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## Communications Advisory

### FCC Denies CBS Petition for Reconsideration of Forfeiture Order

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**Recently, the FCC reaffirmed its decision to fine CBS \$550,000 for indecency violations stemming from the now-infamous Janet Jackson “wardrobe malfunction” incident aired during Super Bowl XXXVII. CBS filed a Petition for Reconsideration of the Forfeiture Order in April 2006 which the Commission quickly denied.**

The FCC noted that many of the arguments raised by CBS in its Petition repeated those set forth in its November 2004 Opposition to the *Notice of Apparent Liability*. In one new argument, however, CBS claimed that the FCC’s conclusion that the image of Justin Timberlake exposing Janet Jackson’s breast was “graphic and explicit” contradicted the Commission’s decisions reached in the *Omnibus Order*. The *Omnibus Order* was a separate indecency decision released in March 2006, which resolved numerous indecency cases from the past few years. CBS attempted to compare the exposure of Janet Jackson’s breast with images of a man’s penis and the words “Fuck Cops” shown briefly on *The Today Show* and *The Amazing Race 6* respectively, which were discussed in the *Omnibus Order* and found not to be indecent. The Commission concluded that the two incidents cited by CBS were not graphic or explicit because the scenes including the nudity and profanity were not the central focus of the shot and “would not likely have been noticed by the average viewer.” In contrast, the exposure of Janet Jackson’s breast during the Super Bowl halftime show was the central focus of the scene. The Commission noted that Ms. Jackson’s breast was “readily discernable” and the natural focus of viewer attention.

In a second new argument, CBS claimed that the Commission’s analysis of the material was flawed because it failed to take into account the fact that CBS did not *intend* to air footage that pandered, titillated or shocked the audience. CBS did not dispute the Commission’s finding that the material was presented in a pandering, titillating and shocking manner. Instead, CBS claimed that the Commission “should have examined whether CBS *intended* to pander, titillate, or shock the audience.” The Commission dismissed that argument, stating that in its evaluation of whether material is indecent, the material itself and the manner in which it is presented are to be examined, not the “subjective state of mind of the broadcaster.”

CBS also attempted to argue that imposing a fine in this instance was “contrary to contemporary community standards for the broadcast medium because available information shows that the community at large was not upset about the Super Bowl broadcast.” The Commission dismissed that argument as well, claiming that “in light of the public uproar following the Super Bowl halftime show, it is CBS and not the Commission that is out of touch with the standards of the American people.”

CBS also challenged the Commission’s finding that the Super Bowl halftime show indecency violation was “willful.” The Commission reaffirmed its decision, finding that CBS acted willfully because it consciously and deliberately aired the halftime show and consciously and deliberately failed to take the necessary precautions to ensure that no indecent material was broadcast. The Commission noted that CBS was aware of the risk of unscripted indecent material being aired during the halftime show and failed to adequately protect against that risk. It chastised CBS for failing to explain why it did not require that the agreements with the performers obligate them to conform to the script and to CBS’s broadcast standards and practices.

Lastly, CBS contested the amount of the forfeiture assessed by the Commission. The network requested that only stations subject to complaints by the public be fined and that the forfeiture amount be proportionately reduced. CBS also attacked the Commission’s decision not to fine network-affiliated stations. Finally, CBS argued that the forfeiture amount should be reduced because of the network’s long history of compliance with FCC rules and because it did not intentionally flout those rules. The FCC was unmoved by these arguments and reaffirmed its decision to fine CBS \$550,000 for the violations.

### **Congress Passes Indecency Bill**

On June 7, 2006, the House passed an indecency bill to increase the maximum fine for airing indecent content. The bill, passed by the Senate in late May, increases the maximum fine that the FCC can impose to \$325,000. The President is expected to sign the measure. House Telecom Subcommittee Chairman Upton (R-Michigan) said that the bill will give the FCC “teeth to police the public airwaves.”

The bill passed on June 7 contains none of the language of an earlier House bill, sponsored by Upton, which would have increased the maximum fine to \$500,000, required the FCC to designate a station's license for revocation after three indecency violations; instituted a "shot clock" for acting on indecency complaints; required the FCC to issue annual reports to Congress regarding indecency; and would have made it possible for performers to be fined personally. The Upton bill also would have made the FCC consider a station's ability to pay, market size, and whether the station had knowledge or control over the indecent programming in determining the amount of a fine. All of these provisions are absent from the current version, which will be heading to the White House for presidential signature.

### **FCC Fines New Jersey AM Station \$4000 for Operating Above Power Limits**

The FCC fined the owner of a New Jersey AM station \$4,000 for willful and repeated violations of Section 73.1745(a) of the Commission’s Rules. The station failed to reduce nighttime power to 500 watts as specified by the station’s license.

The station is authorized at 5000 watts of daytime power and must reduce its power to 500 watts at local sunset time, either 7:30pm or 8:30 pm, depending upon the time of year. An agent in the FCC’s Philadelphia office monitored the station’s output in July 2004. The agent determined that the station failed to reduce power at the specified time on two separate occasions and maintained its daytime power for more than an

hour past sunset on those occasions. In April 2005, the FCC issued a Notice of Apparent Liability in the amount of \$4,000 for the violations. The licensee responded to the Notice in May 2005 and claimed that a cancellation or reduction in the fine was warranted because the gravity and extent of the instant violation was much less than in other cases where a similar fine was assessed. The licensee further claimed that the remedial efforts it had since undertaken mitigated the seriousness of the violations.

The Commission was unmoved by the licensee's arguments, stating that it always considers unauthorized post-sunset operation a serious matter because of the potential interference issues to other broadcasters. The Commission also declined to reduce the fine based on the licensee's remedial efforts, citing the fact that "corrective action necessary to come into compliance with the Rules is expected and does not nullify any prior violations." The forfeiture amount of \$4,000 was reaffirmed.

### FCC Fines Puerto Rico AM Station \$11,000 for Violations

The FCC fined the owner of a Puerto Rico AM station \$11,000 for violating Sections 73.3526 and 73.1350(a) of the Commission's Rules. The station failed to maintain a complete public inspection file and failed to operate according to the technical parameters set forth in its license.

In February 2006, agents from the FCC's San Juan field office conducted an inspection of the station and discovered that the station's issues/programs lists were missing from the public inspection file. The agents also discovered that the station was operating in an omni-directional mode as opposed to using the two-tower directional array authorized in the license. A station engineer confirmed that the station had been operating in omni-directional mode for more than a year. The agents found no evidence that the station had any kind of authority to operate at variance from its authorized parameters.

The base forfeiture amount for failure to maintain a complete public inspection file is \$10,000. Because the station's public inspection file contained a portion of the required items, the Commission decreased the forfeiture amount for this violation to \$4,000. The base forfeiture amount for failure to maintain a directional pattern specified in the station license is \$7,000. The Commission refused to reduce this fine and assessed the entire amount against the station, leading to a total fine of \$11,000.

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