

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

In the Matter of )  
 )  
Complaints Regarding Various Television )  
Broadcasts Between February 2, 2002 and )  
March 8, 2005 )

**NOTICES OF APPARENT LIABILITY AND  
MEMORANDUM OPINION AND ORDER**

**Adopted: February 21, 2006**

**Released: March 15, 2006**

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

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## I. INTRODUCTION

1. The Commission has regulated the broadcast of indecent programming for decades, and our authority in this area has long been upheld as constitutional by the U.S. Supreme Court. During the last few years, however, we have witnessed increasing public unease with the nature of broadcast material. In particular, Americans have become more concerned about the content of television programming, with the number of complaints annually received by the Commission rising from fewer than 50 in 2000 to approximately 1.4 million in 2004. At the same time, broadcasters have sought guidance from the Commission about our rules, arguing that they lack certainty regarding the meaning of our indecency and profanity standards. The decisions we issue today respond to both of these concerns.

2. In these decisions, we address hundreds of thousands of complaints alleging that various broadcast television programs aired between February 2002 and March 2005 are indecent, profane, and/or obscene. The cases we resolve today represent a broad range of factual patterns. Taken both individually and as a whole, we believe that they will provide substantial guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard. The cases also further refine our standard regarding the use of profane language in the broadcast medium and illustrate the types of language proscribed by that standard. Overall, the decisions demonstrate repeatedly that we must always look to the context in which words or images occur to determine whether they are indecent. In addition, while we find certain highly offensive language to be presumptively profane, we also take care to emphasize that such words may not be profane in specified contexts.

3. Section II below is devoted to providing a full description of the Commission’s standards for analyzing whether programming is indecent and/or profane and referencing the legal sources upon which these standards are based. In Section II, we also fully describe our methodology for calculating proposed forfeitures against broadcast licensees when there has been an apparent violation of our prohibitions against indecency and/or profanity.

4. In Section III, we apply these indecency and/or profanity standards to the complaints before us on a case-by-case basis. We begin with cases in which we have determined that the broadcast licensee apparently aired indecent and/or profane material and propose forfeitures against the licensee. The monetary forfeitures proposed demonstrate that the

Commission will exercise its statutory authority to ensure that the broadcast of indecent and/or profane material will be appropriately sanctioned.

5. Section III next addresses cases in which we find the complained-of material indecent and/or profane but do not propose taking action against the licensee. In these cases, the licensee was not on notice at the time of the broadcast that we would deem the relevant material indecent or profane. For example, we hold that a single use of the word “shit” and its variants (the “S-Word”) in the contexts presented is both indecent and profane. However, we do not propose adverse action in these cases because we have not previously announced this conclusion.

6. Section III concludes with a discussion of a number of cases in which we determine that various words, phrases, or scenes that occur in a variety of programs, while undoubtedly upsetting to some viewers, do not warrant action against the broadcast station licensee. We reach these determinations either because the complained-of material is not within the scope of our indecency or profanity definitions or because, even if it is within the scope of our indecency definition, it is not, in the contexts before us, patently offensive as measured by contemporary community standards for the broadcast medium.

7. Together, these decisions demonstrate the Commission’s strong commitment to fulfilling the responsibility vested in us by Congress within the parameters of the United States Constitution. We believe that issuing these decisions as a single order will enable broadcasters to better understand the boundaries of our indecency and profanity standards, while at the same time responding to the concerns expressed by hundreds of thousands of citizens in complaints filed with the Commission. In the end, our primary objective is to fulfill our statutory obligation to enforce the law in this area and to do so in a clear and consistent manner.

## II. BACKGROUND

8. Section 1464 of title 18, United States Code, prohibits the broadcast of obscene, indecent, or profane programming.<sup>1</sup> The FCC rules implementing that statute, a subsequent statute establishing a “safe harbor” during certain hours, and the Communications Act of 1934, as amended (the “Act”), prohibit radio and television stations from broadcasting obscene material at any time and indecent material between 6 a.m. and 10 p.m.<sup>2</sup> Broadcasters also may not air profane material during this time period.<sup>3</sup>

9. The federal prohibition against the broadcast of indecent and profane material is longstanding. In the Radio Act of 1927, Congress first provided that “[n]o person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means

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<sup>1</sup> 18 U.S.C. § 1464.

<sup>2</sup> See 47 C.F.R. § 73.3999; see also Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949 (1992) (setting the safe harbor of 10 p.m. to 6 a.m. for the broadcast of indecent material); see also *Action for Children’s Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (*en banc*) (“ACT III”), cert. denied, 516 U.S. 1072 (1996) (affirming restrictions prohibiting the broadcast of indecent material between the hours of 6 a.m. and 10 p.m.)

<sup>3</sup> See *Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, Memorandum Opinion and Order 18 FCC Rcd 19859 (Enf. Bur. 2004), review granted, 19 FCC Rcd 4975, 4981 ¶¶ 13 and 14 (2004) (“Golden Globe Awards Order”), petitions for stay and recon. pending. The Commission established a “safe harbor” period from 10 p.m. to 6 a.m. during which profane speech may be legally broadcast as a narrowly tailored means of vindicating its compelling interests in assisting parents and protecting minors, consistent with the D.C. Circuit’s decision that the same “safe harbor” period for indecent material is consistent with the Constitution. See *ACT III*, 58 F.3d at 667.

of radio communication.”<sup>4</sup> This prohibition was then reenacted as part of the Act and was moved subsequently to title 18 of the United States Code in 1948.

10. **Indecency Analysis.** The federal courts have consistently upheld Congress’s authority to regulate the broadcast of indecent material, as well as the Commission’s interpretation and implementation of the governing statute. In 1978, the U.S. Supreme Court, in upholding the constitutionality of the prohibition against the broadcast of indecent material, concluded that “special treatment of indecent broadcasting” was appropriate. The Court noted that the Commission’s authority to regulate indecent broadcast material is justified by two primary considerations, both of which are equally, if not more, applicable today. First, the broadcast media occupy “a uniquely pervasive presence in the lives of all Americans.”<sup>5</sup> Indecent material “presented over the airwaves confronts the citizen, not only in public, but also in the privacy of their own home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.”<sup>6</sup> “Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content.”<sup>7</sup> Indeed, while the Supreme Court’s observation regarding the pervasiveness of the broadcast media dates back to 1978, the ubiquity of television in the lives of Americans has only increased in the intervening 28 years. Second, the Supreme Court observed that “broadcasting is uniquely accessible to children, even those too young to read.”<sup>8</sup> This finding is even more relevant today given the increased accessibility of the broadcast media to children.<sup>9</sup>

11. Enforcement of the provisions restricting the broadcast of indecent, obscene, or profane material is an important component of the Commission’s overall responsibility over broadcast radio and television operations. At the same time, however, the Commission must be mindful of the First Amendment to the United States Constitution and section 326 of the Act, which prohibit the Commission from censoring program material or interfering with broadcasters’ free speech rights.<sup>10</sup> As such, in making indecency determinations, the Commission proceeds cautiously and with appropriate restraint.<sup>11</sup>

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<sup>4</sup> 44 Stat. 1172.

<sup>5</sup> *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978) (“*Pacifica*”).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 749.

<sup>9</sup> See Donald F. Roberts, Ulla G. Foehr, and Victoria Rideout, *Generation M: Media in the Lives of 8-18 Year Olds* (March 2005) at 12-13 (finding that 99% of children 8-18 have a television set in their home and that 68% of children 8-18 have a television set in their bedroom).

<sup>10</sup> U.S. CONST., amend. I; 47 U.S.C. § 326. See also *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813-15 (2000).

<sup>11</sup> See *Action for Children’s Television v. FCC*, 852 F.2d 1332, 1344, 1340 n. 14 (1988) (“*ACTI*”) (stating that “[b]roadcast 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,” and that any “potential chilling effect of the FCC’s generic definition of indecency will be tempered by the Commission’s restrained enforcement policy.”).

12. The Commission defines indecent speech as material 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.<sup>12</sup>

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.<sup>13</sup>

13. In our assessment of whether broadcast material is patently offensive, “the *full context* in which the material appeared is critically important.”<sup>14</sup> 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 panders to, titillates, or shocks the audience.<sup>15</sup> In examining these three factors, we must weigh and balance them on a case-by-case basis 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.”<sup>16</sup> In particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently

<sup>12</sup> See *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. Pacifica*, 438 U.S. 726).

<sup>13</sup> *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). In applying the “community standards for the broadcast medium” criterion, the Commission has stated:

The determination as to whether certain programming is patently offensive is not a local one and does not encompass any particular geographic area. Rather, the standard is that of an average broadcast viewer or listener and not the sensibilities of any individual complainant.

*WPBN/WTOM License Subsidiary, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 1838, 1841 ¶ 10 (2000) (“*WPBN/WTOM MO&O*”). The Commission’s interpretation of the term “contemporary community standards” flows from its analysis of the definition of that term set forth in the Supreme Court’s decision in *Hamling v. United States*, 418 U.S. 87 (1974), *reh’g denied*, 419 U.S. 885 (1974). In *Infinity Broadcasting Corporation of Pennsylvania (WYSP(FM))*, Memorandum Opinion and Order, 3 FCC Rcd 930 (1987) (subsequent history omitted), the Commission observed that in *Hamling*, which involved obscenity, “the Court explained that the purpose of ‘contemporary community standards’ was to ensure that material is judged neither on the basis of a decisionmaker’s personal opinion, nor by its effect on a particularly sensitive or insensitive person or group.” *Id.* at 933 (citing 418 U.S. at 107). The Commission also relied on the fact that the Court in *Hamling* indicated that decisionmakers need not use any precise geographic area in evaluating material. *Id.* at 933 (citing 418 U.S. at 104-05). Consistent with *Hamling*, the Commission concluded that its evaluation of allegedly indecent material is “not one based on a local standard, but one based on a broader standard for broadcasting generally.” *Id.* at 933.

<sup>14</sup> *Indecency Policy Statement*, 16 FCC Rcd at 8002 ¶ 9 (emphasis in original).

<sup>15</sup> *Id.* at 8002-15 ¶¶ 8-23.

<sup>16</sup> *Id.* at 8003 ¶ 10.

offensive and consequently indecent,<sup>17</sup> or, alternatively, removing the broadcast material from the realm of indecency.

14. In each of the cases below in which the complaint alleges indecency, we apply the two-pronged indecency analysis described above. Specifically, we first determine whether the complained-of material is within the scope of our indecency definition; *i.e.*, whether it describes or depicts sexual or excretory activities or organs. If so, we then turn to the three principal factors of the second prong to determine whether, taken in context, the material is patently offensive as measured by contemporary community standards for the broadcast medium.

15. As evidenced below, our contextual analysis takes into account the manner and purpose of broadcast material.<sup>18</sup> For example, material that panders to, titillates, or shocks the audience is treated quite differently than material that is primarily used to educate or inform the audience. In particular, we recognize the need for caution with respect to complaints implicating the editorial judgment of broadcast licensees in presenting news and public affairs programming, as these matters are at the core of the First Amendment's free press guarantee.<sup>19</sup>

16. **Profanity Analysis.** In the *Golden Globe Awards Order*, we concluded that the "F-Word" constituted "profane language" within the meaning of 18 U.S.C. § 1464 because, in context, it involved vulgar and coarse language "so grossly offensive to members of the public who actually hear it as to amount to a nuisance."<sup>20</sup> We indicated in that decision that we would analyze other potentially profane words on a case-by-case basis.

17. Just as with indecent broadcasting, we are mindful that, in exercising our statutory authority over profane broadcast material, we must proceed with "due respect for the high value our Constitution places on freedom and choice in what the people say and hear."<sup>21</sup> In the *Golden Globe Awards Order*, we interpreted profanity, citing a decision by the U.S. Court of Appeals for the Seventh Circuit, as "denoting certain of those personally reviling epithets naturally tending to provoke violent resentment or denoting language so grossly offensive to members of the public who actually hear it as to amount to a nuisance."<sup>22</sup> In the context of broadcasting, however, it is not clear whether the "fighting words" portion of this definition applies. Given the nature of television and radio, it appears unlikely that broadcast material would provoke immediate violence between those uttering such words and the audience. Therefore, in the cases below, and

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<sup>17</sup> *Id.* 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), and *EZ New Orleans, Inc. (WEZB(FM))*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 4147 (Mass Media Bur. 1997) (forfeiture paid) (finding that the extremely graphic or explicit nature of references to sex with children outweighed the fleeting nature of the references).

<sup>18</sup> *Indecency Policy Statement*, 16 FCC Rcd at 8010 ¶ 20 (noting that "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").

<sup>19</sup> *See Syracuse Peace Council*, Memorandum Opinion and Order, 2 FCC Rcd 5043, 5050-51 ¶ 52 (1987) (subsequent history omitted) (eliminating the fairness doctrine, which placed an affirmative obligation on broadcasters to cover, and present contrasting viewpoints on, controversial issues of public importance).

<sup>20</sup> 19 FCC Rcd at 4981 ¶ 13.

<sup>21</sup> *ACT I*, 852 F.2d at 1344 (noting that "the potentially chilling effect of the FCC's generic definition will be tempered by the Commission's restrained enforcement policy.").

<sup>22</sup> 19 FCC Rcd at 1980 ¶ 12.

as a general matter, we will analyze potentially profane language with respect to whether it is “so grossly offensive as to constitute a nuisance.”

18. Additionally, given the sensitive First Amendment implications in this area, we establish a presumption that our regulation of profane language will be limited to the universe of words that are sexual or excretory in nature or are derived from such terms. As our regulation of profane language is based on a nuisance rationale similar to that which forms the basis for indecency regulation, we believe that the same limitation on the scope of our regulation is appropriate and rests upon sound constitutional footing.<sup>23</sup> Although we recognize that additional words, such as language conveying racial or religious epithets, are considered offensive by most Americans, we intend to avoid extending the bounds of profanity to reach such language given constitutional considerations.<sup>24</sup>

19. We conclude below that certain vulgar sexual or excretory terms are so grossly offensive to members of the public that they amount to a nuisance and are presumptively profane. We reserve that distinction for the most offensive words in the English language, the broadcast of which are likely to shock the viewer and disturb the peace and quiet of the home. We also note, however, that in rare cases, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.<sup>25</sup> As detailed below, we caution that we will find this exception to be applicable only in unusual circumstances.

20. ***Forfeiture Calculations.*** The *Notices of Apparent Liability for Forfeiture* (“NALs”) contained in this decision are issued pursuant to section 503(b)(1) of the Act. Under that provision, 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 or to have violated section 1464 of title 18, United States Code, shall be liable to the United States for a forfeiture penalty.<sup>26</sup> Section 312(f)(1) of the Act defines willful as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law.<sup>27</sup> The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act,<sup>28</sup> and the Commission has so interpreted the term in the section 503(b) context.<sup>29</sup> The term “repeated” means that the action was committed or omitted more than once, or lasts more than one day.<sup>30</sup> We emphasize that every licensee is responsible for the decision to air particular programming and will be held

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<sup>23</sup> See *Pacifica*, 438 U.S. at 748-751; *Golden Globe Awards Order*, 19 FCC Rcd at 4981-82 ¶¶ 13-16.

<sup>24</sup> See, e.g., *Raycom America, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 4186, 4187, ¶¶ 3-4 (2003); *Complaint of Julian Bond, Atlanta NAACP*, Letter, 69 FCC 2d 943 (Broadcast Bur. 1978).

<sup>25</sup> See *Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004 of the ABC Television Network’s Presentation of the Film “Saving Private Ryan,”* Memorandum Opinion and Order, 20 FCC Rcd 4507, 4512-14 ¶¶ 13-18 (2005) (“*Saving Private Ryan*”).

<sup>26</sup> 47 U.S.C. § 503(b)(1)(B) & D. See also 47 C.F.R. 1.80(a)(1).

<sup>27</sup> 47 U.S.C. § 312(f)(1).

<sup>28</sup> See H.R. Rep. No. 97-765, 97<sup>th</sup> Cong. 2d Sess. 51 (1982).

<sup>29</sup> See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

<sup>30</sup> *Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 1359, 1362 ¶ 9 (2001).

accountable for violating federal restrictions on the willful or repeated broadcast of obscene, indecent, or profane material.

21. The Commission's *Forfeiture Policy Statement* establishes a base forfeiture amount of \$7,000 for the transmission of indecent or obscene materials.<sup>31</sup> The *Forfeiture Policy Statement* also specifies that the Commission shall adjust a forfeiture based upon consideration of the factors enumerated in section 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."<sup>32</sup> For the cases in this decision, the statutory maximum forfeiture amount for each apparent violation occurring prior to September 7, 2004 was \$27,500.<sup>33</sup> The statutory maximum forfeiture amount for violations discussed in this decision occurring on or after September 7, 2004 is \$32,500.<sup>34</sup> Consistent with the *Forfeiture Policy Statement*, we calculate forfeiture amounts by: (1) determining whether to use the base statutory amount, the maximum statutory amount, or a different figure below the statutory maximum based upon consideration of the factors enumerated in section 503(b)(2)(D); and (2) multiplying that figure by the number of violations. Where repeated violations have occurred but the resulting total forfeiture amount would be excessive to achieve the appropriate level of punishment and deterrence, we also may adjust the total proposed forfeiture according to the stated statutory factors.

### III. DISCUSSION

#### A. Notices of Apparent Liability for Forfeiture

##### 1. "The Surreal Life 2" (February 8, 2004)<sup>35</sup>

22. **The Programming.** The Commission received a complaint alleging that WBDC Broadcasting, Inc. ("WBDC Broadcasting"), licensee of Station WBDC-TV, Washington, D.C.,<sup>36</sup> and other station affiliates of the WB Television Network (the "WB Network"), broadcast indecent material during the *Pool Party Episode* of the program "The Surreal Life 2" on February 8, 2004, at 9:00 p.m. Eastern Standard Time. On September 27, 2004, the Bureau sent a letter of inquiry to the WB Network concerning this and other episodes of "The Surreal Life

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<sup>31</sup> See *Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*"); see also 47 C.F.R. § 1.80(b).

<sup>32</sup> *Forfeiture Policy Statement*, 12 FCC Rcd at 17100-01 ¶ 27.

<sup>33</sup> Effective September 7, 2004, the Commission 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 of the Commission's Rules*, Order, 19 FCC Rcd 10945, 10946 ¶ 6 (2004).

<sup>34</sup> *Id.*

<sup>35</sup> FCC File No. EB-04-IH-0166.

<sup>36</sup> See Letter from Lara Mahaney, Parents Television Council, to David H. Solomon, Chief, Enforcement Bureau, Federal Communications Commission (February 17, 2004). In its complaint, PTC incorrectly states that the call sign of the station is "KBDC-TV," but it appears that the complained-of station is Station WBDC-TV based on our review of the videotape of the program provided by PTC.



2.”<sup>37</sup> In response to the letter of inquiry, the WB Network stated, *inter alia*, that Station WBDC-TV aired the complained-of episode on February 8, 2004 at 9:00 p.m. Eastern Standard Time.<sup>38</sup>

23. “The Surreal Life 2” is a “reality-based” television program in which six cast members from diverse backgrounds share a luxurious house for 12 days. One of the six cast members, Ron Jeremy, is a veteran actor in pornographic movies. In the *Pool Party Episode*, he gives a pool party for about twenty of his friends in the pornographic movie industry. During the ten-minute sequence depicting this party, the episode displays approximately 20 pixilated views of various female guests’ nude breasts and, in one case, a female guest’s entire nude body. In addition, there are numerous other examples of sexual images and innuendo, including two brief, pixilated scenes in which Mr. Jeremy touches or kisses a female guest’s bare breast; a scene in which Andy Dick, another guest at the party, places his mouth on the top portion of a female cast member’s breast and makes a comic sound, and the female cast member explains that they are just friends; another scene in which Andy Dick kisses a female guest’s pixilated bare breast and spanks her buttocks, stating jestingly that she should go to her room and he’ll join her there shortly; a scene where a female guest appears to sexually proposition a male cast member;<sup>39</sup> and a scene in which another female cast member suggests that the party attendees play a game of “strip truth or dare to get naked,” saying to Ron Jeremy, “[c]ome on porn star, everyone knows about your big [bleep], though I haven’t seen it.”

24. **Indecency Analysis.** We find that the material meets the first prong of the indecency test. As noted above, the episode contains several pixilated views of nude breasts and a nude body, as well as other sexual images and innuendo described above.<sup>40</sup> All of this material depicts or describes sexual activities and organs.

25. Moving to the second prong of our indecency test, we also find that the material is, in the context presented here, patently offensive as measured by contemporary community standards for the broadcast medium. The first of the three principal factors in our contextual analysis weighs in favor of a finding of patent offensiveness because the material is explicit and graphic. In this regard, the mere pixilation of sexual organs is not necessarily determinative under our analysis because the material must be assessed in its full context.<sup>41</sup> Here, despite the

<sup>37</sup> See Letter from William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to John Maatta, Executive Vice-President and General Counsel, The WB Television Network (September 27, 2004).

<sup>38</sup> See Letter from Arthur H. Harding, Esquire, Fleischman and Walsh, L.L.P., counsel for The WB Television Network, to David Brown, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission (October 6, 2004) (“October Response”); Letter from Arthur H. Harding, Esquire, Fleischmann and Walsh, L.L.P., counsel for the WB Television Network, to William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission (November 1, 2004).

<sup>39</sup> In this scene, program participant Erik Estrada says that one of the female guests propositioned him with “an oral compliment.” The camera then turns to a scene where the female guest in question says to Mr. Estrada: “Wanna come inside [bleep].” Mr. Estrada responds with a shocked facial expression. The camera then turns to a scene in which he says into the camera: “And I said ‘ah you’re very kind and generous, but you know what? I’m a married man.’”

<sup>40</sup> See *Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program “Married By America” on April 7, 2003*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 20191, 20194 ¶ 10 (2004) (“*Married By America NAL*”) (program featuring bachelor and bachelorette parties with pixilated nudity of professional strippers met first prong of indecency standard).

<sup>41</sup> *Id.*

obscured nature of the nudity, it is unmistakable that partygoers are exposing and discussing sexual organs as well as participating in sexual activities, such as when Mr. Jeremy touches or kisses an unclothed female breast. Indeed, a child watching this program could easily discern that nude or partially nude adults are attending a party and participating in, or soliciting participation in, sexual activities.<sup>42</sup> We, therefore, find that the complained-of material is explicit and graphic.

26. With respect to the second prong of our contextual analysis, we find that the broadcast dwells on and repeats the sexual material. We have repeatedly held that repetition and persistent focus on sexual or excretory material is a relevant factor in evaluating the potential offensiveness of broadcasts.<sup>43</sup> In this case, the presentation of approximately 20 views of pixilated female nudity within a ten-minute segment, together with other depictions or descriptions of sexual organs or activities during the same episode, demonstrates that this episode dwells upon and repeats sexual material.

27. Looking to the final prong of our test, we conclude that the broadcast material is presented in a manner that panders to, titillates, and shocks the audience. Among other things, the material depicts male cast members and party guests ogling, fondling, and kissing female party guests' bare breasts, a male party guest spanking a female guest's buttocks and placing his lips on a female cast member's breast, a female party guest sexually propositioning a male cast member, and a male and female cast member attempting to goad one another into disrobing, with the female cast member proposing a game of "strip truth or dare to get naked." The strong emphasis on the fact that some female party guests are pornographic film stars also panders to the audience.

28. In reaching our determination, we disagree with WB Network's contention that "these isolated scenes contain no graphic depictions or profanity that might rise to the level of actionable indecency."<sup>44</sup> In support of its argument, WB Network cites the *KSAZ MO&O* and the *Buffy the Vampire Slayer MO&O* in which we denied indecency complaints. Both of these cases, however, are distinguishable from the *Pool Party Episode* of the "The Surreal Life 2." Each of those cases involved two fully clothed adults, and the individual scenes involved were less graphic, explicit, and sustained than the complained-of material here.

29. In sum, because the material is explicit and graphic, is dwelled upon, and presented in a manner to titillate and shock viewers, we conclude that the broadcast of the material at issue here is patently offensive under contemporary community standards for the broadcast medium and thus apparently indecent. The complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under section

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<sup>42</sup> *Id.* (finding that "although the nudity was pixilated, even a child would have known that the strippers were topless and that sexual activity was being shown.").

<sup>43</sup> See *Indecency Policy Statement*, 16 FCC Rcd at 8008 ¶ 17 (citing cases); see also *Married by America NAL*, 19 FCC Rcd at 20195 ¶ 11; ; *Entercom Seattle License, LLC*, Order on Review, 19 FCC Rcd 9069, 9073-74 ¶ 13 (2004) ("*Entercom Seattle Order on Review*"), petition for recon. pending.

<sup>44</sup> October Response at 2 (citing *KSAZ Licenses, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 15999 (2004) ("*KSAZ MO&O*") and *Complaints Against Various Broadcast Licensees Regarding Their Airing of the UPN Network Program "Buffy the Vampire Slayer" On November 20, 2001*, Memorandum Opinion and Order, 19 FCC Rcd 15995 (2004) ("*Buffy the Vampire Slayer MO&O*").

73.3999 of the Commission's rules.<sup>45</sup> Therefore, there is a reasonable risk that children may have been in the viewing audience and the broadcast is legally actionable.

30. ***Forfeiture Calculation.*** In the instant case, WBDC Broadcasting consciously and deliberately broadcast this episode. Accordingly, we find that WBDC Broadcasting's broadcast in apparent violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999 was willful within the meaning of section 503(b)(1) of the Act, and subject to forfeiture.

31. Based on the egregious nature of the broadcast material at issue, and the factors enumerated in section 503(b)(2)(D) of the Act, we further find that a forfeiture amount of \$27,500, the statutory maximum in effect at the time of the broadcasts, is appropriate.<sup>46</sup> The gravity of the apparent violation is heightened by the degree to which the scene dwells on and repeats sexual material in a manner that titillates and shocks viewers. The scene lasts for over ten minutes, contains approximately twenty pixilated images of nude adults, including a fully nude body, and focuses almost entirely on men and women disrobing, ogling, fondling, kissing, and sexually propositioning one another during a pool party. Moreover, the *Pool Party Episode* of "The Surreal Life 2" is a taped program with an obvious sexual theme that could have been ascertained and preempted by the licensee or shown after 10 p.m.

32. Although other stations also may have broadcast the *Pool Party Episode*, we propose a forfeiture only against WBDC Broadcasting, Inc. as the only licensee whose broadcast of the material was actually the subject of a viewer complaint to the Commission.<sup>47</sup> We recognize that this approach differs from that taken in previous Commission decisions involving the broadcast of apparently indecent programming.<sup>48</sup> Our commitment to an appropriately restrained enforcement policy, however, justifies this more limited approach towards the imposition of forfeiture penalties.<sup>49</sup> Accordingly, we propose a forfeiture of \$27,500 against WBDC Broadcasting, Inc.

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<sup>45</sup> See 47 C.F.R. § 73.3999.

<sup>46</sup> The subject broadcast occurred prior to the September 7, 2004, effective date of the most recent adjustment of the statutory maximum forfeiture amount. Accordingly, the appropriate maximum statutory amount here is \$27,500. See *supra* ¶ 21.

<sup>47</sup> The fact that WBDC may not have originated the programming in question is irrelevant to whether there is an indecency violation. See *Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates*, Notice of Proposed Rulemaking, 10 FCC Rcd 11951, 11961, ¶ 20 (1995) (internal quotation omitted) ("We conclude that a licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory.").

<sup>48</sup> See *Married By America NAL*, 19 FCC Rcd at 20196 ¶ 16 (proposing forfeitures against all Fox Television Network affiliate stations that broadcast apparently indecent material). See also *Clear Channel Broadcasting Licenses, Inc. et al.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 6773, 6779 ¶ 16 (2004) (proposing forfeiture against all commonly owned and operated stations that broadcast the programming at issue, and directing an investigation into stations owned by another licensee that broadcast the same program), *vacated per consent decree*, 19 FCC Rcd 10880 (2004).

<sup>49</sup> See *supra* ¶ 11 and note 11.

## 2. “Con El Corazón En La Mano” (October 9, 2004)<sup>50</sup>

33. **The Programming.** The Commission received a complaint alleging that NBC Telemundo License Co. (“NBC Telemundo”), licensee of Station KWHY-TV, Los Angeles, California, aired indecent material at approximately 8:15 p.m. on October 9, 2004, during a broadcast of the Spanish-language movie, “Con El Corazon En La Mano.” The complaint alleged that the broadcast contains a scene depicting a man and woman engaged in sexual intercourse while another individual watches them.

34. On April 8, 2005, the Bureau directed a letter of inquiry to NBC Telemundo concerning the broadcast.<sup>51</sup> NBC Telemundo responded by letters dated May 19 and June 24, 2005.<sup>52</sup> As confirmed by a videotape of the program provided by NBC Telemundo, the scene in question depicts a man raping a woman in a public restroom while another man stands nearby, acting as a lookout. NBC Telemundo acknowledges that it aired the movie over Station KWHY-TV, Los Angeles, California, beginning at 8:00 p.m. on October 9, 2004, and that the scene took place within the first 15 minutes of the broadcast.<sup>53</sup> NBC Telemundo maintains, however, that “the complained-of material is not actionably indecent because it does not include depictions of nude sexual or excretory organs, offensive language or other material that the Commission previously has deemed indecent.”<sup>54</sup>

35. **Indecency Analysis.** We find that the programming at issue is within the scope of our indecency definition because it clearly depicts sexual activity. NBC Telemundo does not deny that the material portrays a woman being raped.

36. We also find that the complained-of material is, in the context presented, patently offensive as measured by contemporary community standards for the broadcast medium. Turning to the three principal factors that inform our contextual analysis, the scene is explicit and graphic. The material depicts a woman being savagely attacked and raped in a public restroom. One man grabs the woman and forcibly kisses her as she struggles to free herself. He strikes her to the floor and, kneeling down, grabs one of her breasts as she screams. As they struggle together on the floor, the camera focuses on their hips, showing his hand pulling her underwear down her bare thigh as he maneuvers on top of her with his groin between her legs. She forces him off her by grabbing his testicles, but the other man blocks her escape from the room, and the first man again pulls her to the floor, re-mounts her and begins kissing her. She appears to cease resisting and returns his kisses. The camera again pans to their hips, showing his hand fumbling at his zipper. They quite clearly appear to have sexual intercourse, with his groin thrusting into hers as she moans, until he finally stops and rolls off of her. The scene then continues for several minutes, depicting her reaction to the attack. The material by its very design is extraordinarily

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<sup>50</sup> FCC File No. EB-04-IH-0572.

<sup>51</sup> See Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to NBC Telemundo License Co. (April 8, 2005).

<sup>52</sup> See Letter from F. William LeBeau, Senior Regulatory Counsel and Assistant Secretary, NBC Telemundo License Co., to David Brown, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau (May 19, 2005) (“Response”); Letter from F. William LeBeau, Senior Regulatory Counsel and Assistant Secretary, NBC Telemundo License Co., to David Brown, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau (June 24, 2005).

<sup>53</sup> Response at 2-3.

<sup>54</sup> *Id.* at 2.

intense and extremely graphic. We reject NBC Telemundo's claim that the material is neither explicit nor graphic simply because it contained no actual nudity. For example, in the *Married By America NAL*, we found that scenes in which nudity is electronically obscured may be considered graphic and explicit if the sexual nature of the scene is unmistakable.<sup>55</sup> In this case, the sexual nature of the scene is unquestionable, and the material is undeniably graphic, notwithstanding the lack of nudity.

37. Moving to the second factor in our contextual analysis, we conclude that the broadcast dwells on sexual material. We have repeatedly held that a persistent focus on sexual material is a relevant factor in evaluating the potential offensiveness of broadcasts.<sup>56</sup> The rape scene in question lasts several minutes and, contrary to NBC Telemundo's claim, is hardly ephemeral. As we stated in the *Indecency Policy Statement*, "[r]epetition and persistent focus on sexual or excretory material have been cited consistently as factors that exacerbate the potential offensiveness of broadcasts."<sup>57</sup>

38. With respect to the third factor, we find the material to be shocking. In this regard, NBC Telemundo concedes that the rape scene was designed to portray the "intensity of [a] serious and unspeakable event . . ."<sup>58</sup> We agree. Not only does the scene portray an "unspeakable" event of a profoundly disturbing sexual and violent nature, it depicts an incident that was unquestionably shocking and one to which children should not have been exposed. We reject NBC Telemundo's argument that the instant case is indistinguishable from *Saving Private Ryan*,<sup>59</sup> wherein we determined that graphic language throughout the movie was critical to portraying serious events realistically.<sup>60</sup> NBC Telemundo has not demonstrated here that the depiction of a woman being violently raped in such a sustained and graphic manner is essential. In any event, even if these aspects of the scene were essential to the movie, that finding would not alter our ultimate conclusion in this case because the other two factors weigh heavily in favor of a finding of patent offensiveness as measured by contemporary community standards for the broadcast medium. We also do not find that NBC Telemundo's parental advisory prior to its broadcast of "Con El Corazon En La Mano" insulates the licensee from liability.<sup>61</sup>

39. In sum, because the material is explicit and graphic, is dwelled upon, and is shocking, we conclude that its broadcast was patently offensive under contemporary community standards for the broadcast medium and thus apparently indecent. The complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination

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<sup>55</sup> 19 FCC Rcd at 20194 ¶ 10. See also *Back Bay Broadcasting*, Notice of Apparent Liability for Forfeiture, 14 FCC Rcd 3997, 3998 (Mass Media Bur. 1999) ("*Back Bay NAL*") (forfeiture paid) (finding broadcast indecent despite attempt to obscure objectionable language because words remained clearly "recognizable, notwithstanding the editing").

<sup>56</sup> See *Indecency Policy Statement*, 16 FCC Rcd at 8008, ¶ 17 (citing cases); see also "*Married By America*" *NAL*, 19 FCC Rcd at 20195 ¶ 11; *Entercom Seattle Order on Review*, 19 FCC Rcd at 9073-74 ¶ 13.

<sup>57</sup> 16 FCC Rcd at 8008 ¶ 17.

<sup>58</sup> Response at 8.

<sup>59</sup> *Id.* at 7-8.

<sup>60</sup> *Saving Private Ryan*, 20 FCC Rcd at 4512-13, ¶ 14.

<sup>61</sup> See *Pacifica*, 438 U.S. at 748-49 (holding that warnings are not necessarily effective because the audience is constantly changing stations).

under section 73.3999 of the Commission's rules.<sup>62</sup> Therefore, there was a reasonable risk that children may have been in the viewing audience and the broadcast is legally actionable.

40. ***Forfeiture Calculation.*** In the instant case, we find that NBC Telemundo consciously and deliberately broadcast the film in question. Accordingly, we find that NBC Telemundo's apparent violation of 18 U.S.C. § 1464 and section 73.3999 of our rules was willful within the meaning of section 503(b)(1) of the Act, and subject to forfeiture.

41. We therefore turn to the proposed forfeiture amount, based on the factors enumerated in section 503(b)(2)(D) of the Act and the facts and circumstances of this case. We find that the statutory maximum, \$32,500,<sup>63</sup> is appropriate for several reasons. As discussed in detail above, the scene is extremely shocking, depicting a violent rape in a graphic and sustained manner. Also, the broadcast was prerecorded. NBC Telemundo knew that the film contained this material and should have taken efforts to edit the scene. Indeed, NBC Telemundo did include a warning of the upcoming scene. Although inclusion of a warning might warrant a lower forfeiture under certain circumstances, we find that it does not here in light of all of the circumstances surrounding the apparent violation, including the shocking and gratuitous nature of the scene and the fact that it was prerecorded. Therefore, we find that NBC Telemundo is apparently liable for a forfeiture of \$32,500 for its October 9, 2004 broadcast of "Con El Corazon En La Mano."

42. Although other stations may have broadcast the material at issue here between 6 a.m. and 10 p.m., we propose a forfeiture against only the licensee and station whose broadcast of the material was actually the subject of a viewer complaint to the Commission. We recognize that this approach differs from that taken in previous Commission decisions involving the broadcast of apparently indecent programming.<sup>64</sup> Our commitment to an appropriately restrained enforcement policy, however, justifies this more limited approach towards the imposition of forfeiture penalties.<sup>65</sup>

### 3. "Fernando Hidalgo Show" (October 19, 2004)<sup>66</sup>

43. ***The Programming.*** The Commission received a complaint alleging that Station WJAN-CA, Miami, Florida, aired indecent material during the October 19, 2004 broadcast of the program the "Fernando Hidalgo Show," a Spanish-language talk show. The complaint refers to a segment that involved partial female adult nudity. The segment was more than fifteen minutes in duration.

44. On February 11, 2005, the Bureau sent a letter of inquiry to Sherjan Broadcasting Company, Inc., the licensee of Station WJAN-CA, concerning the material described above allegedly broadcast over the station.<sup>67</sup> Sherjan responded by letter dated March 14, 2005.<sup>68</sup> As

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<sup>62</sup> See 47 C.F.R. § 73.3999.

<sup>63</sup> The subject broadcast occurred after the September 7, 2004, effective date of the most recent adjustment of the statutory maximum forfeiture amount. Accordingly, the appropriate maximum statutory amount here is \$32,500. See *supra* ¶ 21.

<sup>64</sup> See *supra* note 48.

<sup>65</sup> See *supra* ¶ 11 and note 11.

<sup>66</sup> FCC File No. EB-04-IH-0625.

<sup>67</sup> See Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Sherjan Broadcasting Company, Inc. (February 11, 2005) ("LOI").

confirmed by the videotape of the program provided by Sherjan, during the segment in question, the host introduces a female guest by stating, “before we present Juliana I want to tell the gentlemen to be careful because she is dressed in a way that can cause a heart attack.”<sup>69</sup> The female guest then appears in an open-front dress, with her nipples covered, but her breasts otherwise fully exposed. As she makes her entrance, she pirouettes in front of the audience, then shakes her breasts towards the cameras. When she turns to face the host, he briefly stares at her breasts, then mugs for the camera. Sherjan acknowledges that the material in question was aired over Station WJAN-CA at 7:00 p.m. on October 19, 2004, and that the female guest appeared in an open-front dress.<sup>70</sup> However, Sherjan maintains that the complained-of material is not actionably indecent because it is “a comedy routine” and does not shock or titillate.<sup>71</sup>

45. **Indecency Analysis.** We find that the programming at issue is within the scope of our indecency definition because it depicts sexual organs – specifically an adult woman’s breasts. Sherjan argues that the complained-of material “did not include any description of sexual or excretory functions in either the video or audio portion, let alone graphic descriptions.”<sup>72</sup> However, the indecency definition clearly encompasses depictions of sexual organs as well as sexual activities.<sup>73</sup> Moreover, the explicitness of the depiction is not relevant to the threshold issue of whether the material depicts or describes a sexual or excretory organ or activity, and is more appropriately considered in our analysis of whether the material is patently offensive.

46. Turning to that issue, we find that, based on our contextual analysis, the material in question is patently offensive as measured by contemporary community standards for the broadcast medium. With respect to the first factor of our contextual analysis, we find that the material is explicit and graphic. The material clearly depicts a woman’s naked breasts, which are sexual organs. In this respect, this case is similar to other cases in which we have held depictions of nudity to be graphic and explicit.<sup>74</sup> The fact that the guest’s nipples are covered with jewelry does not render the depiction of her breasts, which were otherwise fully exposed, insufficiently

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<sup>68</sup> See Letter from Peter Tannenwald, Irwin, Campbell & Tannenwald, P.C., to David Brown, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission (March 14, 2005).

<sup>69</sup> *Id.* at Attachment 2 (licensee’s English-language translation of broadcast). Also according to the licensee’s translation, immediately before the woman appears on stage, the host asks another guest, “Do you know Juliana?” The guest states that she knows “Juliana How Bad You Are,” a popular Spanish-language song. The host replies, “Well this one is worse than that! And we’re going to present her now!” *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 2.

<sup>72</sup> *Id.* at 1-2.

<sup>73</sup> See, e.g., *Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 19230, 19235 ¶ 11 (2004) (“*Super Bowl NAL*”) (finding that Super Bowl halftime show, which displayed a bare female breast, satisfied subject matter prong of indecency analysis).

<sup>74</sup> *Id.*, 19 FCC Rcd at 19235 ¶ 13 (finding that a broadcast, which showed a performer’s exposed breast, was graphic and explicit). See also *Young Broadcasting of San Francisco, Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 1751, 1755 ¶ 11 (2004) (“*Young Broadcasting NAL*”) (finding that a broadcast of performer’s exposed penis was graphic and explicit).

graphic to weigh in favor of a finding of patent offensiveness.<sup>75</sup> Here, the audience had a sustained view of the guest's breasts from several different angles, and the dress only served to enhance the view.

47. With respect to the second factor of our analysis, we find that the broadcast dwells on the sexual material. The guest's naked breasts are visible throughout much of the segment in question, which lasts more than fifteen minutes.<sup>76</sup> Furthermore, the camera focuses on the female guest's torso during much of that time. We have repeatedly held that repetition and persistent focus on sexual or excretory material is a relevant factor in evaluating the offensiveness of broadcasts.<sup>77</sup>

48. With respect to the third factor, we find that the female guest's partial nudity shocked, pandered to, and titillated the audience. Indeed, the behavior of the guest and the host as she came on stage highlighted the titillating nature of the material. Finally, we reject the licensee's contention that the material broadcast is not indecent because it is "a comedy routine." Even if this segment was comedic, it is well settled that comedy formats do not insulate otherwise indecent material.<sup>78</sup>

49. In sum, we find that the broadcast material referenced in the complaint contains an explicit and graphic depiction of sexual organs, and that the nudity is dwelled upon and shocked, pandered to, and titillated the audience. Therefore, we find that the material is patently offensive as measured by contemporary community standards for the broadcast medium and is apparently indecent. The complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under section 73.3999 of the Commission's rules.<sup>79</sup> Therefore, there is a reasonable risk that children may have been in the viewing audience at the time that the material at issue was broadcast, and the broadcast is legally actionable.

50. **Forfeiture Calculation.** In the instant case, Sherjan consciously and deliberately aired the "Fernando Hidalgo Show." By airing the complained-of material, we find that Sherjan's apparent violation of section 73.3999 and 18 U.S.C. § 1464 was willful within the meaning of section 503(b)(1) of the Act, and subject to forfeiture.

51. We therefore turn to the proposed forfeiture amount, based on the factors enumerated in section 503(b)(2)(D) of the Act and the facts and circumstances of this case. For the following reasons, we propose a forfeiture of \$32,500, the statutory maximum, for this broadcast.<sup>80</sup> The scene is sustained, lasting 15 minutes, and contains no warning of the adult-

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<sup>75</sup> See *Super Bowl NAL*, 19 FCC Rcd at 19235-36, ¶ 13 (finding that a broadcast of performer's exposed breast was "clearly graphic," even though breast was partially covered).

<sup>76</sup> In this connection, we note that in the *Super Bowl NAL*, we found that the broadcast of an exposed breast was indecent, even though it lasted less than one second. *Id.*

<sup>77</sup> See *Indecency Policy Statement*, 16 FCC Rcd at 8008 ¶ 17 (citing cases); see also *Married By America NAL*, 19 FCC Rcd at 20195 ¶ 11; *Entercom Seattle Order on Review*, 19 FCC Rcd at 9073-74 ¶ 13.

<sup>78</sup> See *Pacifica*, 438 U.S. at 744 (upholding the Commission's finding that the broadcast of a comedy monologue featuring references to sexual activities and organs was patently offensive and violated the statutory prohibition on indecency).

<sup>79</sup> See 47 C.F.R. § 73.3999.

<sup>80</sup> The subject broadcast occurred after the September 7, 2004 effective date of the most recent adjustment of the statutory maximum forfeiture amount. Accordingly, the appropriate maximum statutory amount here is \$32,500. See *supra* ¶ 21.



oriented content. In addition, the gravity of the apparent violation is heightened because of its egregious nature. Thus we find Sherjan Broadcasting Company, Inc. is apparently liable for a forfeiture of \$32,500 for its October 19, 2004 broadcast of the “Fernando Hidalgo Show.”

#### 4. “Video Musicales” (February 2 -March 8, 2002)

52. *The Programming.* The Commission received a series of written complaints from individuals associated with the group D’Vanguardia (“Complainants”) alleging that Aerco Broadcasting Corp. (“Aerco”), licensee of Station WSJU-TV, San Juan, Puerto Rico, repeatedly broadcast indecent material between the hours of 6:00 a.m. and 10:00 p.m. during the “Video Musicales” program in early 2002.<sup>81</sup> After reviewing the complaints and videotapes provided by the Complainants, the Bureau directed a letter of inquiry to Aerco requesting further information about the music videos that Station WSJU-TV allegedly broadcast,<sup>82</sup> specifically including “DJ Joe, Fatal Fantasy 2 – Feat, Trebol, Clan,”<sup>83</sup> “DJ Joe, Fatal Fantasy 2-- Feat, Nejo, Speedy,”<sup>84</sup> “Operation Sandunga,”<sup>85</sup> and a promotional spot for a DVD entitled “Dangerous -- Fatal Fantasy 2.”<sup>86</sup>

53. Aerco responded to the Bureau’s letter on March 23, 2004, providing a Spanish transcription and English translation of each of the music videos and other material.<sup>87</sup> Aerco states that it is not able to confirm whether it broadcast some of the material at the times and dates provided in the complaints and whether the music videos and other material on the videotape provided by the Complainants accurately reflect Station WSJU-TV’s broadcasts.<sup>88</sup> However, Aerco did not provide any documentation that challenged or raised questions about

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<sup>81</sup> See Letter from David Ramos and Gloria Cardona, D’Vanguardia, to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (March 12, 2002); Letter from David Ramos and Gloria Cardona, D’Vanguardia, to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (March 2, 2002); Letter from David Ramos and Gloria Cardona, D’Vanguardia, to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (February 26, 2002); Letter from David Ramos to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (February 26, 2002); Letter from Gloria Cardona and David Ramos, D’Vanguardia, to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (February 22, 2002).

<sup>82</sup> See Letter from Maureen F. Del Duca, Chief, Investigations and Hearings Division, Enforcement Bureau, to Aerco (December 24, 2003) (“LOI”).

<sup>83</sup> FCC File Nos. EB-02-IH-0167, EB-02-IH-0198.

<sup>84</sup> FCC File Nos. EB-02-IH-0167, EB-02-IH-0199.

<sup>85</sup> FCC File Nos. EB-02-IH-0167, EB-02-IH-0199.

<sup>86</sup> FCC File No. EB-02-IH-0258.

<sup>87</sup> See Letter from John A. Borsari to Marlene H. Dortch, Secretary, Federal Communications Commission at Exhibits 1-A -- 6-B (March 23, 2004) (“Response”).

<sup>88</sup> *Id.* at 1-5. Aerco states that several music videos, all entitled “Fatal Fantasy 2,” were broadcast between January and March 2002. Thus, Aerco claims it cannot confirm the dates and times for the airing of the specific videos “DJ Joe, Fatal Fantasy 2 – Feat, Trebol, Clan” or “DJ Joe -- Fatal Fantasy 2.” *Id.* at 2-3. In regard to “Operation Sandunga,” Aerco states that it does not have any records of such a titled music video. *Id.* at 4. It asserts that Aerco broadcasts programs produced by independent producers after 10:00 p.m. and some of these broadcasts contain music videos that would not be reflected in Aerco’s program logs. *Id.* at 4-5. Aerco further asserts that since these broadcasts are aired after 10:00 p.m., “Operation Sandunga” could not have been broadcast between 10:00 a.m. and 10:52 a.m., as alleged in the complaints. *Id.* at 5. Aerco confirms that it broadcast the promo for “Dangerous – Fatal Fantasy 2” on the four dates alleged in the Bureau LOI, but is unable to confirm the broadcast times. *Id.* at 4.

any of the complaints or videotapes made by the Complainants. Aerco also did not provide a complete record of its program logs for the dates alleged in the complaints.<sup>89</sup>

54. Aerco asserts that it is not aware of any other complaints about the material in question and thus contends that each of the complaints represents only a single viewer who objects to the broadcast matter.<sup>90</sup> In addition, Aerco asserts that, in many instances, significant portions of the material are inaudible and thus an ordinary viewer would be not be able to understand the lyrics. Aerco explains that it hired an independent firm to prepare the transcript to respond to the Bureau's LOI, which isolated the music portion from the speaking portion to identify the lyrics.<sup>91</sup> Aerco asserts that the lyrics do not contain offensive or indecent language and that there were no nude scenes that would satisfy the Commission's standards for the definition of indecency.<sup>92</sup> Aerco concedes that some of the material is suggestive, but that any "sexual or excretory import to the innuendo or artistic license taken by the performers is subject to individual interpretation and to be categorized as indecent, and not merely poor taste, such innuendo must be unmistakable."<sup>93</sup>

55. "DJ Joe, Fatal Fantasy 2 – Feat, Trebol, Clan." This song repeatedly mentions the singer's near-constant state of sexual arousal. There is a segment of the video in which a boy appears to masturbate in a bathroom stall. The lyrics accompanying the segment translate as follows:

When I had been barely born, I instantly knew where I had come from. Since then until I grew up, I have always yearned to be inside a similar hole. In elementary school they called me Mr. Corner. In intermediate school they called me "little masturbator" because this is where my vice of rubbing myself incessantly began.<sup>94</sup>

56. "DJ Joe, Fatal Fantasy 2 -- Feat, Nejo, Speedy." There are multiple segments in which women clad in bikini tops and thongs bend away from the camera – exposing their

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<sup>89</sup> *Id.* at Exhibit 7. In response to the Bureau LOI, Aerco provided a program log for only one of the nine days mentioned in the complaints. Aerco also provided program logs for multiple days not mentioned in the Bureau LOI. The program logs list dates and times of program material, but provide only partial titles of the music videos played. Thus, there are multiple entries for a program entitled "Fatal Fantasy," which could be any of three videos discussed in this *Notice of Apparent Liability*. Because of the confusing nature of Aerco's program logs and the fact that Aerco does not dispute the times and dates listed in the videotapes provided by the Complainants, we will rely only on the videotapes as the basis for the proposed forfeiture here.

<sup>90</sup> *Id.* at 8.

<sup>91</sup> *Id.* at 8-9.

<sup>92</sup> *Id.* at 9-10.

<sup>93</sup> *Id.* at 10.

<sup>94</sup> This translation is based upon our review of the material at issue. Aerco provides the following translation (the parenthetical is in Aerco's translation):

Just barely a newborn, I soon knew where I'd come out from. Since then and until I grew up, in the same kind of hole I always like to be. In elementary school they called me "Mr. Hop." In junior high they called me "Punecinco" (invented word), because that's when I got into the habit of pleasing myself.

buttocks to the viewer -- and simulate sexual intercourse. The music video includes a specific scene of a woman bending away from the camera wearing a thong while one of the male singers slaps her on the buttocks. The lyrics accompanying the segment translate as follows:

I pushed her from the front. I took her and had her. I took her bra off. I lowered her panties like old times. I will give it to you through the ass. I will give it to you through the ass.<sup>95</sup>

57. “Dangerous -- Fatal Fantasy 2.” This promo for a DVD includes multiple scenes with scantily-clad women fondling themselves and each other in a sexual fashion. For example, there are scenes in which females caress their breasts, buttocks and/or genital area. The promo also includes several close-up camera shots of thong-clad buttocks, of scantily-clad breasts and crotches, and of a woman removing her top (with the shot changing just before her breasts are completely exposed). Some of these scenes also show a woman applying baby oil to another woman’s buttocks and women caressing each other’s breasts and buttocks.

58. “Operation Sandunga.” This material contains scenes with scantily-clad women depicting lap dances and a scene simulating oral sex. In one scene, the male singer is seated on a sofa with his legs spread apart. In between his legs kneeling on the floor is a female with her back to the camera whose head bobs up and down over the male’s genital area, simulating oral sex. In other scenes, the woman is also variously shown kneeling and gyrating between his legs or straddling one leg and gyrating with her chest in his face. According to Aerco, the lyrics for the scene in which oral sex is simulated translate to: “You have to lick, lick, lick, lick, lick ... You have to lick, mami, really ‘be’ ... ‘tra’, [sic] to feel my thing and lick, mami, really ‘be’ ... ‘tra’, [sic] to feel my thing.”<sup>96</sup>

59. **Indecency Analysis.** For the reasons discussed below, we find that each of the complained-of videos and promo is apparently indecent.

60. “DJ Joe, Fatal Fantasy 2 – Feat, Trebol, Clan.” The material dwells on the singer’s near-constant state of arousal, depicts a male child simulating masturbation, and the accompanying lyrics also refer to masturbation. We find, therefore, that the material meets the first prong of our indecency analysis.

61. Turning to the three principal factors that comprise our contextual analysis, as mentioned above, we also find that the material, in the context presented, is patently offensive under contemporary community standards for the broadcast medium. With respect to the first factor, the material explicitly depicts a male child simulating masturbation, and includes lyrics also graphically and explicitly describing masturbation, including characterization of the child as a “masturbator,” and a description of “rubbing himself” incessantly. We find, with respect to the second factor, that the material repeatedly discusses the singer’s sexual arousal. We also find that the simulated masturbation and lyrics that refer to masturbation by a male child are not only pandering and titillating, they are shocking.

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<sup>95</sup> This translation is based upon our review of the material at issue. Aerco provides the following translation:

I used to push her with my front part and with my chest far away. I used to take her and screw her. The brassieres I used to take off, the panties I used to take down, like in the old days, I’m giving it to you, I’m giving it to you.

Response at Exhibit 3-B.

<sup>96</sup> *Id.* at Exhibit 6-B (punctuation included in the original).

62. “DJ Joe, Fatal Fantasy 2 -- Feat, Nejo, Speedy.” We find that this material depicts simulated sexual activity between a woman in a thong and a male singer. The lyrics accompanying this depiction refer to sexual activity, including “I took her and had her,” “I lowered her panties like old times,” and “I will give it to you through the ass.” This material also depicts and describes the buttocks, which are sexual and excretory organs.<sup>97</sup>

63. We also find that the material, in the context presented, is patently offensive under contemporary community standards for the broadcast medium. The segment depicts simulated sexual intercourse and contains lyrics that graphically and explicitly describe sexual activities (“I will give it to you through the ass”). In this segment, women’s buttocks are also clearly visible on screen. The segment dwells on and repeats the sexual material, the second factor in our analysis. We have repeatedly held that repetition and persistent focus on sexual material is a relevant factor in evaluating the potential offensiveness of broadcasts.<sup>98</sup> The camera angles throughout repeatedly dwell on shots that provide views of the female dancers’ buttocks. The segment is focused entirely on the repetition of simulated sexual activity with accompanying lyrics that describe such activity. With respect to the third factor, we find that the simulated sexual activity, accompanied by explicit lyrics that reference sexual activity (“I will give it to you through the ass”), and the persistent visual focus on the female dancer’s buttocks are presented in a manner that is obviously pandering and titillating.

64. “Dangerous -- Fatal Fantasy 2.” We find that this material meets the first prong of the Commission’s indecency test. The material includes close-up shots of thong-clad buttocks, breasts and crotches, as well as females fondling their breasts, buttocks and genital areas while they dance, gyrate, and fondle one another in a sexually suggestive manner. These scenes clearly depict sexual organs and activities.

65. We also find that this material, in the context presented, is patently offensive under contemporary community standards for the broadcast medium. The material contains close-up shots of thong-clad buttocks, a female fondling her genital area, and women caressing their own breasts and buttocks as well as those of others. Thus, we conclude that the material is graphic and explicit. Second, while not dispositive, it is relevant that these types of images appear numerous times throughout the promo and, therefore, that sexual images are sustained and repetitious. Finally, the close-up shots of thong-clad buttocks and women fondling their own breasts, buttocks and genital areas as well as the breasts and buttocks of other women in a sexually suggestive manner are presented in a pandering and titillating manner. Indeed, this material appears to have little other purpose. Therefore, because the complained-of material is explicit and graphic, repeated, and is pandering and titillating, we conclude that the promo is patently offensive and thus indecent.

66. “Operation Sandunga.” This material meets the first prong of the indecency test. As noted above, this material includes a scene and lyrics describing and depicting oral sex, a

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<sup>97</sup> See, e.g., *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000) (Supreme Court did not disturb a city’s indecency ordinance prohibiting public nudity, which listed the buttocks as among the body parts subject to the ordinance’s ban on nudity); *Loce v. Time Warner Entertainment Advance/Newhouse Partnership*, 191 F.3d 256, 269 (2d. Cir. 1999) (upholding state district court’s determination that Time Warner’s decision to not transmit certain cable programming that it reasonably believed indecent (some of which included “close-up shots of unclothed breasts and buttocks”) did not run afoul of the Constitution).

<sup>98</sup> See *Indecency Policy Statement*, 16 FCC Rcd at 8008 ¶ 17 (citing cases); see also *Married By America NAL*, 19 FCC Rcd at 20195 ¶ 11; *Entercom Seattle Order on Review*, 19 FCC Rcd at 9073-74 ¶ 13.

sexual activity. Accordingly, we find that the material describes and depicts a sexual activity. We also find that the material, in the context presented here, is patently offensive under contemporary community standards for the broadcast medium. With respect to the first principal factor that informs our contextual analysis, the scene and lyrics depict and describe a female performing oral sex in a manner that is graphic and explicit. With respect to the second factor, while not dispositive, it is relevant that sexual references are sustained and repeated. The scene depicting oral sex is coupled with numerous other scenes depicting the same woman gyrating suggestively as she kneels between the male singer's legs or straddles one of his legs with her chest thrust in his face, apparently simulating a "lap dance." Finally, the graphic depictions of oral sex, joined with the repeated and explicit lyrics in which men direct women to lick their genitals, panders to and titillates the audience. Therefore, because the complained-of material is explicit and graphic, repeated, and shocks, panders, and titillates, we conclude that the video is patently offensive and thus indecent.

67. Aerco states that the music videos and other broadcast material at issue here may be suggestive, but are not indecent or obscene under prevailing standards.<sup>99</sup> Aerco cites the *Indecency Policy Statement* to support its assertion.<sup>100</sup> We disagree with Aerco's analysis. These broadcasts combine sexually explicit language and innuendo with visual depictions that graphically depict the meaning of the lyrics.<sup>101</sup> We also do not agree with Aerco's argument that the lyrics are barely intelligible.

68. According to the Complaints and videotapes, Aerco broadcast each of the music videos and the promo on multiple occasions. Aerco, in its *Response*, states that it is unable to determine whether it broadcast "DJ Joe, Fatal Fantasy 2 – Feat, Trebol, Clan" or "DJ Joe -- Fatal Fantasy 2-Feat, Nejo, Speedy" because its program logs list three music videos with similar titles.<sup>102</sup> Aerco confirms that the promo for the DVD titled "Dangerous – Fatal Fantasy 2" aired on the four dates alleged in the complaints, but states that it is unable to determine the broadcast times.<sup>103</sup> Aerco also asserts that it is unable to determine whether "Operation Sandunga" was aired on the date alleged in the complaint because it has no records of this music video.<sup>104</sup> Aerco states that it broadcast programs produced by independent producers after 10:00 p.m. and that it "could" have aired the independently produced "Operation Sandunga" music video during this time period.<sup>105</sup>

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<sup>99</sup> See Response at 10.

<sup>100</sup> *Id.*

<sup>101</sup> To the extent that the music videos' and the promo's use of visual images in conjunction with lyrics to describe and depict sexual activity could be described as innuendo rather than direct references, they are nonetheless sufficiently graphic and explicit to render the material actionably indecent because the sexual import of those images in conjunction with those lyrics was "unmistakable." See *Married By America NAL*, 19 FCC Rcd at 20194 ¶ 10 (proposing forfeiture for airing nudity, finding that despite electronic blurring ("pixilation") "even a child would have known the strippers were topless and that sexual activity was being shown"). See also *Indecency Policy Statement*, 16 FCC Rcd at 8003-04 ¶ 12; *Telemundo of Puerto Rico License Corp. (WKAQ-TV)*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 7157, 7159, ¶ 8 (Enf. Bur. 2001) (forfeiture paid) ("*Telemundo NAL*").

<sup>102</sup> See Response at 2-3.

<sup>103</sup> *Id.* at 4.

<sup>104</sup> *Id.* at 4.

<sup>105</sup> *Id.* at 4-5.

69. Based on the complaints and the accompanying videotapes, and in the absence of any evidence to the contrary,<sup>106</sup> we find that Aerco broadcast each of the music videos and the promo in question multiple times – a total of at least 14 broadcasts - between the hours of 6 a.m. and 10 p.m., the time frame relevant to an indecency determination.<sup>107</sup> Because there is a reasonable risk that children may have been in the audience when the material in each was broadcast, the material broadcast is legally actionable. By broadcasting this material during these times over Station WSJU-TV, Aerco apparently violated the prohibitions in the Act and the Commission’s rules against broadcast indecency.

70. **Forfeiture Calculation.** Aerco consciously and deliberately broadcast the videos and the DVD promo. Accordingly, we find that the broadcasts in apparent violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999 were willful within the meaning of section 503(b)(1) of the Act. Additionally, Aerco aired this material a total of 14 times. Accordingly, we find that Aerco’s apparent violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999 was also repeated.

71. We therefore turn to the proposed forfeiture amount, based on the factors enumerated in section 503(b)(2)(D) of the Act and the facts and circumstances of this case. Based on consideration of the statutory factors, we find it is appropriate to use the statutory maximum amount of \$27,500<sup>108</sup> to calculate the proposed forfeiture in this case. The gravity of the apparent violations is heightened in this case because, as discussed above, the music videos and the DVD promo at issue are extremely graphic and explicit, including close-up scenes of sexual fondling and simulated oral sex, which are repeated throughout the material. One broadcast segment explicitly depicts a child masturbating, and another repeatedly displays women’s buttocks in a pandering and titillating manner. All of the material depict and describe sexual organs or activities in a highly shocking, vulgar, and gratuitous manner. In addition, this material could have been reviewed by Aerco prior to broadcast. Multiplying the statutory maximum amount of \$27,500 by the 14 broadcasts at issue here results in a total forfeiture amount of \$385,000. Under the specific circumstances of this case, however, we believe that such a forfeiture would be excessive to achieve the appropriate level of punishment and deterrence and that \$220,000 is a more appropriate amount. We base this conclusion on several factors, including the fact that Aerco is the licensee of only San Juan, Puerto Rico, Stations WSJU-TV and WQBS(AM) and that it has no prior indecency violations. Therefore, for the reasons stated above, we propose a forfeiture of \$220,000 against Aerco Broadcasting Corp. for its willful and repeated violations of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999.

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<sup>106</sup> See *Entercom Sacramento License, LLC*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 20129 ¶ 5 (2004) (proposing a forfeiture in a case where the licensee could not deny the broadcast occurred).

<sup>107</sup> See 47 C.F.R. § 73.3999. Based on the videotape and data provided by the Complainants, we conclude that the station aired “DJ Joe, Fatal Fantasy 2- Feat, Trebol, Clan” between the hours of 6:00 a.m. and 10:00 p.m. on February 2 (12:00-12:43 p.m.), 22 (5:00-6:30 p.m.), 26 (3:00-3:30 p.m.) and 28, 2002 (2:05-2:50 p.m.); “DJ Joe, Fatal Fantasy 2-- Feat, Nejo, Speedy” on February 22 (5:30- 6:30 p.m.), 26 (6:00 -6:30 p.m.), March 6 (10:00-10:52 a.m.), and 27 (5:45-5:48 p.m.). We also find that the station aired “Dangerous -- Fatal Fantasy 2” on February 28 (2:05-2:50 p.m.), March 1 (1:13-1:53 p.m.), 4 (6:50 p.m.), 5 (9:40-10:17 a.m.) and 8, 2002 (11:51 a.m.- 12:55 p.m.). We also find that the station aired “Operation Sandunga” on March 6, 2002, between 10:00 and 10:52 a.m.

<sup>108</sup> The subject broadcasts occurred prior to the September 7, 2004, effective date of the most recent adjustment of the statutory maximum forfeiture amount. Accordingly, the appropriate maximum statutory amount here is \$27,500. See *supra* ¶ 21.

## 5. “The Blues: Godfathers and Sons” (March 11, 2004)<sup>109</sup>

72. **The Programming.** The Commission received a complaint alleging that San Mateo County Community College District (“San Mateo”), licensee of noncommercial educational Station KCSM-TV, San Mateo, California, aired indecent material over the station during its broadcast of the program “The Blues: Godfathers and Sons” on March 11, 2004 between the hours of 8:42 and 9:32 p.m. Pacific Standard Time.<sup>110</sup> The complaint alleged that the broadcast, an episode of a prerecorded documentary series provided by the Public Broadcasting Service (“PBS”), contains numerous “obscenities,” including the “F-Word,” the “S-Word” and various derivatives of those words, in violation of the Commission’s rules restricting the broadcast of indecent material.<sup>111</sup> The complainant therefore asked that the Commission investigate and take appropriate enforcement action.

73. Thereafter, the Bureau sent a letter of inquiry to San Mateo, attaching a copy of the Complaint.<sup>112</sup> In its response, San Mateo acknowledges that it aired “The Blues: Godfathers and Sons,” a documentary containing interviews of blues performers and a record producer, over Station KCSM-TV as alleged, between 8 and 10 p.m. on March 11, 2004, but not on any other dates between 6:00 a.m. and 10:00 p.m.<sup>113</sup> With its response, San Mateo provided a DVD and a written transcript of the program.<sup>114</sup> San Mateo does not dispute that it aired the material described in the complaint. It states, “[t]he intent of the program is to provide a window into [the world of the individuals being interviewed] with their own words, all of which becomes an educational experience for the viewer.” Thus, San Mateo maintains that the language contained in the program was not “used in a prurient way, but rather as an infrequent conversational expression of the artist [being interviewed], and was not edited to remove their dialogue, which accurately reflected their viewpoints.”<sup>115</sup> San Mateo represents that, subsequent to its station’s

<sup>109</sup> FCC File No. EB-04-IH-0260.

<sup>110</sup> See Letter from complainant to the Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission March 18, 2004 (“Complaint”).

<sup>111</sup> According to the Complaint, the program includes the following objectionable utterances broadcast between 8:42 and 9:32 p.m.:

- 8:42 p.m.: “See those, motherfucker? Gotta pay those motherfucking notes.”
- 8:51 p.m.: “What’s my job? You stupid motherfucker, your job is to follow me.”
- 9:00 p.m.: “Shit it’s good to be next to you.”
- 9:04 p.m.: “there’s no white bullshit with [Paul] Butterfield.”
- 9:13 p.m.: “I’ll buy some shit.”
- 9:14 p.m.: “This is the kind of shit I buy.”
- 9:23 p.m.: “Cocksucker Blues” (used as an on-screen Chyron to identify a song title).
- 9:32 p.m.: “This poor fucker.”

<sup>112</sup> See Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to San Mateo (August 4, 2004) (“LOI”).

<sup>113</sup> See Letter from Marilyn R. Lawrence, General Manager, KCSM-TV/(FM), to David Brown, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau (August 27, 2004) (“Response”) at 1.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

airing of the program, PBS alerted its member stations that this and similar PBS-supplied programs contained material that might be deemed indecent in light of then-recent Commission rulings, and advised licensees that PBS had changed its procedures involving the editing of potentially indecent or offensive language in programming that it provides them and will now alert licensees to potential problems.<sup>116</sup>

74. **Indecency Analysis.** The Commission determined in its *Golden Globe Awards Order* that the “F-Word” meets the first prong of the indecency test. We stated, “given the core meaning of the “F-Word,” any use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition.”<sup>117</sup> Similarly, we now find that the “S-Word,” at issue here, has an inherently excretory connotation. In light of the core meanings of the “F-Word” and “S-Word,” any use of those terms inherently has sexual or excretory connotations and falls within the first prong of our indecency definition.<sup>118</sup>

75. We also find that the broadcast material is, in context, patently offensive as measured by contemporary community standards for the broadcast medium. First, as we stated in *Golden Globe Awards Order*, the “F-Word” is one of the most vulgar, graphic, and explicit descriptions of sexual activity in the English language. Its use invariably invokes a coarse sexual image.”<sup>119</sup> Similarly, we find the “S-Word” to be one of the most vulgar, graphic and explicit words relating to excretory activity in the English language. Use of the “S-Word” invariably invokes a coarse excretory image. Consequently, we conclude that the broadcast by San Mateo of a program containing numerous uses of the “F-Word” and the “S-Word,” under the circumstances presented here, is vulgar, graphic, and explicit.

76. Second, the program repeats this language numerous times during the broadcast. We note that, while prior FCC staff actions had indicated as of the date this program aired that isolated broadcasts of certain expletives were not indecent or would not be acted upon, the program at issue here contains numerous repeated utterances of the “F-Word” and “S-Word,” and their variants. Our precedent is clear that broadcasts containing numerous expletives may be actionably indecent.<sup>120</sup>

77. Third, the gratuitous and repeated use of this language in a program that San Mateo aired at a time when children were expected to be in the audience is shocking. While San Mateo contends that the expletives in question were not removed from the program so that the viewpoints of those being interviewed would be accurately reflected, as discussed below we disagree that the use of such language was necessary to express any particular viewpoint in this case.<sup>121</sup> We also note that many of the expletives in the broadcast are not used by blues performers. For example, based on our review of the DVD and transcript, Marshall Chess, a former label owner and record producer, states in discussing the relationship between Chess

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<sup>116</sup> *Id.* San Mateo appears to refer to the *Golden Globe Awards Order*.

<sup>117</sup> *Golden Globe Awards Order*, 19 FCC Rcd at 4978 ¶ 8.

<sup>118</sup> *See Pacifica Foundation*, 56 FCC 2d at 99.

<sup>119</sup> *Golden Globe Awards Order*, 19 FCC Rcd at 4979 ¶ 9.

<sup>120</sup> *See Indecency Policy Statement*, 16 FCC Rcd at 8008 ¶ 16 (*citing Back Bay NAL*, 14 FCC Rcd at 3998, which found the broadcast of repeated uncensored uses of the “F-Word,” among other expletives, to be indecent).

<sup>121</sup> *See infra* ¶ 82.



Records and its artists, “my dad had so many people at his funeral, my uncle said, ‘You see all those motherfuckers? They’re coming to make sure he’s dead, so they don’t have to pay back those motherfuckin’ notes.’” In another scene, discussing his relationship with his father at Chess Records, Marshall Chess states, “[h]e said, ‘What’s your job? You stupid motherfucker! Your job is watching me!’” During a scene showing hip-hop artists Kyle Jason, Juice, and Chuck D. shopping in a record store with Chess, Kyle Jason states, “I’ll buy some shit,” and Juice states, “This looks crazy! See that? This is the kind of shit I buy! I mean, my man is wearing pink gear—that shit, that shit is crazy right there! I’m buyin’ it!”

78. In sum, because the expletives in the program are vulgar, explicit, graphic, dwelled upon and shocking to the audience, we conclude that the broadcast of the material at issue here is patently offensive under contemporary community standards for the broadcast medium and thus apparently indecent. The complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under section 73.3999 of the Commission’s rules.<sup>122</sup> Therefore, there is a reasonable risk that children may have been in the viewing audience and the broadcast is legally actionable.

79. **Profanity Analysis.** In the *Golden Globe Awards Order*, the Commission concluded that the “F-Word” was profane within the meaning of 18 U.S.C. § 1464 because, in context, it constituted vulgar and coarse language “so grossly offensive to members of the public who actually hear it as to amount to a nuisance.” We indicated in that decision that the Commission would analyze other potentially profane words on a case-by-case basis.

80. The “F-Word” is a vulgar sexual term so grossly offensive to members of the public that it amounts to a nuisance and is presumptively profane. It is one of the most offensive words in the English language, the broadcast of which is likely to shock the viewer and disturb the peace and quiet of the home. Consistent with our decision in the *Golden Globe Awards Order*, we find here that the use of the “F-Word” in the program at issue violated 18 U.S.C. § 1464’s prohibition of the broadcast of “profane” language.<sup>123</sup>

81. In addition, we find that the “S-Word” is a vulgar excretory term so grossly offensive to members of the public that it amounts to a nuisance and is presumptively profane. Like the “F-Word,” it is one of the most offensive words in the English language, the broadcast of which is likely to shock the viewer and disturb the peace and quiet of the home.

82. As noted previously, in rare contexts, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.<sup>124</sup> However, we will find this to be the case only in unusual circumstances, and such circumstances are not present here. Although in this case the profane language may have had some communicative purpose, we do not believe that San Mateo has demonstrated that it was essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance, or that the substitution of other language would have materially altered the nature of the work. In this respect, this case is unlike *Saving Private Ryan*, where we concluded that deleting offensive words “would have altered the nature of the artistic work and diminished

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<sup>122</sup> See 47 C.F.R. § 73.3999.

<sup>123</sup> *Id.* at 4981 ¶¶ 13-14.

<sup>124</sup> 20 FCC Rcd at 4512-14 ¶¶ 13-18.

the power, realism and immediacy of the film experience for viewers.”<sup>125</sup> While we recognize here that the documentary had an educational purpose, we believe that purpose could have been fulfilled and all viewpoints expressed without the repeated broadcast of expletives.

83. It is undisputed that the complained-of material, including the “F-Word” and the “S-Word,” was broadcast within the 6 a.m. to 10 p.m. time frame relevant to a profanity determination under section 73.3999 of the Commission’s rules. Because there was a reasonable risk that children may have been in the audience at the time the material at issue was broadcast on March 11, 2004, the material broadcast is legally actionable.<sup>126</sup>

84. **Forfeiture Calculation.** San Mateo consciously and deliberately broadcast this episode. Accordingly, we find that the broadcast in apparent violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999 was willful within the meaning of section 503(b)(1) of the Act, and subject to forfeiture.<sup>127</sup> Taking into account the statutory factors and the circumstances of this case, we conclude that the appropriate proposed forfeiture in this case is \$15,000.

85. The Commission’s prohibition on the repeated use of expletives, including the “F-Word” and “S-Word,” was well settled prior to March 2004.<sup>128</sup> The complained-of material contains numerous unedited expletives. The program in question was supplied to the licensee by PBS replete with two words that are among the most vulgar, graphic, and explicit descriptions of sexual and excretory activity in the English language, but whose propriety San Mateo nevertheless failed to question. By broadcasting the program complete with these expletives, San Mateo effectively abdicated this aspect of its programming control to an outside entity, PBS.<sup>129</sup> On the other hand, however, we do recognize that the expletives here were contained in a documentary, and while we conclude that the arguments made by the licensee are mistaken, we do find that the licensee may have been under the good faith belief that the use of these expletives served a legitimate informational purpose. Additionally, we recognize the fact that the licensee runs a small, community station that airs college level educational courses for most of the day. Under these circumstances, we believe that a proposed forfeiture in the amount of \$15,000 is warranted here.<sup>130</sup>

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<sup>125</sup> *Id.* at 4512-13 ¶¶ 13-14.

<sup>126</sup> *See ACT III*, 58 F.3d at 660-63.

<sup>127</sup> Because the broadcast in question was aired prior to the release of the *Golden Globe Awards Order*, our profanity finding will not factor in our determination of any sanction in this case.

<sup>128</sup> *See, e.g., Pacifica*, 438 U.S. at 744 (upholding the Commission’s finding that the broadcast of the comedy monologue “Filthy Words” featuring, among other things, repeated uses of the F-Word and the S-Word was patently offensive and violated the statutory prohibition on indecency).

<sup>129</sup> San Mateo states that its arrangement with PBS required that it defer for several months from broadcasting the program, which aired over most PBS stations in October and November 2003. San Mateo represents that, because its scheduling is done three months in advance of the actual airdate, “the decision to air this series was made in November since the first episode of the series was aired in February.” *Response* at 1. To the extent that San Mateo cites this circumstance to suggest that it did not have adequate notice that the expletives contained in the program were prohibited from broadcast prior to the Commission’s issuance of the *Golden Globe Awards Order* on March 18, 2004, we reject this contention. To the contrary, San Mateo had months after the national airing of the episode at issue to ascertain the questionable content of the program and to take steps to ensure that it did not broadcast the repeated uses of objectionable words at issue.

<sup>130</sup> We exercise our prosecutorial discretion not to propose forfeitures based on the multiple utterances of expletives in this case because the use of individual expletives was not actionable under Commission precedent prior to the

(continued...)

86. Although other stations may have also broadcast the subject episode of “The Blues: Godfathers and Sons,” we propose a forfeiture only against San Mateo as the only licensee with a station whose broadcast of the material between 6 a.m. and 10 p.m. was the subject of a viewer complaint filed with the Commission.<sup>131</sup> We recognize that this approach differs from that taken in previous Commission decisions involving the broadcast of apparently indecent programming.<sup>132</sup> We find, in this case, however, that, in the absence of complaints concerning the program filed by viewers of other stations, it is appropriate that we sanction only the licensee of the station whose viewers complained about that program. Our commitment to an appropriately restrained enforcement policy, however, justifies this more limited approach towards the imposition of forfeiture penalties.<sup>133</sup> Accordingly, we propose a forfeiture of \$15,000 against San Mateo.

#### 6. “The Pursuit of D.B. Cooper” (March 15, 2003)<sup>134</sup>

87. **The Programming.** A viewer filed a complaint with the Bureau alleging that Station KTVI(TV), St. Louis, Missouri, licensed to KTVI License, Inc (“KTVI”), repeatedly aired the “S-Word” on the afternoon of Saturday, March 15, 2003, during the broadcast of a movie featuring a fictional account of the fate of D.B. Cooper, the alias used by a person who disappeared after skyjacking an airplane and extorting money from an air line in 1971. The movie contains numerous scenes in which the “S-Word” is used: a scene in which D.B. Cooper refers to an aborted disguise (“shit”); a flashback scene between Cooper and his then-commanding officer (“horseshit”); a scene between the insurance investigator pursuing Cooper and the investigator’s boss (“shit”); a café scene (“bullshit”); a scene between Cooper's father and ex-wife in which she describes Cooper as having a “shit-eating grin;” a scene after a fire (“bullshit” used twice); a scene during which Cooper escapes from his pursuers by boarding a river raft (“oh, shit!”); and a scene in which a former crony of Cooper buys a used car (“bullshit”). In a subsequent scene involving repairs to a car, an auto mechanic claims he will have the car running “slicker'n owl shit” and “smoother'n owl shit.” When the car breaks down, Cooper refers back to the mechanic’s words (“smoother’n owl shit” twice). At the end of the movie, in scenes in which Cooper is pursued by his former crony and the investigator, the “S-Word” is reiterated on several occasions: in a scene featuring the two pursuers (“shit”); a scene featuring a telephone call between the investigator and his boss (“shit”); a scene taking place aboard an airplane (“shit” and “oh, shit!”); a scene in which Cooper uses the airplane to chase a car driven by his former crony (“holy shit” and “shit”); and a scene after the airplane crashes (“bullshit”).

88. The Bureau sent the licensee a letter of inquiry and attached the complaint.<sup>135</sup>

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*Golden Globe Awards Order.* See *Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 12. While repetition of expletives in certain scenes might have qualified as actionable before the *Golden Globe Awards Order*, we decline to establish a method of identifying multiple utterances that applies only to pre-*Golden Globe Awards Order* programs.

<sup>131</sup> The fact that San Mateo may not have originated the programming in question is irrelevant to whether there is an indecency violation. See *supra* note 47.

<sup>132</sup> See *supra* note 48.

<sup>133</sup> See *supra* ¶ 11 and note 11.

<sup>134</sup> FCC File No. EB-03-IH-0136.

KTVI contends that the aired material is not actionably indecent. The licensee argues that the material at issue is not graphic or explicit, that it is not dwelled upon and that it is not titillating or presented for shock value.<sup>136</sup> KTVI does not claim to have provided any parental warnings prior to or during its broadcast of the film, which occurred from 2:00 to 4:00 p.m.<sup>137</sup>

89. **Indecency Analysis.** KTVI acknowledges – and our review confirms – that the aired movie, “The Pursuit of D.B. Cooper,” includes repeated uses of the words “shit,” “bullshit,” and “owl shit.”<sup>138</sup> Each of those terms, of course, has a clear excretory connotation and describes an excretory activity. Thus, the complained-of material falls within the first prong of our indecency definition.

90. Turning to the second step of our indecency analysis – whether the broadcast material is patently offensive – we conclude, looking at the three principal factors in our contextual evaluation, that the complained-of material is patently offensive under contemporary community standards for the broadcast medium.

91. First, the material is quite graphic and explicit. The “S-Word” is a vulgar, graphic and explicit description of excrement. Its use invariably invokes a coarse excretory image. Consequently, we conclude that the broadcast of a program containing numerous uses of the “S-Word” and its variations, under the circumstances presented here, is vulgar, graphic and explicit.

92. Second, the “S-Word,” in various iterations, is used on a number of occasions. We note that, while prior Commission and staff actions had indicated as of the date this program aired that isolated broadcasts of certain expletives were not indecent or would not be acted upon,<sup>139</sup> the program at issue here contains repeated utterances of the “S-Word,” and its variants. As noted above, the Commission has previously held that repeated use of expletives may be actionably indecent.<sup>140</sup>

93. Third, and most important to our analysis, multiple gratuitous iterations of the “S-Word” broadcast on a weekend afternoon at a time when children are likely to be in the audience, shock, pander to, and titillate the audience.<sup>141</sup> By failing to edit the movie, the licensee

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<sup>135</sup> See Letter from William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, to KTVI License, Inc. (December 30, 2004).

<sup>136</sup> See Letter from John C. Quale, Counsel to KTVI License, Inc., to the Investigations and Hearings Division, Enforcement Bureau (January 31, 2005), and accompanying “Response of KTVI(TV), St. Louis, Missouri to FCC Letter of Inquiry” at 2.

<sup>137</sup> *Id.* at 1.

<sup>138</sup> These terms will be referred to collectively here in as the “S-Word.”

<sup>139</sup> We note that in the *Golden Globe Awards Order*, which was issued after the conduct at issue in this case took place, the Commission overruled prior staff decisions finding that broadcasts containing a single expletive were not indecent. 19 FCC Rcd at 4980 ¶ 12.

<sup>140</sup> See *Indecency Policy Statement*, 16 FCC Rcd 7999, 8008 ¶ 16 (2001) (citing *Back Bay NAL*, 14 FCC Rcd at 3998, which found the broadcast of repeated uncensored references to the “F-Word,” among other expletives, to be indecent).

<sup>141</sup> *Golden Globe Awards Order*, 19 FCC Rcd at 4979 ¶ 9. See also *Agape Broadcasting Foundation, Inc. (KNOM(FM))*, Notice of Apparent Liability for Forfeiture, 9 FCC Rcd 1679 (Mass Media Bur. 1999) (subsequent history omitted) (citing licensee’s decision to run explicit material unedited, during a mid-afternoon broadcast when children were likely to be in the audience), cited in *Indecency Policy Statement*, 16 FCC Rcd at 8014, ¶ 21.

needlessly offended unsuspecting viewers in their homes on a weekend afternoon.<sup>142</sup>

94. In sum, because the material is explicit and graphic, is dwelled upon, and shocks, panders, and titillates, we conclude that its broadcast here is patently offensive under contemporary community standards for the broadcast medium and thus apparently indecent. The complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under section 73.3999 of the Commission's rules.<sup>143</sup> Therefore, there is a reasonable risk that children may have been in the viewing audience and the broadcast is legally actionable.

95. **Profanity Analysis.** In the *Golden Globe Awards Order*, the Commission concluded that the "F-Word" constituted "profane language" within the meaning of 18 U.S.C. § 1464 because, in context, it constituted vulgar and coarse language "so grossly offensive to members of the public who actually hear it as to amount to a nuisance."

96. In this case, as in the related cases in this decision, we similarly find that the "S-Word" is a vulgar excretory term so grossly offensive to members of the public that it amounts to a nuisance and is presumptively profane. For the reasons stated above, use of the "S-Word" invariably invokes a coarse excretory image. Like the "F-Word," it is one of the most offensive words in the English language, the broadcast of which is likely to shock the viewer and disturb the peace and quiet of the home.

97. In rare contexts, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.<sup>144</sup> We caution, however, that we will find this to be the case only in unusual circumstances, and such circumstances are clearly not present here. Although in this case, the profane language in this film may have had some communicative purpose, we do not believe that it was essential to the nature of an artistic or educational work or that editing the language would have materially altered the nature of the program. Based upon our review of the record in this case, we conclude that KTVI aired profane material between 6 a.m. and 10 p.m. in violation of 18 U.S.C. § 1464.

98. **Forfeiture Calculation.** KTVI consciously and deliberately broadcast this film. Accordingly, we find that the broadcast in apparent violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999 was willful within the meaning of section 503(b)(1) of the Act, and subject to forfeiture.<sup>145</sup> We therefore turn to the proposed forfeiture amount, based on the factors

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<sup>142</sup> In *Saving Private Ryan*, 20 FCC Rcd at 4513 ¶ 15, we found that that the network "did not intend the broadcast of a feature film as family entertainment, a fact clearly and explicitly stated in the introduction that precedes the film and is repeated in the aural and visual viewer advisory and voluntary parental code that follow each commercial break during the broadcast. Thus, parents had ample warning that this film contained material that might be unsuitable for children and could have exercised their own judgment about the suitability of the language for their children in the context of this film." Unlike *Saving Private Ryan*, we find that the vulgar material here could have been edited without materially altering the broadcast. Additionally, we disagree with the licensee's argument that all of the complained-of material was used as a means of expressing anger or frustration throughout the course of an intense car chase. As a factual matter, it is not correct that all of the material in question occurred during the scenes involving the car chase. Multiple iterations of the "S-Word" occurred in other scenes.

<sup>143</sup> See 47 C.F.R. § 73.3999.

<sup>144</sup> See *Saving Private Ryan*, 20 FCC Rcd at 4512-14 ¶¶ 13-18.

<sup>145</sup> Because the broadcast in question was aired prior to the release of the *Golden Globe Awards Order*, our profanity finding will not factor in our determination of any sanction in this case.

enumerated in section 503(b)(2)(D) of the Act and the facts and circumstances of this case.

99. We find that the statutory maximum of \$27,500<sup>146</sup> is an appropriate proposed amount for the March 15, 2003 broadcast. The material was prerecorded, and KTVI could have edited the content prior to broadcast. In addition, as noted above, the gravity of the apparent violation is heightened here because of its shocking and gratuitous nature, involving as it does multiple gratuitous utterances of vulgar, graphic, and offensive expletives during a weekend afternoon broadcast. The Commission's prohibition of the broadcast of repeated uses of expletives such as the "S-Word" was well settled prior to its broadcast.<sup>147</sup> The program in question was replete with an expletive that is among the most vulgar, graphic, and explicit descriptions of excretory activity in the English language, but which KTVI nevertheless failed to edit out, suggesting indifference to our indecency regulations. Therefore, we find that KTVI License, Inc. is apparently liable for a proposed forfeiture of \$27,500 for its March 15, 2003 broadcast of "The Pursuit of D.B. Cooper."<sup>148</sup>

### **B. Indecent And/Or Profane Broadcasts But No Forfeiture Proposed**

100. In each of the following cases, we find that the broadcasts at issue are indecent and profane. Because of the specific circumstances associated with the broadcasts, however, we do not propose forfeitures. With one exception, these broadcasts preceded the Commission's decision in the *Golden Globe Awards* Order reversing precedent that had suggested that the isolated use of an offensive word like the "F-Word" is not indecent. In light of our decision not to impose a forfeiture based upon the facts of each case, we will not require the licensee of any of the stations that broadcast the material to report our finding here to us as part of their renewal applications and we will not consider the broadcast to impact adversely upon such licensees as part of the renewal process.

#### **1. "The 2002 Billboard Music Awards" (December 9, 2002)<sup>149</sup>**

101. **The Programming.** The Commission received a complaint concerning the December 9, 2002 broadcast of the "Billboard Music Awards" program over Fox Television Network ("Fox") stations, and specifically Station WTTG(TV), Washington, DC, between 8 and 10 p.m., Eastern Standard Time.<sup>150</sup> The complaint alleges that, during the broadcast, the

<sup>146</sup> The subject broadcasts occurred prior to the September 7, 2004, effective date of the most recent adjustment in the statutory maximum forfeiture amount. Accordingly, the appropriate maximum statutory amount here is \$27,500. See *supra* ¶ 21.

<sup>147</sup> See, e.g., *Pacifica*, 438 U.S. at 744 (upholding the Commission's finding that the broadcast of the comedy monologue "Filthy Words" featuring, among other things, repeated uses of the S-Word was patently offensive and violated the statutory prohibition on indecency).

<sup>148</sup> We do not propose forfeitures based on each of the multiple utterances of expletives in this case because the broadcast took place before the Commission warned licensees that it might treat separate indecent utterances in the same program as separate violations. See *Infinity Broadcasting Operations, Inc. (WKRK-FM)*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 6915, 6918-19, ¶ 12 (April 3, 2003) ("*WKRK NAL*"), vacated in non-relevant part, *Viacom, Inc.*, Order and Consent Decree, 19 FCC Rcd 23100, 23107, ¶ 10 (2004) (vacating all indecency forfeitures against licensee's parent company but preserving the warnings in the *WKRK NAL* that the Commission might propose forfeitures for discrete violations in a single broadcast and might propose to revoke broadcast licenses for egregious or repeat violations).

<sup>149</sup> FCC File No. EB-03-IH-0460.

<sup>150</sup> See Letter from Lara Mahaney, Parents Television Council to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (August 22, 2003).

performer Cher states, “People have been telling me I’m on the way out every year, right? So fuck ‘em.” The complaint alleges that the expletive was indecent and requests that the Commission levy sanctions against each station licensee that aired the material. The Enforcement Bureau obtained a videotape of the offending broadcast that confirms the complaint’s allegation.

102. **Indecency Analysis.** We held in the *Golden Globe Awards Order* that, given the core meaning of the “F-Word,” any use of that word inherently has a sexual connotation and falls within the first prong of our indecency definition.<sup>151</sup> Cher’s retort to her critics used language that we have found inherently describes sexual activity. The material, therefore, warrants further scrutiny to determine whether or not it was patently offensive as measured by contemporary standards for the broadcast medium. We conclude, looking at the three principal factors in our contextual analysis, that the material is patently offensive.

103. First, the complained-of material is quite graphic and explicit. As we indicated in the *Golden Globe Awards Order*, the “F-Word” is one of the most vulgar, graphic, and explicit words relating to sexual activity in the English language. Its use invariably invokes a coarse sexual image.”<sup>152</sup> We conclude that the broadcast of the “F-Word,” under the circumstances presented here, is vulgar, graphic and explicit.

104. Second, the fact that the material is not repeated or not dwelled upon at length, while relevant, is not dispositive. As the Commission indicated in the *Golden Globe Awards Order*: “[T]he mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent.”<sup>153</sup>

105. Third, and most important to our analysis in this specific context, Cher’s use of the “F-Word” here, at a live broadcast of an awards ceremony when children were expected to be in the audience, was shocking and gratuitous.<sup>154</sup> Cher chose to express her displeasure with her critics in a highly vulgar and coarse manner, and in doing so, needlessly offended unsuspecting viewers in the peace and quiet of their homes.

106. In sum, because the material is explicit and shocking and gratuitous, we conclude that the broadcast of the material at issue here is patently offensive under contemporary community standards for the broadcast medium and thus apparently indecent. Technological advances have made it possible to block the broadcast of offensive words without disproportionately disrupting a speaker’s message.<sup>155</sup> Fox could have avoided the indecency violation here by delaying the broadcast for a period of time sufficient to ensure that all offending words were blocked.<sup>156</sup> It did not do so. As a result, the Fox affiliate WTTG(TV) broadcast highly offensive material within the 6 a.m. to 10 p.m. time frame relevant to an

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<sup>151</sup> 19 FCC Rcd at 4978 ¶ 8.

<sup>152</sup> *Golden Globe Awards Order*, 19 FCC Rcd at 4979 ¶ 9.

<sup>153</sup> *Id.*, 19 FCC Rcd at 4980 ¶ 12.

<sup>154</sup> *Id.*, 19 FCC Rcd at 4979 ¶ 9.

<sup>155</sup> *See id.*, 19 FCC Rcd at 4980 ¶ 11.

<sup>156</sup> *See id.*, 19 FCC Rcd at 4980 ¶ 11. We note that Fox has pledged, whenever possible, to air future live entertainment programming with a five-minute delay. *See* Response at 9. While we applaud that change in Fox’s practices, it does not excuse the apparent indecency violation in this case.

indecent determination under section 73.3999 of the Commission's rules. By broadcasting this material, the station apparently violated the prohibitions in 18 U.S.C. § 1464 and the Commission's rules against broadcast indecency:

107. **Profanity Analysis.** The "F-Word" is a vulgar sexual term so grossly offensive to members of the public that it amounts to a nuisance and is presumptively profane. The "F-Word" is one of the most offensive words in the English language, the broadcast of which is likely to shock the viewer and disturb the peace and quiet of the home. Consistent with our decision in the *Golden Globe Awards Order*, we find here that the use of the "F-Word" in the program at issue here apparently violated 18 U.S.C. § 1464's prohibition of the broadcast of "profane" language.<sup>157</sup>

108. In rare contexts, language that is presumptively profane will not be found to be profane where its use is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.<sup>158</sup> We caution, however, that we will find this to be the case only in unusual circumstances, and such circumstances are not present here. Although in this case, the profane language used by Cher may have had some communicative purpose, we do not believe that Fox has demonstrated that the use of such language was essential to informing viewers on a matter of public importance or that editing the language in question would have had a material impact on the network's function as a source of news and information. We note again that Fox or Station WTTG(TV) could have used a delaying technique to avoid the offending broadcast.

109. It is undisputed that the complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to a profanity determination under section 73.3999 of the Commission's rules. Because there was a reasonable risk that children may have been in the audience at the time the material at issue was broadcast, the material broadcast is legally actionable.<sup>159</sup>

110. **No Sanction Proposed.** In the instant case, we find that the Fox Network affiliate Station WTTG(TV) consciously and deliberately broadcast the program in question. Accordingly, we find that the station's apparent violation of 18 U.S.C. § 1464 and section 73.3999 of our rules was willful. Thus, we conclude that the Fox affiliate Station WTTG(TV) aired indecent and profane material between 6 a.m. and 10 p.m. in apparent violation of 18 U.S.C. § 1464 and our rules.

111. The gratuitous use of indecent and profane language on a national network broadcast ordinarily would warrant a forfeiture under the standards announced in the *Golden Globe Awards Order*. Nonetheless, we recognize that our precedent at the time of the broadcast indicated that the Commission would not take enforcement action against isolated use of expletives.<sup>160</sup> "But for the fact that existing precedent would have permitted this broadcast, it would be appropriate to initiate a forfeiture proceeding against [Fox] and other licensees that

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<sup>157</sup> *Id.*, 19 FCC Rcd at 4981 ¶¶ 13-14.

<sup>158</sup> See *Saving Private Ryan*, 20 FCC Rcd at 4512-14 ¶¶ 13-18.

<sup>159</sup> See *ACT III*, 58 F.3d at 660-63

<sup>160</sup> *Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 12 (citing *Pacifica Foundation*, 2 FCC Rcd at 2699).



broadcast the program prior to 10 p.m.”<sup>161</sup> Accordingly, we find that no forfeiture is warranted in this case.

## 2. “The 2003 Billboard Music Awards” (December 10, 2003)<sup>162</sup>

112. *The Programming.* The Commission received a number of complaints alleging that the Fox Television Network (“Fox” or “Fox Network”) aired indecent material during the “Billboard Music Awards” program on December 10, 2003 between 8 and 10 p.m., Eastern Standard Time.<sup>163</sup> The complainants allege that, during the broadcast, Nicole Richie, an award presenter, uttered vulgar expletives in violation of the Commission’s rules restricting the broadcast of indecent material.<sup>164</sup> The complainants request that the Commission levy sanctions against each station licensee that aired the remarks.

113. The Bureau sent Fox a letter of inquiry and attached a transcript of the material in question.<sup>165</sup> Fox responded on January 30, 2004.<sup>166</sup> Fox contends that the aired material is not actionably indecent and does not contain any description or depiction of sexual or excretory organs or activities in a patently offensive manner.<sup>167</sup>

114. *Indecency Analysis.* During her appearance on the “Billboard Music Awards,” Ms. Richie uttered the “F-Word” and the “S-Word.” Fox does not dispute that the “S-Word” refers to excrement.<sup>168</sup> Fox contends, however, that Ms. Richie used the “F-Word” as a mere vulgar expletive to express emphasis, not to depict or describe sexual activities.<sup>169</sup> We disagree.

<sup>161</sup> *Golden Globe Awards Order*, 19 FCC Rcd at 4982 ¶ 15.

<sup>162</sup> FCC File Nos. EB-03-IH-0617, EB-04-IH-0295, EB-04-IH-0091.

<sup>163</sup> See Letter from Lara Mahaney, Parents Television Council to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (December 11, 2003). We also deny an additional complaint from PTC regarding another segment of that same broadcast. See Letter from Lara Mahaney, Parents Television Council, to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (January 22, 2004) (“*Second PTC Complaint*”). See note 195 *infra*.

<sup>164</sup> According to Fox, the Fox affiliate stations located within the Eastern and Central Time Zones broadcast the following exchange between Paris Hilton and Nicole Richie after they walked onstage to present an award:

Paris Hilton: Now Nicole, remember, this is a live show, watch the bad language.

Nicole Richie: Okay, God.

Paris Hilton: It feels so good to be standing here tonight.

Nicole Richie: Yeah, instead of standing in mud and cow[blocked]. Why do they even call it “The Simple Life”? Have you ever tried to get cow shit out of a Prada purse? It’s not so fucking simple.

Fox advises that it edited the tape to remove the expletives before the program aired on tape delay over Fox Stations in the Mountain and Pacific time zones. See Letter from John C. Quale, Counsel to Fox Television Stations, Inc., to Investigations and Hearings Division, Enforcement Bureau (Jan. 30, 2004) (“Response”) at 3-4, 8.

<sup>165</sup> See Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to Fox Television Stations, Inc. (January 7, 2004).

<sup>166</sup> See *supra* note 179.

<sup>167</sup> See Response at 12-13.

<sup>168</sup> *Id.* at 13. We note, however, that even if Ms. Richie was not literally referring to cow excrement, her use of the “S-Word” would still fall within the subject matter prong of our indecency definition. The “S-Word” has an excretory connotation, however it may be used. Its use invariably invokes a course excretory image in any context.

<sup>169</sup> Response at 13.

Given the core meaning of the “F-Word,” any use of that word inherently has a sexual connotation and falls within the first prong of our indecency definition.<sup>170</sup> We conclude that the material at issue clearly describes sexual and excretory activity. The material, therefore, warrants further scrutiny to determine whether or not it is patently offensive as measured by contemporary community standards for the broadcast medium. We conclude, looking at the three principal factors in our contextual analysis, that it is.

115. First, the complained-of material is quite graphic and explicit. The “F-Word” is one of the most vulgar, graphic, and explicit depictions of sexual activity in the English language. Its use invariably invokes a coarse sexual image.<sup>171</sup> Similarly, the “S-Word” is a vulgar, graphic, and explicit depiction of excretory activity. Its use invariably invokes a coarse excretory image. Consequently, we conclude that the broadcast of the “F-Word” and the “S-Word,” under the circumstances presented here, is vulgar, graphic and explicit.

116. Second, the fact that use of the words was not sustained or repeated, while relevant, is not dispositive. As the Commission indicated in the *Golden Globe Awards Order*: “[T]he mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent.”<sup>172</sup>

117. Third, and most important to our analysis in this context, Ms. Richie’s use of the “F-Word” and the “S-Word” here, during a live broadcast of a music awards ceremony when children were expected to be in the audience, was shocking and gratuitous.<sup>173</sup> Indeed, Fox admits that the tone of the material was vulgar.<sup>174</sup>

118. Like the broadcaster discussed the *Golden Globe Awards Order*, Fox was “on notice that an award presenter or recipient might use offensive language during the live broadcast, and it could have taken appropriate steps to ensure that it did not broadcast such language.”<sup>175</sup> As the previous case involving Cher demonstrates, Fox had clear notice that celebrities at this program might utter offensive expletives, including the “F-Word” during the broadcast. Moreover, the record of this broadcast shows that Fox, as the producer of the program and the network that carried it to affiliates throughout the country, deliberately sought to push the limits of decency. According to Fox, the original script called for Ms. Richie to make excretory references to “pig crap” and “cow manure,” and to substitute the euphemism “freaking” for the “F-Word.”<sup>176</sup> Under the circumstances, there was a palpable risk that Ms. Richie would use the “F-Word” and the “S-Word” instead of the euphemisms in the script.

119. Technological advances have made it possible to block the broadcast of offensive words without disproportionately disrupting a speaker’s message.<sup>177</sup> Indeed, Fox utilized a five-

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<sup>170</sup> See *Golden Globe Awards Order*, 19 FCC Rcd at 4978 ¶ 8; see also *Pacifica Foundation*, 56 FCC 2d at 99.

<sup>171</sup> See *Golden Globe Awards Order*, 19 FCC Rcd at 4979 ¶ 9.

<sup>172</sup> *Id.*, 19 FCC Rcd 4980 ¶ 12.

<sup>173</sup> *Id.* at 4979 ¶ 9.

<sup>174</sup> See Response at 13.

<sup>175</sup> 19 FCC Rcd at 4979 ¶ 10.

<sup>176</sup> Response at 6.

<sup>177</sup> See *Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 11.

second delay during the broadcast in question and successfully blocked Ms. Richie's first use of the "S-Word."<sup>178</sup> Fox could have avoided the indecency violation here by delaying the broadcast for a period of time sufficient to ensure that all offending words were blocked.<sup>179</sup> It did not do so. As a result, it broadcast highly offensive material within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under section 73.3999 of the Commission's rules.

120. In sum, because the material is explicit and shocking and gratuitous, we conclude that the broadcast of the material at issue here is patently offensive under contemporary community standards for the broadcast medium and thus apparently indecent. By broadcasting this material, the Fox affiliated stations whose broadcasts were the subject of viewer complaints to the Commission apparently violated the prohibitions in 18 U.S.C. § 1464 and the Commission's rules against broadcast indecency.<sup>180</sup>

121. **Profanity Analysis.** In the *Golden Globe Awards Order*, the Commission concluded that the "F-Word" constituted "profane language" within the meaning of 18 U.S.C. § 1464 because, in context, it constituted vulgar and coarse language "so grossly offensive to members of the public who actually hear it as to amount to a nuisance." In this case, we similarly find that the "F-Word" is a vulgar sexual term and the "S-Word" is a vulgar excretory term, each of which is so grossly offensive to members of the public as to amount to a nuisance and that each word accordingly is presumptively profane. For the reasons stated above, use of the "F-Word" invariably invokes a coarse sexual image and use of the "S-Word" invariably invokes a coarse excretory image. Each of these words is among the most offensive words in the English language, the broadcast of which is likely to shock the viewer and disturb the peace and quiet of the home.

122. In rare contexts, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.<sup>181</sup> We caution, however, that we will find this to be the case only in unusual circumstances, and such circumstances are not

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<sup>178</sup> See Response at 8.

<sup>179</sup> See *Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 11. We note that Fox has pledged, whenever possible, to air future live entertainment programming with a five-minute delay. See Response at 9. While we applaud that change in Fox's practices, it does not excuse the indecency violation in this case.

<sup>180</sup> PTC also filed a complaint concerning an exchange between musician David Grohl and "Triumph the Insult Comic Dog," a hand puppet, during the same program. See *Second PTC Complaint*. According to a partial transcript attached to the complaint, the exchange focused on whether the puppet would "poop" on various celebrities. The exchange also included the phrases "kick-ass lip-singer," "sex with a dog," "singers that suck," "a lot of crap," "my ass," and "you suck." The transcript supplied by PTC stated that the references to pooping on someone were "slang for insults." *Id.* Moreover, the word "poop" is more puerile than offensive. The other words and phrases in question are not generally considered to be as graphic, vulgar, and offensive as the "S-Word" or the "F-Word," and most are fairly commonly used in a non-sexual, non-excretory manner. Accordingly, although they may offend some people, we find that, viewed in the context in which they were used, "poop" and the other words and phrases in question were not patently offensive for the broadcast medium. See, e.g., *Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, Memorandum Opinion and Order, 20 FCC Rcd 1931, 1938, ¶ 8 (2005) ("PTC 2") (in context, fleeting uses of words such as "penis," "dick," "testicle," "vaginal," "ass," "bastard," and "bitch" not indecent). We note, however, that in another context, such as a more graphic and explicit description of sexual or excretory organs or activities, the use of these words might contribute to a finding of indecency. We also conclude that these words were not profane in this context.

<sup>181</sup> See *Saving Private Ryan*, 20 FCC Rcd at 4512-14 ¶¶ 13-18.

present here. Although in this case, profane language may have had some communicative purpose, we do not believe that Fox has demonstrated that it was essential to informing viewers on a matter of public importance or that editing the language in question would have had a material impact on the network's function as a source of news and information.

123. It is undisputed that the complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to a profanity determination under section 73.3999 of the Commission's rules. Because there was a reasonable risk that children may have been in the audience at the time the material at issue was broadcast, the material broadcast is legally actionable.<sup>182</sup>

124. ***No Sanction Proposed.*** Based upon our review of the record in this case, we conclude that the Fox Network affiliated stations in the Eastern and Central Time Zones whose broadcasts were the subject of viewer complaints to the Commission aired material in violation of 18 U.S.C. § 1464 and our rules. They each broadcast indecent and profane words in an awards show that aired between 6 a.m. and 10 p.m. and was watched by people of all ages. The licensees of these stations each consciously and deliberately broadcast the program in question. Accordingly, the apparent violation of 18 U.S.C. § 1464 and section 73.3999 of our rules was willful. The willful broadcast of indecent and profane material on a national network broadcast ordinarily would warrant a forfeiture under the standards announced in the *Golden Globe Awards Order*. Nonetheless, we recognize that our precedent at the time of the broadcast indicated that the Commission would not take indecency enforcement action against isolated use of expletives.<sup>183</sup> "But for the fact that existing precedent would have permitted this broadcast, it would be appropriate to initiate a forfeiture proceeding against [Fox] and other licensees that broadcast the program prior to 10 p.m."<sup>184</sup> Accordingly, we find that no forfeiture is warranted in this case.

### 3. "NYPD Blue" (various dates between January 14 and May 6, 2003)<sup>185</sup>

125. The Commission has received complaints alleging that KMBC Hearst-Argyle Television, Inc., licensee of Station KMBC-TV, Kansas City, Missouri, and other network stations affiliated with The ABC Television Network ("ABC") aired indecent material during several episodes of "NYPD Blue" broadcast between 9:00 and 10:00 p.m. Central Standard Time on various dates between January and May 2003.<sup>186</sup> The complaints allege that, in each of the identified episodes, one or more characters utter expletives in violation of the Commission's

<sup>182</sup> See *ACT III*, 58 F.3d at 660-63

<sup>183</sup> See *Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 12 (citing *Pacifica Foundation, Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 2698, 2699 (1987)). The fact that the statement in question included two expletives is unlikely to have removed it from the former isolated use exception under Commission precedent. The only pre-*Golden Globe Awards Order* decision of which we are aware in which a forfeiture was proposed for a single phrase or statement involved the use of multiple expletives combined with a description of sexual activity. See *LBJS Broadcasting Company*, Notice of Apparent Liability for Forfeiture, 13 FCC Rcd 20956 (1998) (forfeiture paid) (finding broadcast apparently indecent for use of phrase "suck my dick you fucking cunt").

<sup>184</sup> *Golden Globe Awards Order*, 19 FCC Rcd at 4982 ¶ 15.

<sup>185</sup> FCC File No. EB-03-IH-0355.

<sup>186</sup> Collectively referred to as the "NYPD Blue Expletive Complaints."

rules restricting the broadcast of indecent material. The complaints identify several expletives from the episodes at issue, specifically “dick,” “dickhead” and “bullshit.”<sup>187</sup>

126. The terms “dick” and “dickhead” are references to a sexual organ and therefore fall within the first prong of our indecency definition. Similarly, “bullshit,” whether used literally or metaphorically, is a vulgar reference to the product of excretory activity and therefore falls within the first prong of our indecency definition. Accordingly, we must proceed to the three-part contextual analysis in our second prong to determine whether the material is patently offensive as measured by contemporary community standards for the broadcast medium. For the reasons stated below, we find “dick” and its derivative, “dickhead,” not to be patently offensive in this context, whereas we find “bullshit” to be patently offensive in this context. Regarding the former term, we note that last year we found the same word and its variations not to be indecent in the context presented.<sup>188</sup>

127. First, we find that the terms “dick” and “dickhead,” in this context, while understandably offensive to some viewers, are not sufficiently vulgar, explicit, or graphic descriptions of sexual organs or activities to support a finding of patent offensiveness. Second, while not dispositive, it is relevant that none of the programs dwell on these terms. Third, we find that those words, in context, are not sufficiently shocking to support a finding that they are patently offensive. Although the words are undeniably coarse and vulgar, they do not have the same level of offensiveness as the “F-Word” or “S-Word.” As we recently stated, “[a]lthough use of such words may, depending on the nature of the broadcast at issue, contribute to a finding of indecency, their use here was not patently offensive.”<sup>189</sup> The broadcasts at issue here used

<sup>187</sup> The following examples illustrate the typical use of these expletives in the episodes at issue:

1/14/03 episode (Det. Sipowitz in response to his partner’s arrest by Internal Affairs): “Alright, this is Bullshit!”

2/4/03 episode (Det. Sipowitz to street officer regarding that officer’s partner framing Sipowitz’s partner): “Over time - over what - bullshit, a beef!”

2/11/03 episode (Sipowitz speaking to a prisoner who had tried to trick Sipowitz into believing the prisoner was getting transferred to a different prison): “Game’s been run dickhead. You ship out tomorrow. Wrong cop.”

2/18/03 episode (stated by a suspect who bragged about, but now denies, killing his daughter): “I told people I killed Samia to try and get respect back. She had ashamed me and my community look at me as a fool.”

Det. 1: “You took credit for killing your daughter?! Bullshit!”

4/15/03 episode (Det. harassing suspect who had harassed prosecutor): “I’m hoping this bullshit about you trying to get under ADA Haywood’s skin is a misunderstanding.”

4/8/03 episode (Sipowitz, referring to a wheel-chair bound, uncooperative witness to a murder): “and that dickhead in the wheel chair . . . threaten him with perjury and he’ll fold .”

4/29/03 episode (Det. questioning witness/suspect): “Maybe we should clarify Daly. We drop jail time for good information - not bullshit that wastes our time.”

4/29/03 episode (Sipowitz, talking to a suspect who had recruited a youth (who the suspect thought was a minor) to commit a crime): “He’s 16 Dickhead! An adult! . . .”

5/6/03 episode (Captain to Det. who harassed suspect in 4/15 episode): “He said you nearly assaulted his client last night.”

Det: “Well, that’s a bunch of bullshit.”

<sup>188</sup> See *PTC 2*, 20 FCC Rcd at 1938, ¶ 8 (finding fleeting use of “dick” and its variations not indecent in context presented).

<sup>189</sup> See *Complaints Filed By Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, Memorandum Opinion and Order, 20 FCC Rcd 1920, 1926 ¶ 8 (2005) (“*PTC 1*”); *PTC 2*, 20 FCC Rcd at 1938 ¶ 8.

these terms in a similar manner.<sup>190</sup> Therefore, under our three-part analysis and based on our precedent, we find the broadcasts of the terms “dick” and its derivative, “dickhead,” as used in the “NYPD Blue” episodes at issue, are not patently offensive.

128. However, we do conclude that the broadcasts of a derivative of the “S-Word” at issue here are patently offensive. First, consistent with our analysis of the “F-Word” in the *Golden Globe Awards Order*, we find the “S-Word” to be one of the most vulgar, graphic and explicit descriptions of excretory activity in the English language. Its use invariably invokes a coarse excretory image. We conclude that the broadcast of the “S-Word,” under the circumstances presented here, is vulgar, graphic and explicit.

129. Second, while the word is not dwelled upon, in the *Golden Globe Awards Order*, the Commission reversed precedent that had suggested that the isolated use of an offensive word like the “F-Word” is not indecent.<sup>191</sup> “[T]he mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent.”<sup>192</sup> Similarly, we find that the fact that these broadcasts did not dwell on the expletive, though relevant, is not dispositive under the circumstances presented here.

130. Third, the intentional use of a derivative of the “S-Word” on a popular network program broadcast is shocking and gratuitous. In this regard, ABC does not claim that there was any political, scientific or other independent value to using the word here, or any other factor to mitigate its offensiveness. To the extent ABC claims that the word was necessary for dramatic effect, mere dramatic effect does not justify use of patently offensive expletives during time periods when numerous children are likely to be in the audience. Programs utilizing patently offensive expletives for dramatic effect can be aired after 10 p.m.

131. In sum, because the material is explicit and shocking and gratuitous, we conclude that the broadcast of the material at issue here that contained derivatives of the “S-Word” is patently offensive under contemporary community standards for the broadcast medium and thus apparently indecent. The complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under section 73.3999 of the Commission’s rules.<sup>193</sup> Therefore, there is a reasonable risk that children may have been in the audience and the broadcast is legally actionable.

132. **Profanity Analysis.** In the *Golden Globe Awards Order*, the Commission concluded that the “F-Word” constituted “profane language” within the meaning of 18 U.S.C. § 1464 because, in context, it constituted vulgar and coarse language “so grossly offensive to members of the public who actually hear it as to amount to a nuisance.” We indicated in that decision that the Commission would analyze other potentially profane words on a case-by-case basis.

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<sup>190</sup> See *PTC 1*, 20 FCC Rcd at 1926, ¶ 8 (“A number of complaints cite isolated uses of the word “dick” and variations thereof. In context and as used in the complained of broadcasts, these were epithets intended to denigrate or criticize their subjects. Their use in this context was not sufficiently explicit or graphic and/or sustained to be patently offensive.”).

<sup>191</sup> 19 FCC Rcd at 4980 ¶ 12.

<sup>192</sup> *Id.*

<sup>193</sup> See 47 C.F.R. § 73.3999.

133. In this case, we find that the “S-Word” is a vulgar excretory term so grossly offensive to members of the public that it amounts to a nuisance and is presumptively profane. Like the “F-Word,” it is one of the most offensive words in the English language, the broadcast of which is likely to shock the viewer and disturb the peace and quiet of the home.

134. In rare contexts, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.<sup>194</sup> We caution, however, that we will find this to be the case only in unusual circumstances, and such circumstances are not present here. Although in this case, the profane language may have had some communicative purpose, we do not believe that ABC has demonstrated that it was essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance. In this respect, this case is unlike *Saving Private Ryan*, where we concluded that deleting offensive words “would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers.” While we recognize that the expletives may have made some contribution to the authentic feel of the program, we believe that purpose could have been fulfilled and all viewpoints expressed without the broadcast of expletives.

135. It is undisputed that the complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to a profanity determination under section 73.3999 of the Commission’s rules. Because there was a reasonable risk that children may have been in the audience at the time the material at issue was broadcast, the material broadcast is legally actionable.<sup>195</sup>

136. ***No Sanction Proposed.*** In the instant case, we find that the ABC network affiliate Station KMBC-TV consciously and deliberately broadcast the material in question. Accordingly, we find that the apparent violations of 18 U.S.C. § 1464 and section 73.3999 of our rules were willful. The station aired indecent and profane material in violation of our rules because it broadcast indecent and profane words in a show that aired between 6 a.m. and 10 p.m. and was watched by people of all ages. The gratuitous use of indecent and profane language on a national network broadcast ordinarily would warrant a forfeiture under the standards announced in the *Golden Globe Awards Order*. Nonetheless, we recognize that our precedent at the time of the broadcast indicated that the Commission would not take indecency enforcement action against the isolated use of expletives.<sup>196</sup> Thus, we will not impose any sanction in this case on the basis of our profanity finding. “But for the fact that existing precedent would have permitted this broadcast, it would be appropriate to initiate a forfeiture proceeding against [ABC] and other licensees that broadcast the program prior to 10 p.m.”<sup>197</sup> Accordingly, we find that no forfeiture is warranted in this case.

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<sup>194</sup> See *Saving Private Ryan*, 20 FCC Rcd at 4512-14 ¶¶ 13-18.

<sup>195</sup> See *ACT III*, 58 F.3d at 660-63.

<sup>196</sup> See *Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 12 (citing *Pacifica Foundation, Inc.*, 2 FCC Rcd at 2699).

<sup>197</sup> *Golden Globe Awards Order*, 19 FCC Rcd at 4982 ¶ 15.

#### 4. “The Early Show” (December 13, 2004)<sup>198</sup>

137. **The Programming.** A viewer filed a complaint that CBS Television Network (“CBS”) affiliate Station KDKA-TV, Pittsburgh, Pennsylvania, licensed to CBS Broadcasting, Inc., aired a variant of the “S-Word” during the program “The Early Show” on December 13, 2004, at approximately 8:10 a.m., Eastern Standard Time, during a live interview with cast member Twila Tanner of the CBS program “Survivor: Vanuatu.” The Bureau requested a tape of the program from CBS, which CBS submitted. The tape shows, and CBS does not dispute, that Ms. Tanner described a fellow contestant of “Survivor: Vanuatu” as a “bullshitter.”<sup>199</sup>

138. **Indecency Analysis.** The Commission determined in the *Golden Globe Awards Order* that the “F-Word” meets the first prong of the indecency test. We stated, “given the core meaning of the “F-Word,” any use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition.”<sup>200</sup> Similarly, we now find that the “S-Word,” including the variant of that word at issue here, is a vulgar, graphic, and explicit description of excretory material. Its use invariably invokes a coarse excretory image, even when its meaning is not the literal one. Accordingly, we must proceed to analyze whether the material, in context, is patently offensive as measured by contemporary community standards for the broadcast medium. Based on our examination of the three principal factors in our contextual analysis, we conclude that the material is patently offensive.

139. First, the complained-of material is vulgar, graphic, and explicit. Consistent with our analysis of the “F-Word” in the *Golden Globe Awards Order*, we find the “S-Word” to be one of the most vulgar, graphic and explicit words describing excrement or excretory activity in the English language and, for the reasons stated above, its use inherently has an excretory connotation. We conclude that the broadcast of the “S-Word,” under the circumstances presented here, is vulgar, graphic and explicit.

140. Second, the fact that the material is not repeated or dwelled upon at length, while relevant, is not dispositive. As the Commission indicated in the *Golden Globe Awards Order*: “the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent.”<sup>201</sup> Consequently, non-repetitive broadcasts of the “S-Word” may be found indecent.

141. Third, and most important to our analysis in this specific context, the use of the “S-Word,” particularly during a morning news interview, is shocking and gratuitous.<sup>202</sup> Because the interview dealt with the outcome of one of the most popular prime-time shows on broadcast television among children, it is foreseeable that young children not only would be in the audience at that time of day, but also that they would be attentive listeners to the interview with Ms. Tanner. That CBS or the licensee of Station KDKA-TV failed to take measures to protect such

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<sup>198</sup> FCC File No. EB-05-IH-0007.

<sup>199</sup> In commenting on the strategy employed by the fellow contestant, Ms. Tanner stated: “I knew he was a bullshitter from Day One.” The interviewer, Julie Chen, recognized the inappropriateness of the language, stating: “I hope we had the cue ready on that one . . . . We can’t say that word . . . . There is a delay.”

<sup>200</sup> *Golden Globe Awards Order*, 19 FCC Rcd at 4978 ¶ 8.

<sup>201</sup> *Id.*, 19 FCC Rcd at 4980 ¶ 12.

<sup>202</sup> *Id.*, 19 FCC Rcd at 4979 ¶ 9.



viewers from vulgarity in a morning television interview is of particular concern and weighs heavily in our analysis.

142. Viewing the evidence as a whole, while Ms. Tanner's vulgarity is not repeated, the patently offensive nature of the broadcast is clearly established under the first and third principal factors of our contextual analysis. The complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under section 73.3999 of the Commission's rules.<sup>203</sup> Therefore, there is a reasonable risk that children may have been in the audience and the broadcast is legally actionable.

143. **Profanity Analysis.** In the *Golden Globe Awards Order*, the Commission concluded that the "F-Word" constituted "profane language" within the meaning of 18 U.S.C. §1464 because, in context, it constituted vulgar and coarse language "so grossly offensive to members of the public who actually hear it as to amount to a nuisance." In this case, we similarly find that the "S-Word" is a vulgar excretory term so grossly offensive to members of the public that it amounts to a nuisance and is presumptively profane. For the reasons stated above, use of the "S-Word" invariably invokes a coarse excretory image. Like the "F-Word," it is one of the most offensive words in the English language, the broadcast of which is likely to shock the viewer and disturb the peace and quiet of the home.

144. In rare contexts, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.<sup>204</sup> We caution, however, that we will find this to be the case only in unusual circumstances, and such circumstances are clearly not present here. Although in this case, Ms. Tanner's profane language may have had some communicative purpose, we do not believe that it was essential to informing viewers on a matter of public importance or that editing the language would have materially impacted the network's function as a source of news and information.

145. **No Sanction Proposed.** We find that CBS Broadcasting, Inc., the licensee of CBS network affiliate Station KDKA-TV, consciously and deliberately broadcast the program in question. Accordingly, we find that the apparent violation of 18 U.S.C. § 1464 and section 73.3999 of our rules was willful. Thus based upon our review of the record in this case, we conclude that the licensee of this station aired material in violation of 18 U.S.C. § 1464 and our rules by broadcasting indecent and profane language between 6 a.m. and 10 p.m. during programming watched by a nationwide audience of all ages. The gratuitous use of indecent and profane language during a national broadcast ordinarily would warrant a forfeiture under the standards announced in *Golden Globe Awards Order*. However, we recognize that our precedent at the time of the broadcast did not clearly indicate that the Commission would take enforcement action against an isolated use of the "S-Word."<sup>205</sup> "But for the fact that existing precedent would have permitted this broadcast, it would be appropriate to initiate a forfeiture proceeding against [CBS] and other licensees that broadcast the program prior to 10 p.m."<sup>206</sup> Consequently, we find that no forfeiture is warranted in this case.

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<sup>203</sup> See 47 C.F.R. § 73.3999.

<sup>204</sup> See *Saving Private Ryan*, 20 FCC Rcd at 4512-14 ¶¶ 13-18.

<sup>205</sup> See *Golden Globe Awards Order*, 19 FCC Rcd at 4982 ¶ 15.

<sup>206</sup> *Id.*

### C. Broadcasts That Do Not Violate Indecency/Profanity/Obscenity Restrictions

146. In this section, we conclude that the complained-of programming does not warrant action against the licensee. Although some of this programming is undoubtedly upsetting to some viewers, we reach these determinations either because the programming is not within the scope of our indecency or profanity definitions or because it is not, in the contexts before us, patently offensive as measured by contemporary community standards for the broadcast medium.

#### 1. “Alias” (January 5, 2005)<sup>207</sup>

147. **The Programming.** The Commission received complaints concerning the January 5, 2005 broadcast of the program “Alias” by Allbritton Communications, Inc., licensee of Station WJLA-TV, Washington, D.C., from 9:00 to 11:00 p.m. Eastern Standard Time.<sup>208</sup> The show depicts intelligence agents engaged in various covert operations. In this episode, a male and female character engage in a covert operation on a moving train. The female character having completed her portion of the operation is chased by an assailant. The chase leads to a cargo car and, after a fight with the assailant, the female character finds herself hanging out of the cargo car while the train crosses a high bridge. As the assailant attempts to force the female character off of the moving train, the male character, having been victorious in a separate fight with another assailant, rescues the female character from impending death. The male and female characters hug and stare at each other. In the next scene, which is the subject of the complaints, the male and female characters are in bed kissing, caressing and rubbing against each other. The scene is accompanied by off-camera music. There are no depictions of sexual organs in the scene. Afterwards, the couple lay side-by-side and stare at each other.

148. **Indecency Analysis.** The episode’s references to sexual activities place it within the subject matter scope of our indecency definition. In particular, although there are no depictions of sexual organs, the episode depicts a couple in bed passionately kissing, caressing and rubbing against each other, each of which is a sexual activity. Accordingly, we find that the material meets the first prong of our indecency standard. We now turn to the second prong of our indecency analysis, whether the material is patently offensive by contemporary community standards for the broadcast medium.

149. Turning to the first of the three principal factors in our contextual analysis, the episode does not depict sexual or excretory organs and does not depict sexual activities in a graphic or explicit way. The scene involves no display of sexual organs and contains no sexually graphic language. While viewers see the characters kissing, caressing, and rubbing; it is not clear whether the characters are engaged in sexual intercourse.

150. Regarding the second principal factor of our contextual analysis, while not dispositive, the sexual encounter between the male and female character is not fleeting.<sup>209</sup>

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<sup>207</sup> FCC File No. EB-05-IH-0351.

<sup>208</sup> The Commission received two complaints about this program. Neither complaint identified the specific broadcast station on which the program aired. However, we note that the program aired on the ABC Television Network and that both complaints were filed by individuals with addresses within the Washington, D.C. metropolitan area.

<sup>209</sup> Because this scene aired prior to 10 p.m., it falls within the scope of our indecency regulation.

151. With respect to the third principal component of our contextual analysis, we find that the sexual activity is not presented in a pandering, titillating or shocking manner. While the episode shows the male and female characters kissing, caressing, and rubbing in bed, the overall context, including the camera angle, the background music, and the immediately preceding scene, is not shocking in contrast to clear and graphic depictions of sexual intercourse.

152. Accordingly, although the episode depicts sexual activities within the meaning of the Commission's indecency definition, taken as a whole, we conclude that it is not patently offensive as measured by contemporary community standards for the broadcast medium. While the sexual encounter between the two characters is not fleeting, the nature of the encounter is not sufficiently explicit or shocking to be patently offensive. Accordingly, the complaints are denied.

## 2. "Will and Grace" (November 11, 2004)<sup>210</sup>

153. *The Programming.* The Commission received a complaint concerning the November 11, 2004 broadcast of a "Will and Grace" episode titled "Saving Grace Again, Part 1." The episode was broadcast at 8:30 p.m. Central Standard Time over stations affiliated with the NBC Television Network. In the episode, the lead female character, Grace, is in her apartment preparing to go out on her first date after her recent divorce. She is being assisted by her roommate, Will, and is concerned about her appearance. Before leaving, she asks Will if there is "anything else" she should know about dating. Will responds by instructing her to "lean forward" and, as Grace does so, he places his hands on her dress adjusting her breasts upward to enhance her appearance. As Grace is leaving the apartment, she is greeted at the elevator by her friend, Karen, who also knows of the date and places her hand on Grace's breasts and appears to also adjust her bosoms upward.<sup>211</sup>

154. *Indecency Analysis.* The first prong of our indecency analysis is whether the program depicts or describes sexual or excretory activities or organs and, therefore, is within the subject matter scope of the Commission's indecency definition. Although the episode contains some sexual innuendo, the characters in the scene in question appear to touch Grace's breast area primarily to enhance her appearance during her date rather than to elicit a sexual response. We need not decide, however, whether the scene depicts or describes sexual activities or organs because even assuming that the first prong of our indecency analysis is met, we conclude that the material is not indecent because it is not patently offensive as measured by contemporary community standards for the broadcast medium.

155. In making this determination, we must look to the full context in which the material is presented. Here, the context is generally humorous and consists of light-hearted ridicule and indirect references to the size of Grace's breasts and the efforts made by her friends to enhance her sexual appeal for her date by making her breasts look larger.

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<sup>210</sup> FCC File No. EB-05-IH-0049.

<sup>211</sup> The following dialogue occurs:

Karen: "Hey, hey come here, one more thing come here."

Grace: "Will already adjusted them."

Karen: "I wasn't adjusting them."

156. Regarding the first component of our contextual analysis, the touching of Grace's breasts is not presented in a graphic or explicit manner. The program contains no nudity and never explicitly shows or specifically describes sexual activities or organs. We find that the episode does not contain "graphic descriptions of sexual activities and organs or ... language that is so graphic as to qualify as indecent and profane."<sup>212</sup>

157. With respect to the second component of our contextual analysis, while not dispositive, we find it relevant that the episode does not dwell upon or repeat references to sexual organs or activities.

158. Finally, we do not find that the material at issue is used to pander, titillate, or shock - the third component of our contextual analysis. Rather, the episode addresses the anxiety associated with a first date and Grace's friends' efforts to lend assistance -- a topic that is not shocking, pandering, or titillating. Moreover, the touching of the breasts is not portrayed in a sexualized manner, and does not appear to elicit any sexual response from Grace.

159. In sum, we find that, because of the absence of explicit portrayals of, or references to, sexual organs or activities; the brevity of the scene at issue; and the absence of shocking, pandering, and/or titillating effect, the episode, taken as a whole, is not patently offensive as measured by contemporary community standards for the broadcast medium, and therefore is not indecent. Accordingly, the complaint is denied.

### 3. "Two and a Half Men" (February 21, 2005)<sup>213</sup>

160. *The Programming.* The Commission received a complaint that the February 21, 2005 episode of the CBS Television Network program "Two and a Half Men" had a scene in which a female doctor "was doing a hernia check" on a male character "with his scrotum in her hand" while he was trying to seduce her.<sup>214</sup> The broadcast occurred between 9 and 10 p.m. Eastern Standard Time. Based on our review of a videotape provided by CBS, the scene in question takes place in a doctor's office and involves a hernia examination, which requires the male character to remove his pants and cough with the female doctor's hand on his scrotum. No nudity or touching, however, is actually depicted, and the examination is not eroticized. During the examination, to which the male character readily agrees because he apparently finds the doctor attractive, he comments suggestively that her hands are warm and asks her out to dinner. She expresses disbelief that he does not remember her and states that they dated while she was in medical school until he broke it off without explanation and began seeing her roommate. The scene ends with him making comments and sounds indicating that she is painfully squeezing his scrotum.

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<sup>212</sup> *NBC Telemundo License Co.*, Memorandum Opinion and Order, 19 FCC Rcd 23025, 23027 ¶ 7 (2004) ("Coupling MO&O") (denying complaints about sexual references during the program "Coupling").

<sup>213</sup> FCC File Nos. EB-05-IH-0515, EB-05-IH-0570.

<sup>214</sup> The complainant also generally alleges that "Two and a Half Men" episodes are "raunchy" with "a lot of talk about 'humping.'" In order for us to process an indecency complaint, the complaint must identify a specific broadcast containing allegedly indecent material. We cannot prosecute complaints about programs in general. 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. See 47 U.S.C. § 326. Moreover, we previously rejected complaints regarding an episode of the program "Will and Grace" that made similar allegations. See *KSAZ MO&O*, 19 FCC Rcd at 16001, ¶6

161. ***Indecency Analysis.*** After reviewing a tape of the complained-of scene, we conclude that it is not indecent. Even assuming that the scene that the complainant describes falls within the scope of our indecency definition, it does not, in the context at issue here, satisfy the second prong of our indecency analysis – that is, it is not patently offensive under contemporary standards for the broadcast medium.

162. Looking at the three principal factors that inform our contextual analysis, first, the material is not graphic or explicit. Although the episode suggests that one character is touching another’s sexual organs, the apparent touching takes place off-camera; there is never any nudity, depiction of a sexual organ, or description of sexual organs or activities. Rather, viewers are left to surmise what is happening by one character’s reactions to another. Turning to the second factor, while not dispositive, it is relevant that the scene at issue is not sustained or repeated. Finally, we do not believe the material shocks, panders, and/or titillates the viewing audience. As noted, actual touching of the male character’s sexual organs is not depicted or described. Although the male character makes some mildly suggestive remarks to the doctor during the examination, the exam is not eroticized or presented in a manner that shocks, panders to, or titillates the audience. We conclude, based on our examination of these three factors, that the scene in question is not patently offensive under contemporary standards for the broadcast medium, and therefore is not indecent. Accordingly, we deny the complaint.

#### 4. “Committed” (March 8, 2005)<sup>215</sup>

163. ***The Programming.*** The Commission received a complaint that the March 8, 2005 episode of the NBC Television Network program “Committed” had a scene “set in a gymnasium full of children” in which a woman is “grabbing the genitals of a man while he sang the national anthem.” The broadcast occurred between 6 a.m. and 10 p.m. Eastern Standard Time. Our review of a videotape of the episode indicates that the episode does not show the woman touching the man’s genitals – the touching is only suggested – and the suggested touching is not sexual in nature, but apparently intended by the female character to help the man hit the high notes of the national anthem.

164. ***Indecency Analysis.*** Based on our review of the tape of this episode, we conclude that it is not indecent. Even assuming that the scene the complainant describes is within the scope of our indecency definition, we conclude that it does not satisfy the second prong of our indecency analysis – that is, it is not patently offensive under contemporary standards for the broadcast medium.

165. Looking at the three principal factors that inform our contextual analysis, first, the material is not graphic or explicit. Although the episode suggests that one character is touching another’s sexual organs, no touching is ever shown, and there is no nudity, depiction of a sexual organ, or description of sexual activity. Rather, viewers are left to surmise what is happening by one character’s reactions to another. Turning to the second factor, while not dispositive, it is relevant that the scene at issue is not sustained or repeated. Finally, we do not believe the material shocks, panders, and/or titillates the viewing audience. Rather, it is not presented in a sexual manner. As noted, the touching is only suggested or implied, and neither the detail nor the tone of the scene makes it “shocking” or “titillating.” We conclude, based on our examination of these three factors, that the program in question is not patently offensive under

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<sup>215</sup> FCC File No. EB-05-IH-0257.

contemporary standards for the broadcast medium, and therefore is not indecent. Accordingly, we deny the complaint.

**5. “Golden Phoenix Hotel & Casino Commercial” (February 19, 2005)<sup>216</sup>**

166. ***The Programming.*** The Commission received a complaint concerning a commercial for the Golden Phoenix Hotel and Casino, located in Reno, Nevada, broadcast on February 19, 2005 by Sierra Broadcasting Company (“Sierra”), licensee of Station KRNVT, Reno, Nevada. The advertisement features a hotel show entitled “Perfect 10.” It begins with ten women in casino show-style costumes suddenly jumping onto the bed of a fully clothed man who has been reading “Perfect 10” magazine, then features excerpts of singing and dancing from the show mixed with graphics, and ends with a brief view of the man alone on the bed with his partially bare upper torso and face covered by lipstick kisses. The voice-over describes the concept and content of the show and its male star (who is not the man in bed) and identifies the hotel. The complainant describes the bed scenes as “a mostly naked man laying in bed with . . . almost completely naked women exposing their breasts and other body parts [and] acting in a truly obscene and sexual manner.” The complainant alleges that the commercial is obscene and briefly enumerates the criteria for that finding.

167. ***Obscenity Analysis.*** We do not find the complained-of material obscene. Although the material does suggest sexual activity, the mere suggestion of such activity does not render material obscene. Obscene material, which is not protected by the First Amendment and may not be broadcast at any time, is defined by a three-prong test set forth by the Supreme Court in *Miller v. California*: (1) the average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient interest; (2) the material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable law; and (3) the material, taken as a whole, must lack serious literary, artistic, political or scientific value.<sup>217</sup> All three prongs of this test must be met before the material may be found to be obscene. This test is designed “to isolate ‘hard core’ pornography from expression protected by the First Amendment.”<sup>218</sup> Based on our review, the advertisement at issue clearly does not constitute the type of “hard core pornography” covered by *Miller*.

168. ***Indecency Analysis.*** The first prong of our indecency analysis is whether the program depicts or describes sexual or excretory activities or organs and, therefore, is within the subject matter scope of the Commission’s indecency definition. Even assuming that the advertisement’s suggestion of sexual activity meets the first prong of our indecency analysis, however, we conclude that it is not indecent because it is not patently offensive as measured by contemporary community standards for the broadcast medium.

169. Turning to the first principal factor in our contextual analysis, we find that the material at issue is neither explicit nor graphic. In the first bed scene, the man is shown fully clothed on top of the bed, and the women’s costumes, though sexually suggestive, do not actually display their sexual organs. Likewise, the women put their arms around the man in a manner that is suggestive rather than explicit or graphic. The second bed scene merely shows

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<sup>216</sup> FCC File No. EB-05-IH-0314.

<sup>217</sup> 413 U.S. at 24.

<sup>218</sup> *Id.* at 29.

the man alone from the waist up, with his shirt unbuttoned and lipstick marks on his face, without depicting sexual activity or organs.

170. Concerning the second principal factor of our contextual analysis, the material at issue is repeated or dwelled upon in the sense that there are two bed scenes, one at the beginning of the advertisement and one at the end. Note, however, that this factor is not dispositive. “No single factor generally provides the basis for an indecency finding.”<sup>219</sup>

171. Finally, with respect to the third factor of our contextual analysis, it does not appear that the bed scenes at issue shock, pander to, or titillate the viewing audience. No sexual acts or organs are shown. Among other things, no sexual acts or organs are shown, the voice-over is not explicitly sexual, and the camera angles do not present the material in a pandering manner.

172. Viewing the advertisement as a whole, we conclude that it is not patently offensive. Although the bed scenes are repeated, this factor is outweighed, in this particular context, by the absence of any graphic or explicit portrayal of sexual activities or organs and our finding that it is not shocking, pandering to, or titillating. Therefore, we conclude that the advertisement is not indecent, and the complaint is denied.

## 6. “The Oprah Winfrey Show” (March 18, 2004)<sup>220</sup>

173. *The Programming*: The Commission received numerous complaints about the discussion of teenage sexual practices contained in the March 18, 2004 episode of the syndicated television program “The Oprah Winfrey Show.” This particular episode included an examination by the host and her guests and audience of serious parental/supervisory issues including the complained-of discussion arising from the movie “Thirteen.” The complaints cite the following discussion, which we verified from an official transcript of the program:

WINFREY: Yeah. So you say—let’s talk about that secret language, Michelle.

Ms. BURFORD: Yes.

WINFREY: I didn’t know any of this.

Ms. BURFORD: I have—yeah, I have—I’ve gotten a whole new vocabulary, let me tell you.

WINFREY: I did not know any of this. Does this—does this mean I am no longer hip?

Ms. BURFORD: Salad-tossing. I’m thinking cucumbers, lettuce, tomatoes. OK? I am definitely not hip.

WINFREY: OK—so—OK, so what is a salad toss?

Ms. BURFORD: OK, a tossed salad is—get ready; hold on to your underwear for this one—oral anal sex. So oral sex to the anus is what tossed salad is. Hi, Mom. OK. A rainbow party is an oral sex party. It’s a gathering where oral sex is performed. And a—rainbow comes from—all of the girls put on lipstick and each one puts her mouth around the penis of the gentleman or gentlemen who are there

<sup>219</sup> *Indecency Policy Statement*, 16 FCC Rcd at 8003 ¶ 10.

<sup>220</sup> FCC File No. EB-04-IH-0081.

to receive favors and makes a mark in a different place on the penis, hence the term rainbow. So...

WINFREY: OK. And so what does pre—so what does pretty boy mean? A pretty boy.

Ms. BURFORD: Pretty boy is a sexually active boy, someone who's been fairly promiscuous. So it isn't maybe what you would have thought pretty boy meant in your time.

WINFREY: And dirty means what? Does dirty mean...

Ms. BURFORD: Dirty means a diseased—means a diseased girl. And along with that the term that some teens are using to mean HIV is High Five, 'high' and then the Roman numeral 'V.' High Five. So if you got High-Fived by Jack, you got diseased by Jack. You got—you got HIV.

WINFREY: It means he gave you HIV.

Ms. BURFORD: He gave you HIV. Yeah.

WINREY: Yeah. OK. And boo—booty call is pretty common, right?

Ms. BURFORD: Yeah, that's—yeah, that's pretty pervasive. Yeah, that's an early morning or late-at-night call for sex that involves no real relationship. Maybe 2 AM, guy calls girl, and says, 'Meet me at so and so location, we have sex, we leave,' booty call. You all got that?

174. ***Indecency Analysis.*** There can be no question that the complained-of dialogue describes sexual activities, and therefore falls within the subject-matter scope of our indecency analysis. We thus turn to the second prong of our indecency analysis – a determination of whether the material at issue was patently offensive as measured by contemporary community standards for the broadcast medium.

175. Turning to the first factor in our contextual analysis, the broadcast here clearly describes sexual practices in very specific terms, and is highly graphic and explicit.

176. With respect to the second factor, the dialogue is not brief, but continues at length.<sup>221</sup> Indeed, the title of the segment is “The Secret Language of Teens,” and the discussion of these terms for sexual activity is the subject of the entire segment.

177. Given this particular context, though, our findings with regard to the first two factors of our analysis are outweighed by our conclusion under the third factor of our contextual analysis that the complained-of material, in context, is not pandering and is not used to titillate or shock.

178. The program segment focuses on the “secret lives” of many teenagers. Through guests -- parents, teenagers, and others -- serious discussions take place about the disturbing, secret teenage behavior portrayed in the movie “Thirteen.” Guests speak of serious, potentially harmful behaviors of teens– such as drug use, drinking, self-mutilation, and sexual activity, how

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<sup>221</sup> *Indecency Policy Statement*, 16 FCC Rcd at 8008, ¶ 17 (stating that “[r]epetition of and persistent focus on sexual or excretory material have been cited consistently as factors that exacerbate the potential offensiveness of broadcasts”).



teenagers hide those behaviors from their parents, and how parents might recognize and address those behaviors with their teens. The material is not presented in a vulgar manner and is not used to pander to or titillate the audience. Rather, it is designed to inform viewers about an important topic. To the extent that the material is shocking, it is due to the existence of such practices among teenagers rather than the vulgarity or explicitness of the sexual depictions or descriptions. It would have been difficult to educate parents regarding teenagers' sexual activities without at least briefly describing those activities and alerting parents to the little-known terms (*i.e.*, "salad tossing," "rainbow party") that many teenagers use to refer to them.<sup>222</sup> For many of the same reasons, we have previously denied complaints about similar educational broadcasts.<sup>223</sup>

179. As we have previously stated, "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."<sup>224</sup> Here, in light of the overall context of the broadcast, we find that the complained-of material is not patently offensive as measured by contemporary community standards for the broadcast medium, and, therefore, not indecent.

### 7. Political Advertisement (October 14, 2004)<sup>225</sup>

180. ***The Programming.*** The Commission received a complaint regarding a political advertisement that was aired by Multimedia KDSK, Inc., licensee of Stations KDSK-TV and KDNL-TV, St. Louis, Missouri, between 5:00 and 7:00 p.m. on October 14 and 15, 2004. The advertisement, sponsored by the Illinois Democratic Party and the Maag for Justice political campaign, was aired during the Illinois judicial election cycle. The complainant alleges -- and our review of photographic stills from the advertisement confirms -- that the spot included references to rape and sodomy in criticizing the competence of another candidate in the race for a seat on the Supreme Court of Illinois.<sup>226</sup> The complainant argues that this advertisement contains

<sup>222</sup> See *Saving Private Ryan*, 20 FCC Rcd at 4513 ¶ 14 (noting that "[i]n short, the vulgar language here was not gratuitous and could not have been deleted without materially altering the broadcast").

<sup>223</sup> See *King Broadcasting Co. (KING-TV)*, Memorandum Opinion and Order, 5 FCC Rcd 2971, ¶ 13 (1990) (finding that although a program dealt explicitly with teenage sexual issues and included very graphic sex organ models, "the material presented was clinical or instrumental in nature and not presented in a pandering, titillating or vulgar manner"); see also *Indecency Policy Statement*, 16 FCC Rcd at 8011-12 ¶ 21 (citing to staff decisions in which episodes of the "Oprah Winfrey Show" and "Geraldo Rivera Show" were found not indecent).

<sup>224</sup> *Id.*, 16 FCC Rcd at 8010 ¶ 20.

<sup>225</sup> FCC File No. EB-05-IH-0223.

<sup>226</sup> The photographic stills and text of the advertisement can be found at [http://www.brennancenter.org/programs/downloads/buyingtime\\_2004/STSUPCT\\_IL\\_DPIL\\_KARMEIER\\_CHILDR EN.pdf](http://www.brennancenter.org/programs/downloads/buyingtime_2004/STSUPCT_IL_DPIL_KARMEIER_CHILDR EN.pdf). The ad begins with a picture of a schoolyard through a chain-link fence, then shows a blurred image of a home, then superimposes a copy of the judicial decision over the home, then adds a picture of Judge Karmeier, and concludes with a picture of a jail cell, with Judge Karmeier's picture superimposed upon it. The narrator states:

He used candy to lure the children into the house. Once inside, the three children were sexually molested. A four-year old girl raped. Her brothers- sodomized. A Belleville man was arrested and convicted for the crime after trying to develop pictures of the abuse. Despite prosecutor's objections, Judge Lloyd Karmeier gave him probation, saying "The court should grant leniency..." Another case where Karmeier let a violent criminal out into the community. Lloyd Karmeier -- the wrong choice for Supreme Court. Paid for by the Democratic Party of Illinois .

prurient speech, falls outside the First Amendment protections of the Constitution of the United States, and should not have aired at a time when children were watching television.

181. **Obscenity Analysis.** Although the complainant does not explicitly claim that the advertisement is obscene, we read his allegation that the spot contains prurient speech and is without First Amendment protection as an allegation that it is obscene. We find, however, that the complained-of material is not obscene. Although the material does refer to sexual activity, the mere mention of such activity does not render material obscene.<sup>227</sup> Obscene material, which is not protected by the First Amendment and may not be broadcast at any time, is defined by a three-prong test set forth by the Supreme Court in *Miller v. California*: (1) the average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient interest; (2) the material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable law; and (3) the material, taken as a whole, must lack serious literary, artistic, political or scientific value.<sup>228</sup> This test is designed “to isolate ‘hard core’ pornography from expression protected by the First Amendment.”<sup>229</sup> All three prongs of this test must be met before the material may be found to be obscene.

182. The material at issue here is not obscene because it does not meet the three-part definition articulated in *Miller v. California*. Although the advertisement discusses a criminal sexual assault, it is a political ad in a hotly contested judicial election and therefore, taken as a whole, it is not without serious political value. Because the material does not meet the third prong of the *Miller* definition, it is not obscene and it is not necessary to consider the other two prongs of the definition.<sup>230</sup>

183. **Indecency Analysis.** Turning to our indecency analysis, we find that the complained-of material describes sexual activity by referencing rape and sodomy, thereby satisfying the first prong of our indecency analysis. We next turn to the second prong of our indecency analysis – a determination of whether the material at issue was patently offensive as measured by contemporary community standards for the broadcast medium.

184. After reviewing the material, we find that the advertisement is not explicit or graphic, the first factor we must consider in our contextual analysis to determine whether material is patently offensive. The advertisement references rape and sodomy of children without supplying any detailed description or depiction. These references are significantly less graphic than other instances where political advertisements were considered “graphic” but not indecent.<sup>231</sup>

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<sup>227</sup> See *WGBH Educational Foundation, Memorandum Opinion and Order*, 69 FCC 2d 1250, 1253-54 (1978) (“*WGBH MO&O*”) (finding that offensive language, including expletives, does not fit within the established definition of obscenity).

<sup>228</sup> 413 U.S. at 24.

<sup>229</sup> *Id.* at 29.

<sup>230</sup> *Id.* at 23-24. See *Roth*, 354 U.S. 476; but see *Petition for Declaratory Ruling Concerning Section 312(A)(7) of the Communications Act*, Declaratory Ruling, 9 FCC Rcd. 7638 (1994), reversed on other grounds sub nom *Becker v. FCC*, 95 F.3d 75 (1996) (finding that campaign advertisements containing graphic abortion imagery were, in context, part of important political debate and thus were not indecent) (“*1994 Declaratory Ruling*”).

<sup>231</sup> *Id.* at 7643 (depicting dead or aborted and bloodied fetuses in campaign advertisements was graphic, but not indecent).

185. Next, we examine the second factor in our contextual analysis: whether the material is repeated or dwelled upon. We find that rape and sodomy are each referenced only once in the advertisement, which therefore does not repeat or dwell upon these subject areas. After citing these criminal acts, the advertisement moves on to discuss the sentence delivered to the perpetrator by one of the judicial candidates.

186. Finally, we assess whether the material is used in a pandering, shocking or titillating manner. The advertisement calls attention primarily to the judgment of a judicial candidate, and mentions predatory sexual activities to call into question the candidate's judgment in sentencing a criminal. We do not consider such references pandering or titillating. While references to rape and sodomy are shocking, particularly when they involve children, we find that, on balance, the advertisement advocates against a particular judicial candidate rather than shocks, panders to, or titillates the audience.<sup>232</sup> In other words, to the extent that the material has "shock" value, it is not related to sexual or excretory activity but to the judge's allegedly "soft attitude" on crime.

187. In this case, we find that all three of the principal factors in our contextual analysis weigh in favor of a finding that the complained-of material is not patently offensive as measured by contemporary community standards for the broadcast medium. While the references in this political advertisement to rape and sodomy were understandably upsetting to some viewers, subject matter alone does not render material indecent.<sup>233</sup> Therefore, we conclude that this advertisement is not indecent. Accordingly, we deny the complaint.<sup>234</sup>

#### 8. "The Amazing Race 6" (December 21, 2004)<sup>235</sup>

188. *The Programming.* "The Amazing Race 6" is a CBS Television Network ("CBS") program in which two-person teams race around the world for a cash prize. The Commission received a complaint regarding the December 21, 2004 broadcast of the program by CBS affiliate Station KYW-TV, Philadelphia, Pennsylvania, licensed to CBS Broadcasting, Inc. According to the complaint, "[m]idway through that episode, my nine-year-old daughter asked me what was written on the side of a bus that the contestants were embarking upon. She stated that she thought that was a bad word that she was not supposed to say. Sure enough, the words 'FU\*\* COPS' was [sic] visible on the side of the bus near the door where the contestants are getting on the bus."

189. The Bureau obtained a videotape of the subject episode from CBS which confirms that, during a scene in which two of the contestants leave a train, the camera shot briefly includes some graffiti stating "Fuck Cops!" The graffiti is spray-painted in small white letters on the train's side.

190. *Indecency Analysis.* We held in the *Golden Globe Awards Order* that, given the core meaning of the "F-Word," any use of that word inherently has a sexual connotation and falls

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<sup>232</sup> *Id.*

<sup>233</sup> See *Indecency Policy Statement*, 16 FCC Rcd at 8011 ¶ 21.

<sup>234</sup> Because we find that the advertisement is not indecent, we need not decide whether the Commission may propose forfeitures against licensees that broadcast indecent political advertisements outside of the safe harbor. See generally *Becker v. FCC*, 95 F.3d 75 (D.C. Cir. 1996).

<sup>235</sup> FCC File No. EB-05-IH-0394.

within the first prong of our indecency definition.<sup>236</sup> The complained-of material here is language that we have found inherently describes sexual activity. The material, therefore, warrants further scrutiny to determine whether it was patently offensive as measured by contemporary community standards for the broadcast medium.

191. Looking at the three principal factors that comprise our contextual analysis, we note first that, although the “F-Word” is depicted in the program, the image is not graphic or explicit. The graffiti is small, out of focus, and difficult to read. Unless one is looking directly at or for the words, the average viewer would not even notice the graffiti. Second, while not dispositive, it is relevant that the material is not repeated or dwelled upon. Indeed, the image is displayed only momentarily. Finally, the shot of the graffiti is not shocking, pandering, or titillating because it is barely visible. Indeed, the average viewer would not have noticed the graffiti. Since each of the three factors examined above weighs against a finding of patent offensiveness, we conclude that the material is not patently offensive and therefore not indecent.

192. **Profanity Analysis.** In the *Golden Globe Awards Order*, we found that the “F-Word” constituted profane language within the meaning of 18 U.S.C. § 1464 because, in context, it constituted vulgar and coarse language “so grossly offensive to members of the public who actually hear it as to amount to a nuisance.”<sup>237</sup> Based upon our review of the record in this case, however, we conclude that CBS did not air profane material in violation of 18 U.S.C. § 1464. As we have indicated elsewhere in this Order, we believe that the “F-Word” is presumptively profane because it is so grossly offensive as to constitute a nuisance.<sup>238</sup> This, however, is one of the rare instances in which this presumption is effectively rebutted. Unlike the broadcast spoken utterance of the “F-Word” at issue in the *Golden Globes Award Order*, the written version of the word during this broadcast, for the reasons mentioned above, would not have been noticed by the average viewer. As such, we find it impossible to conclude that its broadcast was “likely to shock the viewer and disturb the peace and quiet of the home”<sup>239</sup> and thus amount to a nuisance. For all of these reasons, we find that the broadcast is not profane, and the complaint is denied.

## **9. Various Programs Containing Expletives (various dates between August 31, 2004 and February 28, 2005)**

193. **The Programming.** The Commission has before it twenty complaints concerning programming that contains the following allegedly obscene, indecent, or profane words and phrases: “hell,” “damn,” “bitch,” “pissed off,” “up yours,” “ass,” “for Christ’s sake,” “kiss my ass,” “fire his ass,” “ass is huge,” and “wiping his ass.” We conclude that, while these words and phrases are understandably upsetting to some viewers, in the contexts used here, they are neither obscene, indecent, nor profane. The complaints include:

- (a) an October 19, 2004, complaint against Viacom International, Inc., licensee of Station WTOG(TV), St. Petersburg, Florida, for its alleged October 18, 2004 broadcast of “The Simpsons” program, in which the phrases “up yours,” and “hell”

<sup>236</sup> See *Golden Globe Awards Order*, 19 FCC Rcd at 4978 ¶ 8; see also *Pacifica Foundation*, 56 FCC 2d at 99.

<sup>237</sup> *Golden Globe Awards Order*, 19 FCC Rcd at 4981 ¶¶ 13-14.

<sup>238</sup> *Id.* at 19 FCC Rcd at 4980 ¶ 12 (citing *Tallman v. United States*, 465 F.2d 282, 285 (7<sup>th</sup> Cir. 1972)).

<sup>239</sup> See *supra* ¶ 19.

were allegedly aired between 7:00 and 7:30 p.m. The complainant believes that the material was “obscene.”<sup>240</sup>

- (b) a November 4, 2004 complaint against TVT License, Inc., licensee of Station WTVT(TV), Tampa, Florida, for a November 4, 2004 broadcast of the “North Shore” program, in which the words “bitch” and “hell” were allegedly broadcast during an unspecified time period. The complainant believes that the material was “profane.”<sup>241</sup>
- (c) a November 18, 2004 complaint against KTVI License, Inc., licensee of Station KTVI(TV), St. Louis, Missouri, for its alleged October 26, 2004 broadcast of the “Father of the Pride” program, in which the phrases “damn,” “hell,” and “my ass is huge,” were allegedly aired at approximately 8:00 p.m.<sup>242</sup> The complainant believes that the material “lacks serious literary, artistic, political or scientific value and meets the standard of the prohibition issued by the FCC.”
- (d) a September 22, 2004 complaint against Meredith Corporation, licensee of Station WSMV-TV, Nashville, Tennessee, for its alleged August 31, 2004 broadcast of the “Father of the Pride” program, in which the phrases “bitch” and “slutty sister” were used and “an animal trainer was accosted by a sexually aroused chimpanzee.”<sup>243</sup> The complainant further alleges that a sexual double-entendre was made through the animated lion character’s statement “‘Big Daddy’s ready for lovin’ . . . it may be nine o’clock in New York, but right here it’s mountin’ time.’” The complainant alleges that the material is indecent.
- (e) an undated complaint against Viacom International, Inc., licensee of Station WTOG(TV), St. Petersburg, Florida, for its alleged October 25, 2004 broadcast of the “Girlfriends” program, in which the word “ass” was allegedly aired during the 9:00 to 9:30 p.m. time period.<sup>244</sup> The complainant believes that the material was “offensive.”
- (f) an undated complaint against an unspecified UPN affiliate for its alleged November 29, 2004 broadcast of the “Half and Half” program in which the word “damn” was allegedly aired during the 9:00 to 9:30 p.m. time period.<sup>245</sup> The complainant believes that the material was “profane.”
- (g) a December 20, 2004 complaint against an unspecified UPN affiliate for its alleged December 20, 2004 broadcast of the “Second Time Around” program in which the phrases “get your ass out here,” “I gave you the damn keys,” and “damn flashlight”

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<sup>240</sup> FCC File No. EB-05-IH-0316.

<sup>241</sup> FCC File No. EB-05-IH-0317.

<sup>242</sup> FCC File No. EB-05-IH-0385.

<sup>243</sup> FCC File No. EB-04-IH-0459.

<sup>244</sup> FCC File No. EB-05-IH-0318.

<sup>245</sup> FCC File No. EB-05-IH-0421.

were allegedly aired at approximately 9:50 p.m.<sup>246</sup> The complainant believes that the material was both “profane” and “obscene.”

- (h) an undated complaint against Viacom International, Inc., licensee of Station WTOG(TV), St. Petersburg, Florida, for its alleged December 1, 2004 broadcast of the “America’s Next Top Model” program in which the words “ass” and “bitch” were allegedly aired during the 8:00 to 9:00 p.m. time period.<sup>247</sup> The complainant believes that the material was “profane.”
- (i) an undated complaint against Viacom International, Inc., licensee of Station WTOG(TV), St. Petersburg, Florida, for its alleged December 21, 2004 broadcast of the “Family Matters” program in which the word “hell” was allegedly aired during the 10:30 and 11:00 a.m. time period.<sup>248</sup> The complainant believes that the material was both “obscene” and “profane.”
- (j) an undated complaint against Viacom International, Inc., licensee of Station WTOG(TV), St. Petersburg, Florida, for its alleged broadcast of the “Cuts” program on February 28, 2005 during which the words “ass” and “damn” were allegedly aired during the 8:30 to 9:00 p.m. time period.<sup>249</sup> The complainant believes that the material was “inappropriate.”
- (k) an undated complaint against McGraw-Hill Broadcasting Company, Inc., licensee of Station KMGH-TV, Denver, Colorado, for its alleged broadcast of an unspecified program on January 25, 2005 during which the phrases “my Mom’s been wiping his ass,” “he said his parents would fire her ass,” and “a pissed-off ex-employee” were allegedly aired during the 9:00 to 10:00 p.m. period.<sup>250</sup> The complainant believes that the material was “obscene,” “indecent” and “profane.”
- (l) an April 23, 2005 complaint against TTV License, Inc., licensee of Station WTVT(TV), Tampa, Florida, for a December 9, 2004 broadcast of the “North Shore” program, in which the words “ass” and “hell” were allegedly broadcast between 9 and 10 p.m.. The complainant believes that the material was indecent.<sup>251</sup>

194. **Obscenity Analysis.** We deny the complaints to the extent that they allege the foregoing broadcasts are obscene.<sup>252</sup> The three-part obscenity test set forth in *Miller v. California* requires that (1) an average person, applying contemporary community standards,

<sup>246</sup> FCC File No. EB-05-IH-0428.

<sup>247</sup> FCC File No. EB-05-IH-0420.

<sup>248</sup> FCC File No. EB-04-IH-0422.

<sup>249</sup> FCC File No. EB-05-IH-0423.

<sup>250</sup> FCC File No. EB-05-IH-0696.

<sup>251</sup> FCC File No. EB-05-IH-0417.

<sup>252</sup> The allegations of obscenity concern, specifically, the phrases “up yours,” “hell,” “get your ass out here,” “I gave you the damn keys,” “I was holding the damn flashlight,” “my Mom’s been wiping his ass,” “kiss my ass,” “his parents would fire his ass,” and “either that or a pissed-off ex-employee.”

would find that the material, as a whole, appeals to the prurient interest; (2) the material depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable law; and (3) the material, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>253</sup> This test is designed “to isolate ‘hard core’ pornography from expression protected by the First Amendment.”<sup>254</sup> Nothing in the record indicates that the foregoing broadcasts depict the kind of “hard core pornography” covered by *Miller*, or that, *as a whole*, they appeal to the prurient interest or lack serious literary, artistic, political, or scientific value.<sup>255</sup>

195. **Indecency Analysis.** Although only three complaints explicitly allege that the cited material is indecent,<sup>256</sup> we will perform our indecency analysis on all the allegations about offensive language. Several of the complaints cite similar terms without providing any context. For example, complainants challenge uses of the words “up yours,” “ass,” “hell,” “damn,” and “bitch.”<sup>257</sup> One complaint, about Station WSMV-TV’s August 31, 2004 broadcast of an episode of “Father of the Pride,” concerns references to an animated character’s sister being “slutty,” and to various sexual acts, including animal sex and bestiality.<sup>258</sup> Another complaint, against Station KMGH-TV, concerns the phrases “my Mom’s been wiping his ass,” and “he said his parents would fire her ass,” and “either that or a pissed-off ex-employee.”<sup>259</sup>

196. The words “hell,” “bitch,” “slutty,” and “damn” do not refer to sexual or excretory organs or activity and therefore fall outside the subject matter scope of our indecency rules. We will assume *arguendo* that the remaining allegations describe or depict sexual or excretory organs or activities and therefore fall within the subject matter scope of our indecency rules. Specifically, the word “ass,” and the phrases “wiping his ass” and “fire her ass,” in the context of the programs, refer to the buttocks, which are sexual and excretory organs.<sup>260</sup> Likewise, the term “pissed off” is a derivative of “piss,” which refers to the act of urination. Moreover, the references to sexual acts, including animal sex and bestiality, describe sexual activity. Although the phrase “up yours” is more vague, the speaker arguably is referring to a sexual or excretory organ of the listener. Thus, we must proceed to determine whether these terms or references are patently offensive as measured by contemporary community standards for the broadcast medium under the second step of our indecency analysis.

197. We find that, although the complained-of word “ass,” and the phrases “up yours,” “my ass is huge,” “wiping his ass,” “fire her ass, and “pissed off” are coarse expressions, in the context presented, they are not sufficiently vulgar, graphic, or explicit to support a finding of patent offensiveness. To the extent the complaints describe the context in which the word “ass” is used, it is used in a nonsexual sense to denigrate or insult the speaker or another character. The word “piss” is used as part of a slang expression that means “angry.” The word “ass” and

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<sup>253</sup> 413 U.S. at 24.

<sup>254</sup> *Id.* at 29.

<sup>255</sup> See *WGBH MO&O*, 69 FCC 2d at 1253-54 (finding that offensive language, including expletives, does not fit within the established definition of obscenity).

<sup>256</sup> See *supra* ¶ 193(c), (e), and (j).

<sup>257</sup> See *supra* ¶ 193(a)-(c), (e)-(j), (l).

<sup>258</sup> See *supra* ¶ 193(d).

<sup>259</sup> See *supra* ¶ 193(k).

<sup>260</sup> See *supra* note 97.

the phrase “pissed off” do not invariably invoke coarse sexual or excretory images, and in the context presented they do not rise to the level of offensiveness of the “F-Word” or “S-Word.” Moreover, while not dispositive, none of these complaints suggest that the remarks are repeated or dwelled upon. Although the phrases may have a marginally shocking effect, that impact is not so marked as to convince us that the overall context of the broadcast was indecent. Moreover, we note that last year we found that the fleeting use of some of these same terms was not indecent in the contexts presented.<sup>261</sup> The manner in which these terms are used in the complained-of broadcasts resembles that presented in our previous decisions. Therefore, based on our precedent, the complained-of broadcasts are not indecent.

198. With regard to the remaining allegations in the complaint against the August 31, 2004 episode of “Father of the Pride,” we find that the material is not indecent. First, the animated lion character’s utterance of the phrase “it’s mountin’ time,” although apparently used as a sexual reference, is not, in the context of the instant broadcast, sufficiently explicit or graphic to be deemed patently offensive. While the animated imagery accompanying the lion character’s comment does portray him making a circular pelvic motion while uttering the phrase “mountin’ time,” it does not contain any depiction of sexual organs or explicit sexual acts. Moreover, the sexual reference is neither repeated nor dwelled upon, and is not shocking, pandering, or titillating. Similarly, we find no merit to the allegation that the material visually depicting “an animal trainer [being] accosted by a sexually aroused chimpanzee” is indecent. Contrary to the complainant’s allegation of portrayed bestiality, the scene in question depicts the effect of a trainer’s application of animal pheromones, apparently arousing a chimpanzee to attempt to caress and nuzzle him. It does not contain any depiction of sexual organs or sexually explicit acts and is not titillating or shocking. Consequently, we find that the foregoing material, while offensive to some viewers, is not patently offensive under our indecency standard.

199. **Profanity Analysis.** Several of the complaints allege that the use of the words “bitch,” “hell” or “damn,” or phrases including their variants, are profane. These words are not sexual or excretory terms, and thus are presumed not to be profane.<sup>262</sup> On the other hand, the words “ass” and “piss” and their derivatives do describe sexual or excretory activities. As noted above, we discussed these terms in two decisions last year, finding that neither was not sufficiently graphic or explicit in context to be indecent,<sup>263</sup> and further holding that the term “pissed” was not profane in the context presented.<sup>264</sup> Similarly, we conclude that the use of these terms here in context is not so grossly offensive to members of the public as to amount to a nuisance and thus be deemed profane. Accordingly, we deny the complaints.

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<sup>261</sup> See *PTC 1*, 20 FCC Rcd at 1926, ¶ 8 (finding that, in context, fleeting uses of words including “bitch” and “ass” not sufficiently explicit or graphic to support a finding of patent offensiveness); *PTC 2*, 20 FCC Rcd at 1938 ¶ 8 (finding that, in context, words including “hell,” “damn,” “pissed,” “bitch,” not sufficiently explicit or graphic to support a finding of patent offensiveness). We note that, in contrast, in *Golden Globe Awards*, 19 FCC Rcd at 4979 ¶ 9, we found that a single use of the “F-Word” during the live broadcast of an awards ceremony was explicit and graphic because “its use invariably invokes a coarse sexual image.”

<sup>262</sup> See *supra* ¶ 18.

<sup>263</sup> See *PTC 1*, 20 FCC Rcd at 1926, ¶ 8 (finding that use of the term “ass” was not indecent in context); *PTC 2*, 20 FCC Rcd 1938, ¶ 8 (finding that broadcast references to “hell,” “damn,” “bitch,” and “pissed” were not indecent).

<sup>264</sup> *Id.* (finding that several words, including “pissed,” were not profane in context).



## 10. “Family Guy” (January 16, 2005)<sup>265</sup>

200. **The Programming.** The Commission received a complaint concerning the January 16, 2005 broadcast of “Family Guy” over Fox Television Network-affiliated stations, and specifically Station WTTG-TV, Washington, D.C., at 9:00 p.m. Eastern Standard Time. The episode in question, titled “And The Weiner Is . . .,” includes dialogue in which cartoon characters say “penis,” along with euphemisms for the male sex organ, within the episode’s subject: a father’s concern that he is not as well-endowed as his son.

201. **Indecency Analysis.** The episode’s references to “penis” clearly places it within the subject matter scope of our indecency definition as the word “penis” refers to a sexual organ.<sup>266</sup> We thus turn to the second prong of our indecency analysis – whether the material at issue was patently offensive as measured by contemporary community standards for the broadcast medium. In making this determination, we must look to the full context in which the material is presented, including the explicit or graphic nature of the description, whether it dwells on or repeats at length descriptions of sexual organs or activities, and whether it appears to pander or is used to titillate or shock. While the program’s cartoon format may make it more attractive to younger viewers, the context is generally a humorous series of scenes of increasingly desperate behavior by the cartoon family father as he tries to compensate for his self-perceived inadequacies after learning that his son’s penis is larger than his own.

202. Regarding the first component of our contextual analysis, the program contains no nudity and never actually shows or graphically describes any sexual organ. The episode merely refers to the cartoon son’s penis and shows the cartoon father’s and mother’s reactions upon learning of it. Moreover, the specific euphemisms that are employed, such as “wang” and “little banana,” are relatively inoffensive. In a similar case, the Commission found that several episodes of the program “Coupling” were not sufficiently vulgar, explicit, or graphic to qualify as indecent, even though they repeatedly referred to sexual activities and organs.<sup>267</sup> The Commission concluded that although the episodes included “sustained and repeated use of sexual innuendo and double entendre . . . none of the episodes contain[ed] graphic descriptions of sexual activities and organs or use[d] language that is so graphic as to qualify as indecent and profane.”<sup>268</sup>

203. Regarding the second component of our contextual analysis, the episode does dwell upon and repeat various references to penises. As we have noted previously, however, no single factor in our indecency analysis is generally dispositive.<sup>269</sup>

204. Finally, we do not find that the material is used to pander, titillate, or shock. Rather, the episode at issue addresses the father’s feelings of inferiority, and the topic is presented in an indirect, humorous manner, without the use of graphic or explicit details.

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<sup>265</sup> FCC File No. EB-05-IH-0084.

<sup>266</sup> *Young Broadcasting NAL*, 19 FCC Rcd at 1754 ¶ 9 (finding that broadcast material that showed a male performer’s genitalia satisfied the subject matter prong of the indecency analysis).

<sup>267</sup> *See Coupling MO&O*, 19 FCC Rcd at 23027 ¶ 7.

<sup>268</sup> *Id.*

<sup>269</sup> *Indecency Policy Statement*, 16 FCC Rcd at 8003 ¶ 10.

205. In sum, although the word “penis” and euphemisms for that word are repeated several times in the episode, we find that because of the absence of explicit or graphic descriptions or depictions of any sexual organ, along with the absence of shocking, pandering, and/or titillating effect, the episode, taken as a whole, is not patently offensive as measured by contemporary community standards for the broadcast medium and is therefore not indecent. Accordingly, the complaint is denied.

#### 11. “The Academy Awards” (February 27, 2005)<sup>270</sup>

206. *The Programming.* The Commission received several complaints against the ABC Television Network’s broadcast of “The Academy Awards” program, alleging that show host Chris Rock uttered vulgar and offensive comments including “sit their asses down,” and the statement that the “Superman” film “sucked.” One complainant further alleges that the program featured a video montage in which a male actor was “naked from the waist up, standing in the background, [while a female actor] was apparently eating a sausage or other item, but it appeared to be superimposed and gave the appearance of her performing oral sex on the man.” The segments in question were all broadcast during the evening of February 27, 2005 before 10 p.m. Eastern Standard Time.

207. *Indecency Analysis.* With respect to the first prong of the indecency analysis, we find that the broadcast falls within the scope of the indecency definition.<sup>271</sup> We will assume *arguendo* that, in certain contexts, the term “sucked” may refer to oral sex. The phrase “sit their asses down” refers to the buttocks, which are sexual and excretory organs. Similarly, the video clip described in the complaint uses video images to allude to oral sex, a sexual activity, and thus is within the scope of our indecency definition. We therefore evaluate whether the foregoing material is “patently offensive” as measured by the contemporary community standards for the broadcast medium under the second step of our indecency analysis.

208. We find that although the complained-of phrases “sit their asses down” and “sucked” may be coarse expressions, in the context presented, they are not sufficiently vulgar, explicit, or graphic to support a patent offensiveness finding.<sup>272</sup> First, in the context presented, the word “sucked” is not an explicit or graphic description of sexual or excretory organs or activities. Its use does not invariably invoke a coarse sexual image. The phrase “sit their asses down” includes a coarse expression for the buttocks, but involves a command to sit down, rather than referring to sexual or excretory activity. In addition, while not dispositive, neither remark is repeated or dwelled upon. Furthermore, while this terminology may have been upsetting to some viewers, it is not sufficiently graphic, explicit, or sustained to support the conclusion that it was shocking, pandering or titillates the audience. Although use of such phrases may, depending on the context involved, contribute to a finding of indecency, their use here was not patently offensive and therefore not indecent.

209. Moreover, we find that the program’s video montage, which allegedly “gave the appearance of” a depiction of oral sex, is not actionably indecent. In a recent case, the Commission denied substantially similar complaints directed against the broadcast of segments

<sup>270</sup> FCC File No. EB-05-IH-0277.

<sup>271</sup> See *supra* ¶ 12.

<sup>272</sup> See *PTC 2*, 20 FCC Rcd at 1938 ¶ 8 (in context, words “dick,” “hell,” “damn,” “orgasm,” “penis,” “testicles,” “breast,” “nipples,” “can,” “pissed,” “crap,” “bastard,” and “bitch” were not sufficiently explicit or graphic to be patently offensive).

from the film “Austin Powers: The Spy Who Shagged Me.”<sup>273</sup> Significantly, in this case, as in the “Austin Powers” film, the material cited in the complaint does not actually depict sexual organs or activities; it only uses superimposed images to allude to oral sex. Therefore, we find that the material does not explicitly or graphically depict sexual organs or activities. Furthermore, the image was extremely brief, lasting a mere fraction of a second. Finally, the visual allusion, in context, is not shocking or titillating, and in any event, is simply not explicit and graphic enough to be patently offensive as measured by contemporary community standards for the broadcast medium. Therefore, we find that it was not indecent. Accordingly, the complaints are denied.

## 12. “8 Simple Rules” (February 4, 2005)<sup>274</sup>

210. *The Programming.* The Commission received a complaint regarding the February 4, 2005 broadcast of the ABC Television Network program, “8 Simple Rules” between 6 a.m. and 10 p.m. Eastern Standard Time. According to the complaint, “[a]t the conclusion of the episode, I observed the mother and the oldest child as they stood near a hamster cage in the home. The older girl looked into a hamster cage and asked ‘... what is it doing?’ ... then the girl said ‘... hamsterbating.’ This was a reference [that] the hamster was ‘masturbating.’” The complaint urges the Commission to issue a public warning or fine against ABC and “to take a position not to allow this type of behavior and language on television.”

211. *Indecency Analysis.* As an initial matter, we will assume but not decide that the broadcast falls within the subject-matter prong of our analysis, as it references the sexual activity of masturbation. We conclude, however, that the program is not indecent because it is not patently offensive as measured by the contemporary community standards for the broadcast medium.

212. Turning to the three principal factors that inform our contextual analysis, while the use of the term “hamsterbating” would be interpreted by many viewers as constituting a veiled reference to the sexual activity of masturbation, the term is neither graphic nor explicit, and the program never depicts any sexual activity or organ. Moreover, although not dispositive, it is also relevant to our analysis that the allusion to masturbation is not in any way sustained or dwelled upon. Finally, we conclude that while the use of the term “hamsterbating” may have disturbed some viewers of this program, which is aimed in part at a younger audience, the term’s shock value is marginal at best, and in this context is outweighed by the non-explicit and non-repeated nature of the allegedly indecent material. For all of these reasons, we deny the complaint.

## 13. “The Today Show” (January 11, 2005)<sup>275</sup>

213. *The Programming.* The Commission received a complaint about the January 11, 2005 broadcast of “The Today Show” between 6 a.m. and 10 p.m. Eastern Standard Time. That program contained a segment showing scenes of the devastating floods and mudslides that had occurred in California and of various rescue efforts. In one scene, viewers see an attempt to pull a man wearing only a shirt from raging water onto the safety of a highway overpass. As the man

<sup>273</sup> See *PTC 1*, 20 FCC Rcd at 1926-27, ¶¶ 7-9.

<sup>274</sup> FCC File No. EB-05-IH-0465.

<sup>275</sup> FCC File No. EB-05-IH-0365.

is hauled from water level to the boat, his penis is briefly exposed. At the end of the scene, the rescuers lose their grip on the man, and he goes crashing back into the water, narrowly missing a pillar of the overpass as he falls.

214. ***Indecency Analysis.*** In conducting our indecency analysis in this case, it is important to recognize and emphasize the context of the broadcast material. The complained-of segment contained contemporaneous coverage of an important news event. Therefore, we must exercise particular caution here as the complaint involves programming that implicates core First Amendment concerns. The first prong of our indecency analysis is whether the program depicts or describes sexual or excretory activities or organs and, therefore, is within the subject matter scope of the Commission's indecency definition. The broadcast clearly falls within the subject matter scope of our indecency definition because the scene includes a view of a man's penis, which is a sexual organ.<sup>276</sup> We thus turn to the second prong of our indecency analysis – a determination of whether the material at issue was patently offensive as measured by contemporary community standards for the broadcast medium.

215. Regarding the first principal component of our contextual analysis, although the Commission previously has found exposure of adult sexual organs to be graphic and explicit in certain situations,<sup>277</sup> in this particular context, we find that the complained-of material is not graphic or explicit. The shot of the man's penis is not at close range, and the overall focus of the scene is on the rescue attempt, not on the man's sexual organ. Here, the distant image of a man's penis in footage displaying efforts to rescue him from mortal peril is not explicit or graphic.

216. With respect to the second principal component of our contextual analysis, the segment does not dwell on or repeat the image of the victim's penis. To the contrary, the segment can be fairly described as providing only a brief glimpse of the penis that is incidental to the overall action portrayed – a human rescue effort.

217. Turning to the final principal component of our analysis, and the most important in this particular context, we find that the material does not pander to, titillate, or shock the viewing audience. Rather, it contains coverage of a significant news event and shows the human experience behind that event. To the extent there is shock value to the footage, it derives from the overall action portrayed -- the effort to rescue a human life -- not from the footage's minimal sexual content.

218. Since the material taken as a whole is not graphic or explicit, does not dwell on or repeat images of a sexual organ or activity, and does not appear to shock, pander, and/or titillate, it does not satisfy the second prong of our indecency analysis and, therefore, we deny the complaint. In doing so, we again recognize the need for particular caution with respect to complaints implicating the editorial judgment of broadcast licensees in presenting news and public affairs programming, as these matters are at the core of the First Amendment's free press guarantee.<sup>278</sup> We also emphasize the critical importance of context in determining whether a

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<sup>276</sup> See *Young Broadcasting NAL*, 19 FCC Rcd at 1754 (finding that a broadcast of performer's exposed penis satisfies subject matter prong of indecency analysis).

<sup>277</sup> *Id.* See also *Super Bowl NAL*, 19 FCC Rcd at 19235 (finding that a broadcast of performer's breast was graphic and explicit).

<sup>278</sup> See *Syracuse Peace Council*, 2 FCC Rcd at 5050-51 ¶ 52 (eliminating the fairness doctrine, which placed an affirmative obligation on broadcasters to cover, and present contrasting viewpoints on, controversial issues of public importance).

broadcast is patently offensive. In this regard, the contrast between this case and the *Young Broadcasting NAL* is instructive. Each involves the brief, accidental exposure of male frontal nudity during a news program. Unlike in this case, however, the performer's penis in the *Young Broadcasting NAL* was exposed at relatively close range.<sup>279</sup> More importantly, the display was not incidental to the coverage of a news event; rather, it occurred during an interview of performers who appear nude to manipulate their genitalia, and as the performer stood up to give an off-camera demonstration to the show's hosts.<sup>280</sup> Here, in contrast, the program's focus is a rescue effort, and the complained-of material is incidental and easily could evade the notice of a viewer focused on this effort.

#### 14. "The Simpsons" (September 9, 2004)<sup>281</sup>

219. *The Programming.* The Commission received a complaint regarding the broadcast of an episode of "The Simpsons" over Station WTTG(TV), Washington, D.C., at 6:30 p.m. Eastern Daylight Time on September 9, 2004.<sup>282</sup> The complaint states that the program contains a graphic and explicit depiction of a scene in a strip club. The Bureau requested and received a videotape of the program in question from Fox Television Stations, Inc., the licensee of the station.

220. "The Simpsons" is an animated comedy series featuring a number of regular characters, including the elderly Mr. Burns and his assistant Smithers. The complained-of episode, entitled "Hunka Hunka Burns In Love," deals with Mr. Burns's romantic ineptitude. The scene in question shows Mr. Burns leading Smithers into a club with a "Girls Girls Girls" sign and saying, "Maybe there are some girls in here." In the club, female cartoon characters dance around poles clothed in two-piece or one-piece lingerie or underwear. Mr. Burns reacts by saying, "Great Heavens! This is one of those nude female fire stations! Oh, I'd always be second place to some kitten stuck in a tree. Let's go, Smithers." Smithers is momentarily depicted as crouching and whimpering in embarrassment as he is cornered by two dancers. Although the complaint states that the scene depicts physical contact between Smithers and a female cartoon dancer's buttocks, we were unable to confirm this statement based on our viewing of the tape.

221. *Indecency Analysis.* As an initial matter, for purposes of this analysis, we assume without deciding that the depiction of female cartoon characters dancing in lingerie falls within the subject-matter prong of our indecency standard. We conclude, however, that the program is not indecent because it is not patently offensive as measured by the contemporary community standards for the broadcast medium.

222. Regarding the first principal component of our contextual analysis, we conclude that the complained-of material does not graphically or explicitly depict sexual organs or activities. Although the movements of the two female dancers shown with Smithers are

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<sup>279</sup> 19 FCC Rcd at 1752.

<sup>280</sup> *Id.* at 1756-57. Noting the comments of off-camera employees urging the performers to conduct a nude demonstration, and the partially off-camera demonstration to the show's hosts, the Commission found that the display was pandering, titillating and shocking, notwithstanding the licensee's precautions to prevent such a display. *Id.* at 1757.

<sup>281</sup> FCC File No. EB-05-IH-0041.

<sup>282</sup> See Complaint dated September 8, 2004.

somewhat sexually suggestive, and one of the dancers is shown from behind wearing a “thong,” the scene is not graphic. No cartoon character is shown completely nude, and there are no clear depictions of physical contact involving the cartoon characters’s sexual organs in the scene. Moreover, although a cartoon might be patently offensive if it contained sufficiently graphic or explicit depictions of sexual or excretory organs or activities, in this context the animation weighs against a finding of patent offensiveness: the characters are linear representations, and to the extent they are depicted in sexually-suggestive clothing or situations, the animation makes those depictions inherently less graphic and explicit than, for example, those involved in the “Video Musicales” program discussed above in Section III.A.4.

223. With respect to the second principal component of our contextual analysis, the scene is relatively brief and does not dwell on depictions of sexual organs or activities.<sup>283</sup> Turning to the final principal component of our analysis, we do not find that the material is panders to, titillates, or shocks the viewing audience within the context of the program at issue. Rather, the scene is a relatively brief vignette about the male characters’ romantic ineptitude. Since the material taken as a whole is not graphic, explicit, or sustained and does not appear to shock, pander, and/or titillate, we find that it is not patently offensive. Accordingly, we deny the complaint.

#### 15. “America’s Funniest Home Videos” (February 5, 2005)<sup>284</sup>

224. **Programming.** The Commission received a complaint regarding the February 5, 2005 episode of the ABC Television Network program “America’s Funniest Videos” (“AFV”) that was broadcast over Station WHAM (TV), Rochester, New York. The complaint alleged that this episode, which aired from 8:00 to 8:30 p.m. Eastern Standard Time, included a clip in which a “butt plug” was allegedly inserted into a naked, male infant. As part of the investigation in this matter, the Enforcement Bureau requested and received from the licensee a videotape of that AFV episode. This videotape reveals that the episode depicted a naked infant falling back onto his pacifier, which then becomes wedged between his buttocks.

225. **Indecency Analysis.** The first prong of our indecency analysis is whether the program depicts or describes sexual or excretory activities or organs, and, therefore, is within the subject matter scope of the Commission’s indecency definition. Because this videotape depicts a child’s nude buttocks, we find that it depicts both excretory and sexual organs,<sup>285</sup> and the broadcast therefore falls within the subject matter scope of our indecency analysis. We must then turn to the next part of our analysis – whether the broadcast was “patently offensive” as measured by contemporary community standards for the broadcast medium.

226. Turning to the first principal factor in our contextual analysis of whether material is patently offensive, the segment at issue shows a naked infant falling back onto his pacifier, which then becomes wedged between his buttocks and is therefore marginally explicit. With regard to the second factor, while not dispositive, the broadcast does not dwell on or repeat at

<sup>283</sup> Compare *Married By America*, 19 FCC Rcd at 20195, ¶ 12 (finding material to be sustained where scene at issue lasted approximately 6 minutes).

<sup>284</sup> FCC File No. EB-05-IH-0212.

<sup>285</sup> See *supra* note 97.

length any description or depiction of sexual or excretory organs or activities.<sup>286</sup> Rather, the program shows the relevant segment once and then moves on to other videotapes. And finally, the footage does not appear to shock, pander, or titillate. The depiction, submitted by the infant's parents, is not sexualized in any manner whatsoever. In conclusion, based on our review of the full context of the broadcast, we find that the broadcast is not indecent. Although, as indicated above, the footage is somewhat explicit, its brevity and the absence of any shocking, pandering, or titillate effect on the audience outweigh that factor in our analysis. As we held in the *Indecency Policy Statement*, "no single factor generally provides the basis for an indecency finding."<sup>287</sup> Accordingly, the complaint is denied.

#### 16. "Green Bay Packers v. Minnesota Vikings" (January 9, 2005)<sup>288</sup>

227. *The Programming.* The Commission received complaints regarding a broadcast over the Fox Television Network ("Fox" or "Fox Network") on the evening of January 9, 2005 prior to 10 p.m. Eastern Standard Time. The complaints allege that during the broadcast of the National Football League playoff game between the Green Bay Packers and the Minnesota Vikings, Fox broadcast the image of a player for the visiting Vikings team who, after scoring a touchdown, acted as if he were lowering his pants and exposing his buttocks to the crowd at Green Bay's Lambeau Field, although he remained fully clothed at all times. In other words, the player pretended to "moon" the crowd. The complaints seek an indecency finding and proposed monetary forfeitures against all Fox Network affiliate stations.

228. *Indecency Analysis.* Assuming without deciding that the broadcast of a mimed "mooning" depicts a sexual or excretory organ and thus falls within the subject matter prong of our indecency analysis, we nevertheless conclude that the material is not patently offensive as measured by contemporary community standards for the broadcast medium and thus is not indecent.

229. Each of the three principal factors that inform our contextual analysis weighs against a finding of patent offensiveness. First, the display involves only mimed actions by a fully-clothed player and thus is not graphic or explicit. Second, although not dispositive, it is also relevant that the images are not dwelled upon; the images appear for only a few seconds, and are not replayed during the broadcast. Finally, while we can understand why many viewers may have perceived the player's touchdown celebration as plainly inappropriate, we do not believe that his fully clothed display titillates or rises to the level of shocking behavior. Accordingly, we deny the complaints.

#### 17. "Medium" (January 17, 2005)<sup>289</sup>

230. *The Programming.* The Commission received a complaint concerning the NBC Television Network ("NBC") broadcast of the program "Medium," at 9:00 p.m. Central Standard Time on January 17, 2005. The Enforcement Bureau requested and received a videotape of the program from NBC. A review of the tape discloses that the episode begins with a husband and

<sup>286</sup> See *PTC 2*, 20 FCC Rcd at 1938 ¶ 9 (finding that a rudimentary depiction of a cartoon boy's buttocks was fleeting, and, in context, was not sufficiently graphic or explicit, or sustained, to rise to the level of being patently offensive).

<sup>287</sup> *Indecency Policy Statement*, 16 FCC Rcd at 8003 ¶ 10.

<sup>288</sup> FCC File No. EB-05-IH-0032.

<sup>289</sup> FCC File No. EB-05-IH-0463.

wife being counseled by a therapist in an office setting. During the course of conversation with the couple, the therapist asks the husband to act out his selfish feelings by doing something with (or to) his wife, even if society might not approve of the act, and tells him that he should not be embarrassed because the therapist “has seen it all.” In response, the husband stands up and faces this wife. He then pulls out a gun from his waist, and shoots his wife in the face.<sup>290</sup> The complainant objects to this portrayal of sex associated with violence against women broadcast at that hour of the evening.

231. **Indecency Analysis.** As discussed above, our definition of indecent programming is limited to material that describes or depicts sexual or excretory organs or activities.<sup>291</sup> Violence *per se* is not currently within the defined subject matter scope of these limitations on broadcast programming. The complained-of portion of the episode arguably contains dialogue that suggests the possibility that the husband might wish to engage in some kind of sexual activity with his wife. However, no such activity is described or takes place, and thus the material is not within the scope of our indecency definition. Accordingly, we must deny the complaint.

232. We wish to emphasize, however, that we understand the concerns of the complainant and others with the issue of violent programming on television, as well as the bizarre and shocking violence that is portrayed in the complained-of episode. Last year, at Congress’s urging, we initiated a proceeding to examine violent television programming and its impact on children.<sup>292</sup> In doing so, we sought information about the nature and amount of violent television programming, its effects, what measures are available to control exposure to media violence, and the need for and the legal basis of our ability, if any, to regulate in this area. We have invited the public to submit comments for our consideration, and are currently reviewing those comments and determining our next steps.

#### IV. ORDERING CLAUSES

233. 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, that NBC Telemundo License Co., licensee of Station KWHY-TV, Los Angeles, California is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of \$32,500 for willfully violating 18 U.S.C. § 1464 and section 73.3999 of the Commission’s rules by its October 9, 2004, broadcast of the movie “Con El Corazon En La Mano.”<sup>293</sup>

234. IT IS FURTHER ORDERED that a copy of this *NAL and MO&O* shall be sent by Certified Mail, Return Receipt Requested, to F. William LeBeau, Senior Regulatory Counsel &

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<sup>290</sup> The complaint states that the husband “unzips his pants” before shooting his wife, but our review of the videotape shows that the husband appears to simply remove a handgun from the area of his waist. No unzipping of pants is shown or heard during the scene.

<sup>291</sup> See *Indecency Policy Statement*, 16 FCC Rcd at 8000 ¶ 4 (noting that “in addition, the [*Pacifica*] Court quoted the Commission’s definition of indecency with apparent approval. The definition, “language or material that, in context depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs,” has remained substantially unchanged since the time of the *Pacifica* decision”) (internal citations omitted).

<sup>292</sup> See *Violent Television Programming and Its Impact on Children*, Notice of Inquiry, 19 FCC Rcd 14394 (2004).

<sup>293</sup> NAL Account Number 200632080007, FRN No. 0014139422, Facility ID No. 26231.



Assistant Secretary, NBC Universal, Inc., 1299 Pennsylvania Avenue, N.W., 11th Floor, Washington, D.C. 20004.

235. IT IS FURTHER ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, and section 1.80 of the Commission's rules, that Sherjan Broadcasting Company, Inc., licensee of Station WJAN-CA, Miami, Florida, is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of \$32,500 for willfully violating 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules by its October 19, 2004, broadcast of the "Fernando Hidalgo Show."<sup>294</sup>

236. IT IS FURTHER ORDERED that a copy of this *NAL and MO&O* shall be sent by Certified Mail, Return Receipt Requested, to Peter Tannenwald, counsel for Sherjan Broadcasting Company, Inc., Irwin Campbell & Tannenwald, PC, 1730 Rhode Island Avenue, N.W., Suite 200, Washington, D.C. 20036-3101.

237. IT IS FURTHER ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, and section 1.80 of the Commission's rules, that Aerco Broadcasting Corp., licensee of Station WSJU-TV, San Juan, Puerto Rico, is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of \$220,000 for willfully and repeatedly violating 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules by its broadcast of various music videos, described above in the *NAL and MO&O*, during the "Video Musicales" program from January through March 2002.<sup>295</sup>

238. IT IS FURTHER ORDERED that a copy of this *NAL and MO&O* shall be sent by Certified Mail, Return Receipt Requested, to John A. Borsari, counsel for Aerco Broadcasting Corp., John A. Borsari & Associates, PLLC, 2111 Wilson Blvd., P.O. Box 100009, Suite 700, Arlington, Virginia 22210; and David Ramos, D'Vanguardia, 497 Ave. E. Pol. Apartado 187, San Juan, Puerto Rico 00926-5636.

239. IT IS FURTHER ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, and section 1.80 of the Commission's rules, that WBDC Broadcasting, Inc., licensee of Station WBDC-TV, Washington, D.C., is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of \$27,500 for willfully violating 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules by its February 8, 2004 broadcast of "The Surreal Life 2."<sup>296</sup>

240. IT IS FURTHER ORDERED that a copy of this *NAL and MO&O* shall be sent by Certified Mail, Return Receipt Requested, to Arthur H. Harding, Fleischman and Walsh, LLP, counsel for the WB Television Network, 1919 Pennsylvania Avenue, N.W., Suite 600, Washington, D.C. 20006; R. Clark Wadlow and Thomas P. Van Wazer, Sidley Austin Brown & Wood LLP, counsel for WBDC Broadcasting, Inc., 1501 K Street, N.W., 10th Floor, Washington, D.C. 20005; and Dan Issett, Director of Corporate and Government Affairs, Parents Television Council, 325 S. Patrick Street, Alexandria, Virginia 22314.

241. IT IS FURTHER ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, and section 1.80 of the Commission's rules, that San Mateo County

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<sup>294</sup> NAL Account Number 200632080008, FRN No. 0003756897, Facility ID No. 60165.

<sup>295</sup> NAL Account Number 200632080010, FRN No. 0003732435, Facility ID No. 4077.

<sup>296</sup> NAL Account Number 200632080011, FRN No. 0002833267, Facility ID No. 30576.

Community College District, licensee of noncommercial educational Station KCSM-TV, San Mateo, California, is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of \$15,000 for willfully violating 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules by its broadcast of "The Blues: Godfathers and Sons" on March 11, 2004.<sup>297</sup>

242. IT IS FURTHER ORDERED that a copy of this *NAL and MO&O* shall be sent by Certified Mail, Return Receipt Requested, to Marilyn R. Lawrence, General Manager, Station KCSM-TV, San Mateo County Community College District, 1700 West Hillsdale Blvd, San Mateo, California 94402.

243. IT IS FURTHER ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, and section 1.80 of the Commission's rules, that KTVI License, Inc., licensee of Station KTVI(TV), St. Louis, Missouri, is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of \$27,500 for willfully violating 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules by its broadcast of "The Pursuit of D.B. Cooper" on March 15, 2003.<sup>298</sup>

244. IT IS FURTHER ORDERED that a copy of this *NAL and MO&O* shall be sent by Certified Mail, Return Receipt Requested, to John C. Quale, Counsel for KTVI License, Inc., Skadden Arps Meagher & Flom, LLP, 1440 New York Avenue, N.W., Washington, D.C. 20005-2111.

245. IT IS FURTHER ORDERED, pursuant to section 1.80 of the Commission's rules, that within thirty (30) days of the release of these *NALs*, each licensee identified above SHALL PAY the full amount of its proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of their proposed forfeiture.

246. Payment of each forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. Payments must include the relevant *NAL/Acct. No.* and *FRN No.* referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, Pennsylvania 15251-8340. Payment by overnight mail may be sent to Mellon Bank/LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, Pennsylvania 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106.

247. The responses, if any, must be mailed to William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12<sup>th</sup> Street, S.W., Room 4-C330, Washington D.C. 20554, and MUST INCLUDE the relevant *NAL/Acct. No.* referenced for each proposed forfeiture above.

248. 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.

<sup>297</sup> *NAL* Account Number 200632080012, *FRN No.* 0001545185, *Facility ID No.* 58912.

<sup>298</sup> *NAL* Account Number 200632080089, *FRN No.* 0003476009, *Facility ID No.* 35693.

249. Requests for payment of the full amount of these *NALs* under an installment plan should be sent to: Associate Managing Director -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.<sup>299</sup>

250. Accordingly, IT IS ORDERED that the complaints in the above-referenced *NAL* proceedings ARE GRANTED to the extent indicated herein, AND ARE OTHERWISE DENIED, and the complaint proceedings ARE HEREBY TERMINATED.

251. IT IS FURTHER ORDERED that the complaints referenced in these *NALs and MO&O* are GRANTED to extent set forth herein and otherwise DENIED.<sup>300</sup>

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>299</sup> See 47 C.F.R. § 1.1914.

<sup>300</sup> Consistent with section 503(b) of the Act and consistent Commission practice, for the purposes of the forfeiture proceeding initiated by each *NAL* in this *Order*, the only party or parties to such proceeding will be the licensee or licensees specified above.

**STATEMENT OF  
CHAIRMAN KEVIN J. MARTIN**

*Re: Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show; Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005; Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without A Trace"*

Congress has long prohibited the broadcasting of indecent and profane material and the courts have upheld challenges to these standards. But the number of complaints received by the Commission has risen year after year. They have grown from hundreds, to hundreds of thousands. And the number of programs that trigger these complaints continues to increase as well. I share the concerns of the public - and of parents, in particular - that are voiced in these complaints.

I believe the Commission has a legal responsibility to respond to them and resolve them in a consistent and effective manner. So I am pleased that with the decisions released today the Commission is resolving hundreds of thousands of complaints against various broadcast licensees related to their televising of 49 different programs. These decisions, taken both individually and as a whole, demonstrate the Commission's continued commitment to enforcing the law prohibiting the airing of obscene, indecent and profane material.

Additionally, the Commission today affirms its initial finding that the broadcast of the Super Bowl XXXVIII Halftime Show was actionably indecent. We appropriately reject the argument that CBS continues to make that this material is not indecent. That argument runs counter to Commission precedent and common sense.

**STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS**

*Re: Complaints Regarding Various Television Broadcasts Between January 1, 2002 and March 12, 2005*

*Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without A Trace," Notice of Apparent Liability for Forfeiture*

*Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show, Forfeiture Order*

In the past, the Commission too often addressed indecency complaints with little discussion or analysis, relying instead on generalized pronouncements. Such an approach served neither aggrieved citizens nor the broadcast industry. Today, the Commission not only moves forward to address a number of pending complaints, but does so in a manner that better analyzes each broadcast and explains how the Commission determines whether a particular broadcast is indecent. Although it may never be possible to provide 100 percent certain guidance because we must always take into account specific and often-differing contexts, the approach in today's orders can help to develop such guidance and to establish precedents. This measured process, common in jurisprudence, may not satisfy those who clamor for immediate certainty in an uncertain world, but it may just be the best way to develop workable rules of the road.

Today's Orders highlight two additional issues with which the Commission must come to terms. First, it is time for the Commission to look at indecency in the broader context of its decisions on media consolidation. In 2003 the FCC sought to weaken its remaining media concentration safeguards without even considering whether there is a link between increasing media consolidation and increasing indecency. Such links have been shown in studies and testified to by a variety of expert witnesses. The record clearly demonstrates that an overwhelming number of the Commission's indecency citations have gone to a few huge media conglomerates. One recent study showed that the four largest radio station groups which controlled just under half the radio audience were responsible for a whopping 96 percent of the indecency fines levied by the FCC from 2000 to 2003.

One of the reasons for the huge volume of complaints about excessive sex and graphic violence in the programming we are fed may be that people feel increasingly divorced from their "local" media. They believe the media no longer respond to their local communities. As media conglomerates grow ever larger and station control moves farther away from the local community, community standards seem to count for less when programming decisions are made. Years ago we had independent programming created from a diversity of sources. Networks would then decide which programming to distribute. Then local affiliates would independently decide whether to air that programming. This provided some real checks and balances. Nowadays so many of these decisions are made by vertically-integrated conglomerates headquartered far away from the communities they are supposed to be serving—entities that all too often control both the distribution *and* the production content of the programming.

If heightened media consolidation is indeed a source for the violence and indecency that upset so many parents, shouldn't the Commission be cranking that into its decisions on further

loosening of the ownership rules? I hope the Commission, before voting again on loosening its media concentration protections, will finally take a serious look at this link and amass a credible body of evidence and not act again without the facts, as it did in 2003.

Second, a number of these complaints concern graphic broadcast violence. The Commission states that it has taken comment on this issue in another docket. It is time for us to step up to the plate and tackle the issue of violence in the media. The U.S. Surgeon General, the American Academy of Pediatrics, the American Psychological Association, the American Medical Association, and countless other medical and scientific organizations that have studied this issue have reached the same conclusion: exposure to graphic and excessive media violence has harmful effects on the physical and mental health of our children. We need to complete this proceeding.

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

*Re: Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, Notices of Apparent Liability and Memorandum Opinion and Order*

I have sworn an oath to uphold the Constitution<sup>1</sup> and to carry out the laws adopted by Congress.<sup>2</sup> Trying to find a balance between these obligations has been challenging in many of the indecency cases that I have decided. I believe it is our duty to regulate the broadcast of indecent material to the fullest extent permissible by the Constitution because safeguarding the well-being of our children is a compelling national interest.<sup>3</sup> I therefore have supported efforts to step up our enforcement of indecency laws since I joined the Commission.

The Commission's authority to regulate indecency over the public airwaves was narrowly upheld by the Supreme Court with the admonition that we should exercise that authority with the utmost restraint, lest we inhibit constitutional rights and transgress constitutional limitations on government regulation of protected speech.<sup>4</sup> Given the Court's guidance in *Pacifica*, the Commission has repeatedly stated that we would judiciously walk a "tightrope" in exercising our regulatory authority.<sup>5</sup> Hence, within this legal context, a rational and principled "restrained enforcement policy" is not a matter of mere regulatory convenience. It is a constitutional requirement.<sup>6</sup>

Accordingly, I concur in part and dissent in part with today's decision because, while in some ways the decision does not go far enough, in other ways it goes too far. Significantly, it abruptly departs from our precedents by adopting a new, weaker enforcement mechanism that arbitrarily fails to assess fines against broadcasters who have aired indecent material. Additionally, while today's decision appropriately identifies violations of our indecency laws, not every instance determined to be indecent meets that standard.

We have previously sought to identify all broadcasters who have aired indecent material and hold them accountable. In this Order, however, the Commission inexplicably fines only the licensee whose broadcast of indecent material was the subject of a viewer's complaint, even

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<sup>1</sup> U.S. CONST., amend. I.

<sup>2</sup> Congress has specifically forbidden the broadcast of obscene, indecent or profane language. 18 U.S.C. § 1464. It has also forbidden censorship. 47 U.S.C. § 326.

<sup>3</sup> See, e.g., *N.Y. v. Ferber*, 458 U.S. 747, 756-57 (1982).

<sup>4</sup> See *FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978) (emphasizing the "narrowness" of the Court's holding); *Action for Children's Television v. FCC*, 852 F.2d 1332, 1344 (D.C. Cir. 1988) ("*ACT I*") ("Broadcast material that is indecent but not obscene is protected by the [F]irst [A]mendment.").

<sup>5</sup> See Brief for Petitioner, FCC, 1978 WL 206838 at \*9.

<sup>6</sup> *ACT I*, *supra* note 4, at 1344 ("[T]he FCC may regulate [indecent] material only with due respect for the high value our Constitution places on freedom and choice in what the people say and hear."); *Id.* at 1340 n.14 ("[T]he potentially chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy."). See also *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, Notices of Apparent Liability and Memorandum Opinion and Order*, FCC 06-17 at note 11 (rel. March 15, 2006).

though we know millions of other Americans were exposed to the offending broadcast. I cannot find anywhere in the law that Congress told us to apply indecency regulations only to those stations against which a complaint was specifically lodged. The law requires us to prohibit the broadcast of indecent material, period. This means that we must enforce the law anywhere we determine it has been violated. It is willful blindness to decide, with respect to network broadcasts we know aired nationwide, that we will only enforce the law against the local station that happens to be the target of viewer complaints. How can we impose a fine solely on certain local broadcasters, despite having repeatedly said that the Commission applies a national indecency standard – not a local one?<sup>7</sup>

The failure to enforce the rules against some stations but not others is not what the courts had in mind when they counseled restraint. In fact, the Supreme Court’s decision in *Pacifica* was based on the uniquely pervasive characteristics of broadcast media.<sup>8</sup> It is patently arbitrary to hold some stations but not others accountable for the same broadcast. We recognized this just two years ago in *Married By America*.<sup>9</sup> The Commission simply inquired who aired the indecent broadcast and fined all of those stations that did so.

In the *Super Bowl XXXVIII Halftime Show* decision, we held only those stations owned and operated by the CBS network responsible, under the theory that the affiliates did not expect the incident and it was primarily the network’s fault.<sup>10</sup> I dissented in part to that case because I believed we needed to apply the same sanction to every station that aired the offending material. I raise similar concerns today, in the context of the instant Order.

The Commission is constitutionally obligated to decide broadcast indecency and profanity cases based on the “contemporary community standard,” which is “that of the average broadcast viewer or listener.” The Commission has explained the “contemporary community standard,” as follows:

We rely on our collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups and ordinary citizens, to keep abreast of contemporary community standards for the broadcast medium.<sup>11</sup>

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<sup>7</sup> See, e.g., *In re Sagittarius Broadcasting Corporation*, Memorandum Opinion and Order, 7 FCC Rcd 6873, 6876 (1992) (subsequent history omitted).

<sup>8</sup> See *Pacifica Found.*, 438 U.S. at 748-49 (recognizing the “uniquely pervasive presence” of broadcast media “in the lives of all Americans”). In today’s Order, paragraph 10, the Commission relies upon the same rationale.

<sup>9</sup> See *Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program “Married by America” on April 7, 2003*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 20191, 20196 (2004) (proposing a \$7,000 forfeiture against each Fox Station and Fox Affiliate station); *reconsideration pending*. See also *Clear Channel Broad. Licenses, Inc.*, 19 FCC Rcd 6773, 6779 (2004) (proposing a \$495,000 fine based on a “per utterance” calculation, and directing an investigation into stations owned by other licensees that broadcast the indecent program). In the instant Omnibus Order, however, the Commission inexplicably fines only the licensee whose broadcast of indecent material was actually the subject of a viewer’s complaint to the Commission. *Id.* at ¶ 71.

<sup>10</sup> See *Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, Notice of Apparent Liability, 19 FCC Rcd 19230 (2004).

<sup>11</sup> *In re Infinity Radio License, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 5022, 5026 (2004).



I am concerned that today's Order overreaches with its expansion of the scope of indecency and profanity law, without first doing what is necessary to determine the appropriate contemporary community standard.

The Order builds on one of the most difficult cases we have ever decided, *Golden Globe Awards*,<sup>12</sup> and stretches it beyond the limits of our precedents and constitutional authority. The precedent set in that case has been contested by numerous broadcasters, constitutional scholars and public interest groups who have asked us to revisit and clarify our reasoning and decision. Rather than reexamining that case, the majority uses the decision as a springboard to add new words to the pantheon of those deemed to be inherently sexual or excretory, and consequently indecent and profane, irrespective of their common meaning or of a fleeting and isolated use. By failing to address the many serious concerns raised in the reconsideration petitions filed in the *Golden Globe Awards* case, before prohibiting the use of additional words, the Commission falls short of meeting the constitutional standard and walking the tightrope of a restrained enforcement policy.

This approach endangers the very authority we so delicately retain to enforce broadcast decency rules. If the Commission in its zeal oversteps and finds our authority circumscribed by the courts, we may forever lose the ability to protect children from the airing of indecent material, barring an unlikely constitutional amendment setting limitations on the First Amendment freedoms.

The perilous course taken today is evident in the approach to the acclaimed Martin Scorsese documentary, "The Blues: Godfathers and Sons." It is clear from a common sense viewing of the program that coarse language is a part of the culture of the individuals being portrayed. To accurately reflect their viewpoint and emotions about blues music requires airing of certain material that, if prohibited, would undercut the ability of the filmmaker to convey the reality of the subject of the documentary. This contextual reasoning is consistent with our decisions in *Saving Private Ryan*<sup>13</sup> and *Schindler's List*.<sup>14</sup>

The Commission has repeatedly reaffirmed, and the courts have consistently underscored, the importance of content *and* context. The majority's decision today dangerously departs from those precedents. It is certain to strike fear in the hearts of news and documentary makers, and broadcasters that air them, which could chill the future expression of constitutionally protected speech.

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<sup>12</sup> *In re Complaints Against Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Memorandum Opinion and Order, 19 FCC Rcd 4975 (2004); *petitions for stay and reconsideration pending*.

<sup>13</sup> *In the Matter of Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film, "Saving Private Ryan,"* Memorandum Opinion and Order, 20 FCC Rcd 4507, 4513 (2005) ("Deleting all [indecent] language or inserting milder language or bleeping sounds into the film would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers"); *See also Peter Branton*, Letter by Direction of the Commission, 6 FCC Rcd 610 (1991) (concluding that repeated use of the f-word in a recorded news interview program not indecent in context).

<sup>14</sup> *In the Matter of WPBN/WTOM License Subsidiary, Inc.*, 15 FCC Rcd 1838 (2000).

We should be mindful of Justice Harlan’s observation in *Cohen v. California*.<sup>15</sup> Writing for the Court, he observed:

[W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.<sup>16</sup>

Given all of these considerations, I find that today’s decision, while reaching some appropriate conclusions both in identifying indecent material and in dismissing complaints, is in some ways dangerously off the mark. I cannot agree that it offers a coherent, principled long-term framework that is rooted in common sense. In fact, it may put at risk the very authority to protect children that it exercises so vigorously.

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<sup>15</sup> 403 U.S. 15 (1971).

<sup>16</sup> *Id.* at 26 (“We cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process”).

**STATEMENT OF  
COMMISSIONER DEBORAH TAYLOR TATE**

*Re: Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show, Forfeiture Order; Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program “Without A Trace,” Notice of Apparent Liability; Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, Notices of Apparent Liability and Memorandum Opinion and Order*

Today marks my first opportunity as a member of the Federal Communications Commission to uphold our responsibility to enforce the federal statute prohibiting the airing of obscene, indecent or profane language.<sup>1</sup> To be clear – I take this responsibility very seriously. Not only is this the law, but it also is the right thing to do.

One of the bedrock principles of the Communications Act of 1934, as amended, is that the airwaves belong to the public. Much like public spaces and national landmarks, these are scarce and finite resources that must be preserved for the benefit of all Americans. If numbers are any indication, many Americans are not happy about the way that their airwaves are being utilized. The number of complaints filed with the FCC reached over one million in 2004. Indeed, since taking office in January 2006, I have received hundreds of personal e-mails from people all over this country who are unhappy with the content to which they – and, in particular, their families – are subjected.

I have applauded those cable and DBS providers for the tools they have provided to help parents and other concerned citizens filter out objectionable content. Parental controls incorporated into cable and DBS set-top boxes, along with the V-Chip, make it possible to block programming based upon its content rating. However, these tools, even when used properly, are not a complete solution. One of the main reasons for that is because much of the content broadcast, including live sporting events and commercials, are not rated under the two systems currently in use.

I also believe that consumers have an important role to play as well. Caregivers – parents, in particular – need to take an active role in monitoring the content to which children are exposed. Even the most diligent parent, however, cannot be expected to protect their children from indecent material broadcast during live sporting events or in commercials that appear during what is marketed to be “appropriate” programming.

Today, we are making significant strides toward addressing the backlog of indecency complaints before this agency. The rules are simple – you break them and we will enforce the law, just as we are doing today. Both the public and the broadcasters deserve prompt and timely resolution of complaints as they are filed, and I am glad to see us act to resolve these complaints. At the same time, however, I would like to raise a few concerns regarding the complaints we address in these decisions.

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<sup>1</sup> See 18 U.S.C. § 1464.

First, I would like to discuss the complaint regarding the 6:30 p.m. Eastern Daylight Time airing of an episode of *The Simpsons*. The *Order* concludes that this segment is not indecent, in part because of the fact that *The Simpsons* is a cartoon. Generally speaking, cartoons appeal to children, though some may cater to both children and adults simultaneously. Nevertheless, the fact remains that children were extremely likely to have been in the viewing audience when this scene was broadcast. Indeed, the marketing is aimed at children. If the scene had involved real actors in living color, at 5:30 p.m. Central Standard Time, I wonder if our decision would have been different? One might argue that the cartoon medium may be a more insidious means of exposing young people to such content. By their very nature, cartoons do not accurately portray reality, and in this instance the use of animation may well serve to present that material in a more flattering light than it would if it were depicted through live video. I stop short of disagreeing with our decision in this case, but note that the animated nature of the broadcast, in my opinion, may be cause for taking an even closer look in the context of our indecency analysis.

Second, our conclusion regarding the 9:00 p.m. Central Standard Time airing of an episode of *Medium* in which a woman is shot at point-blank range in the face by her husband gives me pause. While I agree with the result in this case, I question our conclusion that the sequence constitutes violence *per se* and therefore falls outside the scope of the Commission's definition of indecency. Without question, this scene is violent, graphically so. Moreover, it is presented in a way that appears clearly designed to maximize its shock value. And therein lies my concern. One of the primary ways that this scene shocks is that it leads the viewer to believe that the action is headed in one direction – through dialogue and actions which suggest that interaction of a sexual nature is about to occur – and then abruptly erupts in another – the brutally violent shooting of a wife by her husband, in the head, at point-blank range. Even though the Commission's authority under Section 1464 is limited to indecent, obscene, and profane content, and thus does not extend to violent matter, the use of violence as the “punch line” of titillating sexual innuendo should not insulate broadcast licensees from our authority. To the contrary, the use of sexual innuendo may, depending on the specific case, subject a licensee to potential forfeiture, regardless of the overall violent nature of the sequence in which such sexual innuendo is used.

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Finally, I would like to express my hope and belief that the problem of indecent material is one that can be solved. Programmers, artists, writers, broadcasters, networks, advertisers, parents, public interest groups, and, yes, even Commissioners can protect two of our country's most valuable resources: the public airwaves and our children's minds. We must take a stand against programming that robs our children of their innocence and constitutes an unwarranted intrusion into our homes. By working together, we should promote the creation of programming that is not just entertaining, but also positive, educational, healthful, and, perhaps, even inspiring.