



July 2008

Updates on the News

The appeal of indecency – FCC now 0-2 – In a long-awaited decision, the U.S. Court of Appeals for the Third Circuit reversed the FCC's order holding that CBS and its affiliates had broadcast indecency in the notorious 2004 Super Bowl half-time show featuring Janet Jackson and Justin Timberlake. The Court found that the FCC had had a longstanding policy *not* to penalize the occasional fleeting instance of possible indecency and that the Commission had not adequately explained why it chose to depart from that policy when it whacked the CBS folks for the half-second exposure of La Jackson's right breast. The Court's decision was consistent with the Second Circuit's decision in the Fox case, although unlike the Second Circuit, the Third Circuit did not suggest that the Commission's indecency policy is unconstitutional.

It's not clear where this case will go from here. The Court remanded the matter back to the FCC for further consideration – so if the FCC wants to try to take another crack at explaining its abandonment of the fleeting expletive policy, it could conceivably do so. But that policy is already before the U.S. Supreme Court in the Fox case, so it's unlikely that the Commission will bother to try to tweak its policy before Chief Justice Roberts and his pals get their crack at it. It would seem more likely that the Commission might try to bring the CBS case up to the Supremes, to be heard at the same time as the Second Circuit/Fox case which is already there. There is, of course, no guarantee that the Supremes would take the CBS case, but the FCC might think that the image of Ms. Jackson's anatomy broadcast out to gazillions of football fans presents a stronger case for heavy-handed enforcement than does the situation in Fox (which, you will recall, involves ad lib remarks by Cher and Nicole Richie). Another theory is that the FCC will just sit tight and do nothing with the CBS/Jackson case until the Supremes have issued their decision in Fox, which will probably occur sometime in the first half of 2009.

Whatever happens, the Third Circuit's decision provides further confirmation that the Commission's indecency policy in the wake of the 2004 Super Bowl has been a dramatic, and unjustified, over-reaction.

Stayin' Alive I – Channel 5/6 FM proposal? – You may recall that, late last year, consulting engineer Jack Mullaney proposed (in the context of the FCC's DTV allotment process) that the Commission reallocate TV channels 5 and 6 for use by FM radio broadcasters (including commercial operators, NCE folks, LPFM, etc., etc.). You may

also recall (as recounted in the March, 2008 *Memo to Clients*) that Jack's proposal seemed to get some traction when it was addressed in the Commission's "diversity" proceeding, but then got flat-out trashed by the Commission the very next day in the DTV proceeding. While the outlook is decidedly not brilliant for the proposal following that trashing, hope springs eternal. In the "diversity" proceeding the Commission did ask for comments on the matter (even if that request was then effectively undermined in the DTV proceeding) and, in response to that request, the "Broadcast Maximization Committee" (BMC) filed an extensive showing in support of Jack's concept. Jack has asked us to alert anybody interested in this that comments in response to and/or in support of the BMC comments may be filed with the Commission by August 29, 2008.

Stayin' Alive II – White Space proposal? – Meanwhile, the long-running white space proceeding is still, well, running. You may recall that this involves a quasi-futuristic proposal for allowing unlicensed, wi-fi-like communications in the TV band. While that might seem to be a recipe for disaster, the proponents of the technology believe they can jigger their hardware to (a) automatically recognize the presence of TV stations operating in the vicinity and (b) turn itself off so as to prevent any interference. The problem has been that, at least according to some press reports (the FCC has been tight-lipped about what's been going on), the test units which have been provided to the FCC for evaluation have apparently not worked all that well. Displaying an admirable never-say-die attitude, though, the proponents are back at the Commission with more gear, and the FCC is taking to the streets to test the equipment in the real world. Don't look for any knock-out punches here – rather, we can probably expect to hear about inconclusive results that will lead to more testing, which will lead to more inconclusive results, and so on, and so on.

Even Stevens? – U.S. Senator Ted Stevens, a fixture in the Upper House for decades and a guy who has been particularly influential in FCC policy matters, has been indicted by federal prosecutors in Washington on a variety of corruption charges. While Stevens enjoys (as we all do) a presumption of innocence, Senate rules are less forgiving: because of his indictment, he has had to step down from his committee positions, which included serving as the ranking Republican on the Commerce, Science and Transportation Committee which, coincidentally, has first crack at communications-related legislation. (Stevens' position on that Committee had historically enabled him to include a number of Alaska-friendly provisions in the Communications Act and elsewhere.) In his absence – which may or may not be temporary – Texas Senator Kay Bailey Hutchison has stepped in. Bear this in mind if you're scheduling a lobbying trip to DC in the near future.