Four Jacks Findings at 23-24. Again, these two statements are not inconsistent. Both reflect Mrs. Covington's inability to recall whether she prepared the notes in one sitting or two.[10]

c. Ms. Barr's testimony is consistent with Mrs. Covington's

23. Four Jacks is equally ineffective in its attempt to cast doubt on the testimony of Ms. Barr and Mrs. Covington by manufacturing supposed inconsistencies between their statements. According to Four Jacks, their testimony "conflicts in important respects." Four Jacks Findings at 72. Four Jacks, however, cannot establish a single inconsistency on a material issue.

24. For example, Four Jacks highlights differing testimony as to whether it was Mrs. Covington or her husband who dropped the 1992 notes off at WMAR-TV as an "important" conflict. Four Jacks Findings at 24. Even assuming this point were somehow relevant, given that Mrs. Covington testified that the 1992 notes were dropped off at the station, and not personally handed to Ms.

---

[10] Four Jacks emphasizes that "Ms. Covington could not explain at her deposition why the notes for September were more detailed than the notes from June 3 through August 23 . . . ." Four Jacks Findings at 24. Four Jacks then notes that "[c]ounsel for Scripps Howard refused to permit Ms. Covington to answer additional questions in this area at her deposition . . . ." Four Jacks Findings at 24 n.6. Four Jacks has not explained either in its proposed findings or at Mrs. Covington's deposition what additional questions it might ask that are relevant to this proceeding or, for that matter, how the level of detail in the 1992 notes bears any relevance to the matters at issue. It was for this reason that Scripps Howard refused to allow counsel for Four Jacks to continue to ask repetitive questions about immaterial matters at a time when the questioning was keeping Mrs. Covington from the hospital bedside of her seriously ill husband. See SH38 at 120.

Barr, Ms. Barr's assumption that Mrs. Covington dropped off the 1992 notes herself is hardly an act of deceit.

25. Four Jacks also suggests that Ms. Barr and Mrs. Covington presented conflicting testimony as to whether they discussed the 1992 notes after Mrs. Covington gave them to Ms. Barr. Four Jacks Findings at 24-25. There was no such contradiction. While Ms. Barr testified that further discussions did occur, Mrs. Covington's testimony was only that she did not recall such discussions. SH36 at 6-7; SH38 at 44-48. Her inability to recall is underscored by the following statement:

> I don't recall, but if Emily had asked me anything about the notes for clarification I would have answered her. Specifically I do not remember conversations that we're talking about a couple of years later. I cannot recall that. But I can tell you had Emily asked me anything I would have answered her. If she needed clarification I would have given it to her.

SH38 at 48. Thus, Four Jacks' statement that "Ms. Covington disputes that there were discussions" is in error. Four Jacks Findings at 79.[11]

3. <u>Ms. Barr did not contradict herself with respect to production of the 1992 notes</u>

26. With respect to the production of the Covington notes, Four Jacks suggests that Ms. Barr contradicted herself in her

---

[11] Given that Mrs. Covington could not recall whether she discussed the contents of the 1992 notes with Ms. Barr after giving them to her, it is hardly surprising that Mrs. Covington would not be able to recall whether those discussions addressed the programming that would have resulted from the ascertainment contents described in the 1992 notes. Thus, although Ms. Barr listed programming as one of five items she had discussed with Mrs. Covington after receiving the 1992 notes, Mrs. Covington's statement that she and Ms. Barr had not discussed programming is both predictable and immaterial.

1994 direct testimony when she stated, "I do not recall sending Ms. Covington's 1992 notes to Baker & Hostetler, although I now know that I sent them, also." Four Jacks Findings at 27. Four Jacks notes that

> Previously, however, at her July 1994 deposition, when asked if she had told counsel in June 1993 that she had the handwritten notes, she had responded, "I don't recall" and her counsel then interposed an objection.

Four Jacks Findings at 28. There is nothing inconsistent about these statements; neither contradicts Ms. Barr's repeated assertions that while she knows from the June 25, 1993, memorandum that was found with the notes[12] that she obviously sent them to counsel, she has no recollection of doing so.

27. Furthermore, the June 25 memorandum does not provide "documentary proof," as Four Jacks claims, that "Scripps Howard knew precisely where the Covington notes were." Four Jacks Findings at 77. It proves only that Scripps Howard, through Ms. Barr, knew where the 1992 Covington notes were on June 25, 1993. Scripps Howard has never claimed that it never knew where the 1992 Covington notes were; it has claimed only that because Ms. Barr did not <u>remember</u> sending the notes and could not find them in the file where they should have been in September 1993, she assumed she had destroyed them. To the extent that Four Jacks is alleging misrepresentation on the basis of the conduct of Scripps

---

[12] Four Jacks characterizes this memorandum as "conspicuously missing" from Ms. Barr's 1994 direct testimony. Four Jacks Findings at 29. Scripps Howard was under no duty to attach a copy of this memorandum to Ms. Barr's testimony, because it added nothing material to the issue before the Presiding Judge, and it already had been disclosed to the parties.

Howard's counsel, it is ignoring the Presiding Judge's previous determination that no basis exists for such a claim. See Memorandum Opinion and Order FCC 94M-177 (released March 18, 1994), at 3 n.2.

4. Four Jacks improperly relies on the July 13, 1993, letter as evidence of misrepresentation

28. In an ill-advised attempt to find any facts to support its misrepresentation claim, Four Jacks has resorted to using the July 13, 1993, letter from Kenneth C. Howard, Jr., to Martin Leader as independent evidence of misrepresentation by Scripps Howard. See Four Jacks Findings at 78. This attempted use of the July 13 letter, however, is directly contrary to a ruling of the Presiding Judge. T. at 1727-29. The Presiding Judge admitted the letter--in light of the objections of Scripps Howard and the Bureau that it was irrelevant--solely to complete Ms. Barr's testimony. Id. Ms. Barr's testimony had referenced an error in the letter regarding Mrs. Covington's title as an indicator that she had never seen the letter before it went out. Id. Given this sole purpose for its admission, it is improper of Four Jacks to attempt to use it as affirmative evidence of misrepresentation.

29. Furthermore, Four Jacks' discussion of this letter borders on the absurd by attempting to make an issue of Ms. Barr's failure to speculate in her testimony that if she had reviewed the letter before it was sent, "she would have corrected the incorrect implication as to the year the notes were prepared or the incorrect statement that '[t]hese notes were not retained

in any files at WMAR-TV.'" Four Jacks Findings at 31. In contrast, when Ms. Barr testified that she would have corrected the error in Mrs. Covington's title, she was obviously doing nothing more than supporting her testimony (in the previous sentence) that she believed she had not seen the letter before it was sent. See SH36-13. For Four Jacks to find fault with this statement because it was not an all-inclusive list of the errors in counsel's letter defies comprehension, especially because the Presiding Judge sustained Scripps Howard's objection on this very issue at the hearing. T. at 1585-86.

30. Four Jacks also criticizes Ms. Barr separately for not revealing the errors in the July 13, 1993, letter until her September 1994 direct testimony. Four Jacks Findings at 32. First, Four Jacks' attempt to hold Ms. Barr responsible for a letter between counsel has properly been rejected by the Presiding Judge as inappropriate. See T. at 1586-87. Second, Four Jacks did not need Ms. Barr's testimony to be aware that there was a distinction between the notations in Mrs. Covington's 1991 calendar, which Mrs. Covington unfortunately lost, and her 1992 notes, which were misplaced and believed lost until February 1994. When a copy of the 1992 Covington notes was produced to Four Jacks in February 1994, their existence and contents became readily apparent. Further, Four Jacks had been repeatedly advised by Scripps Howard and the Bureau that the July 13 letter mistakenly used "notes" instead of "calendar" well before Ms. Barr's testimony in September 1994. See, e.g., Four Jacks

Findings at 33 n.10. While Four Jacks refuses to credit this obvious and innocent explanation of the errors in the July 13, 1993, letter, it has failed to even suggest a credible alternative to these facts.[13]

31. Finally, in its attempt to attack Ms. Barr's credibility, Four Jacks states that

> Ms. Barr was specifically asked why the destruction of the notes was not disclosed in response to the Motion for Production of Documents. She testified that she didn't think it was a relevant issue.

Four Jacks Findings at 34. In addition to Ms. Barr's testimony being no doubt a correct statement of her understanding of the issue--and not an unreasonable one--again Four Jacks is attempting to hold Ms. Barr responsible for the contents of a pleading prepared by attorneys. The discovery response was prepared by Scripps Howard's counsel, who had determined that the 1992 notes fell outside the time period covered by the document request. See Memorandum Opinion and Order FCC 94M-177 (released March 18, 1994), at 3 n.2.

5. Ms. Barr's explanation of her discovery of the copy of the 1992 Covington notes was credible and consistent

32. Contrary to Four Jacks' description, Ms. Barr's testimony at hearing did not "substantially contradict" her February 15, 1994, declaration concerning her discovery of a copy of the Covington notes. Four Jacks Findings at 72. To the

---

[13] It is also noted that counsel's easily explained errors in the July 13, 1993, letter have been ruled not to be a subject requiring exploration in this hearing. Memorandum Opinion and Order FCC 94M-177 (released March 18, 1994), at 5 n.6.

extent that her testimony differs from the declaration at all, Ms. Barr quickly resolved the "conflict" by explaining that her declaration, which had been taken much closer in time to the discovery of the notes and was a more reliable reflection of her memory, was accurate. T. at 1656-57. Four Jacks' assertion that "[b]y the time of her direct case exhibits . . . Ms. Barr realized that her knowledge of the memo was a handicap" is pure speculation and unsupported by either logic or the record. Four Jacks Findings at 80. This memorandum described the calendars and other matters as well as the 1992 Covington notes, and its recollection by Ms. Barr would pose no "handicap" whatsoever. Four Jacks' description of her September 1994 hearing testimony as "dissembl[ing] in almost comical fashion before finally conceding that the February 15, 1994 Declaration was correct" is inappropriate, insulting, and unsupported by any rational interpretation of Ms. Barr's testimony. Ms. Barr stated:

> Let me state that at the time that I signed this Declaration this Declaration was true and correct, and that is what I believe to be the memo. That was my--you know, a week after having found this that was what I believed I was looking for. What I'm trying to state to you today, many months later, is that I just simply don't remember what specific information I was looking for. I can make an assumption that I was looking for some information that was in this particular memo, but I don't remember today that that's what I was looking for. Clearly, on February 15th I may have had a slightly better memory since it was, you know, about a week later from the date that I originally found the information.

T. at 1656. This response is neither dissembled nor comical, and Four Jacks' description of it is merely another instance of Four

Jacks' attempting to make its case with colorful adjectives in lieu of facts.[14]

33. Four Jacks attaches some significance to the fact that Ms. Barr's February 15, 1994, declaration states that in response to a question from Stephanie Abrutyn, she "immediately" reached for the file entitled "MEMOS TO B&H," while Ms. Barr's direct testimony omits the word "immediately." Four Jacks Findings at 37-38. Four Jacks then adds, "Ms. Barr admitted that she had not made any attempt to look for the Covington notes after Four Jacks filed its Motion to Enlarge Issues until February 9, 1994." Four Jacks Findings at 38. The import of this paragraph is incomprehensible. First, it is irrelevant whether Ms. Barr "immediately" reached for the file in question, and the omission of the adverb in her direct case testimony does not, as Four Jacks implies, create a contradiction. Second, the speed with which Ms. Barr opened the "MEMOS TO B&H" file on February 9, 1994, bears no relationship to whether she searched for the 1992 Covington notes prior to February 9. Third, the terminology used by Four Jacks is again misleading. By referring to Ms. Barr's testimony as an admission, Four Jacks suggests something devious in Scripps Howard's failure to look for the 1992 Covington notes prior to February 9. But there is nothing devious about it--until Ms. Barr accidentally located the June 23 memorandum and a

---

[14] Four Jacks' asserts that "Ms. Barr's testimony concerning the discovery of the notes is implausible for other reasons as well," but it fails to list any of those reasons, and none exist. Four Jacks Findings at 80.

copy of the notes, there was no reason for her to look, because she believed the notes had been discarded. Further, the phrasing also implies that Ms. Barr did make an attempt to look for the notes on February 9, a suggestion that is flatly contradicted by Ms. Barr's repeated testimony that she found the notes fortuitously.[15]

34. Four Jacks' proposed conclusion concerning the discovery of the copy of the Covington notes is equally nonsensical:

> The "discovery" of the Covington notes is one more example of Scripps Howard's misrepresentations and lack of candor. Amazingly, while Four Jacks' motion was pending, no attempt at all was apparently made to locate the notes. The only logical explanation is that Scripps Howard knew it had the notes all along.

Four Jacks Findings at 79-80. Four Jacks does not explain why this is the "only logical explanation," or how it is even any explanation at all. A far more logical explanation is the one that also happens to be truthful: Scripps Howard did not locate the notes because it reasonably believed the notes had been discarded.

---

[15] Four Jacks' statement that "at no time while Four Jacks' motion to enlarge was pending did Scripps Howard produce the Covington notes" hardly sheds any light on this dispute. Four Jacks Findings at 73. Since Scripps Howard has stated from the outset that it believed the notes did not exist until they were discovered after the issue was added, it follows that Scripps Howard could not have produced the notes until that time.

6. Mr. Kilbourne's testimony about the discovery of the original 1992 Covington notes is credible and consistent

35. Four Jacks' statement that the box containing the 1992 Covington notes was not labeled is incorrect. Four Jacks Findings at 40. The box was labeled, "Documents sent by station but not produced because outside time period or because work product." T. at 1533. Indeed, this label supports Scripps Howard's position; it confirms the perfectly logical reason why Scripps Howard's counsel did not produce the 1992 Covington notes and subsequently forgot about their existence.

36. Four Jacks' effort to portray Brett Kilbourne, the legal assistant who discovered the June 25, 1993, memorandum, as a liar is particularly absurd. Four Jacks insists that it is "inconceivable" that Mr. Howard's secretary would tell Mr. Kilbourne to look for a memorandum with a "rough date" without giving him a copy of that memorandum, and that Mr. Kilbourne would be looking only for the June 25 memorandum, and not for the Covington notes. Four Jacks Findings at 80. Nothing is "inconceivable" about any of this testimony; for that matter, to the extent Mr. Kilbourne's memory was unclear, it is hardly "inconceivable" that a legal assistant who was asked to look for some documents without understanding their significance might not remember the episode in vivid detail seven months after the fact. The only aspect in this sequence of events that is "inconceivable" is that Four Jacks might genuinely believe Scripps Howard and its attorneys were engaged in such a wide-

ranging conspiracy to conceal the 1992 Covington notes that even a Baker & Hostetler legal assistant would have reason to commit perjury about the circumstances surrounding their discovery.

D. Conclusion

37. While Four Jacks freely expresses its cynicism of Scripps Howard's explanation of the facts at issue, it fails to present any coherent alternative explanation. It trumpets nonexistent inconsistencies in testimony about facts that are not in dispute and makes vague references to plotting on the part of Scripps Howard, but it never offers a rational theory as to which facts Scripps Howard intentionally misrepresented, who made the decision to misrepresent, how many individuals were "in on" the decision, why all of the documents Scripps Howard allegedly sought to hide were eventually disclosed, and, most importantly, why Scripps Howard purportedly went to such great lengths to perpetrate the alleged misconduct. Thus, any credibility questions Four Jacks may have with respect to Scripps Howard's explanation pale in comparison to the questions left unanswered by Four Jacks' theory of the case.

38. Four Jacks' reliance on Garden State Broadcasting Limited Partnership v. FCC, 996 F.2d 386, is particularly misplaced. As Four Jacks notes, Garden State "deliberately withheld evidence establishing the date of its organizational meeting." Four Jacks Findings at 81 (emphasis added). Four Jacks could rely on the Garden State case only if Scripps Howard deliberately withheld evidence. Scripps Howard, however, did

nothing of the kind, and Four Jacks' arguments to the contrary, when analyzed for their logic and compared to the facts in the record, amount to nothing more than bluster.

39. In sum, Scripps Howard did not initially produce the NBC facsimiles because it did not consider them responsive and, in addition, believed them to have been discarded; as soon as it became aware of Four Jacks' interest in the facsimiles, it searched for them again, found them, and produced them. Scripps Howard did not initially produce the 1992 Covington notes because it did not consider them responsive; when the issue arose again months later, Scripps Howard believed the 1992 Covington notes had been discarded; and when it discovered that they still existed, it produced them immediately. These acts hardly qualify as intentional misrepresentation or lack of candor, and they certainly do not warrant the disqualification of Scripps Howard.

II. MISREPRESENTATION ISSUE AGAINST FOUR JACKS

Introduction

40. As to the issue pending against Four Jacks, Four Jacks' findings are contrary to belief and common sense. First, Four Jacks argues that the Smiths do not consider themselves employees of Sinclair. Based on the record in this case, such a contention is preposterous. It is contradicted by the weight of the evidence, including the candid testimony of the three Smiths themselves at the 1993 hearing. Thus, this argument amounts to an ill-advised effort by Four Jacks' counsel to impeach their own clients. Not surprisingly, given Four Jacks' inability to

reconcile this incredulous claim with the record, Four Jacks' findings simply omit key testimony from its own principals and other crucial evidence on this issue.

41. Second, Four Jacks' findings set forth a variety of ill-conceived arguments which are irrelevant to the pending issue. For example, Four Jacks contends that the three Smiths' own description of their state of mind with respect to the integration pledge is the only evidence relevant to the pending misrepresentation issue. Four Jacks makes this argument despite unanimous contrary case law and the Presiding Judge's earlier rejection of this very same proposition. This argument is also contradicted by the three Smiths' characterization of themselves as employees of Sinclair at the 1993 hearing. One can only conclude that this theory is offered again because Four Jacks hopes to convince the Presiding Judge that the three Smiths' state of mind is not susceptible to proof and thus no intent to deceive can be found.

42. Finally, Four Jacks attempts to resolve the issue in its favor by arguing that the Smiths have sufficient time to honor their commitment to Channel 2 and to Sinclair. Such a contention is, however, irrelevant to whether Four Jacks misrepresented or lacked candor regarding the three Smiths' pledges to resign their then-current employment. Four Jacks here has offered yet another theory apparently designed to distract from the obvious and irreconcilable conflict concerning a central element of its comparative case, a conflict which mandates Four

Jacks' disqualification for its principals' plain misrepresentation and lack of candor in this proceeding.

A. The record conclusively establishes that the three Smiths are employees of Sinclair and so consider themselves

1. Four Jacks' findings omit crucial evidence from the record demonstrating that the Smiths are employees

43. Four Jacks' position that the three Smiths do not consider themselves employees of Sinclair defies belief and common sense. Such an argument is contrary to the overwhelming weight of the evidence presented at hearing. See Scripps Howard Findings at 41-45, 87-94. Four Jacks' findings simply ignore the key testimony and evidence which establish that the three Smiths regard themselves as employees of Sinclair.

44. Two examples illustrate Four Jacks' selective recitation of the facts. The first and perhaps the most egregious omission in Four Jacks' 116-page findings is its failure to even mention that each of the three Smiths testified at the 1993 hearing that he is an employee of Sinclair. See Scripps Howard Findings at 41-42. Four Jacks' failure to address or even include such obviously relevant state of mind testimony in its findings demonstrates that Four Jacks is unable to undermine this candid testimony offered by its principals before the addition of the issue. See Swan Creek Communications, Inc. v. FCC, 1994 U.S. App. Lexis 33055 at *17 (page 7 of copy accompanying Scripps Howard's Proposed Findings) (D.C. Cir. Nov. 22, 1994) (applicant's attempt to retract their prior frank

admissions showed a lack of candor). Second, Four Jacks' findings likewise neglect to address how it is that Four Jacks' own Application refers to Robert and Frederick Smith as employees of Sinclair. Scripps Howard Findings at 41.

45. The omission of these crucial facts from Four Jacks' findings is particularly glaring given that the Presiding Judge relied upon this evidence in orders both adding the misrepresentation issue and denying Four Jacks' Motion for Summary Decision. Memorandum Opinion and Order FCC 94M-51 (Feb. 1, 1994), at 3-5; Memorandum Opinion and Order FCC 94M-246 (April 11, 1994), at 4-5.[16]

46. Four Jacks' omission of these critical facts in its findings can only be viewed as an attempt to distort the record. Indeed, the omission of these facts is necessary to Four Jacks' key arguments. For example, Four Jacks takes great pains to erroneously portray Scripps Howard as basing its case solely on third party characterizations of the three Smiths' employment status at Sinclair. It repeatedly claims that Scripps Howard has focused solely upon an "official" definition of the term "employment." See, e.g., Four Jacks Findings at 85-86. Such a claim is, however, completely disingenuous because it ignores

---

[16] In the order denying Four Jacks' Motion for Summary Decision, the Presiding Judge also rejected Four Jacks' claim that the term "employee" was used only by Scripps Howard's attorney at hearing and not adopted by the Smiths. Memorandum Opinion and Order FCC 94M-246 (released April 11, 1994), at 5 n.5 (noting that Mass Media Bureau characterized as "ridiculous" Four Jacks' claim that Scripps Howard's attorney "stuck" the word "employee" in the mouth of Frederick Smith).

that the three Smiths all testified, before the misrepresentation issue was added, that they are employees of Sinclair and that Four Jacks' own Application describes two of the Smiths as employees of Sinclair.

47. Due to its omission of crucial evidence, Four Jacks' findings are fatally flawed and cannot be credited as credible or complete. As Four Jacks has failed to rebut or present any reasonable interpretation of its principals' testimony at the 1993 hearing and its own Application, this evidence is entitled to great weight.

2. Four Jacks' failure at hearing to provide any evidence, save self-serving declarations, demonstrates the absurdity of its position

48. Four Jacks has put forth no evidence to support its claim that the three Smiths are not employees of Sinclair, save the self-serving declarations of the three Smiths after the issue was added. The lack of such evidence is probative of the falsity and absurdity of Four Jacks' position, especially given that Four Jacks has the burden of proof on this issue. Memorandum Opinion and Order FCC 94M-51 (released Feb. 1, 1994), at 6. Despite the fact that the three Smiths have available all of their own personal records and the business records of Sinclair, they have not introduced a single document to support Four Jacks' outlandish position.[17] Four Jacks also has not provided

---

[17] Four Jacks' findings claim that certain documentary evidence supports its view that the Smiths are not employees is simply false. See Four Jacks Findings at 108-09. In fact, the language relied upon by Four Jacks, referring to the Smiths as "officers" and to their "executive compensation," supports a

testimony from any witness to support its preposterous claim that the Smiths do not consider themselves employees of Sinclair, other than the self-serving declarations of the three Smiths. Given Four Jacks' burden of proof on this issue, the Smiths' conspicuous decision not to introduce such evidence is worthy of note. See Heidi Damsky, 8 F.C.C. Rcd 6242, 6244-45 (Rev. Bd. 1993) (party given burden of proof and the burden of proceeding where it has knowledge of facts at issue).[18]

3. Four Jacks' position is a recent fabrication

49. As to the three Smiths' current claim that they are not employees, Four Jacks' position appears to be a recent fabrication adopted for purposes of this case. When questioned under oath at the 1993 hearing--where their employment status was not at issue and thus no motive to lie existed--each of the three Smiths had no trouble characterizing himself as an employee of Sinclair. Even at the 1994 hearing, Four Jacks was unable to establish any instance where the three Smiths had represented to any person or entity that they are not employees of Sinclair.

---

findings that the Smiths are employees of Sinclair because officers and executives of corporations are employees.

[18] Given that all of the other explanations offered by Four Jacks to date have been shown to lack merit, Four Jacks' strategy appears to be to simply recite, through the mouths of the three Smiths, everything that Four Jacks believes is required of it to prevail on this issue but without any factual support in the form of documents or testimony from third parties. Indeed, the only evidence offered by Four Jacks, the self-serving 1994 testimony of the three Smiths, is irreconcilably inconsistent with the rest of the record, including the three Smiths' prior candid testimony at the 1993 hearing.

B. Four Jacks' position that only the state of mind of the three Smiths is relevant to this issue is erroneous

50. Four Jacks erroneously argues that whether the three Smiths misrepresented or lacked candor in connection with the pledge to resign is an issue of "state of mind" that cannot be resolved by reference to extrinsic evidence. See, e.g., Four Jacks Findings at 85-86. Relatedly, it contends that the documents introduced by Scripps Howard showing that the Smiths are employees of Sinclair are irrelevant.

51. These arguments have already been soundly rejected by the Presiding Judge in this case. In a prior ruling, the Presiding Judge concluded that documents such as those introduced at hearing are relevant to the pending issue and noted that state of mind can be proven by circumstantial evidence. Memorandum Opinion and Order FCC 94M-310 (released May 2, 1994), at 2. Accordingly, he explicitly rejected Four Jacks' argument that only the professed state of mind of the three Smiths is relevant to this issue. Id. Indeed, Four Jacks' objections on this score appear to be nothing more than an attempt to reargue the relevance of these documents.[19]

52. Furthermore, Four Jacks' "state of mind" defense is directly contradicted by the Smiths' own testimony at the 1993 hearing, where they each testified that they are employees of

---

[19] In fact, despite the Presiding Judge's ruling at hearing that these documents are relevant to this inquiry, Four Jacks continues to contest their relevancy. See Four Jacks Findings at 103.

Sinclair. This testimony demonstrates that the Smiths do consider themselves employees of Sinclair; Four Jacks' omission of this fact illustrates that Four Jacks finds it necessary to ignore crucial evidence in the record in order to maintain any credibility for its position.

C. Four Jacks' objection to business records of Sinclair and the three Smiths is unfounded

53. Four Jacks' findings also denigrate the significance of the multitude of business records which all demonstrate that the Smiths are employees of Sinclair in every sense. Four Jacks portrays the documentary evidence in the record as "extrinsic." Four Jacks Findings at 85. These documents consist, however, of the tax returns of the three Smiths and Sinclair business records. Thus, despite Four Jacks' objections to these documents, the three Smiths are merely being held accountable for their own representations regarding their employment status at Sinclair. Under these circumstances, such admissions are dispositive evidence that the Smiths were aware of their employment status at Sinclair.[20]

---

[20] Four Jacks contends that these documents alone are insufficient basis for disqualification. Four Jacks Findings at 104-05 (citing RKO General, Inc. v. FCC, 670 F.2d 215 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982)). Four Jacks' reliance on RKO is woefully misplaced. As Four Jacks' own quotation from the RKO case notes, the Commission's finding of intentional misrepresentation was overturned because no evidentiary hearing was held, despite the fact that issues remained to be resolved. RKO General, 670 F.2d at 225 (cited in Four Jacks Findings at 104-05). Four Jacks has been given an opportunity at hearing to address the representations contained in these documents but has failed to provide any plausible explanation. Furthermore, the business records introduced by Scripps Howard are not the only evidence mandating Four Jacks' disqualification; these documents

54. Four Jacks then attempts to distance itself from representations made by Sinclair concerning the employment status of the three Smiths. The Smiths are, however, the ultimate authority at Sinclair, and the company repeatedly has represented that the three Smiths are employees of Sinclair. Furthermore, these are not obscure documents but instead are business records on issues fundamental to any corporation: taxes; employee benefits and required filings with government agencies. It is ludicrous for the Smiths to attempt to distance themselves from the day-to-day business records of a company that they wholly own and control, down to the approval of each purchase order. Scripps Howard Findings at 60.

55. Four Jacks also claims that the Smiths are ignorant concerning these business records and thus cannot be held accountable for representations contained in them. Four Jacks Findings at 106-07. Such an attempt is disingenuous at best, given the record in this case. Four Jacks' argument is factually flawed because the three Smiths have personally made representations regarding their employment status at Sinclair in these business records. For example, Sinclair has repeatedly represented to the Commission itself that the three Smiths are full-time employees of Sinclair, and the accuracy of these representations was certified by David Smith personally. Scripps Howard Findings at 47-48. Four Jacks has presented no evidence

---

confirm the misrepresentation evidenced by Four Jacks' Application and the 1993 testimony of the three Smiths.

that these representations to the Commission were inaccurate in any respect or had been amended. Furthermore, many of these documents were signed by at least one of the three Smiths. See Scripps Howard Findings at 94-95. Four Jacks' argument is also flawed because, despite its attempt to minimize the documentary evidence, many of the representations contained therein were made under penalty of perjury or similar oath. Id. While Four Jacks may argue that the representations regarding employment contained in these documents have little probative weight, the documents say otherwise and they are the best evidence on that question.

56. Finally, Four Jacks protests that these forms did not give the three Smiths any ability to distinguish between employees and executive officers. Four Jacks Findings at 107. Nothing in the record could show, however, that the Smiths were forced to represent themselves as employees on these forms. Indeed, if the Smiths truly believed that they are not employees of Sinclair, they could and should have simply refrained from making such representations. For example, they simply could have not listed themselves as employees for purposes of Maryland state unemployment insurance. Indeed, it is noteworthy that when the Smiths have represented that they are employees of Sinclair, it was often to secure a particular benefit only available under the law to employees. Id. at 92-93.

57. Four Jacks' theory, simply put, is that the Smiths should not be held responsible for their own voluntary actions. Instead, Four Jacks believes that the Smiths are free to sign

forms under penalty of perjury or make representations to government agencies, including the Commission, and still not be held accountable for these actions.

D. Four Jacks contention that the three Smiths have sufficient time to honor all of their commitments is irrelevant and inaccurate

58. Four Jacks contends that the three Smiths have the ability to fulfill their integration commitment and, therefore, that no misrepresentation occurred in connection with the Smiths' pledge to resign their then-current employment. See Four Jacks Findings at 50.[21]

59. Four Jacks' argument entirely misses the point and clouds the true issue. The question before the Presiding Judge is whether the three Smiths are employees of Sinclair and whether Four Jacks misrepresented or lacked candor in making its pledge to resign employment while, all the while, intending to remain at Sinclair. Memorandum Opinion and Order FCC 94M-51 (released Feb. 1, 1994), at 5 (ruling that issue was to determine whether Four Jacks misrepresented or lacked candor regarding the three Smiths' pledge to resign then-current employment). Four Jacks thus attempts to resolve the issue in its favor by arguing the merits of the comparative issue, which was not at issue in Phase II of this case.

---

[21] In support of this position, Four Jacks details the three Smiths' commitment to Sinclair, the Sinclair stations and the Smiths' other S-corporations such as Cunningham Communications, Inc.

60. Furthermore, Four Jacks' argument is flawed as a factual matter. Each of the three Smiths testified at the 1993 hearing that they worked 9 to 5 at Sinclair. Scripps Howard Findings at 61, 65, 66. While the amount of work performed by the three Smiths at Sinclair during this time period may be subject to debate--and the three Smiths' conflicting testimony can support just about any position on this point, see, e.g., Scripps Howard Findings at 65 n.24--the record is in any event clear that they will continue to work at Sinclair and be available to perform whatever services are necessary for the functioning of the company. Id. at 64, 66.

61. Four Jacks' argument on this score is premised upon an erroneous reading of the applicable law. The pledge to resign employment was made pursuant to a request for integration credit. It is established law that where an applicant proposes to retain "significant outside business interests," such as Sinclair, it must "set forth a specific and credible plan explaining how the principal in question would arrange for the business to be managed while fulfilling his integration pledge." Lowrey Communications, L.P., 7 F.C.C. Rcd 7139, 7152 (Rev. Bd. 1992) (quoting Kevin Potter, 7 F.C.C. Rcd 4342, 4342 (1992)). As the Presiding Judge has already concluded, no such plan has been posited by the Smiths. Memorandum Opinion and Order FCC 94M-246 (April 11, 1994), at 3-4. Given the Smiths' commitment to Sinclair and the complete lack of a plan specifying how they would honor their commitment to Channel 2, it can only be

concluded from their often repeated integration pledge that they did not intend to retain their executive positions at Sinclair.[22]

E. Four Jacks' reliance on certain language contained in the three Smiths' 1993 direct case testimony, concerning "other media interests" is misplaced

62. Both Four Jacks and the Mass Media Bureau cite language in the 1993 direct case testimony of the three Smiths to claim that the three Smiths always intended to remain at Sinclair and thus conclude that the issue should be resolved in Four Jacks' favor. See, e.g., Four Jacks Findings at 100-01 ("notwithstanding [Sinclair's] other media interests," the three Smiths are able and committed to carrying out integration pledge). When this language is viewed in context, however, it in fact bolsters the conclusion that Four Jacks intended to mislead the Commission.

63. By order dated April 6, 1993, the Presiding Judge required that each party file an Integration and Diversification Statement setting forth its integration commitment, including "their definitive intentions to leave their current employment . . . ." Prehearing Conference Order FCC 93M-146 (April 6, 1993), at 1 n.1 (emphasis added). **While the Smiths' pledge to resign their then-current employment is contained in the required Four**

---

[22] As the three Smiths' relationship to Sinclair will not change if they obtain Channel 2, it is also impossible to conclude that Four Jacks has demonstrated that the three Smiths will have sufficient time to honor their commitment to Channel 2. See Lowrey Communications, L.P., 7 F.C.C. Rcd 7139 (Rev. Bd. 1992); see Gloria Bell Byrd, 7 F.C.C. Rcd 7976, 7982 (Rev. Bd. 1992) (noting that no way to foretell how much time will be necessary in the future for a particular business interest).

Jacks' Integration and Diversification Statement, SH47, the cited language relied upon by Four Jacks and the Bureau is not. If this language was central to communicating the scope of the three Smiths' integration commitment, then it should have been included in Four Jacks' Integration and Diversification Statement, as required by the Presiding Judge.

64. Furthermore, if the language cited by Four Jacks was intended to negate the plain meaning of the Smiths' pledge to resign then-current employment contained in the Integration and Diversification Statement, then Four Jacks had a duty of candor to make such an intent clear prior to the close of Phase I. Instead, there is nothing in the text of the Smiths' 1993 direct case statements, or anywhere else in the record before the addition of the issue, which even hints that this cited language is meant as a new caveat to the Smiths' already on-the-record pledge to resign their then-current employment.

65. Finally, the cited language appears in the paragraph immediately after the pledge to resign then-current employment is made. The resignation pledge is in fact immediately juxtaposed with the language representing that the Smiths will have sufficient time to honor their commitment to Channel 2. It appears, therefore, that the cited language compliments, rather than caveats, the pledge to resign as a way of explaining how the