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CBS Corporation v. FCC

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 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;
UNITED STATES OF AMERICA,
Respondents

On Petition for Review of Orders of the
Federal Communications Commission
FCC Nos. 06-19 and 06-68

Argued September 11, 2007

Before: SCIRICA, *Chief Judge*, RENDELL and FUENTES, *Circuit Judges*.

ORDER AMENDING OPINION

IT IS HEREBY ORDERED that the precedential opinion in the above-captioned case, filed July 21, 2008, be amended as follows:

Pages 18-19, footnote 7, which read:

“See In re Infinity Broad. Corp., 37 F.C.C.R. 930, ¶ 5 (1987), *vacated in part on other grounds, Action for Children’s Television v. FCC*, 852 F.2d 1332, 1337 (D.C. Cir. 1988) (“*ACT I*”), *superseded by Action for Children’s Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (en banc) (“*ACT II*”).”

shall read:

“See *In re Infinity Broad. Corp.*, 37 F.C.C.R. 930, ¶ 5 (1987), *vacated in part on other grounds, Action for Children’s Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988), *superseded in part by Action for Children’s Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (en banc).”

Page 19, footnote 8, which read:

“As described in greater detail *infra*, subsequent litigation determined what time of day broadcasters could reasonably air indecent programming without expecting children to be in the audience. The D.C. Circuit Court of Appeals rejected a total ban on indecency, instructing the FCC to identify a precise time period during which broadcasters could air indecent material. See *ACT I, supra*. In response, the Commission adopted the safe-harbor rule of 47 C.F.R. § 73.3999. After further instruction from the D.C. Circuit in 1995, *ACT II, supra*, the Rule was amended to its current form, which confines enforcement of indecency restrictions to the hours “between 6:00 a.m. and 10:00 p.m.” See 47 C.F.R. § 73.3999; *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 10 F.C.C.R. 10558 (1995).”

shall read:

“As described in greater detail *infra*, subsequent litigation determined what time of day broadcasters could reasonably air indecent programming without expecting children to be in the audience. The D.C. Circuit Court of Appeals rejected a total ban on indecency, instructing the FCC to identify a precise time period during which broadcasters could air indecent material. See *Action for Children’s Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991) (“*ACT I*”), *superseded in part by Action for Children’s Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (en banc) (“*ACT II*”). In response, the Commission adopted the safe-harbor rule of 47 C.F.R. § 73.3999. After further instruction from the D.C. Circuit in 1995, *ACT II*, the Rule was amended to its current form, which confines enforcement of indecency restrictions to the hours “between 6:00 a.m. and 10:00 p.m.” See 47 C.F.R. § 73.3999; *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 10 F.C.C.R. 10558 (1995).”

Page 33, footnote 12, which read:

“It was undisputed that the FCC changed its policy on fleeting expletives in *Golden Globes*, which was decided prior to *Fox*. But as the *Fox* court explained, the actual moment the agency changed its course was not pertinent in determining whether the change was valid under *State Farm*:

[W]e . . . reject the FCC’s contention that our review here is narrowly confined to the specific question of whether the two Fox broadcasts . . . were indecent. The [*Fox Remand Order*] applies the policy announced in *Golden Globes*. If that policy is invalid, then we cannot sustain the indecency findings against *Fox*. Thus, as the Commission conceded during oral argument, the validity of the new “fleeting expletive” policy announced in *Golden Globes* and applied in the [*Fox Remand Order*] is a question properly before us on this petition for review.

Fox, 489 F.3d at 454. To hold otherwise would create a situation ripe for manipulation by an agency. *Cf. ACT I, supra*, 852 F.2d at 1337 (“[A]n agency may not resort to [ad hoc] adjudication as a means of insulating a generic standard from judicial review.”).”

shall read:

“It was undisputed that the FCC changed its policy on fleeting expletives in *Golden Globes*, which was decided prior to *Fox*. But as the *Fox* court explained, the actual moment the agency changed its course was not pertinent in determining whether the change was valid under *State Farm*:

[W]e . . . reject the FCC’s contention that our review here is narrowly confined to the specific question of whether the two Fox broadcasts . . . were indecent. The [*Fox Remand Order*] applies the policy announced in *Golden Globes*. If that policy is invalid, then we cannot sustain the indecency findings against *Fox*. Thus, as the Commission conceded during oral argument, the validity of the new “fleeting expletive” policy announced in *Golden Globes* and applied in the [*Fox Remand Order*] is a question properly before us on this petition for review.

Fox, 489 F.3d at 454. To hold otherwise would create a situation ripe for manipulation by an agency. *Cf. Action for Children’s Television v. FCC*, 852 F.2d 1332, 1337 (D.C. Cir. 1988), *superseded in part by ACT II, supra* note 8 (“[A]n agency may not resort to [ad hoc] adjudication as a means of insulating a generic standard from judicial review.”).”

BY THE COURT,

/s/ Anthony J. Scirica
Chief Judge

DATED: August 6, 2008