

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
)
COMPLAINTS AGAINST VARIOUS) File No. EB-04-IH-0011
TELEVISION LICENSEES¹ CONCERNING)
THEIR FEBRUARY 1, 2004, BROADCAST) NAL/Acct. No. 200432080212
OF THE SUPER BOWL XXXVIII)
HALFTIME SHOW)

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: August 31, 2004

Released: September 22, 2004

By the Commission: Chairman Powell issuing a statement; Commissioners Copps and Martin approving in part, concurring in part and issuing separate statements; and Commissioner Adelstein approving in part, dissenting in part and issuing a statement.

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture ("NAL"), issued pursuant to section 503(b) of the Communications Act of 1934, as amended (the "Act"), and section 1.80 of the Commission's rules,² we find that the licensees of the CBS Network Stations, as defined herein,³ aired program material on February 1, 2004, at approximately 8:30 p.m. Eastern Standard Time, during the halftime entertainment show of the National Football League's Super Bowl XXXVIII, that apparently violates the federal restrictions regarding the broadcast of indecent material.⁴ Based upon our review of the facts and circumstances of this case, Viacom Inc. ("Viacom"), as the licensee or ultimate parent of the licensees of the Viacom Stations, is apparently liable for a monetary forfeiture in the aggregate amount of Five Hundred Fifty Thousand Dollars (\$550,000.00), which represents the statutory maximum of \$27,500 for each Viacom Station that broadcast the material. We propose the forfeiture for the broadcast over the

¹ The respective licensees, station call signs and communities of license that are the subject of this NAL are listed in Appendices A and B.

² 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

³ For purposes of this NAL, the "CBS Network Stations" include: (i) the television stations licensed to Viacom or to entities ultimately controlled by Viacom that are listed in Appendix A (the "Viacom Stations"); and (ii) the other television stations that are affiliates of the CBS Television Network listed in Appendix B (collectively, the "CBS Affiliates" and each, a "CBS Affiliate"). According to a recent FCC Form 323 ownership report for CBS Broadcasting, Inc., Viacom is the licensee or the parent of each licensee of the Viacom Stations listed in Appendix A. See FCC File No. BOA-20030701CWJ.

⁴ See 18 U.S.C. § 1464; 47 C.F.R. § 73.3999; and 47 U.S.C. § 503(b).

Viacom Stations of indecent material, in apparent violation of 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.⁵ Although we conclude that the non-Viacom-owned CBS Affiliate stations also aired this programming, for the reasons discussed herein, we decline to propose a monetary forfeiture or other sanction against the licensees of those stations.

II. BACKGROUND

2. During the days and weeks that followed the February 1, 2004, Super Bowl broadcast, the Commission received an unprecedented number of complaints alleging that the CBS Network Stations aired indecent material during the program.⁶ Specifically, the complaints state that the halftime segment, which featured musical performances by Janet Jackson, P. Diddy, Nelly, Kid Rock and Justin Timberlake, contained indecent material, including "crude," "inappropriate," "lewd" and "sexually explicit" dancing and song lyrics, culminating in a performance by Ms. Jackson and Mr. Timberlake that concluded with Mr. Timberlake's removal of a portion of Ms. Jackson's bustier, exposing her breast to the camera.⁷

3. On February 2, 2004, the Enforcement Bureau (the "Bureau") sent a letter of inquiry to CBS Broadcasting, Inc. ("CBS"), also a subsidiary of Viacom and a Commission licensee,⁸ concerning the material described above allegedly broadcast over the CBS Network Stations.⁹ By letter dated February 3, and in response to a request in the *LOI*, CBS provided a videotape of the broadcast of the halftime performance¹⁰ and, by letter dated February 10, submitted an "interim response" to the *LOI*.¹¹ CBS provided, as Exhibit 9 to the *CBS Interim Response*, a videotape of January 29, 2004, rehearsals of the halftime show (the "Rehearsal

⁵ Appendix A also includes the FCC Registration Number (FRN) and facility identification number for each Viacom Station.

⁶ To date, the Commission has received over 542,000 complaints concerning the broadcast.

⁷ Some of the complainants also object to other material in the Super Bowl broadcast, including the propriety of the costume worn by Kid Rock during his halftime performance, a poncho apparently made from a United States flag, and the content of certain commercials. While Kid Rock's wearing of the flag-based apparel may be troubling to many viewers, it does not provide us a basis for action under 18 U.S.C. § 1464. Similarly, we have reviewed all of the commercials aired during the broadcast and find that, although we understand that several may be offensive to some viewers, none fits within the Commission's definition of indecent material so as to be actionable.

⁸ See Appendix A.

⁹ Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Howard Jaeckel, Vice President and Associate General Counsel, CBS Broadcasting, Inc., dated February 2, 2004 (the "*LOI*").

¹⁰ Letter from Robert Corn-Revere, Esquire to William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated February 3, 2004.

¹¹ Letter from Robert Corn-Revere, Esquire to William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated February 10, 2004 (the "*CBS Interim Response*"). Therein, CBS characterizes its *Interim Response* as "preliminary in nature and reflects only that investigation and research as could be accomplished in the time permitted. In addition to not addressing legal issues and preserving all legal defenses and arguments as indicated below . . . the answers provided herein to the questions and requests in the [LOI] may be subject to revision based on results of ongoing investigation, interviews, and review of potentially relevant and/or responsive documents." *CBS Interim Response* at 1, n. 1; see also *id.* at 3.

Videotape”). On February 14, also at the request of the Bureau,¹² CBS supplied videotapes of its complete February 1, 2004, Super Bowl programming broadcast over the CBS Network Stations, including all of the commercials aired therein and the halftime segment (collectively, the “Broadcast Videotape”).¹³

4. On March 16, CBS submitted its response to the *LOI*, certified to by Susanna M. Lowy, Vice President and Associate General Counsel of Viacom and CBS.¹⁴ Therein, CBS admits that the material in question was aired live over each of the CBS Network Stations.¹⁵ Acknowledging that the broadcast included the exposure of Ms. Jackson’s breast, CBS states:

no officer, employee or agent of Viacom Inc. . . . CBS, or MTV Networks. . . had any advance notice or warning that the Super Bowl halftime performance involving Janet Jackson and Justin Timberlake would include the exposure of Ms. Jackson’s breast. The exposure resulted from a poorly-executed stunt that was planned by the performers without any involvement from Viacom, CBS, or MTV, all of whom would have forbidden the stunt if there had been any indication that it was planned. While CBS regrets the incident, the Commission should acknowledge that it was unplanned, unanticipated, and contrary to what we intended.

CBS Response at 1.

5. CBS claims to have taken “advance precautions to ensure that the telecast would not contain any material inconsistent with CBS standards and practices or in violation of the FCC rules. Such measures included, for example, implementation of a five-second audio delay to allow editing out of any unacceptable utterances in the audio of the live entertainment portions of the Super Bowl broadcast”¹⁶ CBS states further that the exposure of Ms. Jackson’s breast was “unexpected,” that Viacom subsidiaries, the CBS Television Network and MTV, “issued prompt apologies” and that “CBS also acted quickly to prevent any similar situation on future telecasts” by “instituting a five-minute audio and video delay to ensure that no unexpected or unplanned video images would be broadcast” during its televising of the Grammy Awards on February 8, 2004.¹⁷ CBS has also provided the declarations of Ms. Jackson and Mr. Timberlake. Ms. Jackson states, “I did not tell anyone who was a representative, officer, director or agent of Viacom, CBS, MTV or the NFL of any possible costume reveal in my performance. . . . Further, there was no costume reveal during any rehearsal for the Halftime Show.”¹⁸ Mr. Timberlake

¹² Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Robert Corn-Revere, Esquire, dated February 10, 2004.

¹³ Letter from James S. Blitz, Esquire to William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated February 14, 2004.

¹⁴ Letter from Susanna M. Lowy, Esquire to William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated March 16, 2004 (the “*CBS Response*”). Although many of CBS’s responses to the *LOI*’s inquiries are contained in both the *CBS Interim Response* and the *CBS Response*, for purposes of simplicity, unless otherwise noted, references herein will be to the latter.

¹⁵ *Id.* at 5-7 (responses to *LOI* Inquiries 1, 2 and 3).

¹⁶ *Id.* at 5.

¹⁷ *Id.* In its statement, CBS Television states that it “deeply regrets the incident. . . .” MTV indicates that it “deeply regrets this incident occurred and we apologize to anyone who was offended by it.” *Id.*, Exhibit 4.

¹⁸ *Id.*, Exhibit 7.

similarly indicates “I did not communicate the plan to do the costume reveal to any officers, employees or representatives of Viacom, CBS, MTV or the NFL.”¹⁹

6. The *CBS Response* also includes the script of the halftime segment,²⁰ which was approximately 15 minutes in duration and was produced by MTV Networks (“MTV”), also a Viacom subsidiary.²¹ Our review of the Broadcast Videotape and the script, which CBS represents to depict the content of the actual broadcast,²² reveals that the halftime segment consisted of a series of musical performances on a stage situated on the playing field. Included was a performance by Janet Jackson, in which she wore a black leather and studded outfit, similar to those worn by the male and female dancers who participated in her performance. She was soon joined by Justin Timberlake for a duet of “Rock Your Body,” during which he urged her in the song to allow him to “rock your body” and “just let me rock you ‘til the break of day” while following her around the stage and, on several occasions, grabbing and rubbing up against her. At the close of the song, immediately after singing the lyrics, “gonna have you naked by the end of this song,” Mr. Timberlake pulled off the right portion of Ms. Jackson’s bustier, exposing her breast.²³

III. DISCUSSION

7. The Federal Communications Commission is authorized to license radio and television broadcast stations and is responsible for enforcing the Commission’s rules and applicable statutory provisions concerning the operation of those stations. The Commission’s role in overseeing program content is very limited. The First Amendment to the United States Constitution and section 326 of the Act prohibit the Commission from censoring program material and from interfering with broadcasters’ freedom of expression.²⁴ The Commission does, however, have the authority to enforce statutory and regulatory provisions restricting indecency. Specifically, it is a violation of federal law to broadcast obscene, indecent or profane programming. Title 18 of the United States Code, Section 1464 prohibits the utterance of “any obscene, indecent or profane language by means of radio communication.”²⁵ In addition, section 73.3999 of the Commission’s rules, which was promulgated for the civil enforcement of that statute and section 16(a) of the Public Telecommunications Act of 1992,²⁶ provides that radio and television stations shall not broadcast obscene material at any time, and shall not broadcast indecent material during the period 6 a.m. through 10 p.m.

8. Under section 503(b)(1) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty. In order to impose such a penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been

¹⁹ *Id.*, Exhibit 8.

²⁰ *Id.*, Exhibit 9.

²¹ *Id.* at 5.

²² *CBS Response* at 9, n. 22.

²³ *Id.*, Exhibit 9 at 35-39; Broadcast Videotape.

²⁴ *See* 47 U.S.C. § 326.

²⁵ 18 U.S.C. § 1464.

²⁶ Pub. L. No. 102-356, § 16(a), 106 Stat. 949, 954 (1992).

issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.²⁷ The Commission will then issue a forfeiture if it finds, by a preponderance of the evidence, that the person has violated the Act or a Commission rule.²⁸ As set forth in greater detail below, we conclude under this standard that Viacom, as the licensee or the ultimate parent of the licensees of the Viacom Stations, is apparently liable for a forfeiture for its apparent willful violation of 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.

A. Indecency Analysis

9. Any consideration of government action against allegedly indecent programming must take into account the fact that such speech is protected under the First Amendment.²⁹ The federal courts consistently have upheld Congress's authority to regulate the broadcast of indecent material, as well as the Commission's interpretation and implementation of the governing statute.³⁰ Nevertheless, the First Amendment is a critical constitutional limitation that demands, in indecency determinations, that we proceed cautiously and with appropriate restraint.³¹

10. The Commission defines indecent speech as language that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium.³²

Indecency findings involve at least two fundamental determinations. First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition—that is, the material must describe or depict sexual or excretory organs or activities. . . . Second, the broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast medium.³³

11. As an initial matter, CBS does not dispute that the CBS Network Stations, the Viacom Stations listed in Appendix A and the CBS Affiliates listed in Appendix B, each aired the

²⁷ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

²⁸ See, e.g., *SBC Communications, Inc., Apparent Liability for Forfeiture*, Forfeiture Order, 17 FCC Rcd 7589, 7591 ¶ 4 (2002) (forfeiture paid).

²⁹ U.S. CONST., amend. I; See *Action for Children's Television v. FCC*, 852 F.2d 1332, 1344 (D.C. Cir. 1988) (“ACT I”).

³⁰ *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (“Pacifica”). See also *ACT I*, 852 F.2d at 1339; *Action for Children's Television v. FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991), cert. denied, 503 U.S. 914 (1992) (“ACT II”); *Action for Children's Television v. FCC*, 58 F. 3d 654 (D.C. Cir. 1995), cert. denied, 516 U.S. 1043 (1996) (“ACT III”).

³¹ *ACT I*, 852 F.2d at 1344 (“Broadcast material that is indecent but not obscene is protected by the First Amendment; the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what people may say and hear.”). See also *id.* at 1340 n. 14 (“the potentially chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy.”).

³² *Infinity Broadcasting Corporation of Pennsylvania, Memorandum Opinion and Order*, 2 FCC Rcd 2705 (1987) (subsequent history omitted) (citing *Pacifica Foundation, Memorandum Opinion and Order*, 56 FCC 2d 94, 98 (1975), *aff'd sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)).

³³ *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999, 8002, ¶¶ 7-8 (2001) (“*Indecency Policy Statement*”) (emphasis in original).

material described in paragraph 2, *supra*, during the February 1, 2004, telecast, during the period between 6 a.m. and 10 p.m.³⁴ Because the broadcast material contained, *inter alia*, a performance by Ms. Jackson and Mr. Timberlake that culminated in on-camera partial nudity, Ms. Jackson's exposed breast, the material warrants further scrutiny to determine whether or not it was patently offensive as measured by contemporary community standards for the broadcast medium.³⁵

12. In our assessment of whether broadcast material is patently offensive, "the *full context* in which the material appeared is critically important."³⁶ Three principal factors are significant to this contextual analysis: (1) the explicitness or graphic nature of the description; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material appears to pander or is used to titillate or shock.³⁷ In examining these three factors, we must weigh and balance them to determine whether the broadcast material is patently offensive because "[e]ach indecency case presents its own particular mix of these, and possibly, other factors."³⁸ In particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent,³⁹ or, alternatively, removing the broadcast material from the realm of indecency.⁴⁰ Here, we examine all three factors and determine that, in context and on balance, the on-camera exposure of Ms. Jackson's breast is patently offensive as measured by contemporary community standards for the broadcast medium.

13. At the outset, review of the Broadcast Videotape leaves no doubt that the Jackson/Timberlake segment is both explicit and graphic. The joint performance by Ms. Jackson and Mr. Timberlake culminated in Mr. Timberlake pulling off part of Ms. Jackson's bustier and exposing her bare breast. CBS admits that the CBS Network Stations broadcast this material, including the image of Ms. Jackson's bared breast, but argues that the exposure of her breast was unexpected and the duration of the exposure was for only 19/32 of a second.⁴¹ Although the exposure was brief, it was clearly graphic.⁴² Assertions that the exposure was fleeting and

³⁴ *CBS Response* at 5-7, Exhibits 5 and 6. CBS states that it "has no reason to believe that any affiliate did not broadcast such material." *Id.* at 7. It also acknowledges that the halftime show aired at approximately 8:30 Eastern Standard Time.

³⁵ The "contemporary standards for the broadcast medium" criterion is that of an average broadcast listener and, with respect to Commission decisions, does not encompass any particular geographic area. See *Indecency Policy Statement*, 16 FCC Rcd at 8002, ¶ 8 and n. 15.

³⁶ *Id.*, 16 FCC Rcd at 8002, ¶ 9 (emphasis in original).

³⁷ *Id.*, 16 FCC Rcd at 8002-15, ¶¶ 8-23.

³⁸ *Id.*, 16 FCC Rcd at 8003, ¶ 10.

³⁹ *Id.*, 16 FCC Rcd at 8009, ¶ 19 (citing *Tempe Radio, Inc (KUPD-FM)*, Notice of Apparent Liability For Forfeiture, 12 FCC Rcd 21828 (Mass Media Bur. 1997) (forfeiture paid) (extremely graphic or explicit nature of references to sex with children outweighed the fleeting nature of the references); *EZ New Orleans, Inc. (WEZB(FM))*, Notice of Apparent Liability For Forfeiture, 12 FCC Rcd 4147 (Mass Media Bur. 1997) (forfeiture paid) (same)).

⁴⁰ *Indecency Policy Statement*, 16 FCC Rcd at 8010, ¶ 20 ("the manner and purpose of a presentation may well preclude an indecency determination even though other factors, such as explicitness, might weigh in favor of an indecency finding").

⁴¹ *CBS Response* at 5, n. 12.

⁴² See *Young Broadcasting of San Francisco, Inc. (KRON-TV)*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 1751 (2004) (response pending) ("*Young Broadcasting*").

unintentional are more appropriate to the analysis under the second and third factors, as discussed below.

14. As to those factors, throughout the Jackson/Timberlake segment, the performances, song lyrics and choreography discussed or simulated sexual activities, concluding with the exposure of Ms. Jackson's breast. In particular, we note that Mr. Timberlake pulled off part of Ms. Jackson's clothing to reveal her breast after he sang, "gonna have you naked by the end of this song."⁴³ Therefore, we find the nudity here was designed to pander to, titillate and shock the viewing audience.⁴⁴ The fact that the exposure of Ms. Jackson's breast was brief is thus not dispositive.⁴⁵

15. Based upon the preceding analysis, we find, in context, that the exposure of Ms. Jackson's breast was apparently indecent, and, therefore, is legally actionable.⁴⁶ By airing this material, the licensee of each of the CBS Network Stations apparently violated the prohibitions in 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules, the rule against broadcast indecency.

B. Proposed Forfeiture

16. Based upon our review of the record in this case, we conclude that the licensee of each Viacom Station is apparently liable for the willful violation of our rules. The Commission's *Forfeiture Policy Statement* establishes a base forfeiture amount of \$7,000 for transmission of indecent or obscene materials.⁴⁷ The *Forfeiture Policy Statement* also specifies that the

⁴³ *CBS Response*, Exhibit 9 at 35-39; Broadcast Videotape.

⁴⁴ *Compare WPBN/WTOM License Subsidiary, Inc. (WPBN-TV and WTOM-TV)*, Order on Review, 15 FCC Rcd 1838 (2000), in which the Commission found not to be patently offensive and accordingly not indecent adult frontal nudity depicted during a broadcast of the film "Schindler's List." In that decision, the Commission held that the staff of the then-Mass Media Bureau had properly concluded that a broadcast of this film was not patently offensive as measured by contemporary community standards for the broadcast medium, based upon the full context of its presentation, including the subject matter of the film, the manner of presentation, and the warnings that accompanied the broadcast of the film. The staff determined, and the Commission agreed, that in the particular broadcast of the film at issue, the depiction of adult frontal nudity was incidental to the broadcast material's rendering of a historical view of World War II and wartime atrocities, which, viewed in context, was not presented in a pandering, titillating or vulgar manner. *Id.* at 1839-40, ¶¶ 3, 13. In contrast, as discussed herein, the manner of presentation of the complained-of material over each CBS Network Station, for which Viacom failed to take adequate precautions, was pandering, titillating and shocking. Nor do we find that the apologies to viewers by CBS and MTV following the broadcast mitigate the liability of Viacom for violation of the statute and the Commission's rules.

⁴⁵ *See Young Broadcasting*, 19 FCC Rcd 1751.

⁴⁶ *See ACT III*, 58 F.3d at 660-63.

⁴⁷ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Memorandum Opinion and Order, 12 FCC Rcd 17087, 17113 (1997) ("*Forfeiture Policy Statement*"), *recon. denied* 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b). The Commission recently amended its rules to increase the maximum penalties to account for inflation since the last adjustment of the penalty rates. *See Amendment of Section 1.80(b) of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 15 FCC Rcd 18221 (2000). However, the new rates apply to violations that occur or continue after September 7, 2004 and therefore do not apply here. *See Amendment of Section 1.80(b) of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, FCC 04-139 (rel. Jun. 18, 2004).

Commission shall adjust a forfeiture based upon consideration of the factors enumerated in section 503(b)(2)(D) of the Act, 47 U.S.C. § 503(b)(2)(D), such as “the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”⁴⁸

17. Significant to our consideration of these statutory factors are the respective roles of CBS and MTV in the preparation, execution and promotion of the halftime segment. We note that, in the wake of the uproar precipitated by this broadcast, in the *CBS Response* and elsewhere, officials of CBS and MTV have each expressed their surprise at and regret over their Super Bowl broadcast of this material.⁴⁹ For her part, Ms. Jackson has assumed personal responsibility, representing that she did not advise Viacom, CBS or MTV “of any possible costume reveal,” although notably failing to represent that the costume reveal was inadvertent.⁵⁰ Similarly, Mr. Timberlake has stated, “I did not communicate the plan to do the costume reveal to any officers, employees or representatives of Viacom, CBS, MTV or the NFL.”⁵¹ However, whether or not officials of these companies had advance knowledge of Ms. Jackson’s breast-baring finale to the halftime program is not dispositive. The materials provided in the *CBS Response*, including the final broadcast script,⁵² the Rehearsal Videotape and the Broadcast Videotape, establish that officials of both CBS and MTV were well aware of the overall sexual nature of the Jackson/Timberlake segment, and fully sanctioned it—indeed, touted it as “shocking” to attract potential viewers.⁵³ The record here demonstrates that CBS failed to take reasonable precautions to ensure that no actionably indecent material was broadcast.⁵⁴

⁴⁸ *Forfeiture Policy Statement*, 12 FCC Rcd at 17100-01, ¶ 27.

⁴⁹ *CBS Response*, Exhibit 4.

⁵⁰ *Id.*, Exhibit 7.

⁵¹ *Id.*, Exhibit 8.

⁵² *Id.*, Exhibit 9.

⁵³ *Id.*, Appendix D, Tab 1 at 2658-60.

⁵⁴ See *Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, Memorandum Opinion and Order, 19 FCC Rcd 4975, 4979 ¶ 10 (2004) (“*Golden Globe Awards Order*”) (petitions for reconsideration pending) (because licensees were on notice that an award presenter or recipient might use offensive language during a live program, they should have taken appropriate steps to ensure that such language would not be broadcast); *CBS Radio License, Inc. (WLLD(FM))*, Notice of Apparent Liability for Monetary Forfeiture, 15 FCC Rcd 23881, 23883, ¶ 8 (Enf. Bur. 2000) (given licensee’s awareness of the actual language used in performers’ recordings, it should have taken precautions to avoid airing material meeting the indecency definition during a live, unscripted broadcast) (subsequent history omitted); *Regent Licensee of Flagstaff, Inc., (KZGL(FM))*, Notice of Apparent Liability for Monetary Forfeiture, 15 FCC Rcd 17286, 17288, ¶ 9 (Enf. Bur. 2000) (forfeiture paid).

Here, the prior conduct of Ms. Jackson and Mr. Timberlake in their performances and efforts to promote their recordings should have given CBS cause for caution regarding their joint appearance on the live, nationally televised Super Bowl broadcast. Mr. Timberlake earned considerable notoriety with his duet with Kylie Minogue on the Brit Awards program, which was nationally televised in England on February 19, 2003, conduct quite similar to that at issue here. According to a news account that ran shortly thereafter, while he performed a song with Ms. Minogue, he “grabbed Minogue’s famous bottom.” The article goes on to relate, “Justin later told a reporter: ‘I’ve heard people in Britain are obsessed with Kylie’s bottom and I can totally see why. I’m pretty obsessed with it, too. I didn’t just touch Kylie’s bum. I copped a feel. On a scale of one to 10, it was like a 58.’” *People in the News*, THE MIAMI HERALD, February 22, 2003, available on LEXIS, News Library, Miami File.

18. In this regard, CBS acknowledges that its officials and those of MTV conducted substantial review of the content of the halftime show before the broadcast, including the Jackson/Timberlake finale.⁵⁵ The January 29 Rehearsal Videotape confirms that, three days before the Sunday national broadcast, officials of CBS and MTV, as well as members of the CBS Broadcast Standards Department and Program Practices Department, had full advance notice of the sexually provocative nature of the segment, including the choreography, the songs and their lyrics (albeit apparently not the exposure of Ms. Jackson's breast).⁵⁶ According to the *CBS Response*, these officials sought only to: (i) instruct a dancer to change her costume to one that was not as "revealing;" and (ii) have Kid Rock remove his reference in his performance to "bastards from the IRS,"⁵⁷ a line that he, in fact, delivered during the broadcast.⁵⁸

19. Furthermore, materials provided by CBS from the MTV website establish that MTV aggressively promoted the program in such a light for days before the telecast. In response to a question in the *LOI*, CBS provided a copy of a news item with its *Response* that MTV posted on January 28 on its website, entitled "Janet Jackson's Super Bowl Show Promises 'Shocking Moments.'"⁵⁹ The item states, "As the big game approaches, one of the top questions along with 'Who's going to win?' is 'What will Janet Jackson be doing at the halftime show?'" It quotes Jackson choreographer Gil Duldulo as saying, "I don't think the Super Bowl has ever seen a

⁵⁵ Thus, according to CBS:

the planning and preparation for the Super Bowl halftime show telecast were directed toward ensuring that the program met the expectations of CBS and the NFL and conformed to broadcast standards. Measures employed included careful selection of proven, experienced talent, careful advance review of the script for the halftime show, and active involvement of the CBS Broadcast Standards Department to monitor the broadcast itself. Each aspect of the halftime show was scripted in advance and a script of the halftime show was reviewed by the CBS Program Practices Department. In addition, employees of CBS and MTV attended two full run-throughs of the halftime show on Thursday, January 29 to review the production. The run-throughs were videotaped, reviewed by representatives of CBS and the NFL. MTV producers then used the tape to individually review the rehearsal performances with the talent to instruct them on changes to be made in the actual performance on Super Bowl Sunday. Based on these procedures, certain changes were made to the show. For example, the costume worn by one of the dancers during the run-throughs was considered to be too revealing, and she was instructed to change it before the final show. There was also concern about some of the language, and changes were suggested.

CBS Response at 9-10; see also Written Testimony of Mel Karmazin, then-President and Chief Operating Officer, Viacom, Before the House Subcommittee on Telecommunications and the Internet, dated February 11, 2004, at 2-3 ("MTV's preparations for this year's half-time event included a full review, in tandem with CBS, of the script and lyrics and attendance at all rehearsals throughout the week before the Super Bowl so as to conform to broadcast standards.").

⁵⁶ *CBS Response* at 9. The language of the performers in the segment is also fully reflected in these pre-broadcast materials and the final script, each page of which is marked "1/31/04 4:00 p." *Id.*, Exhibit 9. Moreover, review of the Broadcast Videotape reveals the performers did not deliver their vocals live during the halftime program- they lip-synched them, mouthing the words to a prerecording of their performances.

⁵⁷ CBS advises in its *Response*, "Other suggested changes involved commercial issues that are not relevant to this inquiry." *Id.*, at 10, n. 26.

⁵⁸ See Broadcast Videotape.

⁵⁹ *CBS Response*, Appendix D, Tab 1 at 2658-60.

performance like this. The dancing is great. She's more stylized, she's more feminine, she's more a woman as she dances this time around. There are some shocking moments in there too.”⁶⁰

20. An hour after CBS broadcast the halftime show, its MTV corporate affiliate posted an item on its website entitled “Janet Gets Nasty,” promoting its planned replay of the halftime segment.⁶¹ One hour later, it revised the item to include the following language:

Jaws across the country hit the carpet at exactly the same time. You know what we're talking about...Janet Jackson, Justin Timberlake and a kinky finale that rocked the Super Bowl to its core. P. Diddy, Kid Rock, & Nelly rounded out the halftime show in the midst of the greatest game on earth. MTV was Super Bowl central, so armchair quarterbacks, fair weather fanatics and fans of Janet Jackson and her pasties were definitely in the right place. So strap on those pads, keep your head down and get the full recap of The AOL Super Bowl XXXVIII Halftime Show produced by MTV.⁶²

21. In its *Response* to the *LOI*, CBS states that the January 28 item “was based on an interview with Mr. Duldulao by an MTV news reporter who flew to Houston to cover the Super Bowl week (including both MTV-sponsored events and those sponsored by others). Both the Executive Vice President of MTV News and the Managing Editor of online news for MTV Networks reviewed the article before it was posted. They and the reporter believed that the ‘shocking moment’ quote referred to. . . Justin Timberlake’s appearance, especially since other media outlets were playing up the ‘surprise guest’ angle, and reporters had been asking about it repeatedly throughout the week.” CBS goes on to explain, “On Monday morning following the Super Bowl, MTV executives decided to remove the ‘shocking moments’ article from the website because, in the wake of the halftime performance, it was being taken out of context. However, because MTV News and its online complement are news outlets, the removal of newsworthy content is generally disfavored, and MTV reposted the article later on February 2, 2004 with an editor’s note designed to prevent readers from misinterpreting the article.”⁶³

22. Even if we accepted CBS’s explanation that it was Mr. Timberlake’s surprise appearance to which MTV was referring in its continual pre-broadcast promotion of the “shocking nature” of the halftime show, an assertion that reasonably could be called into question,⁶⁴ the fact that MTV executives reviewed the January 28 item before it was placed on the

⁶⁰ *Id.*

⁶¹ *Id.* at 13, Appendix F, Tab 2 at 3829.

⁶² *Id.* at 13-14, Appendix F, Tab 2 at 3829. CBS advises that MTV removed this item from its website at 10 a.m. on February 2. *Id.*

⁶³ *Id.* at 11-12. The “editor’s note” reads as follows:

At the time of this report, MTV thought that the “shock” was going to be the as-yet-unannounced appearance of Justin Timberlake as part of Janet’s performance. Janet Jackson’s subsequent performance was not what had been rehearsed, discussed or agreed to with MTV. To read Janet’s statement and apology, see “Janet Apologizes, Says Super Bowl Stunt Went Too Far.” To see MTV’s statement, see “Janet, Justin, MTV apologize for MTV Super Bowl Flash.”

CBS Response, Appendix D, Tab 1 at 2659.

⁶⁴ Indeed, at the start of the halftime segment, MTV included an on-screen credit for Mr. Timberlake, hardly a disclosure that would be made ten minutes before his appearance, had his participation in the

site and apparently did not think to inquire further of Mr. Duldulao, at a minimum, portrayed an attitude of willful indifference to the content and tone of what was ultimately broadcast. Under the circumstances, we do not believe that CBS exercised sufficient control to ensure that actionably indecent material would not be aired, and we hold it responsible for the indecent programming broadcast to an average of over 90 million people,⁶⁵ including the millions of children watching, whom CBS could reasonably expect to be included in the viewing audience.⁶⁶

23. In sum, even assuming that neither CBS nor MTV had advance knowledge that Ms. Jackson's breast would be exposed during her broadcast performance, the record clearly establishes that officials of CBS and MTV did have prior knowledge of, indeed were intricately involved in the planning process for, and tacitly approved, the sexually provocative nature of the Jackson/Timberlake segment. Moreover, they extensively promoted this aspect of the broadcast in a manner designed to pander, titillate and shock. Viacom made a calculated and deliberate decision to air the Jackson/Timberlake segment containing material that would shock Super Bowl viewers, and to accurately promote it as such.⁶⁷

24. In this case, taking into account all of the factors enumerated in section 503(b)(2)(D) of the Act, because of the particular culpability here of Viacom, through its subsidiaries the CBS Television Network and MTV, and the history of recent indecent broadcasts by Viacom-owned radio stations,⁶⁸ we find that the licensee of each of the Viacom Stations is apparently liable for a forfeiture of \$27,500, the statutory maximum, per station that broadcast the subject material, for a total forfeiture to Viacom, as licensee or ultimate parent of each of those licensees, of \$550,000 (\$27,500 times 20 stations). Based upon our review of the entire record, we believe that this upward adjustment to the statutory maximum is warranted.

25. In contrast, we have no evidence that the licensee of any of the non-Viacom-owned CBS Affiliate was involved in the selection, planning or approval of the apparently indecent material. Moreover, we find that the licensee of each such station could not have reasonably anticipated that the CBS Network production of a prestigious national event such as the Super Bowl would contain material that included the on-camera exposure of Ms. Jackson's

program been the "shocking moments" that it had publicized for days on its Internet site. See Broadcast Videotape.

⁶⁵ According to A.C. Nielsen Media Research, an average of 89.6 million people watched the Super Bowl broadcast, with an audience of 98.6 million during the fourth quarter and 143.6 million tuning in for at least some part of the game. *Super Bowl Ratings Up Slightly Over 2003*, SI.COM, February 2, 2004, available at <http://sportsillustrated.cnn.com/2004/football/nfl/specials/playoffs/2003/02/02/bc.fbn.superbowl/ratings/ap>.

⁶⁶ "Based on preliminary stats," an estimated one in five children between the ages of 2 to 11 years watched the halftime show. Lisa de Moraes, *The TV Column*, WASHINGTON POST, February 3, 2004, at C1.

⁶⁷ *Infinity Broadcasting Operations, Inc. (WNEW(FM))*, Notice of Apparent Liability for Monetary Forfeiture, 18 FCC Rcd 19954, 19962 ¶14 (2003) (response pending) (fact that broadcast contest encouraging sexual activity was well-planned and extensively promoted, with the involvement of a large number of station and programming employees and managers, led to the conclusion that the material was aired to pander and titillate).

⁶⁸ See, e.g., *Infinity Broadcasting Operations, Inc. (WKRK-FM)*, Notice of Apparent Liability for Monetary Forfeiture, FCC 04-49 (rel. March 18, 2004) (response pending); *Infinity Broadcasting Operations, Inc. (WKRK-FM)*, Notice of Apparent Liability for Monetary Forfeiture, 18 FCC Rcd 6915 (2003) (response pending); *Infinity Broadcasting Corporation of Los Angeles (KROQ-FM)*, Memorandum Opinion and Order, 17 FCC Rcd 9892 (2002); *Infinity Broadcasting Operations, Inc. (WNEW(FM))*, Notice of Apparent Liability for Monetary Forfeiture, 17 FCC Rcd 10665 (Enf. Bur. 2002) (response pending).

breast. Nevertheless, we urge each such licensee to take reasonable precautions in the future, such as employing such delay technology to independently prescreen the network feed to prevent the broadcast of indecent programming over its licensed station.

C. Conclusion

26. Over twenty-five years ago, in *Pacifica*,⁶⁹ the Supreme Court concluded that, notwithstanding the dictates of the First Amendment and the statutory prohibition imposed by section 326 of the Act on Commission censorship of broadcast content or interference with the right of free speech by means of radio communication, the Commission's regulation of broadcast indecency is constitutional. In so holding, the Court observed that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."⁷⁰ The Court also noted that "broadcasting is uniquely accessible to children, even those too young to read." Citing the government's interest in the "well-being of its youth" and in supporting "parents' claim to authority in their own household," the Court concluded that "the ease with which children may obtain access to broadcast material, coupled with concerns [as to the well-being of youth]. . . amply justify special treatment of indecent broadcasting."⁷¹

27. In subsequently upholding the Commission's broadcast indecency definition against constitutional challenges, the United States Court of Appeals for the District of Columbia Circuit also stressed the importance of the Commission's indecency enforcement to the significant societal objective of empowering parents to control what broadcast material to which their children would be exposed. Thus, the Court concluded that "the Government's own interest in the well-being of minors provides an independent justification for the regulation of broadcast indecency, noting that "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens."⁷² The Court cited *Pacifica* for the proposition that "[s]ociety may prevent the general dissemination of [indecent] speech to children, leaving to parents the decision as to what speech of this kind their children shall hear and repeat."⁷³ It observed further:

[P]arents who wish to expose their children [to the most graphic depictions of sexual acts] will have no difficulty in doing so through the use of subscription and pay-per-view cable channels, delayed-access viewing using VCR equipment, and the rental or purchase of readily available audio and video cassettes. Thus the goal of supporting "parents' claim to authority in their own household to direct the rearing of their children," is fully consistent with the Government's own interest in shielding minors from being exposed to indecent speech by persons other than a parent.⁷⁴

⁶⁹ *Pacifica*, 438 U.S. 726.

⁷⁰ *Id.* at 748.

⁷¹ *Id.* at 749-50.

⁷² *ACT III*, 58 F.3d at 663.

⁷³ *Id.*, citing *Pacifica*, 438 U.S. at 758 (Powell, J. concurring in part and concurring in the judgment).

⁷⁴ *Id.*

The Court concluded, “[i]t is fanciful to believe that the vast majority of parents who wish to shield their children from indecent material can effectively do so without meaningful restrictions on the airing of broadcast indecency.”⁷⁵

28. Through the federally granted authorizations, issued for its owned stations and those of its other network affiliates, with its Super Bowl broadcast, CBS obtained access to the households of, by its own “preliminary” count, over 140 million people. Throughout the country, the game started in the late afternoon or early evening, at a time when parents and their children gathered in homes across the nation to enjoy the broadcast.⁷⁶

29. As the ultimate controlling entity of numerous television licensees, Viacom betrayed its trust, not only to the FCC arising from its obligation to operate its stations in the public interest and in a manner consistent with the Commission’s rules, but to each parent who reasonably assumed that the national network broadcast of a major sporting event on a Sunday evening would not contain offensive sexual material unsuitable for children, the very class of viewers that the Commission’s indecency rule was designed to protect. With its delivery into those homes of the Jackson/Timberlake duet, Viacom wrenched away from parents the ability to control the exposure of their children to the type of objectionable sexual material in which that performance culminated.

IV. ORDERING CLAUSES

30. ACCORDINGLY, IT IS ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, and section 1.80 of the Commission’s rules,⁷⁷ that Viacom Inc. is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of Five Hundred Fifty Thousand Dollars (\$550,000.00) for willfully violating 18 U.S.C. § 1464 and section 73.3999 of the Commission’s rules.

31. IT IS FURTHER ORDERED, pursuant to section 1.80 of the Commission’s rules, that within thirty (30) days of the release of this *NAL*, Viacom Inc. each SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

32. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. Payment by check or money order may be mailed to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. Payment by overnight mail may be sent to Bank One/LB 73482, 525 West Monroe, 8th Floor Mailroom, Chicago, IL 60661. Payment by wire transfer may be made to ABA Number 071000013, receiving bank Bank One, and account number 1165259. The payment MUST INCLUDE the FCC Registration Number (“FRN”) and also should note the *NAL*/Acct. Number referenced above.

33. The response, if any, must be mailed to William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications

⁷⁵ *Id.*

⁷⁶ CBS Television Press Release, *CBS Sports Coverage of Super Bowl XXXVIII Watched by 140 Million Viewers* (February 2, 2004), available at <http://viacom.com/press.tin?ixPressRelease=80254180>.

⁷⁷ 47 C.F.R. § 1.80.

Commission, 445 12th Street, S.W., Room 4-C330, Washington D.C. 20554, and MUST INCLUDE the NAL/Acct. Number referenced above.

34. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (“GAAP”); or (3) some other reliable and objective documentation that accurately reflects the respondent’s current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

35. Requests by a respondent for payment of the full amount of the forfeiture proposed against it in this *NAL* under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.⁷⁸

36. Under the Small Business Paperwork Relief Act of 2002, Pub L. No. 107-198, 116 Stat. 729 (June 28, 2002), the FCC is engaged in a two-year tracking process regarding the size of entities involved in forfeitures. If a respondent against which a forfeiture has been proposed herein qualifies as a small entity and if it wishes to be treated as a small entity for tracking purposes, it should so certify to us within thirty (30) days of this *NAL*, either in its response to the *NAL* or in a separate filing to be sent to the Investigations and Hearings Division. The certification should indicate whether the respondent, including its parent entity and its subsidiaries, meets one of the definitions set forth in the list provided by the FCC’s Office of Communications Business Opportunities (“OCBO”) set forth in Appendix C to this *NAL*. This information will be used for tracking purposes only. A respondent’s response or failure to respond to this question will have no effect on its rights and responsibilities pursuant to Section 503(b) of the Communications Act. If a respondent has questions regarding any of the information contained in Appendix C, it should contact OCBO at (202) 418-0990.

37. Accordingly, IT IS ORDERED, that the complaints filed against the licensees listed in Appendices A and B regarding their broadcasts on February 1, 2004, ARE GRANTED to the extent indicated herein, AND ARE OTHERWISE DENIED, and the complaint proceeding IS HEREBY TERMINATED.⁷⁹

38. IT IS FURTHER ORDERED, that copies of this *NAL* shall be sent by Certified Mail Return Receipt Requested to Viacom Inc., 2000 K Street, N.W., Suite 725, Washington, D.C. 20006, and to its counsel, Robert Corn-Revere, Esquire, Davis Wright Tremaine LLP, 1500 K Street, N.W., Washington, D.C. 20005.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁷⁸ See 47 C.F.R. § 1.1914.

⁷⁹ Consistent with section 503(b) of the Act and Commission practice, for the purposes of the forfeiture proceeding initiated by this *NAL*, Viacom Inc. shall be the only party to this proceeding.

APPENDIX A**VIACOM OWNED
CBS TELEVISION NETWORK AFFILIATES**

Licensee	FCC Registration Number	Call Sign	Community of License	Facility ID No.
CBS Stations Group of Texas L.P.	0001767078	KEYE-TV	Austin, TX	33691
Viacom Inc.	0003612447	WJZ-TV	Baltimore, MD	25455
Viacom Inc.	0003612447	WBZ-TV	Boston, MA	25456
CBS Broadcasting Inc.	0003482189	WBBM-TV	Chicago, IL	9617
CBS Stations Group of Texas L.P.	0001767078	KTVT	Ft. Worth, TX	23422
CBS Television Stations Inc.	0003482189	KCNC-TV	Denver, CO	47903
CBS Broadcasting Inc.	0003482189	WFRV-TV	Green Bay, WI	9635
CBS Broadcasting Inc.	0003482189	WJMN-TV	Escanaba, MI	9630
CBS Broadcasting Inc.	0003482189	WWJ-TV	Detroit, MI	72123
CBS Broadcasting Inc.	0003482189	KCBS-TV	Los Angeles, CA	9628
CBS Television Stations Inc.	0003482189	WFOR-TV	Miami, FL	47902
CBS Broadcasting Inc.	0003482189	WCCO-TV	Minneapolis, MN	9629
CBS Broadcasting Inc.	0003482189	KCCO-TV	Alexandria, MN	9632
CBS Broadcasting Inc.	0003482189	KCCW-TV	Walker, MN	9640
CBS Broadcasting Inc.	0003482189	KDKA-TV	Pittsburgh, PA	25454
CBS Broadcasting Inc.	0003482189	KYW-TV	Philadelphia, PA	25453
CBS Broadcasting Inc.	0003482189	WCBS-TV	New York, NY	9610
KUTV Holdings, Inc.	0004499273	KUTV	Salt Lake City, UT	35823
KUTV Holdings, Inc.	0004499273	KUSG	St. George, UT	35822
CBS Broadcasting Inc.	0003482189	KPIX-TV	San Francisco, CA	25452

APPENDIX B**NON-VIACOM OWNED
CBS TELEVISION NETWORK AFFILIATES**

Licensee	Call Sign	Community of License
Nexstar Broadcasting, Inc.	KTAB-TV	Abilene, TX
Pacific Telestations, Inc.	K20EU	Dededo, Guam
Freedom Broadcasting Of New York Licensee, L.L.C.	WRGB	Schenectady, NY
Emmis Television License Corporation	KRQE	Albuquerque, NM
Emmis Television License Corporation	KREZ-TV	Durango, CO
Emmis Television License Corporation	KBIM-TV	Roswell, NM
Thunder Bay Broadcasting Corporation	WBKB-TV	Alpena, MI
Television Station Group License Subsidiary, L.L.C.	WTAJ-TV	Altoona, PA
Panhandle Telecasting Company	KFDA-TV	Amarillo, TX
Alaska Broadcasting Company, Inc.	KTVA	Anchorage, AK
Meredith Corporation	WGCL-TV	Atlanta, GA
Gray Television Licensee, Inc.	WRDW-TV	Augusta, GA
Westwind Communications L.L.C.	KBAK-TV	Bakersfield, CA
Community Broadcasting Service	WABI-TV	Bangor, ME
WAFB, L.L.C.	WAFB	Baton Rouge, LA
Freedom Broadcasting Of Texas Licensee, L.L.C.	KFDM-TV	Beaumont, TX
KTVQ Communications, Inc.	KTVQ	Billings, MT
Television Station Group License Subsidiary, L.L.C.	WBNG-TV	Binghamton, NY
Media General Communications, Inc.	WIAT	Birmingham, AL
Reiten Television Inc.	KXMB-TV	Bismarck, ND
Fisher Broadcasting-Idaho TV, L.L.C.	KBCI-TV	Boise, ID
Gray Television Licensee, Inc.	KBTX-TV	Bryan, TX
WIVB Broadcasting, L.L.C.	WIVB-TV	Buffalo, NY

Licensee	Call Sign	Community of License
Mt. Mansfield Television, Inc.	WCAX-TV	Burlington, VT
KXLF Communications, Inc.	KXLF-TV	Butte, MT
KCTZ Communications, Inc.	KBZK	Bozeman, MT
Heritage Broadcasting Company Of Michigan	WWTW	Cadillac, MI
Heritage Broadcasting Company Of Michigan	WWUP-TV	Sault Ste Marie, MI
Raycom America, Inc.	KFVS-TV	Cape Girardeau, MO
Chelsey Broadcasting Company Of Casper, L.L.C.	KGWC-TV	Casper, WY
Chelsey Broadcasting Company Of Casper, L.L.C.	KGWR-TV	Rock Springs, WY
KGAN Licensee, L.L.C.	KGAN	Cedar Rapids, IA
Nexstar Broadcasting, Inc.	WCIA	Champaign, IL
WCSC, Inc.	WCSC-TV	Charleston, SC
Jefferson-Pilot Communications/WBTV, Inc.	WBTV	Charlotte, NC
Media General Communications, Inc.	WDEF-TV	Chattanooga, TN
Sagamorehill Broadcasting Of Wyoming/ Northern Colorado, L.L.C.	KGWN-TV	Cheyenne, WY
Sagamorehill Broadcasting Of Wyoming/ Northern Colorado, L.L.C.	KSTF	Scottsbluff, NE
Catamount Broadcasting Of Chico-Redding, Inc.	KHSL-TV	Chico, CA
Citicasters Co.	WKRC-TV	Cincinnati, OH
Raycom National Inc.	WOIO	Shaker Heights, OH
Gray Television Licensee, Inc.	KKTV	Colorado Springs, CO
Pacific And Southern Company, Inc.	WLTX	Columbia, SC
Media General Broadcasting Of So. Carolina Holdings, Inc.	WRBL	Columbus, GA
WCBI-TV, L.L.C.	WCBI-TV	Columbus, MS
WBNS-TV, Inc.	WBNS-TV	Columbus, OH
Eagle Creek Broadcasting Of Corpus Christi, L.L.C.	KZTV	Corpus Christi, TX
Eagle Creek Broadcasting Of Laredo, L.L.C.	KVTV	Laredo, TX

Licensee	Call Sign	Community of License
WHIO-TV Holdings, Inc.	WHIO-TV	Dayton, OH
Des Moines Hearst-Argyle TV, Inc.	KCCI	Des Moines, IA
Gray Television Licensee, Inc.	WTVY	Dothan, AL
NVG-Duluth II, L.L.C.	KDLH	Duluth, MN
KDBC License, L.L.C.	KDBC-TV	El Paso, TX
Initial Broadcasting Of Pennsylvania License Subsidiary, L.L.C.	WSEE-TV	Erie, PA
Fisher Broadcasting-Oregon TV, L.L.C.	KVAL-TV	Eugene, OR
Fisher Broadcasting-Oregon TV, L.L.C.	KCBY-TV	Coos Bay, OR
South West Oregon TV Broadcasting Corp.	KPIC	Roseburg, OR
Ackerley Media Group, Inc.	KVIQ	Eureka, CA
Comcorp Of Indiana License Corp.	WEVV	Evansville, IN
Tanana Valley Television Company	K13XD	Fairbanks, AK
Catamount Broadcasting Of Fargo L.L.C.	KXJB-TV	Valley City, ND
Meredith Corporation	WNEM-TV	Bay City, MI
Media General Broadcasting Of So. Carolina Holdings, Inc.	WBTW	Florence, SC
Fort Myers Broadcasting Company	WINK-TV	Fort Myers, FL
New York Times Management Services	KFSM-TV	Fort Smith, AR
Indiana Broadcasting, L.L.C.	WANE-TV	Fort Wayne, IN
Ackerley Broadcasting – Fresno, L.L.C.	KGPE	Fresno, CA
WGFL License Corporation	WGFL	High Springs, FL
Glendive Broadcasting Corporation	KXGN-TV	Glendive, MT
Hoak Media Of Colorado, L.L.C.	KREX-TV	Grand Junction, CO
Hoak Media Of Colorado, L.L.C.	KREG-TV	Glenwood Springs, CO
Hoak Media Of Colorado, L.L.C.	KREY-TV	Montrose, CO
KRTV Communications, Inc.	KRTV	Great Falls, MT

Licensee	Call Sign	Community of License
WFMY Television Corporation	WFMY-TV	Greensboro, NC
Saga Broadcasting, L.L.C.	WXVT	Greenville, MS
Media General Communications, Inc.	WNCT-TV	Greenville, NC
Libco, Inc.	KGBT-TV	Harlingen, TX
Clear Channel Broadcasting Licenses, Inc.	WHP-TV	Harrisburg, PA
Meredith Corporation	WFSB	Hartford, CT
Media General Communications, Inc.	WHLT	Hattiesburg, MS
Emmis Television License Corporation	KGMB	Honolulu, HI
Emmis Television License Corporation	KGMD-TV	Hilo, HI
Emmis Television License Corporation	KGMV	Wailuku, HI
KHOU-TV, L.P.	KHOU-TV	Houston, TX
West Virginia Media Holdings, L.L.C.	WOWK-TV	Huntington, WV
New York Times Management Services	WHNT-TV	Huntsville, AL
Fisher Broadcasting-S.E. Idaho TV, L.L.C.	KIDK	Idaho Falls, ID
Indiana Broadcasting, L.L.C.	WISH-TV	Indianapolis, IN
Media General Communications, Inc.	WJTV	Jackson, MS
Clear Channel Broadcasting Licenses, Inc.	WTEV-TV	Jacksonville, FL
Mel Wheeler, Inc.	KRCG	Jefferson City, MO
Media General Communications, Inc.	WJHL-TV	Johnson City, TN
Freedom Broadcasting Of Michigan Licensee, L.L.C.	WWMT	Kalamazoo, MI
Meredith Corporation	KCTV	Kansas City, MO
Gray Television Licensee, Inc.	WVLT-TV	Knoxville, TN
QueenB Television, LLC	WKBT	La Crosse, WI
Primeland Television, Inc.	WLFI-TV	Lafayette, IN
KLFY, L.P.	KLFY-TV	Lafayette, LA

Licensee	Call Sign	Community of License
Young Broadcasting Of Lansing, Inc.	WLNS-TV	Lansing, MI
KLAS Inc.,(A Nevada Corp.)	KLAS-TV	Las Vegas, NV
West Virginia Media Holdings, L.L.C.	WVNS-TV	Lewisburg, WV
Gray Television Licensee, Inc.	WKYT-TV	Lexington, KY
Metro Video Productions, Inc.	WLMO-LP	Lima, OH
Gray Television Licensee, Inc.	WYMT-TV	Hazard, KY
Gray Television Licensee, Inc.	KOLN	Lincoln, NE
Gray Television Licensee, Inc.	KGIN	Grand Island, NE
Arkansas Television Company	KTHV	Little Rock, AR
WLKY Hearst-Argyle Television, Inc.	WLKY-TV	Louisville, KY
Nexstar Broadcasting, Inc.	KLBK-TV	Lubbock, TX
Gannett Georgia, L.P.	WMAZ-TV	Macon, GA
Television Wisconsin, Inc.	WISC-TV	Madison, WI
United Communications Corporation	KEYC-TV	Mankato, MN
Media General Broadcasting Of So. Carolina Holdings, Inc.	KIMT	Mason City, IA
Freedom Broadcasting of Oregon Licensee, L.L.C.	KTVL	Medford, OR
New York Times Management Services	WREG-TV	Memphis, TN
WMDN, Inc.	WMDN	Meridian, MS
WDJT-TV Limited Partnership	WDJT-TV	Milwaukee, WI
Reiten Television Inc.	KXMC-TV	Minot, ND
Reiten Television Inc.	KXMA-TV	Dickinson, ND
Reiten Television Inc.	KXMD-TV	Williston, ND
KPAX Communications, Inc.	KPAX-TV	Missoula, MT
Media General Broadcasting Of South Carolina Holdings, Inc.	WKRG-TV	Mobile, AL
Noe Corporation, L.L.C.	KNOE-TV	Monroe, LA

Licensee	Call Sign	Community of License
Ackerley Media Group, Inc.	KION-TV	Monterey, CA
Alabama Broadcasting Partners	WAKA	Selma, AL
MMT License, L.L.C.	KLSB-TV	Nacogdoches, TX
Newschannel 5 Network, L.P.	WTVF	Nashville, TN
WWL-TV, Inc.	WWL-TV	New Orleans, LA
New York Times Management Services	WTKR	Norfolk, VA
ICA Broadcasting I, Ltd.	KOSA-TV	Odessa, TX
Griffin Entities, L.L.C.	KWTV	Oklahoma City, OK
Emmis Television License Corporation	KMTV	Omaha, NE
Post-Newsweek Stations Orlando, Inc.	WKMG-TV	Orlando, FL
Desert Television L.L.C.	KPSP-LP	Cathedral City, CA
Nexstar Broadcasting, Inc.	WMBD-TV	Peoria, IL
Meredith Corporation	KPHO-TV	Phoenix, AZ
Saga Quad States Communications, L.L.C.	KOAM-TV	Pittsburg, KS
WGME Licensee, L.L.C.	WGME-TV	Portland, ME,
Emmis Television License Corporation	KOIN	Portland, OR
Nepesk, Inc.	WAGM-TV	Presque Isle, ME
TVL Broadcasting Of Rhode Island, L.L.C.	WPRI-TV	Providence, RI
Barrington Broadcasting Quincy Corporation	KHQA-TV	Hannibal, MO
Capitol Broadcasting Company, Inc.	WRAL-TV	Raleigh, NC
Sarkes Tarzian, Inc.	KTVN	Reno, NV
Elcom Of Virginia, Inc.	WTVR-TV	Richmond, VA
WDBJ Television, Inc.	WDBJ	Roanoke, VA
Nexstar Broadcasting, Inc.	WROC-TV	Rochester, NY
Coronet Communications Company	WHBF-TV	Rock Island, IL

Licensee	Call Sign	Community of License
Gray Television Licensee, Inc.	WIFR	Freeport, IL
SCI – Sacramento Licensee, L.L.C.	KOVR	Stockton, CA
WBOC, Inc.	WBOC-TV	Salisbury, MD
Jewell Television Corporation	KLST	San Angelo, TX
Kens-TV, Inc.	KENS-TV	San Antonio, TX
Midwest Television, Inc.	KFMB-TV	San Diego, CA
Ackerley Media Group, Inc.	KCOY-TV	Santa Maria, CA
Raycom America, Inc.	WTOC-TV	Savannah, GA
Mission Broadcasting, Inc.	WYOU	Scranton, PA
KIRO-TV Holdings, Inc.	KIRO-TV	Seattle, WA
Gray Television Licensee, Inc.	KXII	Sherman, TX
KSLA, L.L.C.	KSLA-TV	Shreveport, LA
Waitt Broadcasting, Inc.	KMEG	Sioux City, IA
Young Broadcasting Of Sioux Falls, Inc.	KELO-TV	Sioux Falls, SD
Young Broadcasting Of Sioux Falls, Inc.	KDLO-TV	Florence, SD
Young Broadcasting Of Rapid City, Inc.	KCLO-TV	Rapid City, SD
Young Broadcasting Of Sioux Falls, Inc.	KPLO-TV	Reliance, SD
Ketchikan TV, L.L.C.	KTNL	Sitka, AK
Ketchikan TV, L.L.C.	KUBD	Ketchikan, AK
Ketchikan TV, L.L.C.	KUBD-LP	Kodiak, AK
WSBT, Inc.	WSBT-TV	South Bend, IN
Media General Broadcasting Of So. Carolina Holdings, Inc.	WSPA-TV	Spartanburg, SC
Media General Broadcasting Of So. Carolina Holdings, Inc.	WNEG-TV	Toccoa, GA
King Broadcasting Company	KREM-TV	Spokane, WA
Meredith Corporation	WSHM-LP	Springfield, MA

Licensee	Call Sign	Community of License
Mission Broadcasting, Inc.	KOLR	Springfield, MO
KMOV-TV, Inc.	KMOV	St. Louis, MO
Atlantic Properties	WVXF	Charlotte Amalie, VI
WTVH License, Inc.	WTVH	Syracuse, NY
Gray Television Licensee, Inc.	WCTV	Thomasville, GA
Pacific And Southern Company, Inc.	WTSP	St. Petersburg, FL
Emmis Television License Corporation	WTHI-TV	Terre Haute, IN
Libco, Inc.	WTOL	Toledo, OH
Gray Television Licensee, Inc.	WIBW-TV	Topeka, KS
Raycom America, Inc.	KOLD-TV	Tucson, AZ
Griffin Licensing, L.L.C.	KOTV	Tulsa, OK
Catamount – Idaho License L.L.C.	KMVT	Twin Falls, ID
Gray Television Licensee, Inc.	KWTX-TV	Waco, TX
The Detroit News, Inc.	WUSA	Washington, DC
United Communications Corporation	WWNY-TV	Carthage, NY
Gray Television Licensee, Inc	WSAW-TV	Wausau, WI
Withers Broadcasting Company	WDTV	Weston, WV
Freedom Broadcasting Of Florida Licensee, Inc.	WPEC	West Palm Beach, FL
West Virginia Media Holdings, L.L.C.	WTRF-TV	Wheeling, WV
Hoak Media Of Wichita Falls, L.P.	KAUZ-TV	Wichita Falls, TX
Media General Broadcasting of So. Carolina Holdings, Inc.	KWCH-TV	Hutchinson, KS
Media General Broadcasting of So. Carolina Holdings, Inc.	KBSD-TV	Ensign, KS
Media General Broadcasting of So. Carolina Holdings, Inc.	KBSH-TV	Hays, KS
Media General Broadcasting of So. Carolina Holdings, Inc.	KBSL-TV	Goodland, KS
WILM, Inc.	WILM-LP	Wilmington, NC

Licensee	Call Sign	Community of License
Fisher Broadcasting-Washington TV, L.L.C.	KIMA-TV	Yakima, WA
Fisher Broadcasting-Washington TV, L.L.C.	KLEW-TV	Lewiston, ID
Fisher Broadcasting-Washington TV, L.L.C.	KEPR-TV	Pasco, WA
Piedmont Television Of Youngstown License L.L.C.	WKBN-TV	Youngstown, OH
Pappas Arizona License L.L.C.	KSWT	Yuma, AZ

APPENDIX C**FCC List of Small Entities**

As described below, a “small entity” may be a small organization, a small governmental jurisdiction, or a small business.

(1) Small Organization	
Any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.	
(2) Small Governmental Jurisdiction	
Governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.	
(3) Small Business	
Any business concern that is independently owned and operated and is not dominant in its field, <i>and</i> meets the pertinent size criterion described below.	
Industry Type	Description of Small Business Size Standards
<i>Cable Services or Systems</i>	
Cable Systems	Special Size Standard – Small Cable Company has 400,000 Subscribers Nationwide or Fewer
Cable and Other Program Distribution	\$12.5 Million in Annual Receipts or Less
Open Video Systems	
<i>Common Carrier Services and Related Entities</i>	
Wireline Carriers and Service providers	1,500 Employees or Fewer
Local Exchange Carriers, Competitive Access Providers, Interexchange Carriers, Operator Service Providers, Payphone Providers, and Resellers	

Note: With the exception of Cable Systems, all size standards are expressed in either millions of dollars or number of employees and are generally the average annual receipts or the average employment of a firm. Directions for calculating average annual receipts and average employment of a firm can be found in 13 CFR 121.104 and 13 CFR 121.106, respectively.

<i>International Services</i>	
International Broadcast Stations	\$12.5 Million in Annual Receipts or Less
International Public Fixed Radio (Public and Control Stations)	
Fixed Satellite Transmit/Receive Earth Stations	
Fixed Satellite Very Small Aperture Terminal Systems	
Mobile Satellite Earth Stations	
Radio Determination Satellite Earth Stations	
Geostationary Space Stations	
Non-Geostationary Space Stations	
Direct Broadcast Satellites	
Home Satellite Dish Service	
<i>Mass Media Services</i>	
Television Services	\$12 Million in Annual Receipts or Less
Low Power Television Services and Television Translator Stations	
TV Auxiliary, Special Broadcast and Other Program Distribution Services	
Radio Services	\$6 Million in Annual Receipts or Less
Radio Auxiliary, Special Broadcast and Other Program Distribution Services	
Multipoint Distribution Service	Auction Special Size Standard – Small Business is less than \$40M in annual gross revenues for three preceding years
<i>Wireless and Commercial Mobile Services</i>	
Cellular Licensees	1,500 Employees or Fewer
220 MHz Radio Service – Phase I Licensees	
220 MHz Radio Service – Phase II Licensees	Auction special size standard - Small Business is average gross revenues of \$15M or less for the preceding three years (includes affiliates and controlling principals) Very Small Business is average gross revenues of \$3M or less for the preceding three years (includes affiliates and controlling principals)
700 MHz Guard Band Licensees	
Private and Common Carrier Paging	1,500 Employees or Fewer
Broadband Personal Communications Services (Blocks A, B, D, and E)	
Broadband Personal Communications Services (Block C)	Auction special size standard - Small Business is \$40M or less in annual gross revenues for three previous calendar years Very Small Business is average gross revenues of \$15M or less for the preceding three calendar years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Broadband Personal Communications Services (Block F)	
Narrowband Personal Communications Services	
Rural Radiotelephone Service	1,500 Employees or Fewer
Air-Ground Radiotelephone Service	
800 MHz Specialized Mobile Radio	Auction special size standard - Small Business is \$15M or less average annual gross revenues for three preceding calendar years
900 MHz Specialized Mobile Radio	

Private Land Mobile Radio	1,500 Employees or Fewer
Amateur Radio Service	N/A
Aviation and Marine Radio Service	1,500 Employees or Fewer
Fixed Microwave Services	
Public Safety Radio Services	Small Business is 1,500 employees or less Small Government Entities has population of less than 50,000 persons
Wireless Telephony and Paging and Messaging	1,500 Employees or Fewer
Personal Radio Services	N/A
Offshore Radiotelephone Service	1,500 Employees or Fewer
Wireless Communications Services	Small Business is \$40M or less average annual gross revenues for three preceding years Very Small Business is average gross revenues of \$15M or less for the preceding three years
39 GHz Service	
Multipoint Distribution Service	Auction special size standard (1996) – Small Business is \$40M or less average annual gross revenues for three preceding calendar years Prior to Auction – Small Business has annual revenue of \$12.5M or less
Multichannel Multipoint Distribution Service	\$12.5 Million in Annual Receipts or Less
Instructional Television Fixed Service	
Local Multipoint Distribution Service	Auction special size standard (1998) – Small Business is \$40M or less average annual gross revenues for three preceding years Very Small Business is average gross revenues of \$15M or less for the preceding three years
218-219 MHZ Service	First Auction special size standard (1994) – Small Business is an entity that, together with its affiliates, has no more than a \$6M net worth and, after federal income taxes (excluding carryover losses) has no more than \$2M in annual profits each year for the previous two years New Standard – Small Business is average gross revenues of \$15M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) Very Small Business is average gross revenues of \$3M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Satellite Master Antenna Television Systems	\$12.5 Million in Annual Receipts or Less
24 GHz – Incumbent Licensees	1,500 Employees or Fewer
24 GHz – Future Licensees	Small Business is average gross revenues of \$15M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) Very Small Business is average gross revenues of \$3M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Miscellaneous	
On-Line Information Services	\$18 Million in Annual Receipts or Less

Radio and Television Broadcasting and Wireless Communications Equipment Manufacturers	750 Employees or Fewer
Audio and Video Equipment Manufacturers	
Telephone Apparatus Manufacturers (Except Cellular)	1,000 Employees or Fewer
Medical Implant Device Manufacturers	500 Employees or Fewer
Hospitals	\$29 Million in Annual Receipts or Less
Nursing Homes	\$11.5 Million in Annual Receipts or Less
Hotels and Motels	\$6 Million in Annual Receipts or Less
Tower Owners	(See Lessee's Type of Business)

**STATEMENT OF
CHAIRMAN MICHAEL K. POWELL**

Re: Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show

No television event has ever received as many complaints from the American public—over 540,000—as the Super Bowl XXXVIII halftime show produced by CBS. As countless families gathered around the television to watch one of our Nation’s most celebrated events, they were rudely greeted with a halftime show stunt more fitting of a burlesque show. The show, clearly intended to push the limits of prime time television, ultimately violated federal law that restricts indecent programming to times when children are less likely to be watching. The U.S. Constitution is generous in its protection of free expression, but it is not a license to thrill. “Anything goes,” is not an acceptable mantra for those that elect to earn their profit using the public’s airwaves.

Indecency determinations, however, must be made cautiously and with appropriate restraint. There is always a substantial danger that a regulatory authority buoyed by an outraged public will overstep and fail to heel to the commands of the First Amendment. Our decision stays in bounds, but I am troubled at the suggestion of some on the Commission that we should reach further and drop the hammer for the musical performances themselves—divorced from the infamous wardrobe malfunction—or for the commercials. I agree that some of the performances were risqué and that commercials were frequently crass and sophomoric, but they were hardly indecent within the bounds of federal law. To let loose governmental sanction on such a thin premise is to stray from our limited role in enforcing the indecency laws, into the role of national nanny—arbiter of taste, values and propriety.

One critical way in which we exercise restraint is by analyzing the alleged indecent material in the context in which it is presented to the viewer or listener. Broadcasters plead frequently that there should be clear prescriptions to guide their choices. While the desire for such comfort is understandable, it is not possible to write a “red book” of dos and don’ts, nor is it wise. There are simply too many subtleties and too many contexts in which a given form of speech might occur to generalize a set of rules. The individual facts and the context are critical to separating protected speech from unlawful speech.

Nonetheless, the Commission should explain the central elements of its decision in order to permit broadcasters to make reasonable assessments in their programming choices, based on analogous precedents. Nudity, while not necessarily indecent in itself, certainly should raise a red flag for a broadcaster contemplating its airing during the hours in which the law restricts indecency because children are likely in the audience. If a programmer opts to air nude content, he places great weight in the hope that its purpose and context will keep the program from running afoul of the law. In this case, the context of the half time show leads us to conclude that the breast-baring finale was intended (in the vernacular of the indecency law) “to pander, titillate and shock” those watching. The song’s lyrics leave little doubt where the show was going: “Hurry up cause you’re taking too long. . . better have you naked by the end of this song.” Well, he certainly did and judging by the complaints it had its intended shocking effect—and drew a penalty flag in the process.

Finally, although individual licensees are indeed responsible for what is broadcast over the airwaves to their individual communities, fundamental fairness dictates that in this instance we not sanction those affiliates not owned by Viacom. The Super Bowl is widely regarded as a

family event with as many as one in five children watching this year's edition. Past half time productions have generally reflected the family-friendly character of the event. While affiliates certainly are not exempt from their responsibility to guard against the airing of indecent material, I do not believe it is warranted under the circumstances before us, where one would not have reasonably anticipated the dramatic departure.

In contrast, Viacom was not so passively involved. Viacom is the parent company of not only the CBS network, which aired the program, but also of MTV, which developed, rehearsed and produced the program. The Viacom organization knew, or surely should have known, what was to come. The fact that Viacom promoted the half time show before it aired as one that would be shocking, gives credence to their culpability. Unquestionably, Viacom consciously took the risk and, thus, now bears the responsibility.

Enforcing the indecency laws is no easy task, but it is one that falls to the FCC. We must respond to public complaints and give meaning to the indecency prohibitions on the public airwaves. Just as importantly, however, we must exercise great care not to overstep our own Constitutional limits and smother the free expression that is the central tenet of our democracy.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS,
APPROVING IN PART, CONCURRING IN PART**

Re: Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show

Few incidents have focused such widespread attention on the issue of indecency on the airwaves or garnered more complaints than last year's Super Bowl. Millions of Americans watched what should have been an all-American evening for the entire family. Instead, we got something far different – an outrageous stunt and over 540,000 complaints from people all across the country.

I agree that the Super Bowl halftime show violated the indecency statute and am pleased that we are taking this step to address a deplorable incident. I remain troubled, however, by certain aspects of the decision and therefore do not approve it in its entirety.

First, I am concerned by the precedent we establish in failing to assess a penalty against non-Viacom-owned affiliates that aired the Super Bowl. I recognize that the affiliates likely did not expect that this national event would include such indecency. Yet, many stations air programming that they do not produce themselves. The Commission must be careful not to signal that we would excuse indecent broadcasts merely because a station did not control the production of the content. Some level of fine would have been appropriate for these stations. The primary focus of our indecency enforcement under the statute must remain those who are licensed to use the public airwaves and we look to their vigilance to protect our children from indecent broadcasts.

Second, the Commission received complaints about other aspects of the halftime show and some of the commercials. Yet, the Order dismisses these complaints in a footnote with hardly any analysis or explanation. The FCC relies on viewers and listeners to file complaints about indecent broadcasts and places a heavy burden on complaining citizens. The citizens that filed these complaints have a right to expect more of a Commission follow-through on their complaints.

Finally, although the Commission is imposing the largest fine in history for indecency on television, let's not kid ourselves that this fine will serve as a disincentive to multi-billion dollar conglomerates broadcasting indecency. This fine needs to be seen in the context of a broadcast in which each 30-second commercial cost more than \$2 million. In other words, this fine represents less than 10 seconds of ad time on the Super Bowl and will be easily absorbed as a cost of doing business. We must continue to demonstrate to citizens that their complaints will receive prompt and vigorous attention and to the broadcast industry that Commission involvement in these issues is not a passing fancy.

**STATEMENT OF
COMMISSIONER KEVIN J. MARTIN
APPROVING IN PART, CONCURRING IN PART**

Re: Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show, Notice of Apparent Liability for Forfeiture

I write separately to express two concerns.

First, hundreds of thousands of viewers across the country filed complaints asking us to find various aspects of the Super Bowl halftime show indecent. Some even complained that the whole show was indecent. This Notice, however, analyzes only one segment of the show. We have a duty to the public to fully analyze all of the complaints that we receive.¹

Second, as I have said before, we need to affirm local broadcasters' ability – and responsibility – to reject inappropriate programming.² This obligation is critical to local broadcasters' ability to keep coarser network programming off the air in their communities. The network affiliates asked us to clarify that this right over three years ago. We still have not acted, and thus I concur in the decision not to fine the affiliates in this instance.

¹ Note 6 of the Notice acknowledges that “[s]ome of the complainants also object to other material in the Super Bowl broadcast,” but then concludes in two sentences that examples of such material were not indecent.

² See Written Statement of Commissioner Kevin J. Martin, Before the Committee on Commerce, Science and Transportation at 4 (February 2004), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243865A2.doc. See also Petition for Inquiry into Network Practices, filed by Network Affiliated Stations Alliance (March 2001); Motion for Declaratory Ruling, filed by Network Affiliated Stations Alliance (June 2001).

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN,
APPROVING IN PART AND DISSENTING IN PART**

Re: Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show

Based on a careful review of the record, I find today's remedy totally inadequate. After all the bold talk, it's a slap on the wrist that can be paid with just 7½ seconds of Super Bowl ad time. The \$550,000 fine measures up to only about a dollar per complaint for the more than 542,000 complaints that flooded into the FCC after the broadcast.

The Commission is required by Congress to enforce federal restrictions against the broadcast of indecent material, and I agree with the indecency finding here. We were deluged with a record number of complaints about the Super Bowl halftime show, and took the unusual step of launching an investigation. But after a major announcement and months of investigation, today's enforcement action goes out of its way to focus narrowly on the exposure of Janet Jackson's breast on twenty CBS-owned stations.

Most troubling, this decision sets a puzzling precedent by failing to hold all licensees responsible for the material broadcast over their stations. Why announce such a thorough investigation if we just let some of the stations that broadcast this material completely off the hook? It is true that the CBS affiliates are as much the innocent victims as the families who were stunned to see such gratuitous nudity during a family viewing event. In this case CBS affiliates – like the general public – had no idea what was coming, but this is true for most live programming. This aspect of today's action shows the lack of a coherent long-term framework that should form the basis of all our indecency enforcement efforts.

Compliance with federal broadcast decency restrictions is the responsibility of the station that chooses to air the programming, not the performers. Less than a week before the Super Bowl, the Commission fined a television station for a similar case of gratuitous brief on-camera nudity. Since the Super Bowl outcry, Viacom has acted responsibly by apologizing, by instituting measures such as time delays to keep indecency off the airwaves, and by cooperating fully with our investigation. Viacom should be commended for these steps. Nevertheless, subsequent actions cannot excuse the fact that indecent material was broadcast to 100 million viewers, including one in five American children.

While the Commission must always proceed cautiously in broadcast decency cases, this type of graphic and gratuitous nudity is not a close call. The millions of our nation's children who were ambushed by the Super Bowl halftime show deserve better protection. A fine of 7½ seconds of ad time is scarcely any deterrent. The shockwaves are still being felt by this shameful episode. I fear that today we're responding to a "wardrobe malfunction" with a regulatory malfunction.