

LAW OFFICES
HALEY BADER & POTTS P.L.C.

4350 NORTH FAIRFAX DR., SUITE 900
ARLINGTON, VIRGINIA 22203-1633
TELEPHONE (703) 841-0606
FAX (703) 841-2345

POST OFFICE BOX 19006
WASHINGTON, D.C. 20036-9006
TELEPHONE
(202) 331-0606

JOHN WELLS KING
ADMITTED IN VA AND DC

RECEIVED

FEB 26 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

OUR FILE NO.
0059-101-60

February 26, 1996

H. John Morgan, Chief
Experimental Licensing Branch
Federal Communications Commission
Washington, D.C. 20554

Mail Stop: 1300E1

Re: Complaint Against Capital Broadcasting Systems, Inc.
Experimental Station KF2XBF

Dear Mr. Morgan:

This is a complaint against an unauthorized commercial broadcast operation being conducted by Capital Broadcasting Systems, Inc. ("Capital"), in at least five, and up to 25, major cities in the United States. Because of the misuse of Nonbroadcast Experimental Station KF2XBF, the license for its operation should be revoked.

Capital appears to be operating multiple commercial broadcast stations beyond the terms of its experimental proposal to the Commission, beyond the scope of the operating authority granted by the Commission, and without adequate disclosure to the Commission as to the true nature, scope, and commercial character of Capital's operation.

Capital's predecessor applied for a Part 5 experimental authorization.¹ The rules part pursuant to which Capital sought its authorization is entitled "Experimental Radio Services (**Other Than Broadcast**).¹" (Emphasis supplied.) The experimental license exists to promote experimentation in scientific or technical radio research; to permit technical demonstrations of equipment or techniques; and to stimulate the development of new radio techniques, equipment, or engineering data. See Section 5.202 of the Rules.

¹ "Application For New Or Modified Radio Station Authorization Under Part 5 of FCC Rules - Experimental Radio Service (Other Than Broadcast)," (FCC Form 442), Playfone Systems, Inc. dated May 17, 1993 ("Application").

Capital's use of its license has produced none of these developments. It has instead capitalized on the vehicle of an experimental license to pursue gainfully a nationwide plan of developing a permanent, commercial broadcast network of facilities. Its own literature boasts that its service will be available at 25 airport locations. Moreover, Capital appears to have been less than forthcoming in disclosing to the Commission the true nature and extent of its plans.

The Nature Of The Service

The Playfone Proposal

In its application for an experimental authorization, Capital's predecessor, Playfone Systems, Inc., modestly stated the proposed service to be "providing live on-site radio broadcasts to attendees at sporting events."² In response to the application form requiring a description of the program of research and experimentation, specific objectives, and the reasonable promise of the experiments for contribution to the development, extension, expansion, or utilization of the radio art, Playfone stated:³

Playfone intends to provide spectators and attendees with information concerning the event, traffic, emergency information, and any other information that may be of interest or relevance to the occasion.

The objective of the experimental broadcast is to determine the economic and technical feasibility of conducting on-site broadcasts to attendees at live sporting events, to be received using inexpensive, commercially available receivers. . . .

Playfone submits that there is a need for a temporary broadcast service at events that attract large audiences, delivering a high-quality signal to a discrete and limited reception area. Such a service is not currently available under the F.C.C. rules. If the experiment proves successful, such a service could be employed at others [sic] types of events involving large numbers of people gathered at a single location.

Capital's Performance

Enclosed is an audio cassette recording of broadcast matter transmitted on the noncommercial broadcast frequency 88.5 MHz in September 1995 pursuant to Capital's experimental license, from facilities believed to be located at the Avis Car Rental agency at

² Application, Exhibit No. 4(G).

³ Application, Exhibit No. 10.

Logan International Airport in Boston, Massachusetts. The broadcast was received and recorded at a location in Cambridge, Massachusetts, approximately five miles from the airport.

There is no indication that the broadcast is a test transmission conducted pursuant to an experimental FCC authorization. The program matter appears to be a professionally produced, pre-recorded, continuously-broadcast program of about 20 minutes in length, narrated by writer George Plimpton. He greets the listener:

Your company may wish to become one of Avis Travelers Network's corporate advertisers. To do so, please call the Avis concierge and ask for a Capital Broadcasting representative. We welcome the opportunity for you to join AT&T, Hilton, and Planet Hollywood in satisfying the needs of the business and leisure traveler.

Mr. Plimpton welcomes the listener to Boston, and invites the listener to:

Stay tuned for sports trivia, updates on today's hottest money matters, the latest in book reviews, and more. You will also hear suggestions on things to do in the Avis city that you are currently visiting. . . .

Throughout this program you will hear me mention the number 1-800-941-AVIS, the number reserved exclusively to service Avis travelers. . . .

A 30-second commercial for AT&T follows Mr. Plimpton's introduction. Other AT&T commercials are interspersed among the announced program features, as well as commercial announcements for Hilton Hotels, Benihana Restaurant, Planet Hollywood, and Avis.

The Scope Of The Service

The Boston "experiment" is not isolated. Rather, the "Avis Travelers Network" is a broadcast service planned for national distribution. Enclosed is a copy of a booklet copyrighted by Capital Broadcasting Systems, Inc., entitled "The Avis Travelers Network, Making Life On the Road A Little Easier, Airport Location Reference Manual." The booklet's introduction recites:

The [Avis Travelers Network] program consists of two pieces. One is an information radio broadcast which is available to all Avis travelers . . .

Avis is the only company in the industry . . . which will be able to offer these particular types of services at 25 airport locations.

The booklet's "Concept" summary describes the following features of the "Avis Radio Broadcast":

- Rental car radio is pre-tuned by Avis prep personnel to the dedicated frequency in each city.
- Broadcast range is at least five miles around airport location and accessible by all radio listeners.

Under "Equipment/Equipment Maintenance," the manual describes the process for periodically changing the compact discs that contain the program matter.

"Avis Location Responsibilities" include the following obligations:

- 3) Randomly check on a regular basis to make sure the prep personnel are **PRE-SETTING EACH INDIVIDUAL CAR RADIO TO THE DESIGNATED FREQUENCY. OBVIOUSLY, THIS IS ONE OF THE MOST IMPORTANT RESPONSIBILITIES.** Future ideas include offering some type of incentive to prep personnel to help in this task. We will let you know about these possibilities in the near future.
- 4) Anticipate the monthly broadcast you will be receiving via overnight delivery and remember to change the compact disc each beginning day of the month. . . .
- 5) Check to make sure that the signal is going to places that it had previously gone. Do this on a weekly basis. Drive around the airport feeder roads to make sure the signal is going as far as it did initially.

The rollout of the Avis Travelers Network is apparent from the enclosed audio cassette dub of a compact disc for the Chicago area, presumably the Avis Car Rental agency at O'Hare International Airport. In this program Mr. Plimpton addresses the listener:

You're listening to the Avis Travelers Network, a network of radio stations located at major airports around the country dedicated to making life on the road a little easier for both the professional and leisure traveler. . . . Avis has created this information network, along with an innovative concierge service, to assure that your trip will be an enjoyable one.

What's Wrong With This Picture?

The modest experimental, presumably nonbroadcast program described by Playfone in its application, and by Playfone and Capital in their progress reports, bears no resemblance to the full-blown, commercial broadcast venture inaugurated on a national scale by Capital.

The experimental service is not confined to a discrete, limited area.

Playfone proposed to contain its experimental service to a discrete and limited reception area. This element of the experimental service was emphasized in progress reports to the Commission.⁴ Performance is at gross variance from promise, as evidenced by the reception of the Logan International Airport broadcast in Cambridge, some five miles distant. Indeed, Capital proclaims in its Airport Location Reference manual as a beneficial feature of its service that its signal extends *at least* five miles from the airport, and is "accessible by all radio listeners." There is a fundamental difference in intent between professing to provide a service within an enclosed space such as the Georgia Dome or Joe Robbie Stadium, and broadcasting throughout the 78 square-mile area within a five-mile radius of a nondirectional signal.

Playfone represented to the Commission that "it will use only that power necessary to cover the intended, limited service area, using a controlled signal."⁵ It created the impression of a closed or confined system by referring to receipt of broadcasts "using inexpensive, commercially available receivers."⁶ The plain inference is that intended recipients would be on-site pedestrians carrying a proverbial transistor radio within a range of several hundred feet of the transmitter. In practice, the Avis Travelers Network relies upon nothing more sophisticated than a car radio pre-set to the operating frequency

⁴ Each of the three progress reports submitted in April 1994, October 1994, and April 1995, advise that "The emission did not leak outside the perimeter of the structure due to low power limitations." No information is provided as to the basis for the establishment of this negative, such as, for example, whether attempts were made to capture the signals on receivers positioned outside the structures. Interestingly, Capital reports that the purpose of the January 1995 test at Joe Robbie Stadium in Miami was not to test for leakage outside the stadium, but only "to see if fans attending a sporting event inside an enclosed arena could receive an authorized conventional re-broadcast over open FM frequencies." The contribution of this experiment to the development of new radio techniques is about as significant as dropping a pebble in a pond to see if it causes ripples in the water.

⁵ Application, Exhibit 10.

⁶ *Id.*

of the experimental station. The venture is specifically targeted to mobile listeners within a range of several miles – tens of thousands of feet.

The experimental service is not one-time, event-oriented.

In their progress reports to the Commission, Capital and Playfone consistently represented that the nature of their “testing” was live, on-site, one-time, event-oriented in nature, consistent with the representations in the original application for experimental license.⁷ Neither Capital nor Playfone reported an intention to use the experimental license for the continuous broadcast of a pre-recorded program from a permanent site.

Accepting for the sake of argument that the Capital venture qualifies as a Part 5 operation, Section 5.151 places strict limits on use of the experimental operation. Subsection (a) limits transmissions only to those “as are necessary and directly related to the conduct of the licensee’s stated program of experimentation. . . . All transmissions shall be limited to the minimum practical transmission time.” Subsection (b) requires full disclosure in the application for license whether experimental stations are “to transmit programs intended for public reception” The rule appears to have been entirely compromised by Capital’s round-the-clock transmissions intended for, in Capital’s words, “all radio listeners.”

The experimental service is being operated for commercial gain.

Playfone’s original proposal, and the progress reports that it and Capital filed, imply that the licensee has been engaged in a public service exercise on an occasional, one time-only basis. No suggestion of commercial activity is evident. In disturbing contrast, the audio cassettes of Capital’s Avis Travelers Network reflect a starkly commercial enterprise. The very fact that Capital entered into a marketing agreement with Avis reflects a predisposed profit motive on Capital’s part. The commercial nature of the project has never been candidly disclosed – either in the initial application or in any of the subsequent “progress” reports.

Capital has announced the commercial launch of its system at five locations: Chicago, New York, Boston, Atlanta, and Washington, D.C., and the growth of the

⁷ Capital’s April 10, 1995, progress report advised of an 8-hour test on October 23, 1994, in Princeton, New Jersey, and a 3-hour test on January 29, 1995, in Miami, Florida, presumably during the Super Bowl. Playfone’s October 15, 1994, progress report (on letterhead identifying the entity as “Sportscasting Systems, Inc.”) advised of a two-day, 6-hour test at the Marriott Hotel in New York City on April 24-25, 1994. Playfone’s April 3, 1994, progress report advised of a 2-hour test at the Georgia Dome on January 31, 1994. No report appears to have been filed for the six-month period ending in October 1995, two months after the August 29, 1995, announcement of the launch of the Avis Travelers Network, Note 8 *infra*.

system to 25 locations altogether.⁸ Commercial sponsors such as AT&T and Hilton have been recruited, and others are directly solicited in the on-air broadcasts. The pre-recorded program invites the listener to contact a Capital Broadcasting representative to discuss commercial sponsorship.

The impropriety of employing the experimental license for commercial gain is exacerbated by Capital's operation on a noncommercial frequency. It is a rude and mercenary intrusion into spectrum reserved for noncommercial, educational use. Moreover, regardless where in the broadcast spectrum Capital were to operate, if it were a properly authorized experimental broadcast operation, it would be precluded from commercial operation under Section 74.182.⁹

The experimental service is nothing more than a low-power or Class D FM service by another name.

Despite the gloss of newness and uniqueness that Capital has attempted to put on its proposed service, it is similar to service proposals that the Commission has specifically declined to authorize on several prior occasions. In 1984 the Commission denied a proposal to permit FM translators to originate programming – the creation of a “low-power FM” service.¹⁰ Nearly 20 years ago the Commission declared that because of their spectrum inefficiency and preclusionary impact, Class D FM stations would no longer be authorized.¹¹ Through the artifice of an experimental license, however, Capital has evaded these policy determinations with a grand design for a network of stations that are no different in concept or technique from a low-power FM or Class D facility, in 25 major markets throughout the country.¹²

⁸ See the enclosed press release dated August 29, 1995, obtained from the Nexis research service.

⁹ Note also the proscription of the rule, that “no regular program service may be broadcast unless specifically authorized.”

¹⁰ *FM Broadcast Translator Stations*, 98 FCC2d 35, 56 RR2d 79 (1984), *recon. denied*, FCC 84-574, December 4, 1984. The Commission has since twice affirmed its policy on FM translator program origination. *FM Translator Stations*, 5 FCC Rcd 7212, 68 RR2d 705 (1990), *affirmed on reconsideration*, 8 FCC Rcd 5093, 73 RR2d 722 (1993).

¹¹ *Noncommercial Educational Stations*, 69 FCC2d 240, 44 RR2d 235 (1978).

¹² The same policy considerations would condemn Capital's use of the AM band, though Capital does not appear to have employed AM frequencies for the Avis Travelers Network. The Commission has recognized the need to tighten AM allocations and to “clean up” the AM band, disfavoring inefficient proposals. See *Policies to Encourage Interference Reduction Between AM Broadcast Stations*, 5 FCC Rcd 4492 (1990).

The concept for the experimental service was flawed from the outset – there is nothing new under the sun.

In this, the eighth decade of commercial radio broadcasting, the suggestion is simply fantastic that experimentation is warranted into the use of “commercially available broadcast equipment” to provide “traffic, emergency information, and any other information that may be of interest or relevance to the occasion” in order to “determine the economic and technical feasibility of conducting on-site broadcasts.”¹³ The Capital proposal meets no need that is currently unmet by other users of increasingly scarce broadcast spectrum.

The heart of Capital’s concept is not a technical proposal, but a promotional concept. The only issue to be tested is how profitable the commercially supported programming will be. It is not, however, the purpose of an experimental license to test program preferences, or to explore the “economic feasibility” of a venture.

Summary

The license for Experimental Station KF2XBF should be revoked for the following reasons:

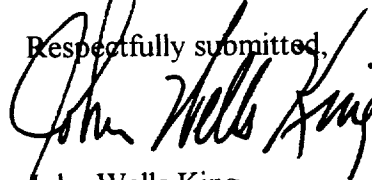
- Capital is conducting a broadcast operation under a nonbroadcast license.
- Capital has failed to disclose to the Commission the true nature, extent, and scope of its operation.
- Contrary to representations that the operation would be confined to a discrete, limited area, Capital affirmatively promotes the 5-mile reach of its signal.
- The Capital “test” operation is not, as represented, one-time and event oriented, nor is it time-limited as required, but is instead a round-the-clock operation intended for all listeners.
- Capital operates its system for profit by broadcasting commercial announcements and sponsorships; its commercial operation in the noncommercial educational FM band is especially inappropriate.
- The Avis Travelers Network is a low-power FM operation of the type the Commission has explicitly rejected.

¹³ Application, Exhibit No. 10.

H. John Morgan, Chief
February 26, 1996
Page 9

Kindly communicate any questions directly to this office.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John Wells King". The signature is fluid and cursive, with the first name "John" being the most prominent.

John Wells King

JWK/

Enclosures:

1. Audio cassettes (2)
2. Airport Location Reference Manual.
3. Press Release: Avis Travelers Network