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TELFAC

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

The Honorable William Kennard
Chairman
Federal Communications Commission
445 12th Street, SW, Room 8-B201
Washington, DC 20554

Re: Refarming – PR Docket 92-235

Dear Chairman Kennard:

The Telephone Maintenance Frequency Advisory Committee (TELFAC) is an unincorporated association representing all common carriers engaged in the maintenance of the wireline and wireless infrastructure necessary to the provision of landline telephone service. TELFAC is governed by a council of licensee representatives presently composed of representatives from SBC/Pacific Bell, Bell Atlantic-New Jersey, Inc., The United States Telecom Association (USTA),[1] Home Telephone Company, Ameritech, and Sprint Ltd. While TELFAC is pleased that the Commission has resolved many of the outstanding issues in the "refarming" proceeding, it is nonetheless concerned about the concurrence rules adopted in the *Second Memorandum Opinion and Order.*

In April, when the Commission released its *Second Memorandum Opinion and Order* affirming its radio service consolidation decision and upholding the frequency coordination process, it also determined that all frequencies – *shared and exclusive* – assigned to the former Power Radio Service, Petroleum Radio Service, and Railroad Radio Service must be coordinated by the frequency coordinators responsible for these services.[2] The Commission also decided to include the former Automobile Emergency Radio Service in the list of frequencies that must receive concurrence from the frequency coordinator responsible for these services prior to consolidation.[3]

In July, however, MRFAC, Inc. and Forest Industries Telecommunications each filed a Motion for Expedited Partial Stay requesting that the Commission stay the effective date of the rules enacted in the *Second Memorandum Opinion and Order* until the issues raised in their petitions for reconsideration – dealing with the matter of

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1 As evidenced by its signature below, USTA (as a member of TELFAC) strongly supports the recommendations discussed in this letter.

2 *See* Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Services, *Second Memorandum Opinion and Order*, PR Docket No. 92-235, FCC 99-68 (rel. April 13, 1999) (*Second MO&O*).

3 *Second MO&O* at ¶ 16.

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concurrence for the shared frequencies – were addressed.[4] On August 5, 1999, the Commission released the *Fourth Memorandum Opinion and Order* granting the stay.[5] According to this Order, the stay will be in effect until the Commission resolves the outstanding petitions for reconsideration.[6]

TELFAC appreciates the Commission's decision to stay the *Second MO&O*, which has provided industry with the opportunity to develop a realistic and workable solution to the matter in question. The rules contained in the *Second MO&O* are clear; any telephone maintenance entity seeking access to frequencies available to them, frequencies that they historically shared with utilities, and pipelines (as well as manufacturers and the forest industry), must first secure the consent of the appropriate frequency advisory committee for the shared frequencies in question prior to filing the application with the Commission. There are, however, some outstanding questions. If the frequencies sought by a telephone maintenance industry applicant were shared by both the petroleum and the power industries, would consent from either or both of the appropriate coordinators be necessary? Also, if one of these coordinators approved the application and the other refused concurrence, how would the issue be resolved? We believe this would constitute a denial. In addition, there is the issue of competition among frequency coordinators – something the Commission has actively promoted in order to keep costs down and ensure that applicants are provided the best service possible. The concurrence process for shared frequencies, instead of promoting competition – potentially impedes it. There is little incentive for an incumbent in affected industries to seek out the best prices and the fastest speed of service if they will ultimately be forced to await concurrence from the designated frequency coordinator for that particular service. TELFAC does not believe it would be appropriate for the Commission to sustain the rules in the *Second MO&O* that serve to protect specialized constituencies, while having a detrimental effect on other like constituencies sharing the same frequencies.

The Commission needs to recognize that the fundamental reason behind the push for the "special" treatment on both formerly exclusive and *shared* channels is the "potential" for interference to power, railroad, and petroleum licensees.[7] TELFAC agrees that there is the "potential" for interference due to unacceptable frequency selection practices. Nevertheless, we believe that creating administrative and financial

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[4] *See* Motion for Expedited Partial Stay, filed by MRFAC, Inc. on July 7, 1999; Petition for Partial Stay, filed by Forest Industries Telecommunications on July 9, 1999.

[5] *See* Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Services, *Fourth Memorandum Opinion and Order*, PR Docket 92-235, FCC 99-203 (rel. August 5, 1999) (*Fourth MO&O*).

[6] *Fourth MO&O* at ¶ 14.

[7] While the Commission consolidated all of the separate pools into 2 pools – the public safety pool and the industrial/business pool, it also recognized some of the problems relating to protecting "safety-related" communications. Accordingly, the Commission required that applicants for frequencies that were *exclusively* allocated to certain radio services (the power, petroleum, and railroads) go through the recognized frequency coordinator. TELFAC agrees with this decision as it protects the needs of these industries while allowing the channels to be used by other entities in other parts of the country – resulting in a more efficient use of the spectrum.

burdens for the telephone maintenance industry is not a reasonable means to this end. While the Commission could, if it desired, reconsider the rules in the *Second MO&O*, TELFAC has an alternative suggestion. The frequency advisory committees already have the capability to initiate internal coordination procedures to protect their respective constituencies through engineering means, *i.e.* protective contours. Extraordinary Commission action to protect certain constituencies from "potential" interference is wholly unnecessary. Unfortunately, the rules do not currently provide an enforcement mechanism to ensure that *all* of the frequency advisory committees are adhering to the same coordination procedures. Thus, TELFAC strongly urges the Commission to adopt a uniform standard for the frequency advisory committees for *all* of the incumbents – whether they be power, petroleum, railroad, telephone maintenance, manufacturers, or forest industry – on the shared channels in question. To that end, we propose below to provide the Commission with a workable solution to these issues – one that we believe will respond to the needs of all parties.

TELFAC supports the approach suggested by API and MRFAC that the Commission institute an interference protection threshold for incumbents in all of the industries on the channels in question – the power, petroleum, railroad, the telephone maintenance, manufacturing, and forest industries. We suggest that the Commission prohibit the 21 dBu contour of the proposed station from interfering with the 39 dBu contour of the incumbent system for UHF systems, and the 19 dBu contour of the proposed system from interfering with the 37 dBu contour of the incumbent system for VHF systems on the channels shared by the petroleum, power, railroad, telephone maintenance, manufacturing, and forest industries. If the proposed system's 21 dBu or 19dBu contours overlap with the incumbent system's 39 dBu or 37 dBu contour, the application may either be rejected by the frequency coordinator or, in cooperation with the frequency advisory committee, seek concurrence from the incumbent system operator. The frequency advisory committees already exchange coordination data on a daily basis; there would therefore be little chance that any frequency advisory committee would be unaware of the location of both incumbent and proposed systems. Furthermore, this approach would provide each frequency advisory committee (including those representing the petroleum, power, and railroad industries) with the opportunity to initiate a very simple process – a contour analysis program – that would serve to protect the interests of their respective constituents.

TELFAC believes that this proposal, if adopted, would significantly reduce the "potential" for harmful interference. We also believe that this approach avoids placing additional administrative burdens on the frequency advisory committees by necessitating concurrence prior to the filing of an application for those frequencies historically shared by a number of industrial/business services. TELFAC's proposal entirely obviates the need for prior concurrence on the channels in question. Instead, this approach provides the Commission with a pragmatic solution that will avoid further

controversy by satisfying the protection needs of all of the industries involved on the shared frequencies in question.

Respectfully submitted,

Michael R. Morris
Chair
Telephone Maintenance Frequency Advisory Committee

Paul K. Hart
Vice President, Technical Disciplines
United States Telecom Association

NOGGIN, HOWEVER WORTHY, IS NOT ELIGIBLE FOR THE DBS SET-ASIDE

Only *Noncommercial* Entities May Qualify for the Set-Aside

Congress specified that 4-7 percent of DBS channel capacity be reserved "exclusively for *noncommercial* programming of an educational or informational nature." 47 U.S.C. Sec. 335(b)(1). Congress further directed that DBS providers meet this responsibility by making channel capacity available to "national educational program suppliers," 47 U.S.C. Sec. 335(b)(3), a category that was defined to include "any qualified *noncommercial educational television station, other public telecommunications entities, and public or private educational institutions*." 47 U.S.C. Sec. 335(b)(5)(B).

While the Commission concluded that Sec. 335(b)(5)(B) is not an "exclusive" list of eligible program suppliers, the Commission held that eligibility is limited to "entities that share *the same essential characteristics* as those listed." Order at Para. 85. Thus, the Commission found that eligibility is limited to "*noncommercial* entities with an *educational* mission." Id. at Para. 87. The Commission allowed for consideration, on a case-by-case basis, of a corporation that is not organized as a nonprofit corporation *if* that entity shows to the Commission's satisfaction that it is organized for a *noncommercial* purpose *and* has a *educational* purpose." Id.

Thus, eligibility for the DBS set-aside clearly is not satisfied by Noggin's apparently "educational" objectives. The commercial or noncommercial nature of the enterprise is equally pertinent to the determination.

Noggin Is *Not* a Noncommercial Entity

Noggin has not disclosed the terms of the agreements between Nickelodeon and CTW, but it has admitted that Noggin is not organized as a nonprofit corporation but as a joint venture, one of whose participants, Nickelodeon, is a commercial entity that in turn is part of a large, diversified, highly commercial, profit-driven enterprise.

Noggin is being marketed as "the flagship network of a package of channels that include Nichelodeon GAS [Games and Sports], that will be part of "The Suite" from MTV Networks." <www.viacom.com/press.tin?ixPressRelease=40001044> It will be part of a "ten-pack of digital services," along with Nick Too and GAS, the latter of which will "include live segments and new programs originating from Nickelodeon Studios Florida, the network's production studio and attraction at Universal Studios Florida in Orlando." <www.viacom.com/press.tin?ixPressRelease=40000474> Promoting Viacom's theme parks is not a noncommercial objective.

The President and Chief Operating Officer of MTV Networks has characterized Noggin as enabling cable operators to "offer their subscribers a broad range of new digital channels from the brands they already know and love." <www.viacom.com/press.tin?ixPressRelease=40000474> He has said that these channels, along with their links back to dedicated web sites, "will further assist our distribution partners in the

continued growth of cable modem distribution." Id. Strengthening the Viacom, Nickelodeon, or MTV "brands" is not a "noncommercial" purpose. Neither is assisting "distribution partners" with "growth of cable modem[s]."

Noggin contemplates "establish[ing] relationships with underwriting sponsors, and will provide sponsors with select spots to run at the beginning or conclusion of Noggin programs." <www.viacom.com/press.tin?isPressRelease=40000967> Neither "sponsors" nor "spots" of unspecified number, length, and character are hallmarks of noncommercial operations.

Other Considerations Militate Against Granting Noggin's Request

The statute specifically limits the prices that DBS providers can charge to national educational programming providers for channel capacity. 47 U.S.C. Sec. 335(b)(3). These prices must "take into account the *non-profit* character of the programming provider" and may not include the DBS provider's "marketing costs, general administrative costs, and similar overhead costs." 47 U.S.C. Sec. 335(b)(4)(A)&(C). These provisions make no sense in the context of entities such as Viacom and Nickelodeon.

Noggin has been favorably received in the marketplace and seems capable of fulfilling its educational potential without invoking the DBS set-aside. See <www.viacom.com/press.tin?ixPressRelease=40000967> ("Noggin ranked as one of the new channels that cable operators said they were most interested in carrying by the end of 1999").

Although Noggin has not disclosed all of its arrangements with Viacom and Nickelodeon (or their arrangements with CTW), it is telling that Noggin has not represented that it will never earn profits or that any such profits will be devoted solely to Noggin's educational objectives. More importantly, Noggin has not denied that it will advance the commercial interests of Nickelodeon and Viacom.

SEC. 335. [47 U.C.S. 335] DIRECT BROADCAST SATELLITE SERVICE OBLIGATIONS.

(a) PROCEEDING REQUIRED TO REVIEW DBS RESPONSIBILITIES.—The Commission shall, within 180 days after the date of enactment of this section, initiate a rulemaking proceeding to impose, on providers of direct broadcast satellite service, public interest or other requirements for providing video programming. Any regulations prescribed pursuant to such rulemaking shall, at a minimum, apply the access to broadcast time requirement of section 312(a)(7) and the use of facilities requirements of section 315 to providers of direct broadcast satellite service providing video programming. Such proceeding also shall examine the opportunities that the establishment of direct broadcast satellite service provides for the principle of localism under this Act, and the methods by which such principle may be served through technological and other developments in, or regulation of, such service.

(b) CARRIAGE OBLIGATIONS FOR NONCOMMERCIAL, EDUCATIONAL, AND INFORMATIONAL PROGRAMMING.—

(1) CHANNEL CAPACITY REQUIRED.—The Commission shall require, as a condition of any provision, initial authorization, or authorization renewal for a provider of direct broadcast satellite service providing video programming, that the provider of such service reserve a portion of its channel capacity, equal to not less than 4 percent nor more than 7 percent, exclusively for noncommercial programming of an educational or informational nature.

(2) USE OF UNUSED CHANNEL CAPACITY.—A provider of such service may utilize for any purpose any unused channel capacity required to be reserved under this subsection pending the actual use of such channel capacity for noncommercial programming of an educational or informational nature.

(3) PRICES, TERMS, AND CONDITIONS; EDITORIAL CONTROL.—A provider of direct broadcast satellite service shall meet the requirements of this subsection by making channel capacity available to national educational programming suppliers, upon reasonable prices, terms, and conditions, as determined by the Commission under paragraph (4). The provider of direct broadcast satellite service shall not exercise any editorial control over any video programming provided pursuant to this subsection.

(4) LIMITATIONS.—In determining reasonable prices under paragraph (3)—

(A) the Commission shall take into account the nonprofit character of the programming provider and any Federal funds used to support such programming;

(B) the Commission shall not permit such prices to exceed, for any channel made available under this subsection, 50 percent of the total direct costs of making such channel available; and

(C) in the calculation of total direct costs, the Commission shall exclude—

(i) marketing costs, general administrative costs, and similar overhead costs of the provider of direct broadcast satellite service; and

(ii) the revenue that such provider might have obtained by making such channel available to a commercial provider of video programming.

(5) DEFINITIONS.—For purposes of this subsection—

(A) The term "provider of direct broadcast satellite service" means—

(i) a licensee for a Ku-band satellite system under part 100 of title 47 of the Code of Federal Regulations; or

(ii) any distributor who controls a minimum number of channels (as specified by Commission regulation) using a Ku-band fixed service satellite system for the provision of video programming directly to the home and licensed under part 25 of title 47 of the Code of Federal Regulations.

(B) The term "national educational programming supplier" includes any qualified noncommercial educational television station, other public telecommunications entities, and public or private educational institutions.

SEC. 336. [47 U.S.C. 336] BROADCAST SPECTRUM FLEXIBILITY.

(a) COMMISSION ACTION.—If the Commission determines to issue additional licenses for advanced television services, the Commission—

(1) should limit the initial eligibility for such licenses to persons that, as of the date of such issuance, are licensed to operate a television broadcast station or hold a permit to construct such a station (or both); and

(2) shall adopt regulations that allow the holders of such licenses to offer such ancillary or supplementary services on designated frequencies as may be consistent with the public interest, convenience, and necessity.

(b) CONTENTS OF REGULATIONS.—In prescribing the regulations required by subsection (a), the Commission shall—

(1) only permit such licensee or permittee to offer ancillary or supplementary services if the use of a designated frequency for such services is consistent with the technology or method designated by the Commission for the provision of advanced television services;

(2) limit the broadcasting of ancillary or supplementary services on designated frequencies so as to avoid derogation of any advanced television services, including high definition television broadcasts, that the Commission may require using such frequencies;

(3) apply to any other ancillary or supplementary service such of the Commission's regulations as are applicable to the offering of analogous services by any other person, except that no ancillary or supplementary service shall have any rights to carriage under section 614 or 615 or be deemed a multichannel video programming distributor for purposes of section 628;

(4) adopt such technical and other requirements as may be necessary or appropriate to assure the quality of the signal used to provide advanced television services, and may adopt

The Suite
License Fees
Effective 1/1/99-12/31/03

1999 License Fees:

Analog Carriage:	NOGGIN	MTV2	GAS	VH1 Soul	VH1 Country	VH1 Smooth	MTV S	MTV X
Expanded Basic	$0.085	$0.000	$0.040	$0.040	$0.040	$0.040	$0.040	$0.040
Tier (<95% Penetration)	0.140	0.070	0.060	0.060	0.060	0.060	0.060	0.060

Digital Carriage: Penetration	NOGGIN	MTV2	GAS	VH1 Soul	VH1 Country	VH1 Smooth	MTV S	MTV X
100%	$0.140	$0.070	$0.060	$0.060	$0.060	$0.060	$0.060	$0.060
90-99%	0.158	0.078	0.067	0.067	0.067	0.067	0.067	0.067
80-89%	0.175	0.088	0.075	0.075	0.075	0.075	0.075	0.075
70-79%	0.200	0.100	0.086	0.086	0.086	0.086	0.086	0.086
60-69%	0.233	0.117	0.100	0.100	0.100	0.100	0.100	0.100
50-59%	0.280	0.140	0.120	0.120	0.120	0.120	0.120	0.120
40-49%	0.350	0.175	0.150	0.150	0.150	0.150	0.150	0.150
30-39%	0.467	0.233	0.200	0.200	0.200	0.200	0.200	0.200
<30%	0.560	0.280	0.240	0.240	0.240	0.240	0.240	0.240

Penetration Discount

40% discount is available with distribution of all nine channels of The Suite in each applicable system

License fees for The Suite shall increase annually from 1/01/00 through 12/31/03 as follows:

- $.015 for analog carriage of Noggin
- 10% for all other services in analog or digital carriage, as well as Noggin digital carriage

1) "The Suite" is a package of nine program services consisting of the following: Noggin, Nick Games & Sports, Nick Too, MTV2: Music Television, MTV X, MTV S, VH1 Smooth, VH1 Soul and VH1 Country.

2) The Noggin and MTV2 license fees will apply to the first two channels of the Suite that are carried, respectively, except that if MTV2 is the first channel carried, the MTV2 license fees will nontheless apply.

3) Higher license fees will apply if combined MTV/VH1/Nickelodeon penetration is lower than 270% in each applicable system.

4) Rates subject to change.