**Federal Communications Commission**
**Office of General Counsel**
**Washington, DC 20554**

February 9, 2010

Ms. Marcia Waldron, Clerk
United States Court of Appeals
for the Third Circuit
21400 U.S. Courthouse
Philadelphia, PA 19106

Re: *CBS Corp. v. FCC*, No. 06-3575 (to be argued Feb. 23, 2010)

Dear Ms. Waldron:

On January 6, 2010, this Court directed petitioners CBS Corp., *et al*. (CBS) to submit a letter brief "addressing Respondents' argument that the Supreme Court's account of the history of the FCC's indecency policy in *FCC v. Fox Television Stations, Inc*, 129 S. Ct. 1800 (2009), undermines this Court's earlier conclusion that the pre-*Golden Globes* safe harbor for fleeting material was not limited to nonliteral expletives."

On January 29, 2010, CBS filed a 19-page letter brief in response to the Court's order. CBS's letter brief raises numerous arguments that have little to do with the Supreme Court's decision in *Fox*. As we have previously shown (Supp. Br. for FCC & US at 27-29), the *Fox* Court understood Commission policy (until the *Golden Globes* order) to exempt from indecency enforcement only isolated uses of "nonliteral (or 'expletive') uses of evocative language," *Fox*, 129 S. Ct. at 1807, and not, as this Court

previously held, all "fleeting material," including images, *see CBS Corp. v. FCC*, 535 F.3d 167, 188 (3d Cir. 2008). That showing remains unrebutted.

## DISCUSSION

The Supreme Court correctly understood in *Fox* that the Commission's former exemption for fleeting material was limited to a narrow class of words – nonliteral expletives – and had no application to words that are used to describe or depict sexual or excretory organs or activities. The Supreme Court's understanding of Commission policy was based firmly on language in a prior Commission order addressing this precise issue. Because, as *Fox* reflects, the Commission's exemption for fleeting material did not apply to words that depict sexual or excretory material, the exemption logically could not have applied to images of such material, because images are by their nature "depictions."

### I. As The *Fox* Decision Confirms, There Has Never Been An Indecency Exemption For Fleeting Images.

The Supreme Court made clear in *Fox* its understanding of the Commission's prior enforcement policy with regard to fleeting indecent material. As the Court explained, "[a]lthough the Commission had [in 1987] expanded its enforcement beyond 'the repetitive use of specific words or phrases,'" the agency nonetheless "preserved a distinction between literal and nonliteral (or 'expletive') uses of evocative language." *Fox*, 129 S. Ct.

at 1807 (citing *In re Pacifica Found., Inc.*, 2 FCC Rcd at 2699 ¶ 13). This meant that "'deliberate and repetitive use'" was "'a requisite to a finding of indecency' when a complaint focuses solely on the use of nonliteral expletives," but a "literal 'description or depiction of sexual or excretory functions'" had to "'be examined in context to determine whether it is patently offensive.'" 129 S. Ct. at 1807 (citing *Pacifica*, 2 FCC Rcd at 2699 ¶ 13).

The Commission's order in *Pacifica* directly supports the Supreme Court's understanding of then-governing Commission broadcast indecency policy. In that order, the Commission stated that "[i]f a complaint focuses solely on the use of expletives, we believe that . . . deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency." 2 FCC Rcd at 2699 ¶ 13. "When a complaint goes beyond the use of expletives, however, repetition of specific words or phrases is not necessarily an element critical to a determination of indecency." *Id.* "Rather, speech involving the description or depiction of sexual or excretory functions must be examined in context to determine whether it is patently offensive under contemporary community standards applicable to the broadcast medium." *Id.*

As we explained our supplemental brief (Supp. Br. for FCC & US 27-29), the *Fox* decision directly undermines this Court's prior ruling that the Commission exemption covered fleeting images as well as fleeting words. For if (as the *Fox* Court found), the Commission's exemption did not cover all sexual or excretory words, but just those that did not describe or depict sexual or excretory activities, then the exemption did not cover images of sexual or excretory activities or organs, because images by their very nature "depict" such matter. This is exactly what the Commission said in *Pacifica*: All "speech involving the description or depiction of sexual or excretory functions must be examined in context." 2 FCC Rcd at 2699 ¶ 13.

## II. CBS's Arguments Are Untenable.

CBS continues to insist that the Supreme Court's discussion of FCC indecency policy in *Fox* "is utterly irrelevant to the FCC's treatment of visual material." CBS Letter Br. 2.

CBS first attempts to find significance in the fact that the Supreme Court's discussion of Commission policy appears in the "Statutory and Regulatory Background" section of the *Fox* opinion. *See id.*; 129 S. Ct. at 1806. But the Supreme Court's discussion was no mere aside; it formed the basis of the Court's substantive holding under the Administrative Procedure

Act that the Commission's elimination of a safe harbor for fleeting expletives was "neither arbitrary nor capricious." *See* 129 S. Ct. at 1812.

The *Fox* Court affirmed as "certainly reasonable" the Commission's determination "that it made no sense to distinguish between literal and nonliteral uses of offensive words, requiring repetitive use to render only the latter indecent." *Id*. Likewise, the Court found "rational[]" the Commission's decision "that it needed to step away from its old regime where nonrepetitive use of an expletive was *per se* nonactionable because that was 'at odds with the Commission's overall enforcement policy.'" *Id*. at 1813. The Court's rulings make sense only on the understanding that the Commission actually had an "old regime" that distinguished between nonliteral expletives and literal descriptions and depictions.

Rather than coming to grips with *Fox*, CBS attempts to construct an alternative reading of the Commission's 1987 *Pacifica* order. CBS contends that *Pacifica* "did not alter the established policy toward isolated and unintended transmissions, whether in the form of expletives, descriptions, or depictions" (CBS Letter Br. 3), and "did <u>not</u> establish a dichotomy between 'nonliteral expletives' . . . versus 'descriptions or depictions,'" *id*. at 8. Instead, CBS contends, the Commission's *Pacifica* order "merely distinguished lengthy discussions of patently offensive sexual activity from

short, spontaneous outbursts, whether or not classified as 'descriptive.'" *Id*. *See also id*. at 5 ("the primary distinguishing characteristic of an 'expletive' in *Pacifica* and in the cases that followed it was not whether the material was descriptive or conveyed a 'literal' meaning, but whether it was 'live, spontaneous and unscripted.'")

CBS here ignores the actual language of *Pacifica*. Paragraph 13 of the order expressly contrasted "expletives," which the Commission required to be repeated in order to be actionable, from "description[s] or depiction[s] of sexual or excretory functions," which were actionable even if not repeated. *Pacifica*, 2 FCC Rcd at 2699 ¶ 13. Examining this very language, the Supreme Court in *Fox* found that the Commission's indecency policy distinguished between "literal and nonliteral (or 'expletive') uses of evocative language." 129 S. Ct. at 1807.

Even if CBS's argument were based on a plausible reading of the 1987 *Pacifica* order (which it is not), CBS's interpretation of the decision could not override the Commission's reasonable contrary view, particularly when the Supreme Court has endorsed the agency's view. *See Cassell v.*

*FCC*, 154 F.3d 478, 483 (D.C. Cir. 1998) ("[a]n agency's interpretation of its own precedent is entitled to deference").[1]

CBS contends that the Commission "cannot legitimately cite" its 1987 order in *Pacifica* as a statement of policy (CBS Letter Br. 10), because the Commission's reconsideration order stated that the *Pacifica* order and companion rulings "were confined to the specific factual settings of each case," *id*. (quoting *Infinity Broad. Corp. of Pa*., 3 FCC Rcd 930, 936 n.18 (1987)). In the same reconsideration order, however, the Commission noted that the rulings "announced" "revised enforcement standards" that "could have an impact on all licensees." 3 FCC Rcd at 936 n.18. On review of the orders, the D.C. Circuit confirmed that *Pacifica* and its companion orders established new Commission policy. The Commission, it explained, "employed the informal adjudication format to promulgate a rule of general applicability." *Action for Children's Television v. FCC*, 852 F.2d 1332, 1337 (D.C. Cir. 1988).

[1] CBS also contends that its reading of the *Pacifica* order is implicitly supported by the Commission's disposition of the two indecency complaints at issue in that case, one (*Jerker*) involving "the presentation of extensive sexually graphic dialog" and the other (*Shocktime U.S.A.*) that "included brief and spontaneous descriptive phrases." CBS Letter Br. 8. But the Commission's discussion of those two broadcasts was entirely separate from (and did not purport to modify) its discussion of the policy regarding repetition of expletives. *Compare* 2 FCC Rcd at 2700-2701 ¶ 17-26 (discussing broadcasts) with *id*. at 2699 ¶ 13 (discussing policy regarding expletives).

CBS points out that both the Supreme Court's decision in *Fox* and the Commission's 1987 order in *Pacifica* focused on "words uttered," rather than indecent images. CBS Letter Br. 6; *see also id*. at 7. True enough. Our point is that the logic of the *Pacifica* order (and of *Fox*) relates directly to the issue whether any former exemption for fleeting material applied to images. By demonstrating that words that are used in their literal sense to describe or depict sexual or excretory activities or organs did not have to be repeated in order to be actionable under past Commission policy, the Supreme Court (and the Commission) effectively foreclosed this Court's conclusion that the Commission's exemption for fleeting material covered fleeting images. If verbal depictions were not covered by the exemption for fleeting material – as the Supreme Court has now confirmed – it is entirely illogical to infer that visual depictions were covered by the exemption. Such a leap of illogic is not permissible where, as here, the relevant agency has expressed a reasonable contrary view. *See Cassell*, 154 F.3d at 483.[2]

[2] CBS goes so far as to contend that the Supreme Court in *Fox* "rejected" the argument that the Commission's exemption for fleeting expletives was "effected in the 1987 *Pacifica* order." CBS Letter Br. 6. CBS bases this contention on its belief that the Supreme Court found it "not . . . entirely unconvincing" that remarks by Nicole Richie describing excrement would have violated the Commission's earlier policy. *Id*. CBS here misreads the *Fox* opinion. The Court's quoted statement actually referred to the Commission's determination with regard an utterance by Cher, who had used the F-word in a less literal sense. *Fox*, 129 S. Ct. at 1812.

## III. The Commission Has Never Applied An Exemption for Fleeting Images.

The Commission has consistently acknowledged that its *general* framework for analyzing whether broadcast material is indecent applies to both words and images. *See, e.g.*, App. 10-13 (evaluating CBS's Super Bowl halftime broadcast under the framework set forth in the Commission's 2001 *Industry Guidance*). Under that framework, the "explicitness or graphic nature" of the material, and whether it "dwells on or repeats at length descriptions or sexual or excretory organs or activities," are highly relevant to "whether material is patently offensive and therefore indecent." *Industry Guidance*, 16 FCC Rcd at 8003 ¶ 10.

The Commission accordingly has held, on occasion, that broadcasts containing brief images of sexual or excretory activities or organs are not actionably indecent when considered as a whole. *See, e.g.*, *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 2664, 2716-2717 ¶¶ 213-18 (2006) (*Today Show* footage of partially naked man's rescue from floodwaters). Such decisions are applications of the Commission's general indecency framework; they are not examples of an unarticulated *per se* exemption for fleeting indecent images.

CBS invokes its prior submissions to this Court as supposedly proving that Commission staff actually employed a fleeting-images exception in cases of this nature. CBS Letter Br. 16-18. We have already explained (Supp. Br. for FCC & US at 34) that the summary denials on which CBS relied in its August 13, 2007 letter under Rule 28(j) nowhere set forth the staff's analysis and therefore cannot support CBS's contention that they constitute examples of the Commission's application of a fleeting image exception.

On January 26, 2010, as part of another Rule 28(j) letter to the Court, CBS submitted copies of an additional five staff denials. Those examples are equally unilluminating. Four of the letters simply state that the complained-of material "in context, is not sufficiently graphic and/or sustained to meet the Commission's standard for indecency." CBS Jan. 26, 2010 28(j) Letter, Attachments 3-6. *See* CBS Letter Br. 17 & n.22. The fifth, concerning an episode of the show *Survivor: The Amazon*, states that the complained-of material "may have been fleeting in nature," but the material broadcast was "not sufficiently graphic and/or sustained to meet the Commission's standard for indecency." CBS Jan. 26, 2010 28(j) Letter, Attachment 2. These staff actions are consistent with the Commission's general recognition that the fact that material "is fleeting in nature . . . has

tended to weigh against a finding of indecency." *Fox*, 129 S. Ct. at 1807 (quoting *Industry Guidance*, 16 FCC Rcd 7999, 8008 ¶ 17 (2001)). They do not establish the existence of a staff-level exemption for fleeting visual depictions. In any event, as we have noted (Supp. Br. for FCC & US at 34 n.5), unpublished staff decisions are not binding on the agency. *Comcast Corp. v. FCC*, 526 F.2d 763, 769 (D.C. Cir. 2008); 47 C.F.R. § 0.445(e).

Finally, CBS's argument is disproved by *Young Broadcasting of San Francisco, Inc.*, 19 FCC Rcd 1751 (2004), which the Commission released four days before the Super Bowl halftime broadcast at issue here. In *Young*, the full Commission issued a Notice of Apparent Liability (NAL) against a San Francisco television station for briefly airing images of a performer's penis during a morning show interview. The Commission acknowledged that the "actual exposure of the performer's penis was fleeting in that it occurred for less than a second." 19 FCC Rcd at 1755 ¶ 12. The agency nonetheless found that the "pandering, titillating, and shocking manner of presentation, coupled with the graphic and explicit nature of the adult male frontal nudity," rendered the broadcast indecent. *Id*. at 1757 ¶ 14.[3] Together

[3] Contrary to CBS's contention (CBS Letter Br. 16), the Commission has not disavowed *Young* or its analysis. *See In re Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue,"* 23 FCC Rcd 3147, 3153 n.48 (2008).

with the Supreme Court's decision in *Fox* and the Commission's 1987 order in *Pacifica*, the NAL in *Young* confirms that, at the time of the 2004 Super Bowl halftime show, CBS was (or should have been) on notice that even fleeting images could be actionably indecent.

## CONCLUSION

For the foregoing reasons, the order under review did not constitute an unexplained departure from prior Commission policy. As *Fox* confirms, the Commission had never established an exemption to broadcast indecency enforcement for fleeting images.

Respectfully submitted,

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/s/ Jacob M. Lewis
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## CERTIFICATE OF SERVICE

I, Jacob M. Lewis, hereby certify that on February 9, 2010, I electronically filed the foregoing Letter Brief for the FCC and the United States with the United States Court of Appeals for the Third Circuit by using the CM/ECF system, which will serve the participants in the case, who are registered CM/ECF users.

/s/ Jacob M. Lewis
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