Ms. Barr's September 1994 direct testimony and hearing testimony contained further evidence of misrepresentation and lack of candor on the subject of the Covington notes and their discovery.

33. When the Presiding Judge denied summary decision to Scripps Howard, he stated, "There is a substantial question of fact raised between the testimony of Ms. Barr and her affidavit dated February 16, 1994 [sic],^{9/} wherein she accounts for the Covington notes which were produced only after a post-hearing search was made of Scripps Howard's files. FCC 94M-177, para. 9. Ms. Barr's testimony of September 1994 contradicting her February 15, 1994 Declaration, and her eventual concession that the February 15th Declaration was correct, demonstrate that neither Scripps Howard nor Ms. Barr are to be believed. The fact that Mr. Schroeder, a corporate officer of Scripps Howard, received a copy of the June 25, 1993 memo which clearly revealed the location of the 1992 Covington notes, demonstrates that Scripps Howard cannot escape responsibility here.

34. Scripps Howard's conduct with respect to the NBC documents reveals a disturbing pattern of conduct. Once again, Ms. Barr's correspondence with NBC was clearly produceable yet was not produced in response to discovery. Then Ms. Barr

9/ Ms. Barr's Declaration was dated February 15, 1994.

testified at her July 16, 1993 deposition that the correspondence she sent by facsimile did not exist. Subsequently, Scripps Howard represented that the "documents were not in the possession of WMAR-TV over three months ago" and "may or may not exist." Only after the Judge called a pre-hearing conference to discuss Four Jacks' request for the issuance of a subpoena to NBC^{10/} did Scripps Howard produce the documents.

35. Moreover, Ms. Barr's 1994 testimony that she did not consider the "facsimile" to be a "document" covered by Four Jacks' Motion for Production of Documents undercuts Scripps Howard's claim that determinations as to the produceability of documents were being made solely by Scripps Howard's attorneys. In any event, Ms. Barr's contention must be rejected since the Judge has already ruled that the NBC materials were covered by the document production request. Moreover, Ms. Barr's memo to NBC requesting the programming information was clearly a "document" within the scope of the definition in Four Jacks' Motion. The fact that it was transmitted via facsimile is irrelevant. This argument shows the depths to which Scripps Howard went to avoid production of documents. In sum, Ms. Barr's testimony on this matter lacked candor and Scripps Howard's October 26, 1993 statements, as well as its present attempt to shift responsibility for non-production of the correspondence to counsel, are patently false.

10/ NBC did not file any objection to the subpoena request.

D. The Covington Notes and NBC Documents Reveal Serious and Substantial Flaws in Scripps Howard's Renewal Expectancy Showing

36. Scripps Howard advances the claim that "[n]othing in the 1992 Covington notes incriminates either Scripps Howard's ascertainment efforts or its representations of those efforts anywhere in the proceeding; on the contrary, the notes provide written confirmation of Mrs. Covington's extensive ascertainment activities during the four month period at issue, and their timely production would have bolstered Scripps Howard's ascertainment documentation from the outset." Scripps Howard Findings at 34.^{11/} However, this argument misses a very central point -- namely, that Ms. Covington's notes were a virtually total fabrication compiled in 1992. All Ms. Covington had in her 1991 calendar were dates and names. (Scripps Howard Ex. 38, p. 120). In that respect her 1991 calendar was apparently no different and certainly no more complete than the 1991 calendars of Ms. Barr and Mr. Kleiner (see Four Jacks Exs. 12, 16). It is impossible to tell from these calendars what issues were discussed, what issues were important to the local community and what programming was developed in response.

37. At her deposition Ms. Covington could not recall anything that was discussed six months earlier on February 9, 1994, when she met with Baker & Hostetler's counsel concerning the issues in this case. (Scripps Howard Ex. 38, p. 103, 107).

^{11/} Scripps Howard also argues in its Conclusions at p. 34, although not in the underlying Findings, that Ms. Barr testified accurately about the content of the Covington notes at the 1993 hearing, citing Tr. 661. The transcript citation, however, does not reflect any testimony about the content of the notes.

She could not recall when or how Baker & Hostetler became her counsel. (Scripps Howard Ex. 38, pp. 6-7). She could not recall why her notes for September (after Four Jacks' application was filed) were more detailed than the notes from June through August. (Scripps Howard Ex. 38, p. 59). She said she had been provided with a copy of her notes recently but could not recall if it was within the two or three months preceding her deposition. (Scripps Howard Ex. 38, pp. 92-93). Ms. Covington's 1992 notes were based on the unsupported recollection of a person whose recollection was hardly reliable.

38. Moreover, even assuming arguendo that the 1992 Covington notes were reliable, a comparison of the notes with Attachment E reveals significant and substantial discrepancies.^{12/} Significantly, Ms. Covington testified that where there were no entries in her notes, there had been no entries in her calendar or she was on vacation. (Scripps Howard Ex. 38, p. 72). Yet there are at least six instances in Attachment E where Ms. Covington is listed as having been at a meeting but her notes do not support the listing. Compare Scripps Howard Ex. 36, Attach. C with Attach. E, SH3-0234, SH3-0269, SH3-0275, SH3-0311, SH3-0318, SH3-0328 and SH3-0332.^{13/} There are numerous other discrepancies as well. For instance, Ms. Covington's entry for June 13, 1991 in her notes does not

^{12/} Although these discrepancies relate more to the renewal expectancy aspect, since Scripps Howard has raised the point, Four Jacks will respond.

^{13/} Although some of these purported contacts occurred after the filing of Four Jacks' application, Four Jacks does not concede their relevance. Four Jacks submits that the period in Attachment E beyond September 3, 1991 cannot be considered.

identify any issues and there is no indication that the matter described has anything to do with Baltimore. Attachment E at SH3-0241 identifies the "issue" as "Consumer Education booklets from Pueblo, Co." A large number of Ms. Covington's notes provide no indication of any responsive programming. See, e.g., entries for June 3, June 5, June 6, June 19, July 10, August 1, and August 23, as compared to Attach. E, SH3-0226, SH3-0230, SH3-0235, SH3-0245, SH3-0246, SH3-0262 and SH3-0306.

39. Other instances of discrepancies and conflicts between the Covington notes and Attachment E are also evident. In contrast to Attach. E, SH3-0227, Ms. Covington's notes for June 4, 1991 do not mention the contact person, where the meeting was held or the responsive programming. A comparison of Ms. Covington's notes for July 11, 1991 with Attach. E, SH3-0239, suggests that the "Contact Person" listed on Attachment E was determined long after the fact. Ms. Covington's notes say "Maybe Pgm [meaning program] in file on speaker or Maria may have." Attach. E lists Maria Velleggia, a station employee as the "Contact Person." Ms. Covington's notes for June 20, 1991 do not describe a local issue or responsive programming at all. Nor does Ms. Barr's calendar. (Four Jacks Ex. 12, p. SH000101). However, an issue mysteriously appears in Attach. E, SH3-0248, which was purportedly treated during "Ongoing news coverage." Ms. Covington's notes for August 1, 1991 do not discuss any issue or responsive programming, yet an issue appears in Attach. E, SH3-0290. The responsive programming listed is in 1992 -- long after the license renewal period and also after Ms. Covington left the station.

40. These discrepancies in an exhibit manufactured long after the events in question render Attachment E totally unreliable. Moreover, the fact that Ms. Covington's 1992 notes became much more detailed for the month of September 1991 -- after Four Jacks' application was filed and no one could explain why -- indicates that the portion of Attachment E relating to the period after September 3, 1991 cannot be relied upon.

**E. Relevant Policy and Precedent Supports
Disqualification of Scripps Howard Under
the Misrepresentation/Lack of Candor Issues**

41. The three cases cited by Scripps Howard in support of its position are wholly inapposite to the facts in this case.^{14/} The misrepresentation/lack of candor issue in Calvary Educational Broadcasting Network, Inc., 76 R.R.2d 728 (Rev. Bd. 1994), arose as a result of the licensee's representations concerning its attempts to resolve FM blanketing interference complaints. In MCI Telecommunications Corporation, 3 FCC Rcd 509, 512 (1988), there were allegations that MCI had engaged in misrepresentations or lack of candor in connection with statements in applications regarding its premature construction violations, unauthorized operation, frequency coordination violations, violations of local ordinances and use of federal lands. Kaye-Smith Enterprises, 71 F.C.C.2d 1402, 1415 (1979), recon. denied, 46 R.R.2d 1583 (1980), concerned alleged misrepresentations about outside business activities.

^{14/} Nor has the Bureau cited any precedent relating to document production or the discovery process.

42. Significantly, Scripps Howard has ignored relevant case precedent dealing with misrepresentations and lack of candor during the discovery process. In Omaha Channel 54 Broadcasting Group, Ltd. Partnership, 3 FCC Rcd 8701 (Rev. Bd. 1988), the Review Board stated that the submission of misleading or untruthful responses to discovery requests is as serious as an untruthful response made directly to the Commission and, standing alone, can lead to disqualification. In WNST Radio, 70 F.C.C.2d 1036 (Rev. Bd. 1978), the Board held that "the submission of a misleading and untruthful response to [an] interrogatory [served by a competing applicant] is fully as serious as an untruthful response directly to the Commission. Ultimately such an action deceives the Commission." Id. at 1043; and cases cited therein. See also Alabama Citizens for Responsive Public Television, Inc., 44 R.R.2d 1363 (ALJ 1978).

43. The importance of complete honesty and candor during the discovery process has been a matter of concern to the courts as well. In Shepherd v. American Broadcasting Companies, Inc., 151 F.R.D. 1904, 28 Fed. R. Serv. 3d (Callaghan 534) (D.D.C. 1993), the court upheld the sanctions it had imposed against defendants ABC and its counsel and the default judgment it had entered against ABC for misconduct during the discovery process. The court found, inter alia, that ABC and/or its counsel had failed to preserve documents they knew were relevant to the litigation and had submitted answers to interrogatories that were unverified, inaccurate, and sometimes even false. The court criticized ABC for leaving admittedly incorrect discovery responses in the court's record and continuing to rely upon them.

151 F.R.D. at 210. According to the court, "ABC's conduct struck at the very heart of the judicial process' search for truth." Id. at 211. The plaintiffs were ultimately awarded \$518,711.91 in fees and costs. Shepherd v. American Broadcasting Companies, Inc., 862 F. Supp. 505 (D.D.C. 1994).

44. Scripps Howard's conduct falls squarely within the framework of this relevant case precedent. Furthermore, Scripps Howard cannot bury its head in the sand and blame its counsel as it now attempts to do. Commission case precedent is also clear that applicants are responsible for actions taken in reliance on advice of counsel. See WHW Enterprises, Inc., 753 F.2d 1132 (D.C. Cir. 1985) and cases cited therein.

III. The Record Is Clear That Four Jacks Has Not Misrepresented Facts or Lacked Candor

45. In its Proposed Findings of Fact and Conclusions of Law, Four Jacks showed that the record compels the following factual conclusions, which separately and collectively require a resolution of the post-hearing issue in Four Jacks' favor:

- (1) Four Jacks' three integrated principals, David, Robert and Frederick Smith, had no conceivable motive to allegedly state that they would resign their ownership and executive positions with Sinclair -- for they have always been committed and able to fulfill their full-time Four Jacks integration pledges while retaining their Sinclair positions.
- (2) Because David, Robert and Frederick Smith have always been willing and able to accommodate their proposed full-time positions with Four Jacks with their Sinclair positions, they never intended -- and never specifically stated (as they were required to do) -- that they would give up their Sinclair positions. Accordingly, they never intended their pledges to resign from their "then-current employment" to encompass their Sinclair

positions, which the record amply demonstrates are far different from traditional "employment."

The Mass Media Bureau's Findings similarly advocate resolution of the pending issue in Four Jacks' favor.^{15/}

46. In short, the record is absolutely bereft of the two fundamental elements -- motive to deceive and intent to deceive -- that must exist in order to resolve the issue adversely to Four Jacks. It is therefore unsurprising that Scripps Howard's attempt to infer a sinister motive on the part of Four Jacks' three integrated principals consists of a mere four paragraphs at the back of its Findings that are based not only on speculation rather than record facts, but on misleading interpretations of Commission law. It is similarly unsurprising that Scripps Howard is unable to point to one iota of deceptive intent on the part of David, Robert or Frederick Smith in making the precise statements at issue -- i.e., their pledges to resign their "then-current employment" if Four Jacks is successful in obtaining a construction permit for Channel 2 in Baltimore. Rather, Scripps Howard has filed a set of findings and conclusions on the issue against Four Jacks that ignore the weight of record evidence and instead attempt, in disjointed fashion, to piece together an assemblage of incorrect, irrelevant and/or insignificant facts into a case of misconduct which simply does not exist. As shown

^{15/} In a patently misleading statement of fact, Scripps Howard states in its Findings that the Bureau supported the denial of Four Jacks' earlier motion for summary decision on this issue. Scripps Howard Findings at 4, para. 10. In fact, the Bureau's Comments on that Motion suggested that the Judge consider whether the issue was warranted at all -- that is, the Bureau actually supported deletion of the issue. See Mass Media Bureau's Comments on Motion for Summary Decision (filed March 14, 1994), at 5.

in detail below, Scripps Howard's Findings are hopelessly insufficient to compel Four Jacks' disqualification.

A. **Scripps Howard's Allegations of Motive and Intent to Deceive on the Parts of David, Robert and Frederick Smith Are Based on Fundamental Misperceptions of Commission Law**

47. As Four Jacks pointed out in its Findings, Scripps Howard has never previously articulated, much less proven, any conceivable motive for David, Robert or Frederick Smith to mislead the Commission about their intentions with respect to Sinclair in connection with their integration commitments. Scripps Howard's first (and only) attempt at establishing such a motive comes in a one-and-a-half page discussion towards the very end of its Findings. Scripps Howard states as follows:

The motive behind Four Jacks' [alleged] lack of candor and misrepresentation is clear: Four Jacks wished to give itself a comparative advantage for integration, while intending that the three Smiths would in reality retain their current positions at their family-run communications business.

* * *

Four Jacks claimed integration credit for the three Smiths, who each pledged to work full-time, 40-hours a week at Channel 2. For persons with outside interests, the pledge to resign current employment is a required representation that must be made before the Commission will credit any claim for an integration preference. See, e.g., Woods Communications, 7 F.C.C. Rcd at 80.

* * *

In light of these precedents, the three Smiths' pledge to resign their then-current employment was a clear prerequisite to the Commission granting them any integration credit. Thus, the three Smiths made the required pledge. At the same time, they

concealed their intentions to remain in their current positions at Sinclair out of justifiable fear that integration credit would be denied if their intent to remain at Sinclair was disclosed.

Scripps Howard Findings at 107-08, paras. 275-77.

48. Unfortunately for Scripps Howard, the central legal premise for its argument -- that David, Robert and Frederick Smith somehow were required to pledge to give up their Sinclair positions -- is flatly wrong. While it is true that under Commission precedent interpreting the now-discredited integration criterion, applicants who propose to give up outside interests to meet their integration commitments must definitively pledge to do so, a pledge to give up outside interests is not required of applicants who in fact do not propose to do so. See, e.g., Harry S. McMurray, 8 FCC Rcd 3168, 3174 (Rev. Bd. 1993) (applicant principal Thom Reinstein proved he could accommodate full-time integration proposal with ownership of outside business interest), rev. denied, 8 FCC Rcd 8554 (1993); Eugene Walton, 7 FCC Rcd 3237 (1992) (applicant principals the Botts could fulfill full-time integration proposal while fulfilling promise to be involved in management of another station); Kevin Potter, 6 FCC Rcd 7278 (Rev. Bd. 1991) (applicant Potter awarded 100% integration credit despite intention to retain ownership of two other stations), aff'd, 7 FCC Rcd 4342 (1992).

49. Because David, Robert and Frederick Smith never intended to give up their Sinclair positions, they did not have to (and in fact, never did) make such a pledge. Thus, the core foundation for Scripps Howard's argument as to motive -- i.e., that David, Robert and Frederick Smith were required to pledge to

relinquish their Sinclair positions as a prerequisite for receiving integration credit -- is based on a flagrant misstatement of Commission requirements. In a nutshell, because David, Robert and Frederick Smith have always been able to accommodate their Sinclair positions with their Four Jacks integration proposals, they did not need to make an untrue commitment to resign from those positions in order to garner integration credit. Scripps Howard's speculative theory as to motive thus cannot be sustained.^{16/}

50. In this regard, no Commission case, rule, or policy of which Four Jacks is aware sets forth any requirement that an applicant who does not propose to give up an outside interest to fulfill his/her integration commitment must affirmatively state that he/she will retain that outside interest. As noted above, David, Robert and Frederick Smith did not need to state that they would relinquish their ownership and executive positions with Sinclair, since they always intended and were able to accommodate those positions with their Four Jacks integration pledges. Indeed, they never did so state, and since they did not expressly pledge to resign their ownership and executive positions with

^{16/} The Commission has only recently decided another case in which it found an applicant innocent of misrepresentation because of the lack of any motive for deceit. In Ramon Rodriguez and Associates, Inc., FCC 95-25 (released January 30, 1995), the Commission found that an applicant had not misrepresented facts in representing the availability of its proposed transmitter site. The Commission held that there was no motive for deceit because the applicant "was not at risk of being dismissed" even had the site been unavailable. Likewise here, David, Robert and Frederick Smith have always been able to accommodate their full-time Channel 2 integration proposals with their Sinclair positions, and therefore did not need to pledge to resign those positions to avoid an adverse effect on Four Jacks' case.

Sinclair, their intentions to remain at Sinclair -- far from being nefariously "concealed" -- were disclosed as a matter of law.

51. Neither in Four Jacks' application, nor in its Integration and Diversification Statement, nor in its direct case testimony, is it stated that David, Robert or Frederick Smith would relinquish their ownership and executive positions with Sinclair. Moreover, as pointed out in Four Jacks' Findings, had David, Robert and Frederick Smith intended to give up their Sinclair ownership and executive positions, it would have been far easier -- and far more advantageous to Four Jacks' comparative case -- for David, Robert and Frederick Smith to definitively state such an intention and concomitantly pledge to divest all of Sinclair's stations rather than merely WBFF(TV) in Baltimore. This would not only have made it easier for them to garner integration credit, but would have enhanced Four Jacks' diversification posture.

52. In sum, aside from lacking any factual support in the record, Scripps Howard's speculation as to David, Robert and Frederick Smith's supposedly deceitful motive and intent is based on fundamental misunderstandings of Commission integration and divestiture requirements. David, Robert and Frederick Smith were required to pledge to give up their Sinclair positions only if they intended to do so, which they did not. Had they so intended, they would have had to make such a commitment specifically, which they did not. As a matter of law, the lack of any specific pledge by David, Robert and Frederick Smith to relinquish their Sinclair positions was clear notice that they

intended instead to retain those positions. Their direct case testimony explaining how they could accommodate their Sinclair positions with their Four Jacks integration pledges made this intention all the more clear. See Four Jacks Findings at 60, 100-02, paras. 107, 181-83; Bureau Findings at 17, para. 5.

B. The Record Demonstrates That David, Robert and Frederick Smith Are Able to Fulfill Their Four Jacks Integration Commitments While Remaining Owners and Executive Officers of Sinclair

53. As demonstrated in Four Jacks' Findings (pp. 50-59 and 90-94), and as advocated by the Bureau as well (Bureau Findings at 18), the record overwhelmingly establishes that David, Robert and Frederick Smiths' positions as owners and executive officers of Sinclair will not interfere with the fulfillment of their pledges to manage Four Jacks' proposed Channel 2 station on a full-time basis. Scripps Howard's Findings do not seriously challenge this conclusion of law, but at pp. 59-68 of its Findings, Scripps Howard sets forth proposed findings that supposedly establish that David, Robert and Frederick Smith "[w]ork [f]ull [t]ime as [o]fficers of Sinclair." Scripps Howard Findings at 59.

54. However, even if it is assumed that David, Robert and Frederick Smith "work full-time as officers of Sinclair," insofar as they generally choose to be present at Sinclair for full business days,^{17/} this does not support a conclusion that David,

^{17/} While David, Robert and Frederick Smith did testify that they generally spend 9-to-5 days at Sinclair, this is hardly surprising. Their roles as executives of their television business are the only thing that presently occupies their time during the business day (with the exception of

(continued...)

Robert and Frederick Smiths' Sinclair duties are of such a nature that they cannot be accommodated with or will interfere with their Four Jacks integration commitments. Indeed, Scripps Howard's findings on this point basically recite various duties that David, Robert and Frederick Smith testified they perform for Sinclair -- while entirely ignoring the Smiths' clear testimony that each of these duties takes little time. For instance:

- Scripps Howard states that "the general managers [sic] [at Sinclair's stations] do not have authority to hire and fire personnel without approval from the Smith brothers," citing Frederick Smith's testimony at Tr. 1335. Scripps Howard Findings at 59, para. 155. Two lines later on Tr. 1335, however, Frederick Smith clarified that the brothers' input is required only with respect to sales executives and department heads. Moreover, the record of the Phase II hearing is clear that the brothers' only involvement in hiring and firing of personnel is down to the level of general sales manager,^{18/} and that their participation in personnel decisions takes very little time. See Four Jacks Findings at 51, para. 88.

17/(...continued)

Frederick's part-time dental practice). They are not involved on-site with the day-to-day operations of any of their television stations. Moreover, David, Robert and Frederick Smith made clear that they are flexible in the time they choose to spend at Sinclair, and that much of the time they do spend there is spent in non-time consuming activities such as reading the trades, responding to phone calls, and contemplating the strategic growth of the company. Four Jacks Findings at 56-58; see also Scripps Howard Findings at 61 n.18 (quoting David Smith's testimony that 8:30 to 5:30 hours are "what I choose them to be when I choose them to be it").

18/ Indeed, Scripps Howard blatantly mischaracterizes this testimony at p. 62, para. 160 of its Findings. Rather than state what David Smith actually said at Tr. 1991-92 -- "[t]he only level to which I would probably become involved might be the general sales manager" -- Scripps Howard contorts this into the clearly misleading finding that David Smith "is involved in the interviewing, hiring and firing of employees at the stations such as general managers and general sales managers."

- At p. 60, para. 156 of its Findings, Scripps Howard describes the purchase order system by which the Sinclair home office approves station expenditures. However, Scripps Howard ignores the Smiths' clear testimony that this approval process takes "as much as two minutes at a time." Four Jacks Findings at 51, para. 89.
- At p. 63, para. 163 of its Findings, Scripps Howard attempts to overstate by omission the time that David Smith spends in purchasing programming for the Sinclair stations. Scripps Howard ignores David Smith's testimony that (i) syndication contracts are boilerplate, and negotiating them is "usually a very quick process"; (ii) if he spends an hour a week meeting with syndicators, "it's a lot"; (iii) Sinclair general managers can acquire certain kinds of programming without his approval; and (iv) he can easily delegate his program purchase functions to existing personnel if it interferes with his Four Jacks integration commitment. Four Jacks Findings at 50-51, para. 87.
- Scripps Howard states that David Smith would not forego reviewing syndication contracts, hiring or firing Sinclair general managers, or his role in new Sinclair acquisitions, if Four Jacks is successful. Scripps Howard Findings at 64, para. 166. This proposed finding is misleading; David Smith testified that he would not have to forego these functions, as they would not interfere with his Channel 2 integration commitment. (Tr. 1999-2001).
- At p. 65, para. 168 of its Findings, Scripps Howard cites Robert Smith's testimony that the Smith brothers are "generally . . . working regularly." Yet Scripps Howard ignores Robert's testimony two questions later, in which he states that "[a] lot of times, there's time to kill." (Tr. 1248). Scripps Howard also ignores Robert's statement two pages earlier (Tr. 1246), where he states that "we're not like a secretary who has to be there 9:00 to 5:00. . . . Basically if we weren't there at all for a month, the tasks at [their] stations would still get done because they are managed by other people."
- So desperate is Scripps Howard to overstate Frederick Smith's time on Sinclair duties that it is forced to point to his testimony that he is "available all the time." Scripps Howard Findings at 65, 67 para. 171. Scripps Howard totally ignores Frederick's clear testimony about how very little time his Sinclair duties take. See Four Jacks Findings at 53, 57, paras. 93, 101.

55. Lastly, Scripps Howard points to portions of Sinclair corporate tax returns that state that David, Robert and Frederick Smith spent from 75% to 100% of their time on Sinclair business. Scripps Howard Findings at 68, para. 176. This evidence is simply meaningless for at least two reasons. First, these percentages do not express a "denominator." In other words, even assuming that the stated percentages are correct, they offer no indication of how much time the Smiths spent in the first place -- the figures are fractions of an indeterminate number. This is entirely consistent with the fact that the Smiths spend as much time on Sinclair as they choose. In any event, the record shows that these were numbers placed by a lawyer or tax accountant, not the Smiths themselves. (See Tr. 1785). In short, notwithstanding Scripps Howard's selective reading of the record, the evidence abundantly demonstrates that David, Robert and Frederick Smith's Sinclair positions will not interfere with their Four Jacks integration commitments.

C. David, Robert and Frederick Smith Never Intended to Resign From Their Positions as Owners and Executives of Sinclair

56. Scripps Howard's findings on the Four Jacks issue are premised on the notion that by stating that they would resign their "then-current employment" in the event of a Four Jacks grant, David, Robert and Frederick Smith intended to convey to the Commission that they would give up their positions as owners and executive officers of Sinclair in such event. The record evidence, however, simply does not support such a conclusion.

1. **At No Time Did David, Robert or Frederick Smith Specifically Pledge to Resign Their Sinclair Positions**

57. As recognized by the Bureau (see Bureau Findings at 17), the plain fact is that at no point in this proceeding have David, Robert and Frederick Smith ever specifically pledged to relinquish their ownership and executive positions at Sinclair. That they did not do so leads inescapably to the conclusion that they never intended to relinquish their Sinclair positions.

58. Nonetheless, citing statements in Exhibit 6 of Four Jacks' FCC Form 301 application (Scripps Howard Ex. 46) that referenced Robert and Frederick Smith as becoming "employees" of Sinclair in the course of discussing those principals' backgrounds, Scripps Howard alleges that "[t]hus, in its application, Four Jacks itself identified the full time employment that Robert and Frederick Smith pledged to resign; the only possible conclusion to draw from the Application is that Robert and Frederick Smith intended to resign their employment at Sinclair." Scripps Howard Findings at 41, 85, paras. 106, 219. This, of course, is pure surmise: Scripps Howard is attempting to prove its point merely by piecing together two entirely separate portions of a document. The fact that the Four Jacks application referred to Robert and Frederick Smith as "employees" of Sinclair, by way of describing their backgrounds, was not in any way intended to define the scope of the term "then-current employment" that appeared two pages earlier. Had David, Robert and Frederick Smith intended to resign their ownership and executive positions with Sinclair to be encompassed in that term, they would not have used the blanket phrase "then-current

employment" and left it to be defined in an unrelated discussion two pages later -- instead, they would have stated flat-out, in describing the integration pledge itself, that they intended to relinquish their positions with Sinclair.

59. Scripps Howard also points to David Smith's Phase I hearing testimony concerning a portion of Sinclair's September 28, 1993 SEC Registration Statement as indicating that David Smith will resign from Sinclair. Scripps Howard Findings at 42-45. It was Scripps Howard's counsel, however, that assumed a resignation pledge in his questioning, asking whether the Registration Statement contained any indication that David Smith "might resign." Id., quoting Tr. 1095 (emphasis added). David Smith was simply attempting to be responsive to the question, pointing to the portion of the Registration Statement which, in his words, advised the public of certain risks "in the event" that he leaves the company. Id. (emphasis added).^{19/} Nowhere in this testimony does David Smith ever state that he would leave Sinclair.

60. In sum, Scripps Howard's argument on David, Robert and Frederick Smiths' intentions is both illogical and unsupported by the factual record. Moreover, the principals' direct case testimony explaining their ability to manage the Channel 2 station full-time "notwithstanding [Sinclair's] other media interests" -- offered long before the pending issue was added -- destroys any conclusion that David, Robert and Frederick Smith intended to resign their Sinclair positions.

^{19/} Such "risk" language is entirely normal in an SEC disclosure.

2. **Scripps Howard's Attempt to Establish David, Robert and Frederick Smith as "Employees" of Sinclair Is Legally Irrelevant and Factually Flawed**

61. Lacking any evidence of a plausible motive on the part of David, Robert and Frederick Smith to misrepresent their integration intentions, and faced with the plain facts that these principals never specifically stated any intention to resign their positions with Sinclair Broadcast Group, Inc., Scripps Howard resorts to the expected tactic of using extraneous documentary evidence and smatterings of testimony to objectively define David, Robert and Frederick Smith as "employees" of Sinclair, from which it leaps to the conclusion that the term "then-current employment" used in the principals' integration pledges automatically encompassed their positions with Sinclair. As discussed in detail in Four Jacks' Findings, this attempt is meaningless, for the simple reason that none of the evidence Scripps Howard offers has any bearing on the states of mind of David, Robert and Frederick Smith in making the statements to the FCC that are at issue in this proceeding.

62. Scripps Howard has stated in this proceeding that either the Smiths are employees of Sinclair or they are not. Scripps Howard Findings at 103, para. 262. While this may be true for tax or ERISA purposes, that is not the question here. As Four Jacks has repeatedly emphasized, the question is whether David, Robert and Frederick Smith intended to represent that they would give up their positions as owners and executive officers of

Sinclair.^{20/} However tax and benefit law or corporate administrative documents might define the Smiths, this evidence is simply insufficient to overcome David, Robert and Frederick Smith's un rebutted testimony -- amply supported by the record -- that they do not consider themselves "employees" of Sinclair in the traditional sense, and did not intend the term "then-current employment" to encompass their Sinclair positions.

63. Moreover, Four Jacks' Findings noted that in addition to its insignificance as a legal matter, much of the evidence Scripps Howard introduced in support of its "employee" definitional efforts is documentation with which David, Robert and Frederick Smith had little to do, and which in many cases they had not even seen prior to the hearing. Four Jacks Findings at 67-69, 105-107. In its Findings, Scripps Howard continues to overstate these principals' awareness of the documents that supposedly classify them as "employees":

- At page 51, para. 130 of its Findings, Scripps Howard alleges that "Sinclair has represented to the state of Maryland that the three Smiths are Sinclair employees for purposes of Maryland State Unemployment Insurance," citing Scripps Howard Ex. 40, Tab 2. While this may be true as a technical matter, it certainly cannot be considered a knowing representation by any of Four Jacks' integrated principals. David Smith testified that he did not make the decision to list himself as an

^{20/} For the same reason, Scripps Howard's bizarre theory that David, Robert and Frederick Smith are somehow culpable for FCC purposes because Sinclair's administrative treatment of them as "employees" resulted in them receiving certain benefits (see Scripps Howard Findings at 92-93, 95, paras. 235-237, 242), is untenable. Even assuming this were true, it not does even come close to establishing that David, Robert and Frederick Smith considered themselves "employees" in the traditional sense, let alone that they intended their FCC pledges to resign "then-current employment" to include their Sinclair positions.

"employee" on that document. Moreover, as Scripps Howard is forced to admit, David Smith did not even personally sign the accompanying check. Four Jacks Findings at 67-68, para. 122.

- At page 55, para. 145 of its Findings, Scripps Howard points to a Sinclair Board of Directors' resolution of September 17, 1992 (Scripps Howard Ex. 40, Tab 26). Both David and Robert Smith testified, however, that they had no explicit memories of that resolution or the meeting at which it was adopted. (Tr. 1855, 2041).^{21/}
- At page 57, para. 148 of its Findings, Scripps Howard states that "[w]hen asked whether he knew that Sinclair's 401(k) plan was for the exclusive benefit of eligible employees and their beneficiaries, Robert Smith testified that 'that's what it says so that's why we did it.'" In the very next sentence of his testimony, however, Robert remarks that "[m]y guess is that's boilerplate language. Anyone who does a 401(k), probably all say the same thing." He also indicated that he had no recollection of what the plan said. (Tr. 2043).^{22/}

64. Scripps Howard also mischaracterizes other facts concerning the documents:

- Concerning Scripps Howard's discussion of Sinclair's "Executive Bonus Plan" (Scripps Howard Findings at 52-53, para. 135), David Smith testified that this is not a "prescribed definitive executive bonus plan," but rather that it is "discretionary on the part of the board of directors." (Tr. 1871). Moreover, the section of Sinclair's SEC Registration Statements discussing the "Executive Bonus Plan" states that it is "designed to provide incentives to executive officers and other key employees." (Scripps Howard Ex. 40, Tab 14, at 56; Scripps Howard Ex. 40, Tab 18, at 22 (emphasis added)). Scripps

^{21/} This is not to suggest that the resolution is invalid or was not adopted. David and Robert Smith's testimony on this point does indicate, however, that this resolution did not form a part of their perceptions as to whether they were or were not Sinclair "employees."

^{22/} Indeed, as Scripps Howard's counsel must certainly know, 401(k) plans for law firms include both partners and non-partners (i.e., "employees").

Howard's statement that "David Smith testified that the three Smiths were included as key management employees eligible for the Bonus Plan" is a mischaracterization of his testimony. A review of that testimony (Tr. 1872-76) reflects that David Smith initially thought the words "key management employees" referred to Sinclair's general managers. He then concluded that the Executive Bonus Plan included him and his brothers by virtue of the phrase "target awards are established for executive officers." (Tr. 1875).

- At p. 57, para. 149 of its Findings, Scripps Howard states that the summary of account activity for Sinclair's 401(k) trust fund (Scripps Howard Ex. 40, Tab 12) "lists all of the Smiths as 'employees.'" In fact, the word "employee" appears nowhere in the document.
- At p. 58, para. 152 of its Findings, Scripps Howard cites David Smith as testifying that a Sinclair indenture filed with the FCC on December 9, 1993 (Scripps Howard Ex. 41) "provided the company with the discretion to make loans to the three Smiths." David Smith actually said that the indenture permitted Sinclair with discretion to make loans to "[w]homever we choose to within the company." His testimony that this could include the Smiths was in response to a question whether "that would include loans to the executive officers of the company[" (Tr. 1883).

65. Sinclair's 1991, 1992, 1993 and 1994 FCC Employment Reports also do not undermine the fact that David, Robert and Frederick Smith did not and do not consider themselves "employees" of Sinclair in the traditional sense. While the headings above the employment chart on FCC Form 395-B refer to "Employee Data," the Judge may take official notice of the fact that there is no separate FCC "employment report" for licensee officers and directors. Moreover, the four Smith brothers are listed under the line "Officers and Managers." (Scripps Howard

Exs. 40, Tab 33, 41, 42, 43, Tr. 1889-90, 1892-93).^{23/}

66. Moreover, regardless of whether David, Robert and Frederick Smith might technically be considered "employees" of Sinclair for tax and benefit purposes, there is ample evidence even in the material presented by Scripps Howard to support David, Robert and Frederick Smiths' perception of themselves as something other than traditional "employees" of Sinclair. See Four Jacks Findings at 62-63, 108-09, paras. 113, 194-95. Scripps Howard's Findings entirely ignore this evidence. Indeed, even the evidence that Scripps Howard, at p. 88, para. 226 of its Findings, contends "confirms the conclusion that the Smiths are employees of Sinclair" in reality confirms Four Jacks' position. For instance, Scripps Howard states in that paragraph that "the three Smiths received substantial compensation from Sinclair for their services." The amount of that compensation, as detailed in Sinclair's SEC filings (see, e.g., Scripps Howard Ex. 40, Tab 18, at 21-22), is far more than what the average television "employee" makes. Moreover, Scripps Howard states in the same paragraph that "each of the three Smiths performed duties at Sinclair which extended from supervision of Sinclair subsidiary stations, to personnel and programming decisions, and the Smiths have ultimate say on all Sinclair budgetary decisions." These are attributes of executives, not mere "employees." In sum, putting aside the tangential nature of the entire question as to

^{23/} Scripps Howard also points to the fact that David, Robert and Frederick Smith have Sinclair corporate credit cards. Scripps Howard Findings at 58, para. 153. This, of course, does not establish that the brothers either are or are not Sinclair "employees" -- let alone constitute any probative evidence of their intent in making the specific statements in question.