UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

06-3575

CBS CORPORATION, CBS BROADCASTING, INC., CBS TELEVISION STATIONS INC., CBS STATIONS GROUP OF TEXAS L.P., AND KUTV HOLDINGS, INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

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SECOND SUPPLEMENTAL BRIEF FOR THE FCC AND THE UNITED STATES

STATEMENT OF THE ISSUES

The underlying issue in this case is whether the Commission lawfully imposed a forfeiture on CBS for willfully violating federal statutory and regulatory prohibitions against broadcast indecency by airing images of Janet Jackson's exposed breast during the 2004 Super Bowl halftime show.

This Court's post-argument order of April 15, 2010, directed the parties to file briefs addressing the following questions:

1. The FCC's orders purport to hold CBS liable on the ground that CBS "consciously and deliberately broadcast the halftime show and consciously and deliberately failed to take reasonable precautions to ensure that no actionably indecent material was broadcast," despite CBS's "acute[] aware[ness] of the risk of unscripted indecent material in this production." *Order on Reconsideration*, 21 F.C.C.R. 6653, 6660 ¶ 17 (2006). Taken on its own terms (that is, without regard to any possible statutory or constitutional requirements), what level of *mens rea* does this standard require with respect to a licensee's broadcast of indecent material?

   a. Is it a level of *mens rea* equal to, less than, or greater than recklessness?

   b. Did the FCC apply the same standard of liability in *Young Broadcasting*?

2. Under 47 U.S.C. § 503(b)(1)(B), the FCC may impose a forfeiture penalty against "[a]ny person who is determined by the Commission" to have "willfully . . . failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter." How should § 503(b)(1)(B)'s willfulness standard be construed?

   a. What is the *mens rea* required to violate § 503(b)(1)(B)? Can CBS be held liable under § 503(b)(1)(B) if it did not intend to broadcast the specific material found indecent?

b. Does § 503(b)(1)(D) require the same *mens rea* as § 503(b)(1)(B)? Why or why not?

c. Is the FCC's interpretation of § 503(b)(1)(B) and (D) entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)?

3. Did the FCC's forfeiture orders rely on any statutory authority other than § 503(b)(1)(B)? If not, is the FCC now foreclosed from justifying a forfeiture penalty under the alternative authority of § 503(b)(1)(D)? If so, and if CBS cannot be held liable under § 503(b)(1)(B)'s willfulness standard unless it intended to broadcast the specific material found indecent, is the FCC's *Forfeiture Order* invalid, such that the appropriate remedy is to grant the petition for review without remand?

BACKGROUND

1. Federal law prohibits the broadcast of "indecent . . . language by means of radio communication." 18 U.S.C. § 1464. *See generally FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (upholding constitutionality of statute). Pursuant to Section 16(a) of the Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949 (1992), and *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1043 (1996), FCC regulations

prohibit television and radio licensees from broadcasting "any material that is indecent" between the hours of 6 a.m. and 10 p.m. 47 C.F.R. § 73.3999(b).

Under the Communications Act, the FCC is empowered to impose a monetary "forfeiture penalty" on any person who has "willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter . . . ," 47 U.S.C. § 503(b)(1)(B), or who has "violated any provision of section 1304, 1343, 1464, or 2252 of Title 18," *id*. § 503(b)(1)(D). The Act defines "the term 'willful,' when used with reference to the commission or omission of any act," to "mean[] the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this chapter, or any rule or regulation of the Commission authorized by this chapter." 47 U.S.C. § 312(f).

2. On February 1, 2004, CBS broadcast the Super Bowl XXXVIII halftime show, which culminated with Justin Timberlake ripping off part of Janet Jackson's bustier and exposing her breast to a nationwide television audience. After receiving an unprecedented number of complaints, the Commission ruled that the broadcast was indecent and that CBS should be held liable for a monetary forfeiture in the amount of $550,000. *See Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, 21 FCC Rcd 2760 (2006) ("*Forfeiture Order*") (J.A. 6), *on recon.*,

21 FCC Rcd 6653 (2006) ("*Reconsideration Order*") (J.A. 40). The Commission found that "CBS acted willfully because it consciously and deliberately broadcast the halftime show, whether or not it intended to broadcast nudity, and because it consciously and deliberately failed to take reasonable precautions to ensure that no actionably indecent material was broadcast." *Forfeiture Order*, 21 FCC Rcd at 2768 ¶ 15 (J.A. 14). As the Commission explained, "the record reveals that CBS was acutely aware of the risk of unscripted indecent material in this production, but failed to take adequate precautions that were available to it to prevent that risk from materializing." *Id*. at 2768 ¶ 17 (J.A. 14). *Accord Reconsideration Order*, 21 FCC Rcd at 6660 ¶ 17 (J.A. 47).

3. On initial review, this Court reversed the Commission's indecency determination because the Court considered it to be an arbitrary departure from the Commission's policy of exempting fleeting material from broadcast indecency enforcement. *CBS Corp. v. FCC*, 535 F.3d 167, 174-189 (3d Cir. 2008). The Court also concluded that the case should be remanded for further explanation of the basis for the Commission's willfulness determination. *Id.* at 189-209.

The Court recognized that "the Commission's interpretation of the Communications Act, including the relevant forfeiture provisions of 47 U.S.C. § 503(b)(1), would be entitled to considerable deference." *Id.* at 204. It nevertheless concluded that "further clarification from the FCC is necessary before

it may be determined whether the agency correctly concluded that CBS's actions constituted a 'willful' violation of the indecency provisions," *id.* at 205.

Ruling that "scienter is the constitutional minimum showing" for an indecency forfeiture, 535 F.3d at 205, the Court found that "[r]ecklessness would appear to suffice as the appropriate scienter threshold for the broadcast indecency regime," *id.* at 206. In this regard, the Court stated that a "broadcaster's failure to use available preventative technology, such as a delay mechanism, when airing live programming may, depending on the circumstances, constitute recklessness." *Id.* at 207. The Court found, however, that it was unclear from the record whether CBS "acted recklessly and not merely negligently when it failed to implement a video delay mechanism for the Halftime Show broadcast." *Id.* at 208. "[C]entral" to this inquiry was whether "video delay technology" was available to the network at the time of the Super Bowl broadcast. *Id.* at 208 n.36. The Court remanded for further explanation because it was "unable to decide whether the Commission's determination that CBS acted 'willfully' was proper in light of the scienter requirement." *Id.* at 206. Judge Rendell dissented on the ground that the Court's analysis of scienter was unnecessary in light of its determination that the Commission had arbitrarily departed in this case from what the Court understood to be a policy of permitting the broadcast of fleeting images. 535 F.3d at 209-10 (Rendell, J., dissenting).

4. After the government petitioned for a writ of certiorari, the Supreme Court (in *FCC v. CBS Corp.*, 129 S. Ct. 2176 (2009)) vacated this Court's decision and remanded the case for further proceedings in light of *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009), which had described the exception to the Commission's broadcast indecency policies as limited to "nonliteral expletives." *Id*. at 1807. This Court held argument in the remand proceeding on February 23, 2010.

SUMMARY OF ARGUMENT

The Commission held that CBS willfully violated 18 U.S.C. § 1464 and the Commission's rules against the broadcast of indecency because the network failed, in the face of risks known to it, to take adequate precautions that would have prevented its broadcast of indecent images. In reaching this conclusion, the Commission identified facts that demonstrate that CBS engaged in reckless behavior which led to the broadcast of indecent material. *See Young Broadcasting of San Francisco, Inc.*, 19 FCC Rcd 1751 (2004) (finding broadcaster apparently liable where it "failed to take adequate precautions" in the face of a known risk of an indecent broadcast).

As this Court has recognized, a "[r]ecklessness" standard "would appear to suffice as the appropriate scienter threshold for the broadcast indecency regime," 535 F.3d at 206, and "a broadcaster might act recklessly if it fails to exercise

proper control over the unscripted content of its programming," *id*. at 207. Here, the Commission found that CBS was "[a]ware of the risk of visual and spoken deviations from the script and staging," but made a "calculated decision . . . to rely on a five-second audio delay that would enable it to bleep offensive language but would not enable it to block unscripted visual moments." *Forfeiture Order*, 21 FCC Rcd at 2770 ¶ 20 (J.A. 16). Under the circumstances, the Commission held that CBS's failure to take adequate precautions to prevent the broadcast indecency was a "conscious and deliberate . . . omission" and therefore "willful" within the meaning of the Communications Act's provisions authorizing the imposition of forfeitures for violations of the Communications Act and the Commission's rules and regulations. *Id.* at 2767 ¶ 15 (J.A. 13); *see also* 47 U.S.C. § 503(b)(1)(B). Implicitly concluding that CBS's willful behavior was sufficient for liability under 47 U.S.C. § 503(b)(1)(D), the Commission had no need to address whether CBS could have been held responsible for a violation of 18 U.S.C. § 1464 under a different *mens rea* standard.

The *Forfeiture Order* does not specifically address the relationship between the two possible sources of the Commission's forfeiture authority – 47 U.S.C. § 503(b)(1)(B) and 47 U.S.C. § 503(b)(1)(D). Nor does the order fully explore the availability of video delay technology at the time CBS broadcast the Super Bowl

halftime show. For these reasons, we have suggested that a remand to the Commission for further explanation would be appropriate. FCC Supp. Br. 37, 40.

The *Forfeiture Order* does make clear, however, the Commission's view that CBS cannot escape liability simply because it may not have had any intent to broadcast the specific material found indecent. The Commission assumed that CBS "had no advance knowledge that Timberlake planned to tear off part of Jackson's clothing to reveal her breast." *Forfeiture Order*, 21 FCC Rcd at 2768 ¶ 17 (J.A. 14). But that fact alone cannot relieve the network from responsibility, where it can be shown that it consciously and deliberately failed "to take adequate precautions that were available to it to prevent that risk from materializing." *Id*. Any other result would, as the Commission observed, "permit a broadcast licensee [to] knowingly tak[e] the risk that performers will engage in offensive unscripted acts or use offensive unscripted language, and then disavow responsibility – leaving no one legally responsible for the result." *Forfeiture Order*, 21 FCC Rcd at 2771 ¶ 22 (J.A. 17). Thus, this Court has correctly recognized that "an actual knowledge or intent standard" could "creat[e] an end-around indecency restrictions." 535 F.3d at 206.

Our responses to the Court's specific questions are offered below.

ARGUMENT

I. THE COMMISSION APPLIED A RECKLESSNESS STANDARD IN THIS CASE AND IN *YOUNG BROADCASTING*

Question 1: The FCC's orders purport to hold CBS liable on the ground that CBS "consciously and deliberately broadcast the halftime show and consciously and deliberately failed to take reasonable precautions to ensure that no actionably indecent material was broadcast," despite CBS's "acute[] aware[ness] of the risk of unscripted indecent material in this production." Order on Reconsideration, 21 F.C.C.R. 6653, 6660 ¶ 17 (2006). Taken on its own terms (that is, without regard to any possible statutory or constitutional requirements), what level of mens rea does this standard require with respect to a licensee's broadcast of indecent material?

a. Is it a level of mens rea equal to, less than, or greater than recklessness?

The Commission found in this case that CBS was "acutely aware of the risk of unscripted indecent material" in the Super Bowl halftime show, but nonetheless "failed to take adequate precautions that were available to it to prevent that risk from materializing." *Forfeiture Order*, 21 FCC Rcd at 2768 ¶ 17 (J.A. 14). The Commission's finding that CBS failed to take reasonable precautions in the face of the network's awareness of the risk of unscripted indecent material is in substance a finding that CBS was reckless in broadcasting the 2004 Super Bowl halftime show.

As the Court recognized in its prior opinion, "recklessness would appear to suffice as the appropriate scienter threshold for the broadcast indecency regime." 535 F.3d at 206. Not only is a recklessness standard likely to " 'separate wrongful conduct from otherwise innocent conduct' of broadcasters," *id*. (quoting *Carter v.*

United States, 530 U.S. 255, 269 (2000)), but it avoids "creating an end-around indecency restrictions that might be encouraged by an actual knowledge or intent standard," *id*. Thus, as the Commission explained, refusing to hold CBS liable under the circumstances of this case "would permit a broadcast licensee to stage a show that 'pushes the envelope,' send that show out over the air waves, knowingly taking the risk that performers will engage in offensive unscripted acts or use offensive unscripted language, and then disavow responsibility – leaving no one legally responsible for the result." *Forfeiture Order*, 21 FCC Rcd at 2771 ¶ 22 (J.A. 17).

As this Court has recognized, recklessness is "an action entailing 'an unjustifiably high risk of harm that is either known or so obvious that it should be known.' " 535 F.3d at 206 (quoting *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 68 (2007)). "In the broadcast indecency context, a broadcaster might act recklessly if it fails to exercise proper control over the unscripted content of its programming." *Id*. In addition, "[a] broadcaster's failure to use available preventative technology, such as a delay mechanism, when airing live programming may, depending on the circumstances, constitute recklessness." *Id*.

Here, the Commission explained that "CBS knew that MTV, the corporate affiliate that was producing the show, was seeking to push the envelope by, among other things, including sexually provocative performers and material." *Id*. at 2769

¶ 18 (J.A. 15). Indeed, the NFL "raised concerns about Timberlake's scripted line 'gonna have you naked by the end of this song' that anticipated the stunt resulting in the broadcast nudity." *Id.* at 2769 ¶ 19 (J.A. 15). Perhaps most striking, Jackson's choreographer promised – in a story posted on the MTV website three days before the broadcast – that Jackson's performance would include "some shocking moments," and added that "I don't think the Super Bowl has ever seen a performance like this." *Forfeiture Order*, 21 FCC Rcd at 2769 ¶ 19 (J.A. 15); J.A. 507.

As the Commission emphasized, CBS "failed to investigate Jackson's choreographer's 'shocking moments' prediction." *Forfeiture Order*, 21 FCC Rcd at 2771 ¶ 21 (J.A. 17). Instead, in the face of that warning sign and others, the network made a "calculated decision . . . . to rely on a five-second audio delay that would enable it to bleep offensive language but would not enable it to block unscripted visual moments." *Id.* at 2770 ¶ 20 (J.A. 16). In doing so, the Commission found, CBS "failed to take adequate precautions to prevent the airing of unscripted indecent material," *id*. – a failure that was "conscious and deliberate," *id*. at 2771 ¶ 22 n.73 (J.A. 17). The Commission therefore concluded that the case presented "fully appropriate circumstances for application of the 'conscious and deliberate . . . omission' basis for finding 'willfulness'

incorporated by Congress into Section 503(b) of the Act." *Id*. at 2771 ¶ 22. (J.A. 17).

The facts that support the Commission's willfulness finding – involving CBS's knowledge of a substantial risk and its failure to respond to the risk – also show that CBS was reckless – *i.e.*, it failed to respond to an unjustifiably high risk of harm that is either known or so obvious that it should be known.' " 535 F.3d at 206 (quoting *Safeco*, 127 S. Ct. at 2215). Thus, the Commission's finding that CBS chose to broadcast the 2004 Super Bowl halftime show without adequate precautions in the face of its awareness of the elevated risk of unscripted indecent material was, in substance, a finding that CBS was reckless.[1]

In its prior opinion, the Court was unable to decide whether CBS acted recklessly "when it failed to implement a video delay mechanism for the Halftime Show broadcast" because the record was "scant on evidence regarding the availability, history and other details of video delay technology." 535 F.3d at 208. There is no dispute that CBS used a video delay system for its broadcast of the Grammy Awards the week after the Super Bowl. J.A. 72. But this Court was not

[1] To the extent the Court disagrees, and finds that the Commission applied a lesser standard of willfulness, the Court should remand so that the Commission may reconsider the evidentiary record in light of the correct standard. *INS v. Orlando Ventura*, 537 U.S. 12, 16 (2002) ("Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands.").

persuaded that "the state of the art even shortly after the Halftime Show" would "necessarily refute CBS's contention that video delay technology was newly created for the awards show as a reaction to the Halftime Show incident but otherwise unavailable prior to that time." 535 F.3d at 208. As we have argued (FCC Supp. Br. 40), now that the Court has identified this issue as "central" to the recklessness inquiry, 535 F.3d at 208 n.36, the Court should remand so that the Commission can further examine the availability of video delay technology in the first instance.

Question 1.b: Did the FCC apply the same standard of liability in Young Broadcasting?

Yes. In *Young Broadcasting of San Francisco, Inc.*, 19 FCC Rcd 1751 (2004), a San Francisco television station broadcast a live interview with "two male performers who tour with the stage production 'Puppetry of the Penis,' . . . in which they appear nude in order to manipulate and stretch their genitalia to simulate a wide variety of 'installations,' including objects, architecture, and people." *Id.* at 1752 ¶ 3. The host of the show agreed to let the performers demonstrate; "[a]s the performers stood and apparently turned away from the camera to demonstrate their act to the show's hosts, the penis of one was fully exposed on-camera." *Id*.

The Commission issued a Notice of Apparent Liability for Forfeiture. It found that "the station failed to take adequate precautions to ensure that no

actionably indecent material was broadcast despite its awareness that the interview involved performers who appear nude in order to manipulate and stretch their genitalia." *Id.* at 1755-56 ¶ 13; *see also id.* at 1758 ¶ 16 ("Given the fact that the licensee broadcast material involving performers who appear nude in order to manipulate their genitalia, and who were in fact nude during the interview except for easily removed capes, the licensee failed to take adequate precautions to prevent the broadcast of indecent material.").

The facts of *Young* were arguably more egregious than those presented here. The station was aware that the performers were naked under their robes, and the Commission found that under the circumstances, "the airing of indecent material was clearly foreseeable." *Young*, 19 FCC Rcd at 1756 ¶ 13. Nonetheless, the Commission's determination that the licensee in *Young* could be held liable for a monetary forfeiture because it failed to take "adequate precautions" (*id.*) to prevent the broadcast of indecency is identical to the Commission's determination in this case that CBS was liable for a forfeiture because it, too, failed to take "adequate precautions to prevent the airing of unscripted indecent material." *Forfeiture Order*, 21 FCC Rcd at 2770 ¶ 20 (J.A. 16).

II. THE COMMISSION REASONABLY CONCLUDED THAT WILLFULNESS UNDER 47 U.S.C. § 503(b)(1)(B) DOES NOT REQUIRE INTENT TO AIR THE SPECIFIC MATERIAL FOUND INDECENT

Question 2: Under 47 U.S.C. § 503(b)(1)(B), the FCC may impose a forfeiture penalty against "[a]ny person who is determined by the Commission" to have "willfully . . . failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter." How should § 503(b)(1)(B)'s willfulness standard be construed?

The Communications Act defines " 'willful,' when used with reference to the commission or omission of any act, [to] mean[] the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision" of the Act or the FCC's regulations. 47 U.S.C. § 312(f).[2] For rule violations generally, the Commission has long held that willfulness "requires only that the Commission establish that the licensee knew that [it] was doing the acts in question – in short, that the acts were not accidental (such as brushing against a power knob or switch)." *Liability of Midwest Radio-Television, Inc.*, 45 FCC 1137, 1141 ¶ 11 (1963).

There is no question here that CBS knew that it was broadcasting the Super Bowl halftime show. Nonetheless, recognizing the need to be "sensitive to the

[2] The legislative history of the provision makes clear that the statutory definition applies to section 503(b) of the Act as well as section 312. *See Forfeiture Order*, 21 FCC Rcd at 2767 ¶ 15 n.51 (J.A. 13); *Southern California Broad. Co.*, 6 FCC Rcd 4387, 4388 (1991).

impact of [its] decisions on speech and, in particular, on live news coverage," the Commission concluded that the customary rule that such knowledge, by itself, could demonstrate willfulness did not apply to live broadcasts of indecent material. *Forfeiture Order*, 21 FCC Rcd at 2778 ¶ 35 (J.A. 24). Rather, the Commission explained that its "finding of willfulness is based on CBS's knowledge of the risks [of an indecent broadcast] and its conscious and deliberate omissions of the acts necessary to address them." *Reconsideration Order*, 21 FCC Rcd at 6662 ¶ 23 (J.A. 49). This aspect of the Commission's willfulness finding is highlighted by the fact that CBS's affiliates – who also knowingly broadcast the Super Bowl halftime show live, but who (unlike CBS) could not have "reasonably anticipated" that indecent material would be part of the show – were not subject to forfeiture liability. *See Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, 19 FCC Rcd 19230, 19240 ¶ 25 (2004) ("*NAL*") (J.A. 520).[3]

Question 2.a: What is the mens rea required to violate § 503(b)(1)(B)? Can CBS be held liable under § 503(b)(1)(B) if it did not intend to broadcast the specific material found indecent?

As the Commission ruled in this case, CBS is properly held liable under Section 503(b)(1)(B) even if it did not intend to broadcast the specific material

[3] The Commission's analysis in this case focused on the particular characteristics of live broadcasts. Different considerations may apply with respect to scripted programming, as this Court recognized in its prior opinion. 535 F.3d at 207.

found indecent. The Commission assumed that CBS "had no advance knowledge that Timberlake planned to tear off part of Jackson's clothing to reveal her breast." *Forfeiture Order*, 21 FCC Rcd at 2768 ¶ 17 (J.A. 14). It nonetheless found that CBS was liable for a forfeiture because it was "acutely aware of the risk" that there might be "unscripted indecent material" in its broadcast, "but failed to take adequate precautions that were available to it to prevent that risk from materializing." *Id*. The definition of "willful" applicable to Section 503(b)(1)(B) expressly permits liability to be based on a "conscious and deliberate . . . omission" of such precautions, *see* 47 U.S.C. § 312(f), and these were, as the Commission found, "fully appropriate circumstances" in which to apply the law. *Forfeiture Order*, 21 FCC Rcd at 2771 ¶ 22 (J.A. 17).

Nor is there any policy reason to interpret the willfulness requirement to limit enforcement to cases in which a broadcaster specifically intended to broadcast the precise material that was found indecent. Just the opposite. As the Commission explained, such a reading "would permit a broadcast licensee to stage a show that 'pushes the envelope,' send that show out over the air waves, knowingly taking the risk that performers will engage in offensive unscripted acts or use offensive unscripted language, and then disavow responsibility – leaving no one legally responsible for the result." *Id*. This Court likewise understood in its

prior opinion that "an actual knowledge or intent standard" could "creat[e] an end-around indecency restrictions." 535 F.3d at 206.

Question 2.b: Does § 503(b)(1)(D) require the same mens rea as § 503(b)(1)(B)? Why or why not?

Unlike Section 503(b)(1)(B), which authorizes the Commission to impose a forfeiture only for violations of the Communications Act or FCC regulations that are "willful[] or repeated[]," 47 U.S.C. § 503(b)(1)(B), Section 503(b)(1)(D) authorizes a forfeiture against a broadcaster that has simply "violated any provision of section . . . 1464," 47 U.S.C. § 503(b)(1)(D). Thus, as this Court has recognized (535 F.3d at 205), Section 503(b)(1)(D), unlike Section 503(b)(1)(B), does not on its face contain a requirement that the violation be willful or repeated, or for that matter any other express *mens rea* requirement. The Commission has suggested that strict liability would not be an appropriate liability standard in the context of indecent live programming, given the First Amendment interests at stake. *Forfeiture Order*, 21 FCC Rcd at 2778 ¶ 35 (J.A. 24); *see also CBS*, 535 F.3d at 205. And implicit in the Commission's conclusion that CBS violated 18 U.S.C. § 1464 is that willfulness is a sufficient basis to impose a forfeiture under Section 503(b)(1)(D). *See Forfeiture Order*, 21 FCC Rcd at 2776 ¶ 29 n.103 (J.A. 22). However, the Commission had no occasion here to address specifically whether Section 503(b)(1)(D) imposes a different *mens rea* standard from Section 503(b)(1)(B).

Question 2.c.: Is the FCC's interpretation of § 503(b)(1)(B) and (D) entitled to deference under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)?

The Commission's interpretation of the provisions of the Communications Act (of which Sections 503(b)(1)(B) and 503(b)(1)(D) are a part) is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). *See, e.g.*, *National Cable & Telecomms. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 981 (2005); *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205, 214 (3d Cir. 2007). Under that familiar framework, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. Thus, under *Chevron*, the Commission's interpretation of Section 503 – such as its conclusion that willfulness does not require an intent to broadcast material found indecent (*see supra* Section I) – should receive "considerable deference" as a reasonable interpretation of ambiguous statutory language. *CBS*, 535 F.3d at 204.

III. THE ORDERS ON REVIEW ARE REASONABLY READ TO INVOKE BOTH 47 U.S.C. §§ 503(b)(1)(B) AND (D)

Question 3: Did the FCC's forfeiture orders rely on any statutory authority other than § 503(b)(1)(B)? If not, is the FCC now foreclosed from justifying a forfeiture penalty under the alternative authority of § 503(b)(1)(D)? If so, and if CBS cannot be held liable under § 503(b)(1)(B)'s willfulness standard unless it intended to broadcast the specific material found indecent, is the FCC's Forfeiture Order invalid, such that the appropriate remedy is to grant the petition for review without remand?

The Commission imposed the forfeiture at issue on CBS "pursuant to section 503(b) of the Act." *Forfeiture Order*, 21 FCC Rcd at 2778 ¶ 38 (J.A. 24). It did not specify whether it was acting under Section 503(b)(1)(B) or Section 503(b)(1)(D). But the Commission's orders are reasonably read to rely on both provisions. For one thing, the *Forfeiture Order* expressly finds CBS liable for "willfully violating 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules." *Id.* While the willfulness requirement is contained in Section 503(b)(1)(B), which authorizes the Commission to impose a forfeiture for a violation of any Commission "rule" or "regulation," *see* 47 U.S.C. § 503(b)(1)(B), it is Section 503(b)(1)(D) that authorizes the Commission to impose a forfeiture for a violation of 18 U.S.C. § 1464. *See* 47 U.S.C. § 503(b)(1)(D). On its face, the Commission's determination that CBS violated both Section 1464 and the Commission's broadcast indecency rules is thus reasonably read to invoke both sources of its forfeiture authority.

That the Commission understood that Section 503(b)(1)(D) provided authority for its action is also illustrated by the Commission's implicit conclusion that, having found willfulness on CBS's part, that finding was sufficient to permit a forfeiture for a violation of Section 1464, and there was therefore no need to address whether CBS "could also be held responsible under Section 503(b)(1)(D) without a showing of willfulness." *Forfeiture Order*, 21 FCC Rcd at 2776 ¶ 29 n.103 (J.A. 22). Indeed, the ordering clause of the *Forfeiture Order* refrains from specifying that the Commission was relying on any particular subsection of Section 503(b). If the Commission had intended to rely on Section 503(b)(1)(B) alone in imposing the forfeiture on CBS, it would have been a simple matter for the agency to have specified that particular subsection in the ordering clause.

We acknowledge that the Commission did not expressly state in the *Forfeiture Order* that it was relying on any subsection of Section 503(b) other than Section 503(b)(1)(B). But it is plain that in determining that CBS "violat[ed] 18 U.S.C. § 1464," *Forfeiture Order*, 21 FCC Rcd at 2778 ¶ 38 (J.A. 24), the Commission must have relied on Section 503(b)(1)(D) as authority to impose a forfeiture penalty on CBS.

At a minimum, if this Court concludes that CBS's violation of federal broadcast indecency restrictions is not "willful" within the meaning of Section 503(b)(1)(B) under the circumstances of this case, the Commission should be

allowed on remand to address the question whether the *Forfeiture Order* is nonetheless authorized under Section 503(b)(1)(D). "[U]nder settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards." *AT&T, Inc. v. FCC*, 582 F.3d 490, 499 (3d Cir. 2009) (internal quotation marks omitted). Accordingly, if the Court concludes that the Commission's order relied solely on Section 503(b)(1)(B), the proper course is to remand so that the Commission can determine whether the forfeiture can be maintained under Section 503(b)(1)(D). *See, e.g.*, *WorldCom, Inc. v. FCC*, 288 F.3d 429, 430 (2002) (remanding rulemaking "[b]ecause there may well be other legal bases for adopting the rules chosen by the Commission"). Such a remand would not be unfair to CBS; the *NAL* and the *Forfeiture Order* put CBS on notice that it may be held liable under "§ 503(b)" because it had violated, among other things, "18 U.S.C § 1464." *NAL*, 19 FCC Rcd at 19242 ¶ 30 (J.A. 522); *Forfeiture Order*, 21 FCC Rcd at 2778 ¶ 38 (J.A. 24). Because Section 1464 is clearly enforceable under Section 503(b)(1)(D), CBS would not be prejudiced by the Commission's consideration of the applicability of paragraph (D) in a remand proceeding.

With regard to the final part of Question 3, a remand would not be necessary if (contrary to the arguments above) the Court concludes both that Section 503(b)(1)(B)'s willfulness standard requires an intent to broadcast the specific material found indecent and that the Commission is now foreclosed from exercising its forfeiture authority under Section 503(b)(1)(D).

CONCLUSION

The Commission's determination that CBS's broadcast of the 2004 Super Bowl halftime show was indecent within the meaning of federal law prohibitions against the broadcast of indecent material should be affirmed. The Commission's determination that CBS's conduct was "willful" should be remanded to permit the Commission to further explain its reliance on Section 503(b)(1)(B) and Section 503(b)(1)(D) in imposing a forfeiture on CBS as well as to resolve the issue of whether video delay technology was available to CBS at the time of the Super Bowl broadcast, thereby rendering CBS's conduct reckless.

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MAY 18, 2010

UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

CBS CORPORATION, CBS BROADCASTING, INC., CBS TELEVISION STATIONS INC., CBS STATIONS GROUP OF TEXAS L.P., AND KUTV HOLDINGS, INC.,	)	
PETITIONERS,	)	
v.	)	06-3575
FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF America,	)	
RESPONDENTS.	)	

COMBINED CERTIFICATE OF COMPLIANCE

Pursuant to the type-volume limitations of Fed. R. App. P. 32, I hereby certify that the accompanying "Second Supplemental Brief for the FCC and the United States" has been prepared in a proportionally spaced typeface (14 point Times New Roman) using Microsoft Word 2003 and contains 5396 words.

Pursuant to 3d Cir. L.A.R. 31.1(c), I further certify that the text of the electronic version of the brief is identical to the text in the paper copies, and that the submitted PDF has been scanned for viruses with Symantec Endpoint Protection version 11 and that no virus has been detected.

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MAY 18, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CBS Corporation, CBS Broadcasting, Inc., CBS Television Stations Inc., CBS Stations Group of Texas L.P., and KUTV Holdings, Inc., Petitioners,

v.

Federal Communications Commission and United States of America, Respondents.

CERTIFICATE OF SERVICE

I, Nandan M. Joshi, hereby certify that on May 18, 2010, I electronically filed the foregoing Second Supplemental Brief for the FCC and the United States with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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