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## Court Strikes Down FCC Policy On “Fleeting Expletives”

The major U.S. broadcast networks and their supporters celebrated an important legal victory on Tuesday as the Second Circuit Court of Appeals struck down on constitutional grounds a series of FCC rulings in which the agency determined that fleeting utterances of profanity on live television constitute indecent speech that is prohibited under the FCC’s rules. Tuesday’s court ruling caps a legal fight that began in 2004 when the FCC first held the Fox and NBC broadcast networks liable for unscripted and unanticipated utterances of the “f-word” and similar swear words on live award show telecasts in 2002 and 2003. At the urging of the networks, the Second Circuit overturned the FCC orders in 2007 upon concluding that the agency failed to “articulate a reasoned basis” for holding broadcasters liable for off-the-cuff profanity that is not intended to convey sexual or excretory meaning. Although the U.S. Supreme Court struck down that ruling last year, the high court stressed that its opinion only upheld the reasonableness of the FCC’s attempts to police broadcast indecency, given the increasing “pervasiveness of foul language” on broadcast television. Acknowledging, however, that the FCC orders could be overturned on First Amendment grounds, the Supreme Court returned that issue to the Second Circuit for further examination. Proclaiming the FCC’s policy to be “unconstitutionally vague,” the Second Circuit on Tuesday wrote: “by prohibiting all ‘patently offensive’ references to sex, sexual organs and excretion without giving adequate guidance as to what ‘patently offensive’ means, the FCC effectively chills speech because broadcasters have no way of knowing what the FCC will find offensive.” The three-judge panel also determined that “to place any discussion of these vast topics at the broadcaster’s peril has the effect of promoting wide self-censorship of valuable material which should be completely protected under the First Amendment.” While praising the decision, a spokesman for Fox explained: “while we will continue to strive to eliminate expletives from live broadcasts, the inherent challenges broadcasters face with live television . . . must allow for the unfortunate isolated instances where inappropriate language slips through.” Lamenting “the chilling effect today’s decision will have on the ability of American parents to safeguard . . . their children,” FCC Commissioner Michael Copps voiced hope that “this decision [will be] appealed—and ultimately reversed.

## Comcast-NBCU Offer Additional Commitments On Merger

To appease critics who have cited concerns about the effects of the proposed \$13.75 billion merger of Comcast and NBC Universal (NBCU) on media diversity, Comcast and NBCU unveiled a new set of voluntary commitments in a letter to a House lawmaker that includes the establishment of a \$20 million fund to assist minority entrepreneurs in the development of new media content and technology. The commitments outlined in the letter to Representative Bobby Rush (D-IL) were also presented at a hearing conducted last Thursday by the House Communications Subcommittee—the sixth such hearing to

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be convened by lawmakers since the announcement of the Comcast-NBCU deal last December. Although Hip Hop on Demand and other minority media groups have touted Comcast's record in terms of minority employment and minority corporate leadership, other groups contend that Comcast has performed poorly with respect to the promotion of local and minority-owned programming. Testifying at last week's hearing, Comcast senior vice president Joseph Waz confirmed the merger partners' plan to offer a strengthened set of commitments on the "diversity of programming, ownership, supplier and workplace opportunities," adding: "we have embraced diversity . . . because it is good business." In the letter to Rush, which was entered at the hearing, Comcast said it would invest \$20 million in the expansion of minority entrepreneurial opportunities through a new fund to be administered by Comcast's venture capital arm, Comcast Interactive Capital. Comcast also said it would add ten independently-owned cable networks to its digital channel lineup within eight years of the merger's completion instead of the six channels promised to the FCC in its transfer of control application. According to Comcast, at least four of those channels would be majority-owned by African Americans, and two of those channels would be added within the first two years of closing. The nation's largest cable operator has also pledged to (1) expand carriage of current African-American programming "in key market systems" within six months of closing, (2) add four Hispanic-owned independent channels to its lineup, and (3) appoint at least one Latino to the merged company's board of directors within two years of closing. Comcast executive vice president David Cohen emphasized that the commitments are aimed at "expanding the presence of minorities both in front of and behind the cameras." Representative Maxine Waters (D-CA), a one-time opponent of the Comcast-NBCU merger, admitted that the proposal represents "a critical opportunity for both companies to implement a plan of action to address their shortcomings with respect to minority inclusion within the programming, management, ownership and advertising activities."

## Genachowski Confirms FCC-NTIA Plan To Proceed With Spectrum Inventory

Although a bill mandating an inventory of the nation's airwaves has yet to pass Congress, FCC Chairman Julius Genachowski told two Senate leaders on Wednesday that the FCC and the National Telecommunications & Information Administration (NTIA) were moving ahead with a spectrum audit that was recently endorsed by the Obama Administration as an important first step in identifying unused or underused frequencies that could be allocated for wireless broadband. Addressed to Senate Commerce Committee Chairman Jay Rockefeller (D-WV) and to Senate Communications Subcommittee Chairman John Kerry (D-MA), Genachowski's letter responds to a May 28 request from both lawmakers that asks the FCC and NTIA to proceed with the inventory, even though Senate legislation (S. 649) mandating such an inventory has stalled. (Sources indicate that Senator Tom Coburn (R-OK) has placed a hold on the bill in protest against its proposed \$22 million price tag.) Noting that, "despite our repeated attempts to pass the bill through the full Senate, we remain at a stalemate," Rockefeller and Kerry called on Genachowski to proceed without a statutory mandate as they emphasized that "such an inventory will be a positive first step in helping us formulate a sound policy for this nation's future spectrum needs." Agreeing that "a complete survey of the nation's existing spectrum allocation, assignment and utilization is imperative," Genachowski confirmed that he has already met with NTIA Administrator Larry Strickling to discuss "our mutual commitment to spectrum policy" and mutual agreement "to coordinate intergovernmental efforts to generate a comprehensive spectrum inventory." Applauding Genachowski's actions, Commissioner Meredith Baker said she hoped "the inventory can be completed as quickly as possible and form the foundation for a comprehensive spectrum database."

## Tyco Electronics To Acquire ADC For \$1.25 Billion

Swiss telecom equipment firm Tyco Electronics boosted its presence in the U.S. market with a \$1.25 billion agreement to purchase ADC Telecommunications, a key supplier of wireline and wireless network infrastructure to Verizon Wireless and AT&T. Announced on Tuesday, Tyco's cash offer of \$12.75 per share represents a premium of 44% over ADC's closing share price on Monday. In addition to doubling the size of Tyco's networking business, the deal could position Tyco as a top global provider of broadband connectivity products to wireline and wireless carriers as well as to enterprise networks. Minnesota-based ADC, whose roots go back to 1935, generated more than \$1 billion in sales last year of fiber-optic and wireless connectivity equipment used for the delivery of

high-speed Internet traffic on fixed and mobile networks. In addition to expanding ADC's market beyond the U.S. border, the transaction is expected to position both companies to respond more efficiently to the surging demand for wired and wireless broadband network products, both in the U.S. and internationally. As ADC CEO Robert Switz observed that "our organization's ability to serve the world's leading telecommunications services providers . . . will be strengthened significantly" through the deal, Tyco CEO Tom Lynch asserted that the combination "creates an industry leader with the scope and geographic scale to help customers deliver needed capacity, from the core of the network all the way to the end user."

## Judge Allows iPhone Class Action Suit To Proceed

A California district court judge has granted class action status to a lawsuit filed by two iPhone buyers in 2007. The suit accuses iPhone manufacturer Apple, Inc. and AT&T, the sole licensed provider of iPhone services to the U.S. market, of entering into a secret agreement to "technologically restrict" iPhone voice and data services for a period of five years. The complaint was filed with the U.S. District Court for the Northern District of California just four months after the June 2007 debut of the iPhone in the U.S. An amended version of the lawsuit filed in 2008 takes issue with Apple's practice of "locking" iPhones so they cannot be used on any carrier network other than that of AT&T. The amended suit also accuses Apple of monopolizing the market for third-party iPhone applications. Noting that iPhone customers must sign a two-year contract with AT&T to receive service, the lawsuit argues that Apple's phone lock policy in combination with its secret agreement with AT&T effectively forces iPhone users into a five-year relationship with AT&T and also drives up prices while limiting competition. Although Apple and AT&T have denied that their actions hurt competition, U.S. District Judge James Ware decided late last week to grant class action status to portions of the lawsuit that deal with potential violations of antitrust law. The class action suit covers all customers who purchased an iPhone under a two-year contract with AT&T from the introduction of the iPhone in 2007 to the present day. In addition to seeking injunctive relief that would prohibit Apple from marketing locked iPhones to U.S. customers or blocking software applications sold outside of the Apple iPhone store, the class action suit also requests unspecified monetary damages.

## Smartphone Makers Sued On Violations Of Wireless E-Mail Patents

Four years after collecting a hefty legal settlement from Research-In-Motion (RIM), the manufacturer of the BlackBerry wireless e-mail device, NTP Inc. last Friday announced the filing of a lawsuit against six smart phone makers that are accused of infringing NTP patents that relate to the wireless transmission of e-mail messages to cell phones. Filed with the U.S. District Court for the Eastern District of Virginia, the patent suit names Apple, Inc., Google, HTC Corp., LG Electronics, Microsoft Corp. and Motorola as defendants. The complaint also follows a similar lawsuit filed earlier by NTP against wireless carriers AT&T, T-Mobile USA, Sprint Nextel, and Verizon Wireless. (That suit has been stayed pending the completion of patent reviews by the U.S. Patent & Trademark Office.) To avoid an injunction against the marketing and usage of its popular BlackBerry device, RIM agreed to pay \$612.5 million to settle patent infringement claims levied by NTP. Co-founded by Thomas Campana, who is credited as the "inventor of wireless e-mail," NTP has signed licensing pacts with Nokia Corp. and with e-mail systems provider Good Technology, Inc. that cover the usage of patents held by NTP. Commenting on last week's court filing, a settlement negotiator with NTP explained that "there have been conversations with the people named in this suit, but they haven't been successful." Although five of the six firms named in the suit declined comment, a spokesman for HTC said his company "takes these matters very seriously."

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