



**Unjust Enrichment
A Primer on the FCC's Calculations
Regarding the Sale of CPs and Licenses
Acquired at Auction**

Whether one agrees or disagrees with the concept of the FCC's auctioning of spectrum licenses, radio construction permits in particular, the fact remains that the process is one we now must contend with.

In 1993, Congress granted the Commission authority to use competitive bidding to choose from among two or more mutually exclusive applications for a construction permit. In the Balanced Budget Act of 1997, Congress extended and expanded the FCC's auction authority.

Congress set multiple goals for spectrum auctions, as the Congressional Budget Office pointed out:

In designing auctions for spectrum licenses, the FCC is required by law to meet multiple goals and not focus simply on maximizing receipts. Those goals include ensuring efficient use of the spectrum, promoting economic opportunity and competition, avoiding excessive concentration of licenses, preventing the unjust enrichment of any party, and fostering the rapid deployment of new services, as well as recovering for the public a portion of the value of the spectrum.

While we may have strong disagreement with the label "unjust" enrichment upon the sale of a construction permit or broadcast license, we still have to deal with the reality that if you sell a CP or a license which was obtained at auction with a new entrant bidding credit in less than five years from the date of grant of the CP, and if that sale is to an entity that would have a lower discount standing, then you will have to pay an "unjust enrichment" penalty.

At this time we are starting to see the sale of CPs and/or licenses that fall into this category. It is becoming an important part of the analysis of principal deal points to take into consideration not only the capital gains or recapture taxes, but also the possible unjust enrichment penalty.

As it pertains to radio stations, here is the language regarding unjust enrichment embodied in the FCC Rules:

Unjust Enrichment. If a licensee or permittee that utilizes a new entrant bidding credit under this subsection seeks to assign or transfer control of its license or construction permit to an entity not meeting the eligibility criteria for the bidding credit, the licensee or permittee must reimburse the U.S. Government for the amount of the bidding credit, plus interest based on the rate for ten-year U.S. Treasury obligations applicable on the date the construction permit was originally granted, as a condition of Commission approval of the assignment or transfer. If a licensee or permittee that utilizes a new entrant bidding credit seeks to assign or transfer control of a license or construction permit to an entity that is eligible for a lower bidding credit, the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify, plus interest based on

the rate for ten-year U.S. Treasury obligations applicable on the date the construction permit was originally granted, must be paid to the U.S. Government as a condition of Commission approval of the assignment or transfer. The amount of the reimbursement payments will be reduced over time. An assignment or transfer in the first two years after issuance of the construction permit to the winning bidder will result in a forfeiture of one hundred (100) percent of the value of the bidding credit; during year three, of seventy-five (75) percent of the value of the bidding credit; in year four, of fifty (50) percent; in year five, twenty-five (25) percent; and thereafter, no payment. If a licensee or permittee who utilized a new entrant bidding credit in obtaining a broadcast license or construction permit acquires within this five-year reimbursement period an additional broadcast facility or facilities, such that the licensee or permittee would not have been eligible for the new entrant credit, the licensee or permittee will generally not be required to reimburse the U.S. Government for the amount of the bidding credit.

What is not addressed in this section of the Rules is exactly how the interest rate is determined nor how the interest rate is applied. To get a better understanding of this process, we spent some time working with the FCC's Financial Operations section of the Auctions Accounting Group. Here is a step-by-step process for determining what your unjust enrichment penalty might be and following that we have included a sample analysis for a station belonging to one of our clients, only with some of the identifying information deleted.

The analysis begins with the establishment of the original grant of the construction permit. This is neither the date of the auction nor the date that the winning bids were released. You will start from the date of the original grant. This becomes the starting point for the five-year holding period.

Next, you must determine the interest rate which would be applied. This is not an exact science. In fact, what is presented here may vary from what the Auctions Group actually calculates, but it is very close and follows the Auctions Group's process. The Rules state that the interest is based "on the rate for ten-year U.S. Treasury obligations applicable on the date the construction permit was originally granted."

To do this, go to the website <http://www.treasurydirect.gov>. From there navigate to Quick Links For--Institutions--Historical Auction Results. At the historical auction results page, go to the drop-down window for Treasury Notes, select "by Auction date" and click on the "GO" button. At the Historical Treasury Notes Search page, find the date range input fields and do the following:

- a. In the "To" field, input your date of original grant
- b. In the "From" field, input a date which is a month or two previous. This has to be sufficient in front of the grant date in order to encompass a valuation point otherwise your search results will be null
- c. In the Security Term area, check the box next to 9 & 10 year

When you click on the "Search" button, you will be directed to the Historical Securities Search Results page. In the column headed "Interest Rate %" locate the issued interest attributable to the 10-year Note that is closest to and pre-dates your grant date. That is the applicable Interest Rate.

The next step is to determine the percentage of your discount that is to be reimbursed. Per the FCC's Rules, the rate is 100% in years 1 and 2; 75% in year 3; 50% in year 4; and 25% in year 5.

At this point you have all the elements needed to use the Unjust Enrichment Calculator. In effect you are going to calculate the per diem rate of penalty interest and apply that to the number of days outstanding of your CP or license, added to the applicable percentage reimbursement rate.

Three elements that must be correct: (1) Make sure you have entered the correct percentage of your bidding credit in the Assignor Bidding Credit column header, make sure you have entered the correct percentage of your buyer's bidding credit in the Assignee Bidding Credit column header--based on that entity's eligibility, and (2) make sure you have entered the correct percent of reimbursement in the Reimbursement Percentage column header.

To download an Excel version of this Calculator, go to our website: **www.mchentinc.com** then look for the download link on the home page. Additional information may be obtained from the FCC's Auctions Group. Check the FCC website for department information. Many thanks to the FCC's Auctions Group for guidance and templates.

This example was prepared for a hypothetical construction permit acquired during auction #37 for a now-licensed station. The hypothetical assumptions are that the construction permit was granted on November 3, 2006 and it is anticipated that a sale of the station will close on November 2, 2009. It is further assumed that the buyer would qualify only for a bidding credit of 25% with a remaining liability of 10% “unjust enrichment” to the seller. Since the sale will close on the last day the seller had to complete construction, it falls within the third year of the holding period, and therefore the reimbursement rate is 75%. The closest date to the grant date for a 10-year Treasury Note turns out to be August 15, 2006. For a complete working calculator, go to our website: www.mchentinc.com and look for the download link on the home page.

	A	B	C	D	E	F	G	H	I	J	K	L	M	
1	Unjust Enrichment Calculator							Year	Begin	End	Reimbursement			
2	Prep. Date:	January 25, 2009						1	11/3/2006	11/2/2007	100%			
3	Licensee:	Sample Broadcasting Company						2	11/3/2007	11/2/2008	100%			
4	Station:	KMCH						3	11/3/2008	11/2/2009	75%			
5	Community of License:	Anytown						4	11/3/2009	11/2/2010	50%			
6	Original Grant Date:	11/3/2006						5	11/3/2010	11/2/2011	25%			
7	Unjust Enrichment Date:	11/2/2009												
8	Auction #:	37												
9	File #:	FM123												
10														
11														
12														
13	High Bid	Assignor	Bid	Assignee	Net Unjust	* T-Note	Original			Reimbursement			Total	
14	Amount	Bidding Credit	Price Paid	Bidding Credit	Enrichment	Interest	Grant	Days	Years	Percentage	Interest	Total	Enrichment	
15		35%		25%	10%	8/15/06	Date	Outstanding	Outstanding	75%	Per Diem	Interest	Penalty	
16	\$122,000.00	\$42,700.00	\$79,300.00	\$30,500.00	\$12,200.00	4.875%	11/3/2006	1,095	3.00	\$9,150.00	\$1.24	\$1,356.77	\$10,506.77	
17														
18	Note: This Calculator has been prepared by MCH Enterprises in conjunction with the FCC's Auction Group. This should be used only for planning and estimation purposes.													
19	The actual unjust enrichment penalty will be calculated by the FCC upon the filing of an assignment application. No warranties are conveyed with this information and MCH													
20	Enterprises, Inc., cannot be held accountable for any discrepancies between this estimation and that which is actually calculated by the FCC.													
21														
22	Payment of any unjust enrichment penalty must be made as of the date of consummation. Failure to make timely payments, in full, may result in an invalidation of the grant of													
23	assignment. In the event payment occurs after the consummation date, the per diem reimbursement and per diem interest will accrue until paid in full.													
24														
25	* Per TreasuryDirect.Gov													