

C-Band Divided and Reallocated

The FCC has adopted a new allocation plan for the 3.7-4.2 GHz band, currently allocated to the Fixed Service (“FS”) and the Fixed Satellite Service (“FSS”), which will require broadcasters and others with satellite operations in the lower portion of this band to relocate them to the upper end. The FCC took this action in a *Report and Order and Order of Proposed Modification* (FCC 20-22) in Docket 18-122.

Many broadcasters have satellite operations in this band that they use to retrieve programming from networks and other program distributors. These frequencies are used for space-to-earth downlinks which are paired with earth-to-space uplinks in the 5.925-6.425 GHz band. Together these two bands have been collectively known as the “conventional C-band.” The lower 300 megahertz, from 3.7 to 4.0 GHz, are being reallocated to commercial wireless services for deployment of 5G services.

In a companion Public Notice (FCC 20-23) adopted in Docket 20-25, the FCC proposes the rules for Auction 107, in which the right to operate in these frequency blocks would be sold to wireless operators. The auction is scheduled to commence on December 8, 2020. The 3.7-4.0 GHz band will be divided into 14 20-megahertz blocks (with a 20-megahertz guard band at the top) and offered at auction geographically in partial economic areas (“PEAs”).

Costs incurred to clear FSS operators out of the 3.7-4.0 GHz band and to relocate them to the 4.0-4.2 GHz band are expected to be covered from the proceeds of Auction 107. Compensable costs for the relocation will include all reasonable engineering, equipment, site and FCC fees, as well as reasonable additional costs that incumbent space station and earth station operators may incur. A neutral third party will be engaged as a clearinghouse to manage the distribution of reimbursement funds to the eligible parties.

Only incumbent FSS participants will be eligible to have their costs reimbursed. Incumbent space station operators include all C-band space station operators authorized to provide service to any part of the contiguous United States as of June 21, 2018. These include ABS, Empresa, Eutelsat, Hispasat, Intelsat, SES, Star One, and Telsat. Incumbent earth stations include those that: (1) were operational as of April 19, 2018; (2) are licensed or registered (or had a pending application for license or registration) in the FCC’s International Bureau Filing System (“IBFS”) database as of

continued on page 8

Appellate Court Affirms Sports Commentators’ First Amendment Rights

The U.S. Court of Appeals for the Sixth Circuit has affirmed a lower court’s ruling dismissing a lawsuit brought by John Higgins, an NCAA basketball referee, against Kentucky Sports Radio (“KSR”) and two of its on-air personalities, Matt Jones and Drew Franklin. Higgins had alleged that KSR and its talent were liable for intentional infliction of emotional distress, invasion of privacy, tortious interference with a business relationship, civil conspiracy, negligence, harassment, and engaging in harassing communications. The appellate court said that all of these alleged causes of action reduced to a single theory of liability arising from unfavorable statements made about Higgins and his roofing business in KSR’s radio programming and on its website. The court ruled that the First Amendment protects KSR and its personnel from such liability.

KSR produces and distributes sports programming that is broadcast on some 40 radio stations throughout Kentucky,

continued on page 7

IN THIS ISSUE

Communications Marketplace	2
LPTV Must-Carry Notices.....	2
White Space Devices	3
Asymmetric FM Sidebands.....	3
Deadlines to Watch.....	4-6

For more information about or help with any of the items reported in **Antenna™** please contact:

pillsbury

1200 Seventeenth St. NW
Washington, D.C. 20036

Tel: 202.663.8167

Fax: 202.663.8007

E-mail: scott.flick@pillsburylaw.com

FCC Studies Communications Marketplace

The FCC is required by Congress to publish a document known as the *Communications Marketplace Report* in the last quarter of every even-numbered year. The FCC's Office of Economics and Analytics has released a Public Notice (DA 20-199) to invite input from the public to inform the Commission's preparations for the 2020 edition of the *Report*. This study is to evaluate the state of competition in the communications marketplace, including competition to deliver voice, video, audio, and data services among broadcast stations, providers of satellite communications, Internet service providers, multichannel video programming distributors ("MVPDs"), providers of telecommunications, and providers of commercial mobile services. The FCC's mandate includes an assessment of whether laws, regulations, or regulatory practices at any level of government, or other demonstrated marketplace practices pose a barrier to competitive entry into the communications marketplace or to the competitive expansion of existing providers of communications services.

The FCC plans to use an analytical framework that will categorize video services into three groups – MVPDs, online video distributors, and broadcast television stations. Commenters are invited to provide data and information on the following:

- Competition in the provision of video services
- Vertical integration

- Technological developments
- Recent entry and exit
- Trends in subscription models and content
- Service features that lead some services to be viewed as substitutes for one another and others as supplements
- Operating and financial statistics
- Data concerning the competition in set-top boxes and devices

Data and comment about the delivery of audio programming may include, but is not necessarily limited to, AM and FM broadcasting, satellite radio, and Internet audio providers. Specific topics could include the following:

- Audio industry participants
- Trends in service offerings, pricing, and consumer behavior
- Extent of competition among intramodal providers and intermodal providers
- Ratings, subscriptions, and revenue information
- Capital investment, innovation, and the deployment of advanced technology
- Recent entry and exit
- Requirements for entry and into the marketplace

Comments are due by April 13. May 13 is the deadline for reply comments.

Electronic Notices Required for LPTV Must-Carry

The FCC has extended the mandate for electronic must-carry notices sent to multichannel video programming distributors ("MVPDs") to eligible low power television and noncommercial television translator stations. This action was adopted in a *Report and Order* (FCC 20-14) in Docket 17-317.

In 2019, the FCC enacted rules to modify how full power television stations communicate their must-carry election notices to MVPDs. Rather than sending paper letters through the postal mail, a full power station now announces its must-carry election in its online Public Inspection File and notifies MVPDs by email if it changes its election. There are a limited number of stations that may qualify for must-carry status (LPTV and noncommercial translator stations) that are not required to have online Public Files. In its 2019 ruling, the FCC deferred its decision about adopting similar rules for these stations in view of the fact that they did not have Public Inspection Files.

Now the FCC has decided that it will require qualified LPTV stations to use the same process as full power stations to notify MVPDs of any change in carriage election status. However, rather than imposing a new Public File obligation on these stations, they will now be required to send MVPDs an initial "baseline" notice via email in which they state their carriage election for the 2021–2023 carriage cycle, even if there is no change in their election status. The deadline for delivery

of this baseline notice will be October 1, 2020.

The election notice and subsequent change notices sent to each MVPD's carriage-election specific email address must include the following information: the station's call sign, the station's community of license, the designated market area where the station is located, the specific change being made in election status, and an email address and phone number for carriage-related questions. A copy of the email is to be sent to the FCC's verification email inbox at ElectionNotices@FCC.gov.

Qualified noncommercial translator stations may only request mandatory carriage and may not elect retransmission consent. When a noncommercial translator requests mandatory carriage, that request carries forward indefinitely, absent a change in circumstances, and there is no opportunity or need for a notice of a change of status. However, like LPTV stations, each noncommercial translator station must deliver a one-time baseline carriage notice to the relevant MVPDs by October 1, 2020.

In order to provide MVPDs with a contact point for making carriage-related inquiries, LPTV stations are required, and noncommercial translators are encouraged, to provide contact information in their files in the FCC's Licensing and Management System by July 31, 2020.

Increased Facilities Proposed for White Space Devices

In a *Notice of Proposed Rulemaking* (FCC 20-17) in Docket 20-36, the FCC has proposed amendments to its rules governing unlicensed devices operating in television white spaces – i.e., the unused spectrum in the television band between licensed stations. Adoption of these rule changes would enhance the capabilities of devices to deliver wireless broadband services in rural areas and to operate applications associated with the Internet of Things (“IoT”).

The FCC proposes to permit higher transmitter power and higher antenna HAAT (“height above average terrain”) for fixed white space devices in “less congested” geographic areas. The maximum permissible radiated power would be increased from 10 to 16 watts EIRP in these areas. The maximum permissible antenna HAAT would be increased from 250 meters to 500 meters. The minimum distance separation required between the device and a co-channel television station would be increased. A “less congested area” is an area where at least half of the television channels in the band of operation (i.e., low VHF, high VHF, or UHF) are not in use. To ensure protection for licensed operations,

the Commission proposes that a party wishing to operate a fixed white space device at an HAAT greater than 250 meters notify potentially affected entities of their intended operation at least 48 hours in advance.

In another development facilitating the growth of the IoT, the FCC proposes to modify the white space rules to facilitate the deployment of narrowband devices. A narrowband device would be defined as a type of fixed or personal/portable white space device operating in a bandwidth of no greater than 100 kHz. These devices would be client devices that communicate with a fixed master device that contacts the white space database to obtain available channels and operating powers at its location.

The FCC invites public comment on these and related technical questions concerning white space devices and operations. The deadline for comments will be 30 days after notice of this proceeding is published in the Federal Register. Reply comments will be due 60 days after that publication.

Petitioners Seek Authorization for Asymmetric FM Sidebands

The National Association of Broadcasters, Xperi Corporation, and National Public Radio have jointly filed a Petition for Rulemaking to ask the FCC to initiate a rulemaking to consider authorizing FM stations to broadcast with asymmetric sideband operations.

FM stations are authorized to operate digital sidebands with IBOC technology. Section 73.404 of the FCC’s Rules permits all IBOC FM stations to operate at -14 dBc. Stations that meet certain guidelines may increase the sideband power to -10 dBc. The petitioners explain that to operate above -14 dBc, a station must submit an informal request to the FCC with an analysis of the potential for harmful interference to adjacent-channel analog signals. The FCC requires that all stations calculate the formula using the station’s analog F(50,10) field strength at all points on the 60 dBu F(50,50) contour of the desired station without regard to the actual class of station or protected contour for the station. This research is used to determine the most restrictive analog field strength of the proponent station. The rule requires that the sidebands be symmetric. Thus the power level on both sides of the main channel is limited by the need to protect the more vulnerable adjacent-channel signal. The petitioners assert that the mandated use of symmetric sidebands for all calculations eliminates a viable

path for many stations to increase power on at least one sideband where the adjacent channels on each side require different levels of protection.

The petitioners reported the results of a 2017 study conducted by NAB and Xperi. They reviewed every full power FM station in the United States. For each station, they studied the three worst first-adjacent-channel interferers. With the limitation that stations had to protect equally channels above and below the studied station, they found that only 6,120 stations, 60 percent of all FM stations, could qualify to increase their power to the -10 dBc level. However, if a station was able to adjust each sideband separately – i.e., asymmetrically – an additional 3,496 stations would be able to increase the power on one sideband to -10 dBc. Further, an additional 532 stations would be able to increase one sideband above -14 dBc, but not to the full -10 dBc level. The petitioners conclude that authorizing asymmetric sidebands universally would significantly increase the number of stations eligible to increase their power and improve their coverage without causing new interference to other stations.

The FCC has requested public input on this proposal in RM-11851. The time for filing comments has expired. Reply comments can be submitted until March 23.



DEADLINES TO WATCH



License Renewal, FCC Reports & Public Inspection Files

March 1 & 16	Radio stations in Arkansas, Louisiana, and Mississippi broadcast post-filing announcements regarding license renewal applications.	April 1 & 16	Radio stations in Arkansas, Indiana, Kentucky, Louisiana, Mississippi, and Tennessee broadcast post-filing announcements regarding license renewal applications.
March 1 & 16	Radio stations in Indiana, Kentucky, and Tennessee broadcast pre-filing announcements regarding license renewal applications.	April 1 & 16	Radio stations in Michigan and Ohio and TV stations in the District of Columbia, Maryland, Virginia and West Virginia broadcast pre-filing announcements regarding license renewal applications.
March 30	Deadline to file Children's Television Programming Reports for all commercial full power and Class A television stations for the period September 16 - December 31, 2019.	April 10	Deadline to place Issues/Programs List for previous quarter in Public Inspection File for all full service radio and television stations and Class A TV stations.
April 1	Deadline to file license renewal applications for radio stations in Indiana, Kentucky, and Tennessee .	April 10	Deadline to file quarterly Transition Progress Reports for television stations subject to modifications in the repack.
April 1	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 Delaware, Indiana, Kentucky, Pennsylvania, Tennessee, and Texas .	April 10	Deadline for noncommercial stations to file quarterly report re third-party fundraising.
April 1	Deadline for all broadcast licensees and permittees of stations in Delaware, Indiana, Kentucky, Pennsylvania, Tennessee, and Texas , and 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).	May 1 & 16	Radio stations in Indiana, Kentucky, and Tennessee broadcast post-filing announcements regarding license renewal applications.
		May 1 & 16	Radio stations in Michigan and Ohio and TV stations in the District of Columbia, Maryland, Virginia and West Virginia broadcast pre-filing announcements regarding license renewal applications.

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 with 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
Auction disclosures, Sections 1.2110, 1.2111, 1.2112	Mar. 23
Emergency antennas, Section 73.1680	Mar. 30
Television channel sharing, Section 74.799, Form 2100, Schedule D	Mar. 30
CORES updates/changes, Form 160	Mar. 30
Post incentive auction LPTV licensing and operations, Sections 74.787, 74.793, 74.799, 74.3700; Form 2100, Schedule C	Mar. 30
Application for wireless radio authorization, Form 601	Apr. 6
Application for assignment or transfer of control of wireless radio authorization, Form 603	Apr. 6
Accessibility of emergency information, Sections 79.2, 79.105, 79.106	Apr. 10
Handling confidential information	Apr. 14
TV station notices to MVPDs re repack modifications, Sections 73.3700, 73.3800	Apr. 20
Agreements to remove conflicts between applications, Section 73.3525	Apr. 20
Noncommercial FM licensing and service requirements, Section 73.503	Apr. 20
Noncommercial TV licensing and service requirements, Section 73.621	Apr. 20
Noncommercial broadcast Public Inspection Files, Section 73.3527	Apr. 20
Availability of contracts by broadcast stations, Section 73.3613	Apr. 20



DEADLINES TO WATCH



Deadlines for Comments in FCC and Other Proceedings

DOCKET

COMMENTS

REPLY COMMENTS

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

Docket 20-31; NPRM (FCC 20-10) Retransmission consent negotiations between MVPD and broadcast groups		Mar. 16
U.S. Copyright Office; NOI Docket 2019-7 (84 FR 66328) Status of online dissemination as "publication" for purposes of copyright registration	Mar. 19	Apr. 16
RM-11851; Petition for Rulemaking Request to authorize digital FM asymmetric sideband operations		Mar. 23
Docket 20-51; Public Notice (DA 20-187) iHeartMedia, Inc. Petition for Declaratory Ruling re foreign ownership interests	Mar. 26	Apr. 10
Docket 19-311; NPRM (FCC 19-123) All-digital AM broadcasting		Apr. 6
Docket 20-61: Public Notice (DA 20-203) Truth-in-billing requirements of Television Viewer Protection Act of 2019	April 6	April 13
Docket 20-60; Public Notice (DA 20-199) Competition in communications marketplace	Apr. 13	May 13
Federal Trade Commission Regulatory Review (85 FR 10104) Guidelines for endorsements and testimonials in advertising	Apr. 21	N/A
Docket 20-25; Public Notice (FCC 20-23) C-Band auction procedures	May 1	May 15
Docket 19-226; NPRM (FCC 19-126) Human exposure to radiofrequency electromagnetic fields	FR+30	FR+60
Docket 20-35; NPRM (FCC 20-19) Records of cable operator interests in video programming	FR+30	FR+45
Docket 20-36; NPRM (FCC 20-17) Unlicensed device operations in television band white space	FR+30	FR+60
Docket 15-80; 2nd NPRM (FCC 20-20) Access for state and other federal agencies to Disaster Information Reporting System	FR+30	FR+60

FR+N means the filing deadline is N days after publication of notice of the proceeding in the Federal Register.

Cut-Off Date for FM Application to Change Community of License

The FCC has accepted for filing the application identified below proposing to change the station's community of license. The deadline for filing comments about this application in the list below is **March 16, 2020**. Informal objections may be filed anytime prior to grant of the application.

PRESENT COMMUNITY	PROPOSED COMMUNITY	STATION	CHANNEL	FREQUENCY
Annona, TX	Mount Vernon, TX	New	263A	100.5

FM AUCTION 106

UPFRONT PAYMENTS DUE: **MARCH 20, 2020**
 MOCK AUCTION: **APRIL 24, 2020**
 BIDDING BEGINS: **APRIL 28, 2020**



DEADLINES TO WATCH



Lowest Unit Charge Schedule for 2020 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 ("LUC") for advertising that promotes the candidate's campaign for office. Lowest-unit-charge restrictions are in effect now or soon will be in the following jurisdictions. Some of these dates may be subject to change.

JURISDICTION	ELECTION EVENT	DATE	LUC PERIOD
Alaska	Dem. Pres. Primary	Apr. 4	Feb. 19 - Apr. 4
American Samoa	Rep. Pres. Caucus	Mar. 24	Feb. 8 - Mar. 24
Arizona	Dem. Pres. Primary	Mar. 17	Feb. 1 - Mar. 17
Connecticut	State & Pres. Primaries	Apr. 28	Mar. 14 - Apr. 28
Colorado	State Primaries	Jun. 30	May 16 - Jun. 30
Delaware	Presidential Primaries	Apr. 28	Mar. 14 - Apr. 28
District of Columbia	Dem. Pres. Primary	Jun. 2	Apr. 18 - Jun. 2
Florida	Presidential Primaries	Mar. 17	Feb. 1 - Mar. 17
Georgia	Presidential Primaries	Mar. 24	Feb. 8 - Mar. 24
Georgia	State Primaries	May 19	Apr. 4 - May 19
Guam	Rep. Pres. Caucus	Mar. 14	Jan. 29 - Mar. 14
Guam	Dem. Pres. Caucus	May 2	Mar. 18 - May 2
Hawaii	Rep. Pres. Caucus	Mar. 10	Jan. 25 - Mar. 10
Hawaii	Dem. Pres. Primary	Apr. 4	Feb. 19 - Apr. 4
Idaho	Presidential Primaries	Mar. 10	Jan. 25 - Mar. 10
Idaho	State Primaries	May 19	Apr. 4 - May 19
Illinois	State & Pres. Primaries	Mar. 17	Feb. 1 - Mar. 17
Indiana	State & Pres. Primaries	May 5	Mar. 21 - May 5
Iowa	State Primaries	Jun. 2	Apr. 18 - Jun. 2
Kansas	Dem. Pres. Primary	May 2	Mar. 18 - May 2
Kentucky	Rep. Pres. Caucus	Mar. 21	Feb. 5 - Mar. 21
Kentucky	Dem. Pres. Primary	May 19	Apr. 4 - May 19
Kentucky	State Primaries	May 19	Apr. 4 - May 19
Louisiana	Presidential Primaries	Apr. 4	Feb. 19 - Apr. 4
Maine	State Primaries	Jun. 9	Apr. 25 - Jun. 9
Maryland	State & Pres. Primaries	Apr. 28	Mar. 14 - Apr. 28
Michigan	Presidential Primaries	Mar. 10	Jan. 25 - Mar. 10
Mississippi	State & Pres. Primaries	Mar. 10	Jan. 25 - Mar. 10
Missouri	Presidential Primaries	Mar. 10	Jan. 25 - Mar. 10
Montana	State & Pres. Primaries	Jun. 2	Apr. 18 - Jun. 2
Nebraska	State & Pres. Primaries	May 12	Mar. 28 - May 12
Nevada	State Primaries	Jun. 9	Apr. 25 - Jun. 9
New Jersey	State & Pres. Primaries	Jun. 2	Apr. 18 - Jun. 2
New Mexico	State & Pres. Primaries	Jun. 2	Apr. 18 - Jun. 2
New York	Presidential Primaries	Apr. 28	Mar. 14 - Apr. 28
New York	State Primaries	Jun. 23	May 9 - Jun. 23
North Dakota	Dem. Pres. Primary	Mar. 10	Jan. 25 - Mar. 10
North Dakota	State Primaries	Jun. 9	Apr. 25 - Jun. 9
Ohio	State & Pres. Primaries	Mar. 17	Feb. 1 - Mar. 17
Oregon	State & Pres. Primaries	May 19	Apr. 4 - May 19
Pennsylvania	State & Pres. Primaries	Apr. 28	Mar. 14 - Apr. 28
Puerto Rico	Dem. Pres. Primary	Mar. 29	Feb. 13 - Mar. 29
Rhode Island	Presidential Primaries	Apr. 28	Mar. 14 - Apr. 28
South Carolina	State Primaries	Jun. 9	Apr. 25 - Jun. 9
South Dakota	Presidential Primaries	Jun. 2	Apr. 18 - Jun. 2
Utah	State Primaries	Jun. 30	May 16 - Jun. 30
Virgin Islands	Rep. Pres. Caucus	Mar. 12	Jan. 27 - Mar. 12
Virgin Islands	Dem. Pres. Caucus	Jun. 6	Apr. 22 - Jun. 6
Virginia	State Primaries	Jun. 9	Apr. 25 - Jun. 9
Washington	Presidential Primaries	Mar. 10	Jan. 25 - Mar. 10
West Virginia	State & Pres. Primaries	May 12	Mar. 28 - May 12
Wisconsin	State & Pres. Primaries	Apr. 7	Feb. 22 - Apr. 7
Wyoming	Dem. Pres. Caucus	Apr. 4	Feb. 19 - Apr. 4

Appellate Court Affirms Sports Commentators' First Amendment Rights continued from page 1

primarily focusing on University of Kentucky football and basketball. This case arose from KSR's coverage of an Elite Eight game in the 2017 NCAA men's basketball tournament and its aftermath. The University of North Carolina beat the University of Kentucky with a last-second shot. Higgins was a member of the three-person team that officiated the game. In a post-game interview, the Kentucky coach complained that the referees had been unfair to his team and that Higgins may have been at least partially responsible for the Kentucky loss.

During the days following the game, KSR, Jones and Franklin repeatedly disparaged the officiating of the game. Jones and Franklin also both wrote highly critical articles about Higgins's refereeing that appeared on the KSR website. Kentucky fans in the audience responded to these messages with their own hostile criticisms of Higgins in tweets, emails and uploads to the blog on the website.

Higgins's main occupation is owning and operating a roofing business in the Omaha, Nebraska, area known as Weatherguard. In a play on words, the company's website was www.rooferees.com. Soon after the game, an unknown individual uploaded a video showing scenes from the game overlaid with commentary criticizing the referees. It ended with a shot of Higgins standing next to a Weatherguard truck. Also on the screen were Weatherguard's telephone number, Weatherguard's website URL, Higgins's home telephone number, and a message encouraging viewers to write a review of Higgins on the Weatherguard Facebook page.

In their ongoing commentaries critical of Higgins's officiating, Jones and Franklin frequently referred to or read emails from listeners who were also critical of Higgins. In one of his website articles, Franklin included a link to the anonymous Vimeo video. They discussed the Weatherguard website and read negative reviews about the company that had been posted there by angry Kentucky fans. In an article promoting Jones's show, Franklin wrote, "It's a busy day on KSR as Matt and Ryan . . . continue the hatred for John Higgins. . . . Join the fun by calling . . ." A flood of false negative reviews poured into Weatherguard's Facebook page and Yelp. This resulted in the decline of Weatherguard's Google star business rating from 4.8 (out of 5) to 1.2 in two days' time. Individuals filed false reports against Weatherguard with the Better Business Bureau using the names of easily identifiable Kentucky celebrities. The company's phone lines were flooded with some 3,000 calls on the days following the game. Most of the complaints came from Kentucky area codes. Weatherguard's regular service to its legitimate customers was badly disrupted. Higgins and his family received abusive and offensive phone calls at their home, including death threats, resulting in special police protection. For their safety, Weatherguard employees were told to not come to work for several days. When Higgins officiated at a Final Four basketball game a few days later, he was accompanied by a personal bodyguard.

Jones and Franklin reported on these activities, often reading the Facebook postings and tweets on the air. Jones

read emails on the air from listeners who said they were going to post poor reviews about Weatherguard online, and then proceeded to announce the name of Weatherguard's web page, Rooferees. However, he did say that leaving a bad review on the Weatherguard website would be a "bad thing to do," and would constitute "harassment."

Nonetheless, he ended the segment by concluding, "Now I still don't think you should troll the guy but now I have less sympathy if his [company's] name is Rooferees." Jones claimed that he at other times tried to discourage listeners from contacting Higgins and his business. Franklin wrote in his blog, "We here at Kentucky-Sports-Radio-dot-com do not condone the activity from Big Blue Nation on John Higgins'[sic] roofing company's Facebook page. But like Big Blue Nation, we are still upset over some of Higgins'[sic] calls in the UK-UNC game, so we can and we will read the activity on the Facebook page."

The District Court ruled that, while the remarks by Jones and Franklin were offensive, they were protected by the First Amendment. The Court of Appeals agreed. The court noted that whether the First Amendment presumptively shields commentary from liability turns on whether the speech involves a public or private concern. Although Higgins argued that radio coverage of a university sporting event was not a public concern, the court decided otherwise. It observed that advancing to the later rounds of a sports tournament may change a university's financial fortunes and improve its admissions statistics.

The court determined that these same considerations place officiating within the sphere of public concern as well. A referee's calls can change the outcome of a game. When they do, fans have every right to read about and discuss the manner in which the referee called the game. Commentators must be free to discuss fans' reaction to the officiating as well as the officiating itself. The court said that even if the discussion was inappropriate or controversial, it continued to be a matter of public concern. Higgins claimed that KSR had stoked fans' aggravation about the game and thereby given the matter a higher profile than it deserved by covering that same fan reaction that it had created. The court agreed that the defendant sued for its speech cannot by its own conduct

continued on page 8

TELEVISION REPACK

STATIONS ASSIGNED TO PHASE 9

TESTING PERIOD BEGINS: **MARCH 14, 2020**

COMPLETION DEADLINE: **MAY 1, 2020**

STATIONS ASSIGNED TO PHASE 10

TESTING PERIOD BEGINS: **MAY 2, 2020**

COMPLETION DEADLINE: **JULY 3, 2020**

C-Band Divided and Reallocated continued from page 1

November 7, 2018; and (3) have timely certified, to the extent required, the accuracy of information on file with the FCC. For earth stations licensed or registered before the 2018 processing window, applications and registrations filed by May 28, 2019 will be deemed as certified. The FCC directed the International Bureau to terminate registrations for uncertified receive-only earth stations whose owners failed to register or certify on a timely basis, and to remove them from the IBFS database.

The overall deadline to clear the 3.7-4.0 GHz band of FSS operations is set for December 5, 2025. There will be two Accelerated Relocation Deadlines for incumbent space station operators that voluntarily relocate on an accelerated schedule with additional incentives and obligations. The Phase I Accelerated Relocation Deadline will be December 5, 2021. The Phase II deadline will be December 5, 2023. The Phase I goal would be to clear the lower 100 megahertz of spectrum in 46 PEAs, covering 58 percent of the population of the contiguous United States. The Phase II goal would be to completely clear the 3.7-4.0 GHz band of FSS operations by 2023, rather than

2025. Monetary incentives possibly amounting to as much as \$9.7 billion will be offered to those operators who clear the lower band early. A space station operator who volunteers to clear spectrum by the accelerated deadlines must also take responsibility for relocating the earth stations associated with it. By June 12, 2020, each incumbent space station operator must make available for public review its transition plan, including its plan for relocating the earth stations associated with it. An incumbent space station operator that does not opt for an Accelerated Relocation Deadline may, but is not required to, make arrangements for its associated earth stations. In the alternative, earth station owners will have to make their own arrangements to move to the higher frequencies. A relocation coordinator will be appointed to oversee and coordinate the transition process.

The 3.7-4.0 GHz band will continue to be available for FSS operations in Alaska, Hawaii, and the outlying territories. In those areas, FSS operators will share this band with the 5G wireless services.

Appellate Court Affirms Sports Commentators' First Amendment Rights continued from page 7

make the plaintiff a public figure. However, it ruled that KSR had adequate justification for its coverage of a high-profile tournament game in which Higgins played a key role.

Even though Higgins's officiating of the game was deemed to be matter of public concern, he had other so-called "carve-outs" from First Amendment protection that he could assert. The first of these concerned the incitement of lawlessness. This test requires the plaintiff to demonstrate three things: (1) that the speech explicitly or implicitly encouraged lawless action; (2) that the speaker intends that the speech will result in lawless action; and (3) that the imminent use of lawless action is the likely result of the speech in question. The court found against Higgins on all three of these questions. It said that he had not identified any statement made by the defendants, explicitly or implicitly, that the fans should attack his business. Further, there were several instances where the defendants explicitly stated that bad reactions would be bad things for fans to do. That also tended to indicate that the defendants did not intend that lawlessness should result from their speech, nor was it clear that lawless action was the likely result of KSR's programming. KSR had the right to cover as news the attacks on Higgins and his business. The court said it could not curtail a speaker's First Amendment protection on the grounds that otherwise permissible content might touch a nerve with an

easily agitated audience.

Higgins also argued on appeal that the defendants engaged in a conspiracy to defame him. The court concluded that Higgins had failed to demonstrate that KSR had acted with actual malice in merely repeating potentially false statements attributed to others. To prove a defamation claim that would overcome First Amendment protection, the plaintiff must show that the defendant acted with actual malice in knowingly making false statements or acted with reckless disregard for the truth.

The appellate court affirmed the lower court's decision that the defendants enjoyed First Amendment protection for their speech. However, the Court of Appeals also joined the District Court in expressing extralegal disapproval of the defendants' behavior in this case, observing that a "few words about common decency are in order." It commented that KSR knew, or should have known, about the volatility of the situation. A media outlet can report on a gasoline spill without adding needless sparks. Even though it had a platform to make a difference, the court observed that KSR did more to fan the flames of discontent than to extinguish them. "The Constitution protects that choice. A conscience must do the rest."

The decision is known as *Higgins, et al. v. Kentucky Sports Radio, LLC, et al.*, 2020 U.S. App. LEXIS 5987.

The Pillsbury Law ANTENNA™ is an information service about current events in communications law published by Atlantic Star Media, Inc. This publication is produced only to report on current events and factual matters in the field of communications law. Publication and dissemination of this material is not intended to constitute the practice of law or the rendering of legal advice. No attorney-client relationship shall be deemed to exist between the provider and the reader or between the publisher and the reader as a result of the publication, dissemination, distribution or other use of this material. The publisher makes its best effort to ensure that the information reported is accurate, but no warranty, express or implied, is given as to the accuracy or completeness of any information or statement published herein. Copyright 2020 by Atlantic Star Media, Inc. All rights reserved.