

POST-NEWSWEEK

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March 8, 1995

Ex parte
mm Docket
91-221

RECEIVED

MAR 8 1995

BY MESSENGER

Mr. William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: Informal Objection
Application for Consent to Assign License for
Station KRRT(TV), Kerrville, Texas
FCC File No. BALCT-940810KE

Dear Mr. Caton:

Post-Newsweek Stations, San Antonio, Inc. ("Post-Newsweek"), licensee of Station KSAT-TV, San Antonio, Texas, hereby objects to the grant of the above-captioned application, which has, as an integral element, a controversial local marketing agreement ("LMA") that is subject to the review of the FCC staff. Post-Newsweek believes there are substantial and important public interest issues surrounding this transaction and the LMA that cannot be resolved on the basis of the documentation that has been reluctantly submitted by the parties.

Post-Newsweek believes, further, that it would be procedurally inappropriate for the Commission's staff to establish de facto rules for the permissibility of LMAs generally by ruling on this assignment application before the Commission has resolved the issues it has raised concerning LMAs in the pending television multiple-ownership docket -- a decision which will, finally, establish industry-wide rules for the permissibility of all LMAs. For these reasons, the subject application should not be considered by the staff until (1) the parties have disclosed information sufficient to permit the staff to determine whether the public interest would be served and (2) the Commission has established the rules that will govern all LMAs, including the one at issue here.

I.

As the Commission is well aware, the substance of the proposed transaction is under challenge by Harte-Hanks Television, Inc. ("Harte-Hanks"). After the filing of Harte-

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Hanks' objection, the parties disclosed, under objection, the proposed local marketing agreement ("LMA") under which River City Broadcasting, L.P. ("River City") would essentially operate Station KRRT(TV) (the "Station"), which would be licensed to KRRT, Inc. ("KRRT") (see attached LMA). Under the LMA, River City would gain almost total control over the day-to-day operation of the Station. River City would make all programming decisions for, and have the right to program all the airtime of, the Station, subject only to KRRT's minimal right to reject. River City would sell all advertising on the Station and would garner all revenues from the operation of the Station -- including even network compensation and retransmission consent payments. In exchange, River City would pay KRRT an amount the parties have refused to disclose and would pay into escrow all amounts necessary to satisfy a certain loan between KRRT and a third party -- in an amount which, again, the parties have refused to disclose.

The LMA covers a period of up to 15 years. Its initial period of five years can be extended for two additional five-year terms in the sole discretion of River City. See LMA, Section 1.2, 1.4. KRRT has no right to escape the LMA prior to the end of that 15-year period, with minor exceptions. If River City breaches the LMA, of course, KRRT may terminate. However, if KRRT wishes to terminate the LMA because it determines the LMA no longer serves the public interest, it cannot do so without repaying River City, immediately upon termination and apparently in cash, for all amounts that River City has paid into escrow for a certain loan. See LMA, Section 6.2(b); Attachment 1.5.

The parties have refused to disclose the amount of indebtedness that KRRT would be required to repay to River City immediately to regain the right to operate the Station. Without disclosure of facts relevant to this indebtedness, including its amount, it will be impossible for the staff to determine whether KRRT has any right at all to escape the LMA. If the amount is beyond the reasonable ability of a small-station licensee to immediately repay, KRRT will be placed in the untenable position of having agreed to a 15-year agreement that it cannot end under any reasonable circumstances. If, however, the amount is relatively minor or otherwise reasonable, the otherwise open-ended termination provision may provide KRRT with a workable escape clause that could operate to restrain River City from assuming essential control over the Station. But this is a fact-based determination that cannot be made in the absence of the crucial facts. Accordingly, the subject application should not be granted

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until the facts surrounding KRRT's ability to terminate are disclosed by the parties.

II.

The Commission has initiated a broad-based rule making proceeding that will establish, for the first time, rules to govern television LMAs.^{1/} The permissibility of the subject application hinges, in large part, on whether the LMA proposed to be entered between the parties complies with the Commission's rules and policies.^{2/} Granting the subject application prior to the adoption of rules in this docket thus would have the potential to either (1) prejudice the proper resolution of the issues, potentially before parties have had an opportunity to file comments in the docket or (2) establish a result in this particular transaction that could be at odds with the rules the Commission ultimately adopts. Either result would be inappropriate. Consideration of this application thus should be deferred until the Commission has had the opportunity to assess the industry-wide record concerning LMAs and establish the rules that will apply to the entire industry.

In MM Docket 91-221, the Commission could, for example, establish rules requiring a party to have the ability to escape an LMA after a reasonable period of time and on commercially reasonable terms. The Commission also could establish rules or policies that would render an agreement with an essential 15-year term inconsistent with a licensee's continuing ability to control its station. Further, the Commission could determine that licensees have to make a financial showing of necessity to enter into an LMA. More basically, the Commission could decide that an LMA like this one, in which an in-market licensee obtains the right to

^{1/} See Review of the Commission's Regulations Governing Television Broadcasting, Notice of Proposed Rule Making, FCC 94-322 (MM Docket 91-221, Jan. 17, 1995).

^{2/} In its transmittal letter submitting the LMA to the FCC's staff, counsel for KRRT, Inc. states that the "form of the proposed LMA was approved by Robert Somers, Esquire on behalf of the Complaints and Compliance Division this past June." Of course, a single staff attorney reviewing a single document in isolation cannot make a conclusive and binding determination that an entire transaction complies with the Commission's policies and rules.

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program essentially all the broadcast time of another licensee in the same market, should constitute an attributable interest for the programming licensee and thus violate the duopoly rule. If the Commission takes any of these positions, the proposed LMA at issue here would be rendered impermissible. If this application is granted before the Commission can establish the rules that will govern all LMAs, it would be in the position of making potentially inconsistent decisions within a relatively brief span of time. Such an action would be administratively unwise and procedurally inappropriate.

The Commission also has proposed grandfathering certain LMAs. If the staff approves the subject transaction and the parties execute the proposed LMA, it is likely that the parties would urge that the LMA -- whether or not it complies with the rules the Commission ultimately adopts -- should be grandfathered for its entire 15-year term.^{3/} This result would clearly be inappropriate. The Commission grandfathers ownership and related interests on a very narrow basis and limits its use of this tool to situations where valid reliance interests have been developed under a prior regulatory plan. That would not, of course, be the case here, where the proposed agreement, if approved, would be entered into on the eve of the establishment of new rules.

Deferring consideration of the subject application pending the adoption of appropriate rules would not be a burden on the parties. To the contrary, it would permit a more efficient resolution of the issues. First, the rule-making proceeding has been pending for a period of months and comments will be filed next month. It is thus likely that deferral will not delay this transaction for an unduly lengthy period of time. Second, any result entered in this proceeding that varies from the rules the Commission ultimately adopts could easily be challenged on reconsideration or appeal, a result that would lead only to greater uncertainty between the parties and in the marketplace generally. Simply deferring decision until the rules can be established would permit a certain result in this proceeding to the benefit of all concerned.

^{3/} Even grandfathering an LMA such as the one under consideration here for a five-year period could have serious deleterious effects on the local television marketplace and diversity of service to the public.

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For these reasons, Post-Newsweek objects to the subject application and suggests that it be held in abeyance pending the submission of appropriate information by the parties and the resolution of the LMA rule making docket.

Respectfully submitted,

POST-NEWSWEEK STATIONS,
SAN ANTONIO, INC.

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MM Docket 91-221 (w/enc.)

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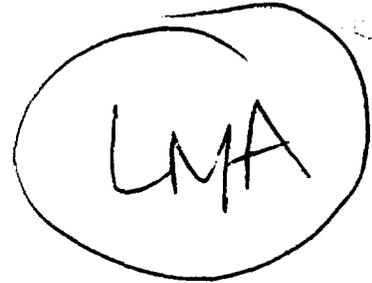
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November 18, 1994

Clay Pendarvis, Esquire
Federal Communications Commission
1919 M Street, N.W.
Room 700
Washington, D.C. 20554

A handwritten circle containing the letters 'LMA' in a stylized, cursive font.

Re: Station KRRT
Kerrville, Texas
File Number BALCT-940810KE

Dear Mr. Pendarvis:

In response to your letter of November 14, 1994 there is enclosed a copy of the proposed Time Brokerage Agreement ("LMA") between KRRT, Inc. and River City License Partnership. It has not been executed. The financial terms of the proposed LMA, which are proprietary, have been redacted. Additionally, portions of the proposed LMA that relate to continued licensee control of the station's programming, finances and personnel, have been highlighted. The form of the proposed LMA was approved by Robert Somers, Esquire on behalf of the Complaints and Compliance Division this past June (See KRRT, Inc. letter dated October 17, 1994, p.3).

This document is submitted for the confidential review of the Commission's staff. Submission is not required under the Commission's rules or the application form. Moreover, it contains proprietary information with respect to the proposed operation of Station KRRT. As such, we have not provided a copy of the document to the objector in this proceeding and request that the Commission similarly restrict access to this document.

Clay Pendarvis, Esquire
November 18, 1994
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Should any further information be required, please communicate directly with this office.

Very truly yours,

A handwritten signature in black ink, appearing to read "Dennis F. Begley". The signature is fluid and cursive, with a large initial "D" and a long, sweeping tail.

DENNIS F. BEGLEY
Counsel for
KRRT, INC.

DFB:lmb

Enclosure

cc (w/encl.): George Shapiro, Esq.
Jack Friedman, Esq.

LMA

TIME BROKERAGE AGREEMENT

for

KRRT(TV), KERRVILLE, TEXAS

Between

KRRT, INC.

and

RIVER CITY BROADCASTING, L.P.

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TIME BROKERAGE AGREEMENT

Draft of
July 14, 1994

TIME BROKERAGE AGREEMENT, made this ____ day of _____, 1994, by and between KRRT, Inc., a Texas corporation (the "Licensee") and River City Broadcasting, L.P., a Delaware limited partnership (the "Programmer").

WHEREAS Licensee has acquired Television Station KRRT(TV), Kerrville, Texas (the "Station") from Paramount Stations Group of Kerrville Inc. and Paramount Stations Group Inc.;

WHEREAS Programmer is experienced in television station ownership and operation and is the licensee of Television Station KABB(TV), San Antonio, Texas;

WHEREAS Licensee wishes to retain Programmer to provide programming for the Station that is in conformity with Station policies and procedures, Federal Communications Commission ("FCC") policies for time brokerage arrangements, and the provisions hereof;

WHEREAS Programmer agrees to use the Station exclusively to broadcast such programming of its selection that is in conformity with all rules, regulations and policies of the FCC, subject to Licensee's full authority to manage and control the operation of the Station; and

WHEREAS Programmer and Licensee agree to cooperate to make this Time Brokerage Agreement work to the benefit of the public and both parties and as contemplated in this Agreement;

NOW, THEREFORE, in consideration of the above recitals and mutual promises and covenants contained herein, the parties, intending to be legally bound, agree as follows:

Section 1

Lease of Station Air Time

1.1 Representations. Both Licensee and Programmer represent that they are legally qualified, empowered and able to enter into this Agreement.

1.2 Term. This Agreement shall be in force from and after the date hereof for a period of five (5) years unless otherwise extended or terminated as set forth below.

1.3 Scope. During the term of this Agreement and any renewal thereof, Licensee shall make available to Programmer time on the Station as set forth in this Agreement. Programmer shall deliver such programming, at its expense, to the Station's transmitter facilities or other authorized remote control points as reasonably designated by Licensee. Subject to Licensee's reasonable approval, as set forth in this Agreement, and subject to Sections 2.1, 2.2, 3.1 and 3.2 hereof, Programmer shall provide programming of its selection complete with commercial matter, news, public service announcements and other suitable programming to the Licensee up to one hundred sixty-two hours per week. Notwithstanding the foregoing, the Licensee may use such time as it may need to serve the public interest through the broadcast of its own regularly scheduled programming. The

schedule of broadcast time reserved by Licensee may vary on a weekly basis and will be established by mutual agreement between Licensee and Programmer.

1.4 Option to Renew. Subject to the rights of Licensee and Programmer to terminate this Agreement pursuant to Section 6 hereof, Programmer shall have the right to extend the initial term of this Agreement for two additional terms of five years each upon sixty (60) days' written notice to Licensee prior to the expiration of each term.

1.5 Consideration. As consideration for the air time made available during the term hereof and any renewal periods, Programmer shall make payments to Licensee as set forth in Attachment 1.5.

1.6 Licensee Operation of Station. Licensee will have full authority, power and control over the management and operations of the Station during the initial term of this Agreement and during any renewal of such term. Licensee will bear all responsibility for Station's compliance with all applicable provisions of the Communications Act of 1934, as amended ("the Act"), the rules, regulations and policies of the FCC and all other applicable laws. Licensee shall be solely responsible for and pay in a timely manner all operating costs of the Station, including but not limited to the expenses listed on Attachment 1.5, which shall include the costs of maintenance of the studio and transmitting facility and costs of electricity,

provided that Programmer shall be responsible for the costs of its programming as provided in Sections 1.8 and 2.3 hereof. Licensee shall employ at its expense management level or other employees consisting of, at a minimum, a General Manager and another employee, who will direct the day-to-day operations of the Station, and who will report to and be accountable to the Licensee. Licensee shall be responsible for the salaries, taxes, insurance and related costs for all personnel employed by Licensee and shall maintain its eligibility for insurance satisfactory to Programmer covering the Station's studios, offices and transmission facilities. During the initial term of the Agreement and any renewal hereof, Programmer agrees to perform, without charge, routine monitoring of the Station's transmitter performance and tower lighting, if and when requested by Licensee.

1.7 Licensee Representations, Warranties and Covenants. Licensee represents and warrants as follows:

(a) During the term of this Agreement and any renewal thereof, Licensee will hold all licenses and other permits and authorizations necessary for the operation of the Station, and such licenses, permits and authorizations are and will be in full force and effect throughout the term of this Agreement and any renewal thereof. There is not pending, or to Licensee's best knowledge, threatened, any action by the FCC or by any other party to revoke, cancel, suspend, refuse to renew or

modify adversely any of such licenses, permits or authorizations. To the best of Licensee's knowledge, Licensee is not in violation of any statute, ordinance, rule, regulation, policy, order or decree of any federal, state or local entity, court or authority having jurisdiction over it or the Station, which would have an adverse effect upon the Licensee, its assets, the Station or upon Licensee's ability to perform this Agreement. Licensee shall not take any action or omit to take any action which would have an adverse impact upon the Licensee, its assets, the Station or upon Licensee's ability to perform this Agreement. All reports and applications required to be filed with the FCC or any other governmental body during the course of the initial term of this Agreement or any renewal thereof, will be filed in a timely and complete manner. The facilities of the Station will be maintained in accordance with good engineering practice and will comply in all material respects with the engineering requirements set forth in the FCC authorizations, permits and licenses for the Station, and Licensee will ensure that the Station broadcasts a high quality signal to its service area (except at such time where reduction of power is required for routine or emergency maintenance). Licenses, throughout the term of this Agreement and any renewal thereof, will maintain good and marketable title to all of the assets and properties used and useful in the operation of the Station. During the term of this Agreement and any renewal thereof, Licensee shall not dispose of, transfer,

assign or pledge any of such assets and properties except with the prior written consent of the Programmer, if such action would adversely affect Licensee's performance hereunder or the business and operations of Licensee or the Station permitted hereby.

(b) Licensee shall pay, in a timely fashion, all of the expenses incurred in operating the Station including lease payments, utilities, taxes, etc., as set forth in Attachment 1.5, and shall provide Programmer with a certificate of such timely payment within thirty (30) days of the end of each month.

1.8 Programmer Responsibility. Programmer shall be solely responsible for all expenses attributable to its programming on the Station, including but not limited to any expenses incurred in the origination and/or delivery of programming from any remote location and for any publicity or promotional expenses incurred by Programmer, including, without limitation, ASCAP, BMI and SESAC music license fees for all programming provided by Programmer. Such payments by Programmer shall be in addition to any other payments to be made by Programmer under this Agreement, including those required to be made pursuant to Attachment 1.5.

1.9 Contracts. Programmer will assume Licensee's rights and obligations under the contracts listed on Attachment 1.9 hereto. Programmer will not assume any of Licensee's other contracts or leases. Programmer will enter into no third-party

contracts, leases or agreements which will bind Licensee in any way except with Licensee's prior written approval.

1.10 Use of Station's Studios. Subject to Licensee's own programming needs, Licensee agrees to provide Programmer with access to the Station's complete facilities including the studios and broadcast equipment for use by Programmer, if it so desires, in providing programming for the Station. Subject to the overall supervision by Licensee and its employees, Programmer shall and may peacefully and quietly have the full use of and enjoy the use of the Station's facilities, studios and equipment free from any hindrance from any person or persons whomsoever claiming by, through or under Licensee. Unless otherwise permitted by the Licensee and subject to the overall supervision of Licensee, Programmer shall use the studios and equipment only for the purpose of producing programming for the Station.

Section 2

Station Public Service Obligations

2.1 Licensee Authority. Notwithstanding any other provision of this Agreement, Programmer recognizes that Licensee has certain obligations to operate the Station in the public interest, and to broadcast programming to meet the needs and interests of its community of license, the Station's service area and the educational and informational needs of children. From time to time the Licensee shall air, or shall require Programmer to air, programming on issues of importance to the local

community and educational and informational programming for children aged 16 years and younger. Nothing in this Agreement shall abrogate the unrestricted authority of the Licensee to discharge its obligations to the public and to comply with the Act and the rules and policies of the FCC.

2.2 Additional Licensee Obligations.

(a) Although both parties shall cooperate in the broadcast of emergency information over the Station, Licensee shall also retain the right to interrupt Programmer's programming in case of an emergency or for programming which, in the good faith judgment of Licensee, is of greater local or national public importance.

(b) Licensee shall also coordinate with Programmer the Station's hourly station identification and any other announcements required to be aired by FCC rules.

(c) Licensee and Programmer shall cooperate in ensuring compliance with the FCC's rules and requirements governing uses of the Station's facilities by legally qualified candidates for public office, including Licensee's obligation to provide reasonable access to legally qualified federal candidates. Programmer will provide Licensee with copies of any material setting forth terms and/or conditions for the availability of political advertising time on the Station in advance of public dissemination of such material so that Licensee may provide its input as to such material.

(d) Licensee shall (i) continue to maintain and staff a main studio, as that term is defined by the FCC, within the Station's principal community contour, (ii) maintain its local public inspection file within Kerrville, Texas, and (iii) prepare and place in such inspection file or files in a timely manner all material required by Section 73.3526 of the FCC's Rules, including without limitation the Station's quarterly issues and program lists; information concerning the broadcast of children's educational and informational programming; and documentation of compliance with commercial limits applicable to certain children's television programming. Programmer shall, upon request by Licensee, provide Licensee with such information concerning Programmer's programs and advertising as is necessary to assist Licensee in the preparation of such information or to enable Licensee to verify independently the Station's compliance with the Children's Television Act or any other laws, rules, regulations or policies applicable to the Station's operation.

(e) Programmer agrees to provide to Licensee such information as Licensee may request concerning Programmer's recruitment, hiring or employment practices in connection with Programmer's provision of programming to the Station.

(f) Licensee shall also maintain the station logs, receive and respond to telephone inquiries, control and oversee any remote control point for the Station.

2.3 Regulatory Disputes. In the event of a dispute between Licensee and Programmer as to whether any aspect of the Station's operation violates the Communications Act of 1934, as amended, or any applicable rule, regulation or policy of the FCC, Licensee and Programmer will jointly select one or more persons qualified to mediate the dispute. Programmer and Licensee will pay for the fees of a communications attorney and/or engineer to advise the mediator, if such services are necessary. Programmer and Licensee recognize that the views of any such mediator are merely advisory, that Licensee retains the ultimate decision-making authority over regulatory compliance matters, and that Licensee has the right to require that Programmer cure any violation of the Communications Act of 1934, as amended, or the rules, regulations and policies of the FCC at the earliest practical opportunity. Disputes arising under this Section 2.3 shall not be subject to arbitration pursuant to Section 7.10 hereof.

2.4 Responsibility for Employees and Expenses. Programmer shall employ and be solely responsible for the salaries, taxes, insurance and related costs for all personnel used in the sale of commercial advertising time and the production of Programmer's programming (including salespeople, traffic personnel, board operators and programming staff). Licensee will provide and be responsible for the Station personnel necessary for the broadcast transmission of

Programmer's programs (including, without limitation, the Station's General Manager and other employee), and will be responsible for the salaries, taxes, insurance and related costs for all the Station personnel used in the broadcast transmission of Programmer's programs and necessary to other aspects of Station operation. Whenever on the Station's premises, all employees of Programmer shall be subject to the overall supervision of Licensee's General Manager and/or other employee.

Section 3

Station Programming Policies

3.1 Broadcast Station Programming Policy Statement.

Licensee has adopted a Broadcast Station Programming Policy Statement (the "Policy Statement"), a copy of which appears as Attachment 3.1 hereto and which may be amended from time to time by Licensee upon notice to Programmer. Programmer agrees and covenants to comply in all material respects with the Policy Statement, with all rules and regulations of the FCC, and with all changes subsequently made by Licensee or the FCC. Programmer shall furnish or cause to be furnished the artistic personnel and material for the programs as provided by this Agreement and all programs shall be prepared and presented in conformity with the rules, regulations and policies of the FCC and with Policy Statement set forth in Attachment 3.1 hereto. All advertising spots and promotional material or announcements shall comply with

applicable federal, state and local regulations and policies and the Policy Statement, and shall be produced in accordance with quality standards established by Programmer. If Licensee determines that a program, commercial announcement or promotional material supplied by Programmer is for any reason, with Licensee's sole discretion, unsatisfactory or unsuitable or contrary to the public interest, or does not comply with the Policy Statement it may, upon written notice to Programmer (to the extent time permits such notice), suspend or cancel such program, commercial announcement or promotional material and substitute its own programming or require Programmer to provide suitable programming, commercial announcement or other announcement or promotional material.

3.2 Licensee Control of Programming. Programmer recognizes that Licensee has full authority to control the operation of the Station. The parties agree that Licensee's authority includes but is not limited to the right to reject or refuse such portions of the Programmer's programming which Licensee believes to be contrary to the public interest. Programmer shall have the right to change the programming supplied to Licensee and shall give Licensee at least twenty-four (24) hours notice of substantial and material changes in such programming. Licensee and Programmer will cooperate in an effort to avoid conflicts regarding programming on the Station.

3.3 Programmer Compliance with Copyright Act.

Programmer represents and warrants to Licensee that Programmer has full authority to broadcast its programming on the Station, and that Programmer shall not broadcast any material in violation of the Copyright Act. All music supplied by Programmer shall be: (i) licensed by ASCAP, SESAC or BMI; (ii) in the public domain; or (iii) cleared at the source by Programmer. Licensee will maintain ASCAP, BMI and SESAC licenses as necessary. The right to use the programming and to authorize its use in any manner shall be and remain vested in Programmer.

3.4 Sales. Programmer shall retain all of the Station's network compensation revenues, any promotion-related revenues received from any network or program supplier with respect to affiliation or any particular program, retransmission consent revenues and all revenues from the sale of advertising time within the programming it provides to the Licensee. Programmer may sell advertising on the Station in combination with any other broadcast stations of its choosing. Programmer shall be responsible for payment of the commissions due to any national sales representative engaged by it for the purpose of selling national advertising which is carried during the programming it provides to Licensee. Unless otherwise agreed between the parties, Licensee shall retain all revenues from the sale of Station's advertising during its own programming, with the exception provided for certain political advertising as set

forth in Section 5.2 herein. Licensee and Programmer each shall have the right, at their own expense, to seek copyright royalty payments for their own programming.

3.5 Children's Television Advertising. Programmer agrees that it will not broadcast advertising in programs originally designed for children aged 12 years and under in excess of the amounts permitted under applicable FCC rules.

3.6 Payola. Programmer agrees that it will not accept, and will not permit any of its employees to accept, any consideration, compensation, gift or gratuity of any kind whatsoever, regardless of its value or form, including, but not limited to, a commission, discount, bonus, material, supplies or other merchandise, services or labor (collectively "Consideration"), whether or not pursuant to written contracts or agreements between Programmer and merchants or advertisers, unless the payer is identified in the program for which Consideration was provided as having paid for or furnished such Consideration, in accordance with the Act and FCC requirements. Programmer agrees to annually, or more frequently at the request of the Licensee, execute and provide Licensee with a Payola Affidavit, substantially in the form attached hereto as Attachment 3.6.

3.7 Cooperation on Programming. Programmer and Licensee mutually acknowledge their interest in ensuring that the Station serves the needs and interests of the residents of