06-1760-ag(L)

06-2750-ag(con), 06-5358-ag(con)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

FOX TELEVISION STATIONS, INC., CBS BROADCASTING INC.,
WLS TELEVISION, INC., KTRK TELEVISION, INC.,
KMBC HEARST-ARGYLE TELEVISION, INC., ABC, INC.,

Petitioners,

—against—

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA,

Respondents,

(*caption continued on inside cover*)

ON PETITIONS FOR REVIEW OF ORDERS
OF THE FEDERAL COMMUNICATIONS COMMISSION

RESPONSE OF PETITIONERS CBS BROADCASTING INC., ABC, INC., WLS TELEVISION, INC., AND KTRK TELEVISION, INC. AND INTERVENORS NBC UNIVERSAL, INC., NBC TELEMUNDO LICENSE CO., AND ABC TELEVISION AFFILIATES ASSOCIATION TO PETITION FOR REHEARING AND REHEARING EN BANC

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Pursuant to this Court's Order of August 31, 2010, CBS Broadcasting Inc.; ABC, Inc., WLS Television, Inc., and KTRK Television, Inc.; NBC Universal, Inc. and NBC Telemundo License Co. (collectively "the Networks"); and the ABC Television Affiliates Association (the "Affiliates") hereby oppose Respondents' Petition for Rehearing and Rehearing En Banc ("FCC Petition").

INTRODUCTION

The FCC Petition falls far short of the F.R.A.P. 35(a) mandate that rehearing en banc "is not favored and will not be granted" unless the decision conflicts with other circuit precedent or involves a question of "exceptional importance." The Commission attempts to satisfy the Rule's high standard by making the hyperbolic assertion that the *Fox* decision "appears effectively to preclude the Commission from enforcing federal broadcast indecency restrictions," FCC Petition at 10, but this distorts what the panel actually held and misreads *FCC v. Pacifica Foundation, Inc.*, 438 U.S. 726 (1978). The panel merely observed that broadcasters simply want "some degree of certainty" regarding the meaning of the FCC's indecency policy and properly held "[t]he First Amendment requires nothing less." Panel Dec., slip op. at 24. This straightforward holding neither conflicts with any decision of the Supreme Court or this Court, nor raises any issue of exceptional importance that would justify rehearing by the panel pursuant to F.R.A.P. 40 or rehearing *en banc* under F.R.A.P. 35.

ARGUMENT

I. THE PANEL DECISION IS CONSISTENT WITH SUPREME COURT AND CIRCUIT PRECEDENT

The *Fox* panel held that the FCC failed to articulate a discernable indecency standard by which broadcasters can accurately predict what speech is prohibited. Panel Dec., slip op. at 22-29. It did not hold that the governing statute, 18 U.S.C. § 1464, the corresponding FCC rule, or the Commission's general definition of indecency violate the First Amendment. Accordingly, there is no possible conflict between the *Fox* panel's decision and this Court's earlier opinion in *Dial Information Services Corp. v. Thornburgh*, 938 F.2d 1535 (2d Cir. 1991), as the FCC claims.

Unlike this case, *Dial Information Services* involved a facial challenge to Sections 223(b)-(c) of the Communications Act and implementing rules governing dial-a-porn service. This Court reversed and remanded the district court's order preliminarily enjoining enforcement altogether. *See* 938 F.2d at 1536, 1539-40. By contrast, the panel decision here held only that "the FCC's *current policy* fails constitutional scrutiny." Panel Dec., slip op. at 32 (emphasis added). *See also id.* at 18, 22-23, 29. It did not enjoin Section 1464. To the contrary, it stressed that "[w]e do not suggest that the FCC could

not create a constitutional policy."[1] The *Fox* decision thus poses no conflict.[2]

The Commission's claim that the panel decision "strikes at the heart of the longstanding context-based approach to indecency enforcement" as approved in *Pacifica* is equally unfounded. FCC Petition at 9. In particular, the panel expressly disavowed the FCC's straw man assertion that it was disapproving application of the agency's "judicially approved indecency approach in *any* context." *See* FCC Petition at 2 (emphasis in original). Analyzing *Pacifica*, the panel clearly acknowledged that "context is always relevant, and we do not mean to suggest otherwise in this opinion." Panel Dec., slip op. at 28. Instead, it focused carefully on what the Supreme Court actually meant by that concept. The panel correctly concluded that *Pacifica* stressed the importance of context "in order to emphasize the limited scope of its holding." *Id.* at 28-29.

Contrary to the Commission's reading of *Pacifica*, a majority of the Court expressly rejected an approach that would permit the government to judge indecency by engaging in an *ad hoc* weighing of the relative merit of expression against its "offensiveness."

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[1] Panel Dec., slip op. at 32. The panel also correctly found that *Reno v. ACLU*, 521 U.S. 844 (1997), overruled *Dial Information Services*. *Id.* at 22 n.8. However, both *Reno* and *Dial Information Services* involved facial challenges to Section 223's definition of indecency. The panel cogently distinguished those facial challenges from the Commission's application of its policy in the broadcast context. *Id.* at 21.

[2] This fact likewise defeats the asserted conflict with *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) ("*ACT I*"), which merely upheld the FCC's generic indecency definition. The *Fox* panel also distinguished *ACT I* based on the D.C. Circuit's stated understanding that the generic indecency definition would be applied only under a "restrained enforcement policy," the very thing the FCC abandoned in this case. Panel Dec., slip op. at 22 n.8.

Pacifica, 438 U.S. at 761 (Powell, J., concurring). *See also id.* at 762-63 (Brennan, J., dissenting). The *Fox* panel merely pointed out that the FCC's attempt to expand contextual analysis beyond what was contemplated in *Pacifica* had created an opaque policy, and that the First Amendment requires "discernable standards by which individual contexts are judged." Panel Dec., slip op. at 28-29. The Commission's manifest desire to expand its authority beyond what was approved in *Pacifica* is not a valid justification for rehearing.

Nothing in the panel decision is inconsistent with *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009), in which the Supreme Court remanded the case to resolve the networks' constitutional challenges. The majority observed that the Commission's change in policy may cause broadcasters "to avoid certain language that is beyond [FCC] reach under the Constitution," and that whether such changes violate the First Amendment "will be determined soon enough, *perhaps in this very case*." *Id.* at 1811 (emphasis added). *See also id.* at 1826, 1829 (Stevens, J., dissenting) (describing constitutional impact of the "FCC's shifting and impermissibly vague indecency policy"). The panel on remand did nothing more than decide the remaining issues the Supreme Court requested be reviewed.

II. THE PANEL DECISION DOES NOT CREATE AN ISSUE OF EXCEPTIONAL IMPORTANCE REQUIRING REHEARING

The *Fox* panel's mandate that the Commission review its indecency policy and formulate standards that survive First Amendment scrutiny is not an issue of exceptional importance. The Commission's claim that the task is "seemingly impossible" and that it

is precluded from enforcing federal broadcast indecency restrictions unless it can devise a standard that "deemphasizes context," FCC Petition at 10, simply misreads *Pacifica*, as noted above. The panel merely ordered the FCC to articulate a standard that respects *Pacifica's* narrow holding. Notwithstanding the Commission's speculation about the difficulty of the task, requiring the agency to apply an existing standard is not properly considered a "question of exceptional importance" that requires rehearing. *Watson v. Geren*, 587 F.3d 156, 158 (2d Cir. 2009).

The Commission's argument that the panel "all but ignore[d] the specific broadcasts at issue" and focused instead on "other FCC decisions," *id.* at 9-10, overlooks the very purpose of the *Omnibus Order* of which the decisions were a part. The orders were announced as two among a "broad range of factual patterns" that were to be taken "both individually and as a whole" to provide "substantial guidance" about "the types of programming that are impermissible under our indecency standard." *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd. 2664 ¶ 2 (2006). The panel did nothing more than attempt to apply the standards articulated by the Commission to some of the other factual scenarios discussed in this same agency order, but found "little rhyme or reason" to the Commission's policy. Panel Dec., slip op. at 25-26. It hardly is controversial to require the FCC to be coherent when regulating expression.

Finally, it seems ironic, to say the least, for the FCC to claim that a requirement that it articulate a constitutionally sound indecency policy is somehow "exceptional" or

too difficult. Earlier in these proceedings, the Commission sought, and this Court granted, remand of the challenged indecency policy so that it could attempt to explain its position. Order, Sept. 7, 2006. The panel decision provides the FCC with just such an opportunity once again. The Commission may not like the *Fox* panel's First Amendment holding, but that is no basis for granting rehearing.

CONCLUSION

For these and the foregoing reasons, the Networks and Affiliates respectfully submit that rehearing in this matter should be denied.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(5)-(7), 35(e) and 40(b)

This brief complies with the volume limitation of Fed. R. App. P. 35(e) and 40(b) because it contains 7 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September 2010, one copy of the foregoing Response of Petitioners CBS Broadcasting Inc.; ABC, Inc., WLS Television, Inc., and KTRK Television, Inc.; Intervenors NBC Universal, Inc. and NBC Telemundo License Co.; and Intervenor ABC Television Affiliates Association was sent by First Class mail, postage prepaid, to:

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In accord with Local Rule 25, I further certify that on this date a copy of this brief in PDF format was emailed to the Clerk at agencycases@ca2.uscourts.gov and to the counsel listed above, and that the PDF brief has been scanned for viruses and no viruses were detected.

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