

No. 06-3575

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.

On Petition for Review
from the Federal Communications Commission

**BRIEF FOR PETITIONERS
CBS CORPORATION, *et al.***

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 & 28(a)(1) and Circuit Rule 26.1.1, Petitioners state that (a) CBS Corporation has no publicly owned parent corporation, but is itself a publicly held company; (b) CBS Broadcasting Inc. is an indirect wholly owned subsidiary of CBS Corporation; (c) CBS Television Stations Inc. is a wholly owned subsidiary of CBS Broadcasting Inc.; (d) CBS Stations Group of Texas L.P. has two partners, CBS Dallas Ventures, Inc. and CBS Dallas Media, Inc., both of which are wholly owned subsidiaries of CBS Corporation; and (e) KUTV Holdings, Inc. is a wholly owned subsidiary of CBS Television Stations Inc. There are no publicly held corporations not a party to the proceeding before this Court that have a financial interest in the outcome of the proceeding.

STATUTES

Pursuant to Federal Rule of Appellate Procedure 28(f), 18 U.S.C. § 1464, pertinent sections of the Communications Act, 47 U.S.C. § 151, as amended, and of the regulations of the Federal Communications Commission are reproduced in the Addendum.

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JURISDICTIONAL STATEMENT

The Court has jurisdiction over this matter under 28 U.S.C. §§ 2342(1) & 2344 and 47 U.S.C. § 402(a), which govern appeals from final orders of the Federal Communications Commission (“FCC” or “Commission”). Venue is proper under 28 U.S.C. § 2343 because Petitioner CBS Corporation (“CBS”) is a Delaware corporation that is the licensee of stations subject to forfeitures challenged in this case and is the ultimate parent of licensees of stations owned and operated (“O&O”) by remaining Petitioners. In addition, CBS Television Stations Inc. and KUTV Holdings, Inc., two licensees of O&O stations subject to forfeitures at issue, are Delaware

corporations. Petitioners seek review of final FCC orders captioned *Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, 21 FCC Rcd. 6653 (2006) (“*Reconsideration Order*”), and *Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, 21 FCC Rcd. 2760 (2006) (“*Forfeiture Order*”). The *Reconsideration Order* was released May 31, 2006, and CBS timely filed a Petition for Review on July 28, 2006. Also on July 28, 2006, CBS paid under protest the forfeiture imposed by the Orders. See *AT&T Corp. v. FCC*, 323 F.3d 1081 (D.C. Cir. 2003).

STATEMENT OF ISSUES PRESENTED

1. Whether the FCC’s Orders violate the First Amendment? (J.A. 0600-0630; 0663-0666)
2. Whether the FCC’s Orders violate Due Process? (J.A. 0630-0633; 0663-0666)
3. Whether the FCC’s Orders are arbitrary, capricious, and contrary to law? (J.A. 0591-0599; 0643-0663)

STATEMENT OF THE CASE

In the Orders at issue, the FCC held CBS’s twenty O&O television stations violated 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999, which prohibit dissemination of “indecent” programming, when they broadcast a portion of the Super Bowl XXXVIII halftime show featuring Janet Jackson and Justin Timberlake in 2004. The Orders found CBS in violation because of an unscripted, unauthorized, and

unintended long-distance shot of Ms. Jackson's breast for nine-sixteenths of one second. The FCC ordered CBS to pay a \$550,000 forfeiture, representing the then-maximum fine of \$27,500 against each of twenty O&O stations. CBS is aggrieved by the Orders, not only because they mandated payment of the forfeiture, but because they reflect a zero tolerance approach to indecency enforcement that eliminates the "breathing space" to which CBS and all broadcasters are entitled to exercise their First Amendment rights.

STATEMENT OF FACTS

In 2004, CBS presented a live broadcast of Super Bowl XXVIII along with its halftime show, which was produced by MTV Networks. At the time of the broadcast, both CBS and MTV were divisions of Viacom Inc. The show featured several experienced and popular contemporary artists, along with headliner Janet Jackson and surprise guest Justin Timberlake. In the final seconds of the halftime show, Jackson and Timberlake performed an unscripted and unauthorized stunt in which Timberlake pulled off part of Jackson's bustier, exposing her right breast in a long-distance shot for nine-sixteenths of a second. (J.A. 0072). CBS issued an immediate public apology for the unexpected event and both performers confirmed that they independently and clandestinely devised the finale after all pre-show rehearsals, without consulting with, or informing anyone at Viacom, CBS, or MTV. (J.A. 0075; 0101; 0115; 0116).

