

ARIZONA STATE SENATE

45TH LEGISLATURE SECOND REGULAR SESSION

MINUTES OF COMMITTEE ON COMMERCE

DATE: January 23, 2002 **TIME:** 8:30 a.m. **ROOM:** SHR 1

CHAIRMAN: Senator Verkamp **VICE CHAIRMAN:** Senator Arzberger

ANALYST: Julie Szperling **COMMITTEE SECRETARY:** Nancy L. DeMichele

ASSISTANT ANALYST: Dallas Gold

INTERN: Nathaniel Searing

ATTENDANCE

BILLS

<u>Committee Members</u>	<u>Pr</u>	<u>Ab</u>	<u>Ex</u>	<u>Bill Number</u>	<u>Disposition</u>
Senator Burns	X			SB 1018	HELD
Senator Hamilton	X			SB 1033	HELD
Senator Mitchell	X			SB 1042	DP
Senator Valadez	X			SB 1055	DPA
Senator Arzberger, Vice Chair	X				
Senator Verkamp, Chair	X				

GOVERNOR'S APPOINTMENTS

<u>Name</u>	<u>Position</u>	<u>Recommendation</u>
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Chairman Verkamp called the meeting to order at 8:35 a.m., and attendance was taken.

STAFF INTRODUCTIONS

Senator Verkamp introduced staff members for the 2002 Legislative Session as follows:

Julie Szperling – Commerce Research Analyst
Dallas Gold – Commerce Research Assistant Analyst
Nathaniel Searing – Commerce Intern
Nancy DeMichele – Committee Secretary
Katie Oakley – Page
Jennifer Alewelt – Page
Victor Riches – Republican Staff Policy Advisor
Julie Erin – Republic Staff Intern
Melanee Smith – Democrat Staff Policy Advisor
Teresa Zhang – Democrat Staff Intern

CONSIDERATION OF BILLS

SB 1018 – credit reports; copies to consumer - HELD

SB 1033 – appropriation; high technology clusters - HELD

Senator Verkamp announced that Senator Cirillo, sponsor, has requested SB 1018 and SB 1033 be held.

SB 1055 – American flag; patriotic display – DO PASS AMENDED

Julie Szperling, Commerce Research Analyst, explained SB 1055 prohibits homeowners' associations (HOAs) from prohibiting an outdoor display of the American flag, if the display is in a respectful and honorable manner. She stated a Hamilton amendment is being offered, which specifies that the manner in which the flag is displayed must be consistent with the federal flag code. The amendment requires HOAs to adopt reasonable rules and regulations regarding the placement and manner of the display of the American flag. The amendment also allows HOA rules to regulate the size and location of flagpoles, but prohibits the rules from prohibiting the installation of a flagpole.

George Staropoli, representing himself, testified in support of SB 1055 and the amendment. He stated it is a first step toward HOAs being subject to the laws of the State of Arizona and the federal government. However, work still needs to be done to make HOAs responsible and accountable, especially in the area of enforcement.

Tom Dorn, Lobbyist, Community Associations Institute, testified in support of SB 1055 with the amendment. He stated the Institute is a trade association comprised of HOA groups, board members, and the industry that services those groups. He commented that the Hamilton amendment is excellent, and will clarify very clearly that no HOA can prohibit the flag. He pointed out that the Institute is not aware of any association in the State of Arizona that prohibits the display of the American flag.

Senator Verkamp announced the following individuals were present in support of SB 1055: **Pat Haruff, representing himself (with amendment); Mary Arnold, representing herself; and Roland Kelly, representing himself.**

Senator Arzberger moved SB 1055 be returned with a DO PASS recommendation.

Senator Hamilton moved the 17-line Hamilton amendment dated 01/22/02, 2:12 P.M., be ADOPTED (Attachment A). The motion CARRIED by a voice vote.

Senator Arzberger moved SB 1055 be returned with an AS AMENDED, DO PASS recommendation. The motion CARRIED by a roll call vote of 6-0-0 (Attachment 1).

SB 1042 – broadcast employees; noncompete clauses – DO PASS

Dallas Gold, Commerce Research Assistant Analyst, explained SB 1042 prohibits broadcast employers from requiring current or prospective employees to agree to a noncompete clause as a condition of employment. He noted it also stipulates that a violation of this prohibition constitutes a class 1 misdemeanor.

Senator Scott Bundgaard, sponsor, explained the purpose of SB 1042 relates to freedom and opportunity. He commented that with only five television stations in the Phoenix marketplace, the opportunities are limited. He cited a certain example in his profession, and explained the problems that occur when employees in the broadcast industry become uprooted in their employment. He said that at the national level, broadcasters are willing to let the free market determine salaries and contractual agreements. He questioned why those efforts are opposed at the state level, especially since Arizona is a right-to-work state. He emphasized that people deserve the freedom and opportunity to work and enter into a fair contract and be rewarded for good performance. He noted SB 1042 seeks to prevent the enforcement of a noncompete clause after the employment relationship has ceased.

Senator Burns asked whether there are occasions when noncompete clauses are justified. Senator Bundgaard responded there are occasions when it may apply, as in dealing with confidential information or trade secrets. However, he believes that it does not apply in a situation pertaining to a broadcast employee, for example, a cameraman, associate producer, or on-air talent. He pointed out that those individuals have invested a great deal in their education and profession and should have the freedom to apply their trade within the marketplace without having to uproot themselves.

Senator Burns stated she is having difficulty understanding the difference as it pertains to the broadcast industry. She asked Senator Bundgaard for an explanation on the issue of how the broadcast industry would be any different than other professions or industries, such as the pharmaceutical profession. Senator Bundgaard responded that although he has heard from other industries on certain issues, he cannot speak directly on the pharmaceutical profession. He emphasized the limitations pertaining to broadcast employees within the marketplace in the State.

Senator Burns asked whether there are any broadcast employers in the State without noncompete clauses. Senator Bundgaard replied most employers sign their on-air talent to agreements that contain noncompete clauses. He noted that a few stations sign both on-air and off-air talent in this manner. Senator Burns believes the situation should be reviewed in a broader context. She commented that the passage of this bill could start a precedent for other industries. Senator

Bundgaard responded that the comparison of the broadcast industry to other industries is not the same in this instance; however, he would be happy to research the issue further as it relates to other professions. Senator Burns said she is interested in having court cases researched on this issue to gain more information.

Senator Verkamp commented on a particular situation, and believes there are instances where noncompete agreements are important. However, he does not understand the justification for a noncompete agreement for off-air individuals. He said it is a complicated issue and the courts are very divided depending upon the circumstances.

Senator Hamilton commented on a particular situation whereby employees are required to sign noncompete agreements due to specialization, confidentiality, and advanced technology. He asked whether that type of situation would apply to off-air personnel in the broadcast industry. Senator Bundgaard responded that the employees to whom he is referring are not in the same category as those mentioned by Senator Hamilton. However, it is important for those employees to have the freedom to move around in the marketplace without limitations. Senator Hamilton asked whether the practice of noncompete agreements has had any impact on the market for particular personnel in the area of wages. Senator Bundgaard responded wages are being affected.

Senator Mitchell asked whether an individual is prohibited from going to another station, if that person is fired. Senator Bundgaard responded that the individual would still be bound by the noncompete clause in the contract for a period of time.

Senator Arzberger asked whether an employee is forced to sign a noncompete agreement with the employer. Senator Bundgaard replied that anyone desiring to work in the Phoenix market is required to sign a noncompete agreement. Senator Arzberger commented she is divided on this issue and would like more information and proof that individuals in the industry are locked into signing a noncompete agreement. Senator Bundgaard pointed out that many of the individuals being affected indicated they would forward a copy of the noncompete agreements; however, some are understandably reluctant to speak on this issue.

Senator Hamilton wanted to know the number of employers as it relates to the ownership of those stations. Senator Bundgaard responded he does not have that information; however, there are media people present who may have that figure. He said it appears there are a few companies that own many stations.

Scott Davis, news producer, representing himself; testified in support of SB 1042. He stated he is an employee affected by the noncompete clause, and described his situation. He pointed out that SB 1042 would protect his private life in that it would provide the freedom to use his off-air talents without having to move to a new location.

Jeanine L'Ecuyer, representing herself, testified in support of SB 1042. She stated she has spent approximately twenty years in broadcasting and the noncompete agreement is an issue that is dealt with regularly. She explained the background and problems that occur when the noncompete clause is applied to all categories of employment within a broadcast station.

Senator Hamilton asked if there is a reason why noncompete agreements are not as important at the national level. Ms. L'Ecuyer responded that she has not negotiated a contract on a national level; however, larger markets have been discussing this issue for quite some time.

Senator Burns asked whether there is a union covering this issue. Ms. L'Ecuyer replied she is not a member of a union. She said there are some unions active in Phoenix, but to her knowledge there are none that involve employees in the news gathering operation. Senator Burns asked whether there is a role for noncompete clauses. Ms. L'Ecuyer responded that there are some circumstances where they would apply; however, not in all levels. She said she is concerned with "blanket" noncompete agreements being applied to employees who do not have the strategic knowledge nor community image as it applies to the station.

Dominique Bravo, legal director, American Federation of Television and Radio Artists (AFTRA), representing herself, testified in support of SB 1042. She stated that AFTRA is an international labor union representing over 80,000 performers and broadcasters in television and radio nationally including several hundred members in Arizona. She commented AFTRA does not represent any stations, but she is present to testify because of its importance.

Ms. Bravo stated that SB 1042 is necessary because of the injustices that have been occurring in the broadcast industry. She explained the reasons why the broadcast industry is unique, pointing out the salary range of off-air employees. She noted that there are very few jobs available and fewer employers. She spoke about the mergers and acquisitions that have taken place in the broadcast industry. In response to an earlier question, she indicated there are four companies that own all the radio stations in Tucson. She commented that because of the control by those companies, employees are required to sign the noncompete agreements for employment. Unfortunately, there are limited job options for those who do not sign the noncompete agreements.

Ms. Bravo responded to the question raised regarding the treatment of noncompete agreements in the Arizona courts. She stated that, in general, Arizona courts disfavor noncompete agreements. She cited a particular court case. She said litigation is not the solution because it will generally take a longer period of time than the term of the noncompete provision, and it is not worth the expense to go to court.

TAPE 1, SIDE B

Ms. Bravo stated SB 1042 would restore some free market for services in the broadcast industry. She indicated that broadcast employees today face unprecedented pressures that constantly challenge the journalistic integrity, and noncompete agreements exacerbate the situation. She remarked that broadcast employees are not present today because of the fear of being "blackballed."

Ms. Bravo indicated that Arizona is not the first state to consider this legislation. Due to its uniqueness, three other states have passed laws banning noncompete agreements in the broadcast industry: Massachusetts, Maine and Illinois. Ms. Bravo urged the Committee to support SB 1042.

Senator Burns asked whether this issue had been brought before the owners in an attempt to negotiate the problems. Ms. Bravo responded the few companies involved exert a considerable amount of control. She said she has interviewed broadcasters throughout the country, but generally has not had a favorable response. She mentioned that when similar legislation was being considered in Illinois, meetings took place with the broadcast association. The bill in that instance passed by an overwhelming majority.

Art Brooks, President & CEO, Arizona Broadcasters Association (ABA), testified in opposition to SB 1042. He explained that the Association is the official trade association for all radio and television stations in the State. He stated the Association opposes the bill because it represents legislation in

search of a problem. He said each contract between an employer and employee is unique and different. He pointed out that noncompete agreements are commonly accepted in the broadcast industry across the country, and are common in many other industries. He indicated that employees could potentially take away trade secrets, brand identity, audience, customer lists, or even good will. In addition, covenants not to compete are commonly given in many industries including the legal industry as a condition of sale not to set up a similar business within a certain area. In the broadcast industry, noncompete agreements are generally negotiated between two categories of employees: sales representatives and on-air talent. The majority of those agreements range from six months to one year.

Mr. Brooks commented that the purpose of having a sales representative sign a noncompete agreement is because a station's business could be harmed in the luring away of a top-producing sales representative by a competitor. He said that he has been associated with this unique industry for thirty years, and for seventeen of those years he operated small market stations. He noted that the industry is unique because it operates on one revenue stream; namely, the sale of advertising airtime. All resources of the station, regardless of which department, must be focused on making that one opportunity as productive and successful as possible. He pointed out that when employees sign noncompete agreements, it is done in exchange for monetary consideration. He emphasized that no employer wants to see its employees out of work, but the noncompete agreements are there for the employer's protection as indicated earlier. Mr. Brooks said it is not uncommon for noncompete agreements to include compensation to cover the period outlined in the agreement when the employee is out of work. Senator Verkamp indicated that is not his understanding of the situation. Mr. Brooks said there is no template and every contract is negotiated and unique, but many are designed to compensate the individual throughout the noncompete time period.

Mr. Brooks stated that SB 1042 would harm an employee's bargaining power rather than enhancing it. He said if this legislation passes, the opposite effect will take place and will encourage larger companies to allow smaller businesses to train, develop and invest in key employees. He questioned why larger companies would invest in employees as a training ground, only to have those employees leave to join other companies. He stated that this bill unnecessarily involves the government in the process of negotiating mutually agreed-upon private employment agreements for no legitimate public policy purpose. He said the courts are doing a good job regulating noncompete agreements. He emphasized that SB 1042 unfairly singles out the broadcast industry without justification, and strips the industry of a basic contract right.

Senator Burns asked whether there had been any discussions between employers and employees regarding the noncompete issue prior to this proposed legislation. She asked Mr. Brooks whether he would be interested in seeing those types of discussions take place. Mr. Brooks responded he is not aware of any discussions, and companies would not necessarily discuss noncompete agreements with other companies for various reasons. Although the Association has not been asked to partake in any such discussions, it probably would be willing to do so as part of a solution.

Senator Hamilton referred to compensation and asked whether there would be a problem if the words "non compensated" prior to "non compete" were added in the bill. Mr. Brooks responded the Association would rather not have the bill at all, and does not believe it would correct the problem. Senator Hamilton commented that it currently appears that employees are "trapped" because of the noncompete clause. If employees were compensated, then it would allow them the freedom to change jobs and would also protect the employer's investment. Mr. Brooks said there have not been many court cases on this issue because generally employers and employees have been able to work out the problems through negotiations. He commented the system is working. By adding any piece

of legislation, it would present a problem where none exists at this time. He said the compensation compromise outlined would appear to handle the problem from both sides. Mr. Brooks responded that it was only discussed this morning, and there has not been ample time to seriously consider that approach.

Senator Burns commented that she would like to see an attempt made by Mr. Brooks to discuss the compensation issue with the Association's members. Mr. Brooks reiterated that every situation is unique, and there is no industry template on this issue.

In response to Senator Mitchell, Mr. Brooks explained the progression of employees in their jobs and the situation in the marketplace. Senator Mitchell remarked that since Phoenix is considered to be a major market, he does not believe it is necessary to have noncompete agreements apply to off-air employees.

Joe Conway, General Manager, ABA, testified in opposition to SB 1042. He commented that it is the general practice that employees are not paid for the noncompete period. He said noncompete agreements are in place for sound reasons. Mr. Conway said there has been one court case. He indicated that ABA has the best interest in mind for both employers and employees. He pointed out that whenever someone becomes no longer employed, that individual is compensated. He said various factors are involved, and each noncompete agreement is different and unique.

Senator Burns commented that she is concerned with SB 1042, and believes the issue needs further review.

Senator Verkamp stated his preference is to vote the bill out of Committee today, and have further discussions before it goes to the floor. Senator Burns said she is concerned and feels that one week is not a great deal of time to deal with this type of precedent-setting legislation.

Senator Bundgaard stated he is always willing to work on legislation, if it is needed. He said he understands there is support for this bill, but is open to make changes to clarify the language.

Senator Burns stated there is no other opportunity for a public hearing other than in this Committee. She said she is very concerned regarding the stories she is hearing on this issue. She indicated the Session is still in the early stages, and believes more time should be given to gather additional information.

Senator Verkamp responded that this bill has been properly noticed and anyone who had concerns had the opportunity to appear at this meeting. He said he does not believe one more week would add any amount of significant information on this issue.

Senator Arzberger moved SB 1042 be returned with a DO PASS recommendation.

Senator Hamilton explained his vote. He stated his initial reaction was to vote "no." However, as he studied the issue he became neutral on the legislation. After listening to testimony and talking to individuals involved, he is strongly in favor of SB 1042 and will vote "aye."

Senator Arzberger explained her vote. She stated that she firmly believes in the ability to make contractual agreements between two parties. However, testimony has shown in this case that broadcasters do not have freedom in this matter. She would like to see changes in the language on the positions of both parties, but will vote "aye" to move the bill along.

Senator Burns explained her vote. She stated that this has been a very difficult decision for her. She said she cares greatly about the employees and the situation placed upon them. She commented she has not heard any good solutions from the employers' side. She is unsure how she will vote when the bill goes to the floor. However, she feels strongly that time should be taken to explore this issue prior to voting today. She said today she will vote "no."

Senator Verkamp explained his vote. He stated that he also has mixed feelings regarding this bill, which he has expressed to Senator Bundgaard. He said that although it is a difficult issue, he feels a good case has been made on this issue today. He said he will vote "aye."

The motion CARRIED by a roll call vote of 5-1-0 (Attachment 2).

Senator Burns stated she would like to request that the bill not be on the consent calendar.

There being no further business, the meeting adjourned at 10:35 a.m.

Respectfully submitted,

Nancy L. DeMichele
Committee Secretary

(Tapes and attachments on file in the Secretary of the Senate's Office/Resource Center, Room 115.)