pillsbury *Antenna*™ JUNE 2014
AN UPDATE ON COMMUNICATIONS LAW & ISSUES

Rules for Incentive Auction Adopted

Auction Planned for Mid-2015

In a *Report and Order* in Docket 12-268, the FCC has adopted rules and procedures to govern the incentive auction that is planned for transforming much of the 600 MHz band from home territory for television to use by broadband and other nonbroadcast services. This action furthers the Commission's implementation of the 2012 Congressional mandate to reallocate spectrum from broadcasting to wireless services.

The Commission expects to conduct the two-way auction in mid-2015. The reverse portion of this auction will employ a descending clock format in which the prices offered to broadcasters for the spectrum rights will decrease with each successive round of bidding. The forward auction, in which the spectrum will be redistributed to wireless users, will use a multiple round ascending clock format in which the prices will generally rise from round to round as long as the demand for licenses exceeds the spectrum available.

Pre-Auction Procedures

Full power and Class A station licensees will be eligible to participate in the reverse auction. They may voluntarily relinquish the spectrum usage rights associated with any facilities that would be eligible for protection in the repacking process. Broadcasters can offer to sell some or all of their spectrum rights by proposing to go dark permanently, to move from a UHF to a VHF channel, or to share a six-megahertz channel with another station. UHF-VHF bidders may limit their bids to a high (channel 7 to 13) or low (channels 2 to 6) channel.

Licensees with pending enforcement matters whose bids may result in their holding no broadcast license in the future can participate in an escrow program similar to that now used in the context of a station sale. Some portion of the auction proceeds will be placed in escrow pending resolution of the enforcement matter.

Bidders will submit certified applications. The Commission will protect the identity of licensees that apply to participate in the reverse auction until the results of the auction and the repacking are announced. Information from licensees who do not become winning bidders will be held in confidence for two years.

Between the short-form application deadline and the announcement of the results of the reverse auction and the repacking process, all full power and Class A licensees will be

continued on page 6

FCC Offers New Open Internet Proposals

The FCC has launched a new proceeding to consider its approach to regulating the Internet with a *Notice of Proposed Rulemaking* in Docket 14-28. This effort comes about in response to a ruling by the U.S. Court of Appeals in January that vacated some of the Commission's previous Internet regulations, so-called "new neutrality" rules. The Court of Appeals said that the Commission inconsistently attempted to regulate broadband providers as if they were common carriers when the agency had earlier ruled that they are not.

The Commission's rules for the Internet will have a significant impact on broadcasters as they increasingly rely on Internet connections to receive content from outside sources and to transmit content to their audiences.

The major overarching issue to be explored in this proceeding concerns how the Internet should be regulated. The Commission seeks to explore comparative advantages and disadvantages of Section 706 of the Telecommunications Act of 1996 as compared to Title II

continued on page 3

IN THIS ISSUE

Premature Transfer....................................2
Zapple Zapped..2
Experimental Underwriting......................3
Deadlines To Watch............................ 4-5
Journalist Without a Shield......................8

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Premature Transfer of Control Leads to Consent Decree

The parties to applications requesting FCC consent for the transfer of control of the corporate licensee of WHIZ(TV), Zanesville, Ohio, and the corporate licensee of a group of four radio stations in the Zanesville area have resolved missteps in the transfer process by entering into a Consent Decree with the FCC's Media Bureau. The Consent Decree includes their admission to concluding a premature transfer of control without FCC approval, in violation of Section 310(d) of the Communications Act; the voluntary contribution of $22,000 to the U.S. Treasury; and the adoption of a compliance plan to help avoid such mistakes in the future.

Section 310(d) of the Communications Act prohibits the transfer, assignment or any disposition of a broadcast construction permit or license without the prior approval of the FCC. The prohibition is also found in Section 73.3540 of the Commission's rules.

In May of last year, Norma Littick and her son, Henry Littick, filed applications proposing changes in the ownership structures of the two licensee entities, shifting majority control in each of them from Norma to Henry. In October, 2013, it was found that these ownership changes had actually been effectuated in December, 2012 – some five months before the FCC applications were submitted. Upon discovery of the error, the parties promptly notified Media Bureau staff and amended the applications to disclose and explain these circumstances. They said that the premature transfer occurred as the result of a "miscommunication" among Mr. Littick, local counsel and communications counsel concerning the status of the changes and the sequence of events to be followed. The incident was described by the parties as an innocent mistake.

Innocent or not, the Media Bureau felt obliged to investigate the situation and to prosecute an enforcement action. The Litticks and their companies brought the proceeding to a close by agreeing to a Consent Decree. In addition to admitting to the rule violation, the television licensee and the radio licensee each agreed to contribute $11,000 to the U.S. Treasury. The companies also agreed to establish a compliance plan at each station that will feature (1) an ongoing training program for all station employees and managers on compliance with FCC rules applicable to his or her responsibilities; and (2) the hiring of outside FCC counsel to provide guidance on FCC compliance issues, to provide regular updates and notices on developments in communications law pertinent to the stations, and to review in advance all documents to be filed with the Commission. The compliance plan is to remain in place for three years.

Zapple Doctrine Finally Zapped

An early 1970s artifact of the Fairness Doctrine era known as the Zapple Doctrine has finally met its demise more than 25 years after the Fairness Doctrine itself was nullified by the FCC in the *Syracuse Peace Council* decision in 1987 – a ruling sustained by the U.S. Court of Appeals in 1989. The Zapple Doctrine was a policy of the FCC that required a broadcast station to offer airtime to supporters of a political candidate if the station had allowed supporters of the candidate's opponent(s) on its air. The policy's name originated from the fact that it was first articulated by the FCC in response to an inquiry in 1970 from a Senate staff attorney named Nicholas Zapple. The Commission considered it to be an interpretation based on the Fairness Doctrine. More broadly, the Fairness Doctrine required broadcasters to devote some of their airtime to discussing controversial matters of public interest, and to air contrasting views regarding those matters.

The Zapple Doctrine was most recently invoked by a public interest group known as the Media Action Center in its petitions to deny the 2012 license renewal applications of two AM talk radio stations in Milwaukee, WISN and WTMJ. Among other things, the Center alleged that the stations had refused to provide air time to supporters of the Democratic candidate for governor of Wisconsin, Tom Barrett, so that they could respond to material aired on the stations in support of the Republican candidate, Scott Walker. The FCC's Media Bureau has denied both of the petitions and granted the renewal applications for both stations.

The Bureau characterized the petitions to deny as broad complaints about the programming choices of the stations. The Bureau said that the FCC has no authority to exercise any power of censorship concerning content-based programming decisions. A licensee has broad discretion to exercise its right to free speech and to choose programming that it believes best serves the needs and interests of its audience.

More specifically about the Zapple Doctrine, the Bureau explained that the Commission has no current basis to enforce it. In 1989, the Court of Appeals affirmed the FCC's conclusion that the Fairness Doctrine no longer served the public interest, was not statutorily mandated and was inconsistent with the First Amendment. In August, 2011, the Media Bureau described the Fairness Doctrine as "defunct" and deleted rules referencing it as "obsolete," finding them to be "without current legal effect."

In its decisions concerning the license renewals for WISN and WTMJ, the Bureau acknowledged that since 1989, the Commission has never specifically ruled on or addressed the Zapple Doctrine. However, all other applications of the Fairness Doctrine have been repealed or found unenforceable, including its application to ballot propositions, the personal attack rule and the political editorial rule. Because the Zapple Doctrine was based on an interpretation of the Fairness Doctrine – which has no current legal effect – the Bureau concluded that likewise, the Zapple Doctrine has no current legal effect.

Noncommercial Underwriting Experiment Rejected

The FCC's Media Bureau has denied a "Request for Experimental Authority to Relax Standards for Public Radio Underwriting Announcements" filed by Maricopa County Community College. Maricopa is the licensee or joint licensee of two noncommercial FM stations in Phoenix.

In March, 2013, Maricopa asked for authorization to conduct a temporary three-year experiment to allow its stations "to enhance" their underwriting announcements by relaxing the Commission's standards for the language that is permitted in such announcements. Specifically, Maricopa requested permission to enlarge the announcements to:

(1) provide factually accurate information concerning interest rates available at underwriter businesses, such as banks, credit unions and automobile dealerships.

(2) notify listeners of underwriter sales or special events.

(3) include qualitative adjectives describing underwriters that have a well-understood factual basis, such as "certified," "accredited," "award-winning," "experienced," or "long-established," and including publicly-determined rankings.

Maricopa said the purpose of this experiment would be to test the effects, if any, on listener satisfaction, program quality and station revenue that might result from such a relaxation of the Commission's underwriting requirements.

The Media Bureau denied Maricopa's request for a number of reasons. First, the proposal did not meet the legal definition for an experimental authorization – there was no technical or engineering aspect to it.

In the alternative, Maricopa asked that the proposal be treated as a request for a waiver of Section 73.503 of the Commission's rules. The Bureau responded that granting such a waiver would undermine the statutory and regulatory purposes in authorizing noncommercial stations – i.e., to foster the development of a public broadcasting system that is free of extraneous influence and control. The Bureau said that the Commission's current policies about underwriting acknowledgements adequately balance the financial needs of stations and their obligation to provide a noncommercial service.

The Bureau observed that, generally, a petition for rulemaking would be a better vehicle for obtaining the relief that Maricopa requested, and it hastened to add that this rejection does not in any way prejudge how the Commission might rule on such a future petition.

FCC Offers New Open Internet Proposals

continued from page 1

of the Communications Act of 1934. Section 706 provides that the Commission should encourage the deployment of telecommunications services to all Americans on a reasonable and timely basis by utilizing a variety of legal tools to promote competition and innovation. The regulatory emphasis of Title II is less nuanced – that service providers must offer their services fairly and without discrimination to all potential customers. The Court of Appeals blessed the Section 706 approach and the Commission has tentatively concluded that Section 706 offers the fastest path forward, but remains open considering Title II. The Commission asks the public to comment on and to compare the two regimes.

The Commission proposes to require that all Internet users must have access to fast and robust service. Service providers should maintain their facilities and standards of service so as to keep pace with innovation and be able to offer consistently high state-of-the-art service.

The agency wants to prevent practices and conduct that it believes would threaten the free-ranging openness of the Internet. The Commission says it is committed to preventing unfair treatment of consumers, edge providers and innovators. It asks whether the practice of prioritizing – where a service provider favors some users over others – should be absolutely prohibited. At the least, the Commission proposes to adopt a rebuttable presumption that exclusive agreements that prioritize service to entities affiliated with a broadband provider are unlawful.

The FCC also proposes to adopt rules to improve the transparency to consumers and edge providers of how service providers operate. The Commission tentatively concluded that broadband providers should disclose meaningful information to their customers about the service, including (1) information tailored to the specific needs of end users; (2) congestion that may adversely affect the experience of end users; and (3) information about practices such as any paid prioritization that might be permitted. In that context, the Commission asks whether such mandatory disclosures should include specific performance characteristics (such as effective upload and download speeds, latency and packet loss) and/or terms and conditions of service (such as data caps).

The Commission is anxious to ensure that the Internet environment will continue to be conducive for innovators and start-ups, and safe for consumers. It proposes to establish an ombudsperson with enforcement authority to operate as a watchdog and advocate for start-ups, small businesses and consumers. The agency asks for advice on how to ensure that everyone, including small businesses and start-ups, has effective access to the Commission's dispute resolution and enforcement mechanisms. It is considering allowing anonymous complaints for reporting violations to alleviate concerns by small entities about retribution from broadband providers.

July 15 is the deadline for filing comments. Replies must be filed by September 10.

DEADLINES TO WATCH

License Renewal, FCC Reports & Public Inspection Files

Date	Deadline
June 1 & 16, 2014	Radio stations in **Delaware** and **Pennsylvania,** and television stations in **Arizona, Idaho, Nevada, New Mexico, Texas, Utah** and **Wyoming** broadcast post-filing announcements regarding license renewal applications.
June 1 & 16, 2014	Television stations in **California** broadcast pre-filing announcements regarding license renewal applications.
June 2, 2014	Deadline to file license renewal applications for televisions in **Arizona, Idaho, Nevada, New Mexico, Utah** and **Wyoming**.
June 2, 2014	Deadline to file Biennial Ownership Report for all noncommercial radio stations in **Michigan** and **Ohio** and television stations in **Arizona, Idaho, Nevada, New Mexico, Utah** and **Wyoming.**
June 2, 2014	Deadline to place EEO Public File Report in public inspection file and on station's Internet website for all nonexempt radio and television stations in **Arizona, District of Columbia, Idaho, Maryland, Michigan, Nevada, New Mexico, Ohio, Utah, Virginia, West Virginia** and **Wyoming.**
June 2, 2014	Deadline for all broadcast licensees and permittees of stations in **Arizona, District of Columbia, Idaho, Maryland, Michi-gan, Nevada, New Mexico, Ohio, Utah, Virginia, West Virginia** and **Wyoming** to file annual report on all adverse findings and final actions taken by any court or governmental administrative agency involving misconduct of the licensee, permittee, or any person or entity having an attributable interest in the station(s). Stations for which this is the license renewal application due date will submit this information as a part of the renewal application.
July 1 & 16, 2014	Television stations in **Arizona, Idaho, Nevada, New Mexico, Utah** and **Wyoming** broadcast post-filing announcements regarding license renewal applications.
July 1 & 16, 2014	Television stations in **California** broadcast pre-filing announcements regarding license renewal applications.
July 10, 2014	Place Issues/Programs List for previous quarter in public inspection file for all full service radio and television stations and Class A TV stations.
July 10, 2014	Deadline to file quarterly Children's Television Programming Reports for all commercial television stations.
August 1, 2014	Deadline to file license renewal applications for television stations in **California.**

Deadlines for Comments In FCC and Other Proceedings

(All proceedings are before the FCC unless otherwise noted.)

Docket	Comments	Reply Comments
Before the Copyright Royalty Board Docket 14-CRB-0005; NPRM Notice and recordkeeping for use of sound recordings under statutory license	June 2	June 16
Docket 04-296; Public Notice Request for comments to refresh record re proposal to require multilingual EAS facilities		June 12
Docket 14-77; Public Notice Request for comments re Black Television News Channel's request for waiver of ad ban on DBS set-aside channels	June 16	July 1
RM-11720; Public Notice Request for comments re Petition for Rulemaking re good-faith bargaining for retransmission consent	June 19	July 7
Docket 05-231; FNPRM Closed captioning	June 25	July 25
Docket 10-71; FNPRM Network non-duplication and syndicated exclusivity rules	June 26	July 24
Docket 09-19; Public Notice Request for comments re audio filtering for Travelers' Information Stations	June 30	July 14
Docket 14-50; FNPRM 2014 Quadrennial Regulatory Review	July 7	Aug. 4
Docket 14-28; NPRM Open Internet	July 15	Sept. 10

Rulemakings to Amend FM Table of Allotments

The FCC is considering the following additions and deletions (indicated with a "D") to the FM Table of Allotments. The deadlines for filing comments and reply comments are shown.

Community	Channel	MHz	Comments	Reply Comments
Tocquerville, UT	246C	97.1		June 10
Tocquerville, UT	280C(D)	103.9		June 10
Dayton, WA	272A	102.3		June 10
Custer, MI	260A	99.9	June 16	July 1
Custer, MI	263A(D)	100.5	June 16	July 1
Rough Rock, AZ	258C2	99.5	June 23	July 8
McCall, ID	280A	103.9	June 23	July 8
Centerville, TX	267A(D)	101.3	June 23	July 8
Centerville, TX	274A	102.7	June 23	July 8

DEADLINES TO WATCH

Lowest Unit Charge Schedule for 2014 Political Campaign Season

During the 45-day period prior to a primary election or party caucus and the 60-day period prior to the general election, commercial broadcast stations are prohibited from charging any legally qualified candidate for elective office (who does not waive his or her rights) more than the station_s Lowest Unit Charge for advertising that promotes the candidate_s campaign for office and includes a "use" by the candidate. Lowest-unit-charge periods are imminent in the following states.

State	Election Event	Date	LUC Period
Alaska	State Primary	Aug. 19	July 5 - Aug. 19
Arizona	State Primary	Aug. 26	July 12 - Aug. 26
Colorado	State Primary	June 24	May 10 - June 24
Connecticut	State Primary	Aug. 12	June 28 - Aug. 12
Delaware	State Primary	Sept. 9	July 26 - Sept. 9
Florida	State Primary	Aug. 26	July 12 - Aug. 26
Guam	Territory Primary	Aug. 30	July 16 - Aug. 30
Hawaii	State Primary	Aug. 9	June 25 - Aug. 9
Kansas	State Primary	Aug. 5	June 21 - Aug. 5
Maine	State Primary	June 10	Apr. 26 - June 10
Maryland	State Primary	June 24	May 10 - June 24
Massachusetts	State Primary	Sept. 16	Aug. 2 - Sept. 16
Michigan	State Primary	Aug. 5	June 21 - Aug. 5
Minnesota	State Primary	Aug. 12	June 28 - Aug. 12
Missouri	State Primary	Aug. 5	June 21 - Aug. 5
New Hampshire	State Primary	Sept. 9	July 26 - Sept. 9
New York	State Primary	June 24	May 10 - June 24
Oklahoma	State Primary	June 24	May 10 - June 24
Rhode Island	State Primary	Sept. 9	July 26 - Sept. 9
South Carolina	State Primary	June 10	Apr. 26 - June 10
Tennessee	State Primary	Aug. 7	June 23 - Aug. 7
Utah	State Primary	June 24	May 10 - June 24
Vermont	State Primary	Aug. 26	July 12 - Aug. 26
Virginia	State Primary	June 10	Apr. 26 - June 10
Washington	State Primary	Aug. 5	June 21 - Aug. 5
Wisconsin	State Primary	Aug. 12	June 28 - Aug. 12
Wyoming	State Primary	Aug. 19	July 5 - Aug. 19

REVISED SCHEDULE FOR FCC APPLICATION FILING FEES EFFECTIVE JUNE 6, 2014

TV JOINT SALES AGREEMENTS BECOME ATTRIBUTABLE JUNE 19, 2014

Parties to agreements that violate multiple ownership rules have two years to unwind.

MUST CARRY / RETRANSMISSION CONSENT ELECTIONS FOR 2015-2017 DUE OCTOBER 1, 2014

Paperwork Reduction Act Proceedings

The FCC is required under the Paperwork Reduction Act to periodically collect public information on the paperwork burdens imposed by its record-keeping requirements in connection certain rules, policies, applications and forms. Public comment has been invited about this aspect of the following matters by the filing deadlines indicated.

Topic	Comment Deadline
Satellite earth stations and space stations, Part 25, Form 312	June 2
Exposure to radiofrequency radiation, Sections 1.1307 and 1.1311	June 9
Noncommercial broadcast construction permit application, Form 340	June 9
FM translator time of operation, Section 74.1263	June 9
Broadcast Station Annual Employment Report, Form 395-B	June 16
Market definitions for purposes of must carry, Section 76.59	June 16
Regulatory fee "True-ups"	June 30
Station logs, Section 73.1820	July 1
Handling confidential information	July 11
Candidate rates, Section 73.1942	July 28

Cut-Off Dates for AM and FM Applications to Change Community of License

The FCC has accepted for filing the AM and FM applications identified below proposing to change each station's community of license. These applications may also include proposals to modify technical facilities. The deadline for filing comments about any of the applications in the list below is **July 28, 2014.** Informal objections may be filed anytime prior to grant of the application.

Present Community	Proposed Community	Station	Channel	Frequency
Teec Nos Pos, AZ	Shiprock, NM	KNDN-FM	243	96.5
Mena, AR	De Queen, AR	KENA-FM	271	102.1
Burns, CO	Milner, CO	KIDN-FM	249	95.9
Islamorada, FL	Duck Key, FL	WAZQ	207	89.3
Homerville, GA	Axson, GA	WVHY	246	97.1
Indian Springs, NV	Hildale, UT	KURR	276	103.1
Paradise, NV	Enterprise, NV	NEW(AM)	n/a	1590
Conroe, TX	Baytown, TX	WJOZ(AM)	n/a	880
Menard, TX	Mertzon, TX	NEW	287	105.3

FM TRANSLATOR AUCTION 83 PRE-AUCTION FILING WINDOW FOR SETTLEMENTS APRIL 30 – JUNE 30, 2014

RESTRICTIONS ON JOINT NEGOTIATING OF RETRANSMISSION CONSENT AGREEMENTS EFFECTIVE JUNE 18, 2014

Rules for Incentive Auction Adopted *continued from page 1*

prohibited from communicating any reverse or forward auction applicant's bids or bidding strategies to any other full power or Class A licensee or forward auction applicant.

Bidding

The auction will occur in stages, each of which will consist of a reverse auction and a forward auction bidding process. Prior to the first stage, the initial spectrum clearing target will be determined – that is, the quantity of spectrum that the FCC projects that television stations will vacate. This estimate will be based upon broadcasters' indications in the pre-auction application process about their willingness to sell their rights. Then the reverse auction bidding process will be conducted to determine the total amount of incentive payments to broadcasters that will be required to clear that amount of spectrum. Next, the forward bidding process will follow. If the forward bidding process continues until there is no excess demand, the final stage rule (defined below) will be satisfied and the auction will close. If the final stage rule is not satisfied, additional stages will be run, with progressively lower spectrum targets in the reverse auction and less spectrum available in the forward auction.

The reverse auction will feature a descending clock format. In each round, licensees will be offered prices for one or more bid options and will indicate their choices at these prices. The prices offered will be adjusted downward as the rounds progress. Intra-round bidding will allow bidders to indicate price levels (between the opening and closing prices within a round) at which they would like either to choose different bid options or to drop out of the auction. A licensee will continue to be offered prices for bid options until the station's voluntary relinquishment of rights becomes needed to meet the current spectrum clearing target. When all remaining active bidders are needed in this way, the reverse auction for the stage will end. If the final stage rule is satisfied in that stage, the active bidders will be winning bidders and the price paid to each of them will be at least as high the last price it agreed to accept.

The final stage rule is expressed as a reserve price with two components– both of which must be satisfied. The first component requires that the average price per MHz-pop for wireless licenses in the forward auction meets or exceeds a certain price per MHz-pop benchmark that the Commission will establish. "MHz-pop" is defined as the product derived from multiplying the number of megahertz associated with a wireless license by the population of the license's service area. The second component requires that the proceeds of the forward auction be sufficient to cover all of the costs mandated by the statute, including compensating broadcasters for the relinquished spectrum rights and their expenses incurred in repacking. If both components of the reserve price are met, the final stage rule is satisfied.

Post-Auction Procedures

After the auction has ended, the FCC will release one or more public notices to announce the completion of the auction and the repacking effective date. Channel reassignments will be announced where necessary for stations that will remain in operation. Stations will have three months in which file construction permit applications for the modifications needed for the reassignments. Stations may also request to change channels and/or expand their facilities. Upon the grant of these construction permit applications, stations will have up to 36 months to complete construction of the modifications. Some stations may be assigned shorter deadlines tailored to their specific circumstances. No station will be allowed to continue to operate on a reassigned or reallocated channel more than 39 months after the repacking effective date. Licensees that are turning in their authorizations or moving to share a channel will have three months from receipt of auction proceeds to stop operating on the pre-auction channel.

Repacking

To accommodate the new users in the 600 MHz band, television stations that remain will have to be "repacked" on lower channels. Stations may have to change channels, move the antenna to a new site, or both. The auction legislation requires the FCC to "make all reasonable efforts to preserve . . . the coverage area and population serviced of each broadcast television licensee" as of February 22, 2012. The Commission will use the methodology described in Office of Engineering and Technology Bulletin 69 to determine each station's coverage area. All reasonable efforts will be made to preserve the same specific viewers for each full power and Class A station that it served on February 22, 2012. Channel assignments that would reduce a station's population served by more than 0.5% will not be allowed.

In the repacking process, the law requires the FCC to protect all full power and Class A stations as their facilities were licensed on February 22, 2012 (or for which a license application was pending on that date). The Commission will exercise its discretion to protect additional facilities based on factors such as the potential impact on the repacking process, the potential stranding of broadcasters' investment, the loss of service to existing viewers and the potential impact on the Class A service's digital transition. Specifically, the Commission commits to protecting the following additional facilities:

• New full power stations that were authorized but not constructed or licensed as of February 22, 2012.

• Full power facilities authorized in construction permits issued to effectuate a channel substitution for a licensed station.

• Modified facilities of full power and Class A stations that were authorized by construction permits granted on or before April 5, 2013, the date the Media Bureau froze the processing of certain applications.

• Minor change facilities authorized to implement any Class A station's mandated transition to digital operations.

A channel sharing bidder may propose to change its

continued on page 7

New Rules Proposed for Good Faith Bargaining

Block Communications, Inc. has filed a Petition for Rulemaking with the FCC to propose new elements to be incorporated into the rules requiring television stations and multichannel video programming distributors (MVPDs) to negotiate in good faith for retransmission consent. Block says it is familiar with both sides of this issue. It owns Buckeye Cablevision, Inc., a cable TV operator with 130,000 subscribers in Ohio and Michigan. The company also owns five full power television stations and assorted low power stations in small and mid-sized markets throughout the country.

According to Block, where market power between a television station and an MVPD in the retransmission consent negotiations is lopsided, large companies with national footprints take unfair advantage of small to mid-sized broadcasters and MVPDs on the other side of the table. This results in loss of service and/or higher prices for the consumer. Block described situations in its experience where a large national MVPD offered Block's top rated network affiliate station in a middle sized market retransmission consent fees that were lower than those received by the lowest rated network affiliates in the market. On the other side, it says that a large station group owner purchased the perennially lowest rated network affiliate in the small market where Block operates a cable system and then demanded retrans fees higher than any other station in the market was then earning. If a black-out occurs in either case, Block believes that the company with the national footprint can more likely afford the loss than can a small or middle-sized operator like Block. The black-outs usually end with a deal slanted substantially in the larger company's favor.

To mitigate the harm arising from these conditions, Block proposes that the FCC adopt additional rules especially for cases involving negotiating partners of uneven strength in markets below the top 30. Uneven strength would be defined as situations involving (1) an MVPD with fewer than 400,000 subscribers negotiating with a broadcaster with attributable interests in 25 or more stations that elect retransmission consent; or (2) an MPVD with more than 1,500,000 subscribers versus a broadcaster with interests in five or fewer television stations.

The FCC already has a regime for stations and MVPDs to submit complaints about bad-faith bargaining for retransmission consent. Block's proposal would elevate the standard for analyzing complaints arising out of the situations with the criteria listed above. This standard would require negotiating positions to be reasonable in light of the conditions prevailing in the market or markets where the dispute it occurring. Upon an appropriate complaint, each party would be required to demonstrate that its position is reasonable in light of prevailing market conditions. A party could provide any market data it chooses to defend the reasonableness of its position. That information must include (with appropriate safeguards for confidentiality) (1) the contents of its most recent offer; (2) evidence of its other in-market retransmission consent agreements; and (3) evidence regarding the ratings for all stations in the market.

Block believes that with this information, the Commission should be able to determine whether parties are bargaining fairly, or whether one is trying to exploit its bargaining leverage over the other with factors unrelated to the conditions in the market. This analysis will rest on whether the parties' offers are consistent with the value that the station provides to local viewers as evinced by ratings. Block says that this process will help the FCC avoid having to approve or disapprove specific rates. Rather, on the basis of objective evidence, the Commission will be able to determine whether parties are bargaining in good faith as they are required to do.

Without expressing its views or putting forward any proposal of its own, the Commission has invited public comment on Block's Petition for Rulemaking in RM-11720. Comments should be submitted by June 19. July 7 is the deadline for filing reply comments.

Rules for Incentive Auction Adopted

continued from page 6

community of license if it cannot satisfy signal coverage requirements from the new transmitter site. The new community must meet the same allotment priorities as the original community and must be in the same Designated Market Area.

Stations will be grandfathered where the auction and/or repacking process causes them to fall out of compliance with the multiple ownership rules.

Expenses incurred by stations in the repacking process will be reimbursed through designated individual accounts in the United States Treasury. These funds will be available to draw down as needed.

The Commission decided that it could not protect low power television and television translator stations without jeopardizing the repacking process and undermining the objectives of the incentive auction. However, the agency did commit to open a special filing window for such stations that are displaced by repacking to select a new channel. The rules will be amended to expedite the process for displaced stations to relocate. The Commission also said that it intends to begin a rulemaking proceeding to consider additional ways to mitigate the impact that the repacking process will have on LPTV and TV translators.

Supreme Court Declines to Hear Journalist's Shield Appeal

The Supreme Court has declined to entertain an appeal by New York Times journalist James Risen from a decision of the U.S. Fourth Circuit Court of Appeals ordering him to disclose his source(s) for information he published in 2006 in a book entitled *State of War: The Secret History of the CIA and the Bush Administration.* Risen's petition to the Supreme Court was supported by numerous news media interests, both print and electronic.

On December 22, 2010, a federal grand jury indicted former CIA agent Jeffrey Sterling on various charges related to the suspected disclosure of classified information that he had legitimately obtained in the course of his work with the Agency. In the trial court proceedings that followed, Risen was subpoenaed to testify about the source for information that he had published in *State of War*.

Scenarios in the book seemed to describe situations and activities in which Sterling had been involved, and Sterling was suspected to be the source. In one chapter, Risen disclosed information he knew to be classified concerning a failed attempt by the CIA to have a former Russian scientist provide flawed nuclear weapons blueprints to Iran. Much of the chapter is told from the viewpoint of a CIA case officer responsible for handling the Russian scientist. The chapter mentions two classified meetings at which Sterling was the only common attendee.

In the late 1990s, Sterling had been assigned work on a classified program intended to impede Iran's efforts to obtain nuclear weapons. Eventually however he was reassigned and then dismissed at the beginning of 2002 for poor performance. Before and after his employment, Sterling had signed confidentiality agreements concerning classified information. He attempted twice to initiate litigation against the CIA for employment discrimination. He also attempted to write a memoir about this experience in the agency, but the CIA's Publications Review Board heavily edited his drafts. Consequently, he was very unhappy with the Agency, and Sterling threatened to take these complaints to the press. In the period following his departure from the CIA, Sterling had numerous contacts with Risen. Sterling appeared to have motive and opportunity to commit the criminal leaking of classified information.

The trial was set for the U.S. District Court in Alexandria, Virginia. At Risen's request, the court quashed the subpoena for his testimony, finding that Risen had "a qualified First Amendment reporter's privilege that may be invoked about confidential sources or is issued to harass or intimidate the journalist."

The government appealed that decision to the Fourth Circuit, where it was reversed. In stark, blunt language, the appellate court ruled that

> There is no First Amendment testimonial privilege, absolute or qualified, that protects a reporter from being compelled to testify by the prosecution or the defense in criminal proceedings about criminal conduct that the reporter personally witnessed or participated in, absent a showing of bad faith, harassment, or other such non-legitimate motive, even though the reporter promised confidentiality to his source.

Risen argued that the lack of a shield for a reporter's sources would chill future newsgathering. The court responded that the criminal justice system is entitled to everyman's testimony – including that of the journalist. The search for truth and the need for justice outweigh the public interest value in reporting the news.

Risen went on to assert that even if there was no reporter's privilege under the First Amendment, the court should have recognized a federal common law privilege. The court rejected this claim also, quoting the Supreme Court in stating that "the common law recognized no such testimonial privilege." Risen followed this with the argument that Federal Rule of Evidence 501 gives the court some flexibility to grow a privilege: "the common law - as interpreted by United States courts in the light of reason and experience - governs a claim of privilege . . ." He pointed to other privileges against compelled testimony such as attorney-client, therapist-patient, etc. The court said these other privileges are different because in these cases it is the communication itself that is being held in confidence. Risen had already published the information that he had obtained. He was trying to protect the source of the information rather than the information itself. In any event, the Fourth Circuit felt obliged to follow the Supreme Court's lead in declaring that there is no federal common law on privileges for journalists in criminal cases.

There is no federal reporter's shield statute (although legislation is pending in Congress to address this issue). The court acknowledged that some states have such statutes, and that some states have common law privileges for journalists. Upon being referred to these by Risen, the court shrugged its shoulders. It said that what the states do on this topic is their own affair and the federal courts have nothing to do with it.

With the Supreme Court's rejection of Risen's plea for a hearing, the case will return to the District Court for resumption of the trial. If Risen continues to refuse to testify, as he says he will, there is the possibility that he could go to jail.

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