



November 2008

Updates on the News

And the last shall be first – We all know that Hawai'i was the last state to join the Union (it's Number 50 – hence "Hawaii 5-0"). But with the FCC's blessing, it will be the first state to make the state-wide DTV transition, starting on January 15, 2009. Why jump the February 17 gun? It turns out that a number of TV stations on Maui have their analog facilities (and, we suspect their digitals as well) located in an area frequented by the Hawaiian petrel (for the ornithologically-challenged, that's a bird) for breeding purposes. And the Hawaiian petrel's breeding season happens to be in February. Who knew? Obviously, it would not be ecologically responsible to send truckloads of tower crews tromping around the landscape while the petrels are trying to do their thing. So the U.S. Fish and Wildlife Service, the Hawai'i Association of Broadcasters, a number of elected officials and, ultimately, the FCC all agreed that it would be a good idea to move the transition up a month in the Islands. That way, by the time February rolls around, everything in the area of the petrels' honeymoon suites will be peaceful and quiet and conducive to whatever activities the petrels may choose to engage in. The FCC is gung-ho about this – it has even set up a website (www.dtv.gov/Hawaii) dedicated to Hawai'i's early transition.

AM on FM translators – Still no word on the whereabouts of the decision which would change the rules to permit AM licensees to retransmit on FM translators. That decision was drafted, but abruptly pulled from the Commission's agenda. While the proposed rule change may be in limbo, we understand from the FCC's staff that the staff *is still authorizing* such operations on a case-by-case basis pursuant to STAs.

Where never is heard an indecent word – On November 4 (yes, Election Day), the Supreme Court heard oral arguments in *FCC v. Fox*, the indecency case out of the Second Circuit that involves "fleeting expletives" uttered by Cher and Nicole Richie. As you may recall, in the wake of the Janet Jackson Super Bowl affair in 2004, the Commission abandoned its longstanding policy of restraint and, instead, announced that it would penalize the "fleeting" broadcast of indecent words. Fox, which was on the wrong end of that particular decision, appealed to the U.S. Court of Appeals for the Second Circuit, which held in Fox's favor in 2007. The Second Circuit held that the FCC hadn't provided an adequate explanation of its change in policy. The Second Circuit also threw in some "dicta" (*i.e.*, discussion that doesn't constitute a component of the court's technical justification for or explanation of its ruling) indicating that the FCC's policy

might be unconstitutional in any event. The Supremes agreed to review the Second Circuit's decision and, after receiving extensive briefing in the case, heard the oral argument earlier this month. Three FHH attorneys attended the argument – their reportage can be found on our blog, www.commlawblog.com (get to the blog page and enter “supreme court indecency” in the Search box).

Our vote for the most noteworthy aspect of the argument (besides Scalia's passing observation that folks don't “use ‘gollywoggles’ instead of the F-word”)? For 60 minutes 11 very bright people – the nine members of the Court and two accomplished attorneys – discussed whether the FCC could properly penalize the broadcast of two particular words, and yet *neither* of those words was articulated in the courtroom. The same thing happened in the 1978 *Pacifica* case (which involved George Carlin's monologue about seven dirty words).

It's possible that the Supremes will have yet another chance to weigh in on indecency this term—the FCC has decided to ask the Court to review the Third Circuit's decision in the Janet Jackson case. Don't look for a decision as to whether the Court will agree to hear that appeal for several months. Though it's a bit late in the term, it's at least possible to get briefing, argument and decision in by the end of June. We shall see.

Fairness Doctrine on the come-back trail? – While there has been a certain amount of noise about possible resurgence of the Fairness Doctrine, we have seen no solid evidence that such a resurgence is likely. However, we note with interest that Senator Charles Schumer (D-NY), who is viewed by many as a Democratic leader in the Senate, recently likened the need for the Fairness Doctrine to the need to regulate broadcast “pornography”. Schumer was quoted as saying that “the very same people who don't want the Fairness Doctrine want the FCC to limit pornography on the air. I am for that. But you can't say government hands off in the one area to a commercial enterprise but you are allowed to intervene in another. That's not consistent.” We're not really sure what he was trying to say there, but it could be interpreted as an indication that he wouldn't have any problem with a re-vivified Fairness Doctrine. While that's a far cry from actually drafting or sponsoring legislation to that effect, it's nevertheless troublesome when political leaders hint that they might support such legislation. Of course, we might be reading Schumer's statement incorrectly. Keep your fingers crossed and stay tuned as the new Administration (and new Congress) crank up their engines and start to get traction early next year.

FCC Quote of the Month — “We conclude that the typographical errors in the staff orders do not constitute reversible error.” (FCC 08-222—you can look it up.)