

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of )  
)  
Remand of Section III.B of the Commission's ) DA 06-1739  
March 15, 2006 *Omnibus Order* Resolving )  
Numerous Broadcast Television Indecency )  
Complaints )

**JOINT COMMENTS OF FOX TELEVISION STATIONS, INC., CBS BROADCASTING  
INC., NBC UNIVERSAL, INC. AND NBC TELEMUNDO LICENSE CO.**

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Pursuant to the Commission’s *Public Notice* regarding the Second Circuit’s remand of the *Omnibus Order*, Fox Television Stations, Inc. (“Fox”), CBS Broadcasting Inc., NBC Universal, Inc. and NBC Telemundo License Co. (collectively “the Networks”) respectfully submit their comments regarding the Commission’s enforcement of the prohibition against broadcast indecency, 18 U.S.C. § 1464.

**INTRODUCTION AND SUMMARY**

The Commission should use this remand proceeding to reverse its radically expanded efforts to regulate through punitive forfeitures what it considers to be “indecent” speech under 18 U.S.C. § 1464. Since the mid-1970s, when it first began to enforce the ban on so-called indecent speech, the Commission has carefully observed a cautious and limited enforcement policy that paid serious respect to the First Amendment rights of broadcasters. Indeed, this severely restrained enforcement policy has always been the centerpiece of the Commission’s defense of the indecency regime’s constitutionality. When the Supreme Court on the narrowest basis upheld the specific prohibition as applied to George Carlin’s “Filthy Words” monologue, the Court expressly recognized that its decision did “not speak to cases involving the isolated use of

a potentially offensive word.” *FCC v. Pacifica Found.*, 438 U.S. 726, 760-61 (1978) (Powell, J., concurring). Following *Pacifica*, the Commission for more than 25 years observed this limitation and did not take enforcement action against broadcasts of isolated and fleeting expletives.

In 2004, the Commission unexpectedly and without meaningful explanation abandoned its longstanding restrained enforcement policy, overruling numerous precedents that have stood for decades and greatly expanding the amount of speech that is subject to punishment. Under this new policy, the Commission has, for the first time, begun to (1) take enforcement action against fleeting and isolated utterances of potentially offensive words; (2) use the ban on “profane” speech as a separate basis for prohibiting the use of certain words; (3) punish licensees for “indecent” speech that was unintentionally broadcast during live coverage of newsworthy events; and (4) impose massive and unprecedented fines for violations of the indecency rules.

The Commission’s sweeping departure from restraint in its approach to indecency has resulted in an unprecedented intrusion into the creative and editorial process and threatens to bring about the end of truly live broadcast television. Writers and producers of scripted television programs exercise their creative judgment in deciding that potentially offensive words may be necessary for dramatic verisimilitude or effect, but the Commission now second-guesses those creative decisions on a show-by-show basis. To avoid exposure to enormous indecency penalties, creative personnel censor themselves because of the risk that they will misjudge what the current Commissioners will find offensive. For live television, broadcasters have been required to invest in expensive time-delay equipment and the personnel necessary to operate it. Cable and satellite television are not subject to the Commission’s regime, nor is the internet, and therefore only those media will be able to broadcast truly live news, sporting or political events.

The Commission's exceedingly aggressive enforcement against both scripted and live broadcasts represents an extreme and unwarranted departure from the cautious approach that barely passed constitutional muster in *Pacifica*.

In bringing enforcement proceedings against isolated and fleeting expletives, the Commission is now going well beyond the restrained approach that the Supreme Court approved in *Pacifica*. The Commission cannot reflexively cite *Pacifica* as authorizing its current indecency enforcement regime; indeed, it is clear that the courts, and particularly the Supreme Court in *Pacifica*, would have never approved content-based regulation of speech if the Commission had attempted to enforce § 1464 as aggressively as it now does with respect to fleeting expletives. *See Pacifica*, 438 U.S. at 761 n.4 (Powell, J., concurring) (permitting enforcement action because "the Commission may be expected to proceed cautiously, as it has in the past"); *Action for Children's Television v. FCC*, 852 F.2d 1332, 1340 n.14 (D.C. Cir. 1988) ("*ACT P*") (relying on the Commission's commitment to proceeding cautiously). Now that caution has been thrown to the wind, the First Amendment cost of the Commission's expanded regime is intolerable.

In challenging the Commission's assault on protected speech, the Networks are not seeking license to use potentially offensive language whenever or wherever they want. Everyone understands that some content is not appropriate for television, even if it falls short of what is actually indecent. But rather than foist its own subjective interpretation onto programming decisions, the Commission must "provide adequate breathing space to the freedoms protected by the First Amendment," *Boos v. Barry*, 485 U.S. 312, 322 (1988) (internal quotation marks omitted), which it had always done by deferring to the editorial judgments of broadcasters about content. Indeed, the networks maintain broadcast standards departments to monitor their

programming, employing strict standards to ensure that their broadcast content is appropriate and consistent with viewers' expectations. The Networks are now merely asking the Commission to rescind its radical, new interpretation of its indecency rules—first announced in the *Golden Globe Order*<sup>1</sup> and reaffirmed in the *Omnibus Order*<sup>2</sup>—and instead return to a cautious and restrained enforcement program, while articulating clear standards for licensees to follow and regulators to apply. The Commission should take the opportunity afforded by the Second Circuit's remand to keep its earlier promises to the courts to act with restraint in light of the important First Amendment values at stake. The *Omnibus Order* relies entirely on the new standard articulated in the *Golden Globe Order*, and it cites no other authority for its indecency findings. Most of the arguments below have already been presented to the Commission in various responses to the *Golden Globe Order*, and they provide strong grounds for the Commission to reconsider its actions now.<sup>3</sup> For all these reasons, the Networks urge the

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<sup>1</sup> *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Memorandum Opinion & Order, 19 FCC Rcd. 4975 (2004) ("*Golden Globe Order*").

<sup>2</sup> *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion & Order, 21 FCC Rcd. 2664, ¶¶ 102, 114, 138 (2006) ("*Omnibus Order*").

<sup>3</sup> See Petition for Partial Reconsideration of National Broadcasting Company, Inc., *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program* (April 19, 2004) (attached as Appendix I); Joint Petition for Reconsideration of ACLU, et al., *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program* (April 19, 2004) (attached as Appendix II); Joint Petition for a Stay of Fox Entertainment Group, Inc., NBC Universal, Inc. and Viacom, Inc., *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program* (June 18, 2004) (Attached as Appendix III). The arguments raised in these pleadings are hereby incorporated by reference and made part of this proceeding, as are the arguments from NBC's responses to the Commission's inquiries regarding its live broadcasts. See Letter from F. William LeBeau to William H. Davenport re: FCC File No. EB-04-IH-0512 (Feb. 2, 2005) (Attached as Appendix IV); Letter from F. William LeBeau to William H. Davenport re: FCC File No. EB-04-IH-0591 (Feb. 2, 2005) (Attached as Appendix V); Letter from F. William LeBeau to William H. Davenport re: FCC File No. EB-04-IH-0570 (Feb. 14, 2005) (Attached as Appendix VI).

Commission to return to a § 1464 enforcement program that is at least as restrained as that reviewed in *Pacifica*.

## ARGUMENT

### I. THE COMMISSION'S NEW INDECENCY ENFORCEMENT REGIME VIOLATES THE ADMINISTRATIVE PROCEDURE ACT.

The Commission's indecency regime, announced in the *Golden Globe Order* and reaffirmed in the *Omnibus Order*, rests on a dramatic departure from Commission precedents that have stood for decades. The Commission has an obligation to justify such departures with a reasoned analysis—especially given the First Amendment issues at stake—but has fallen far short of an adequate explanation. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (“an agency changing its course must supply a reasoned analysis”). By adopting a *per se* indecency rule for isolated and fleeting expletives, the Commission violated the APA, which requires a reviewing court to set aside action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

In the *Golden Globe Order*, the Commission admitted that it was changing its policy—reversing its interpretation of the indecency standard, retreating from its longstanding position that *Pacifica* did not authorize it to regulate fleeting expletives, and promulgating a new definition of “profane” content under 18 U.S.C. § 1464. Despite these significant changes in its regulation of constitutionally-protected speech, the Commission offered no justification for its sudden shift; instead, it simply declared that its prior cases were “no longer good law.” *See Golden Globe Order* ¶ 12. The *Omnibus Order* provided no further justification and simply cited the *Golden Globe Order* as precedent for finding fleeting expletives to be indecent. *See, e.g., Omnibus Order* ¶¶ 102, 114, 138.

The complete failure of the Commission to articulate any justification for its sudden shift in policy violates the APA. *Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) (Roberts, J.) (“An agency’s failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decision making” (internal quotations and citation omitted)); *New York Council, Ass’n of Civilian Technicians v. Fed. Labor Relations Auth.*, 757 F.2d 502, 508 (2d Cir. 1985) (“the agency must explain why the original reasons for adopting the rule or policy are no longer dispositive”). If the Commission is unwilling or unable to explain its about face, then its new approach to indecency should be abandoned.

## **II. THE CURRENT INDECENCY REGIME, AS IT RELATES TO POTENTIALLY OFFENSIVE WORDS, IS UNCONSTITUTIONAL.**

It is undisputed that “indecent” speech, unlike obscenity, receives the highest degree of First Amendment protection. “Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people.” *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004). For that reason, content-based restrictions on speech—like the Commission’s indecency findings—are presumed to be invalid, and the Commission bears the heavy burden of showing their constitutionality. *See id.*; *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 817 (2000).

### **A. The Current Indecency Regime Is Unconstitutionally Vague And Impermissibly Chills Protected Speech.**

1. The government cannot use a vague standard for the sensitive task of regulating constitutionally protected speech. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 874 (1997); *Perez v. Hoblock*, 368 F.3d 166, 175 n.5 (2d Cir. 2004). The “literal scope” of § 1464 applies to expression protected by the First Amendment, and the vagueness doctrine therefore “demands a

greater degree of specificity than in other contexts.” *Smith v. Goguen*, 415 U.S. 566, 573 (1974); *see also Smith v. California*, 361 U.S. 147, 151 (1959).

To whatever extent the Commission’s indecency rules may have survived a vagueness challenge in the past, changes in the indecency regime as well as developments in the law undermine any constitutional defense of the Commission’s current approach. The changes effected by the Commission in the *Golden Globe Order* and reapplied in the *Omnibus Order* greatly expanded the types of expression that might be considered indecent and added a novel interpretation of the concept of profanity, thereby materially departing from the enforcement regime that had been approved previously by the courts. In addition, recent judicial decisions cast doubt on whether the current enforcement regime is constitutionally permissible. In *Reno*, a unanimous Supreme Court concluded that the Communications Decency Act (“CDA”) was unconstitutionally vague. *See Reno*, 521 U.S. at 870-74. The CDA defined indecency as any “communication that, in context, depicts or describes, in terms [1] patently offensive [2] as measured by contemporary community standards, [3] sexual or excretory activities or organs.” *Id.* at 860 (quoting 47 U.S.C. § 223(d)). The Commission’s prohibition on broadcast indecency punishes speech based on the same three elements as the CDA: “First, 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.” *Omnibus Order* ¶ 12 (quoting *Indecency Policy Statement* ¶¶ 7-8<sup>4</sup>). Under

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<sup>4</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*”).

*Reno*, such a broad restriction on speech is unconstitutional. *See Reno*, 521 U.S. at 870.<sup>5</sup> At a minimum the Commission must explain why *Reno* is not controlling.

2. Even without *Reno*, the newly-expanded indecency standard is unconstitutionally vague under longstanding precedent. The Supreme Court has invalidated laws that prohibited speech “manifestly tending to the corruption of the youth,” *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 59 (1963), made it unlawful “to curse or revile or to use obscene or opprobrious language,” *Lewis v. New Orleans*, 415 U.S. 130 (1974), or rendered it illegal to utter “opprobrious words or abusive language,” *Gooding v. Wilson*, 405 U.S. 518, 519 (1972). Under the Commission’s new regime, there are no workable criteria for determining what might violate the policy other than familiarity with each individual Commissioner’s sense of outrage at any given moment. This is the very paradigm of a vague enactment, for it vests unbounded discretion to restrict speech with the government. *E.g.*, *Coates v. Cincinnati*, 402 U.S. 611, 615-16 (1971); *Houston v. Hill*, 482 U.S. 451, 466-67 (1987).

The vagueness inherent in the expanded indecency regime is exacerbated by the failure to articulate or analyze what is patently offensive under “contemporary community standards for the broadcast medium.” As *Reno* made clear, contemporary community standards can disambiguate the vagueness inherent in the indecency regime only if they are based on objective criteria, such as specifically-defined state laws in the *Miller* obscenity standard. *See Reno*, 521 U.S. at 873 (explaining that reference to a specific, legal definition “reduces the vagueness

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<sup>5</sup> Numerous courts have since cited *Reno* in striking down laws intended to ban or regulate the sale, rental or transmission of material that may be deemed indecent or harmful to minors. *See, e.g.*, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *Playboy Entertainment*, 529 U.S. 803; *PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004), *reh’g and reh’g en banc denied*, 372 F.3d 671 (4th Cir. 2004); *ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003), *aff’d* 542 U.S. 656 (2004); *Am. Amuse. Mach. Ass’n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999).

inherent in the open-ended term ‘patently offensive’”). Instead of objective legal standards, the Commission’s contemporary community standards for the broadcast medium are determined by the Commission’s “collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups and ordinary citizens.” *Infinity Radio License, Inc.*, Memorandum Opinion & Order, 19 FCC Rcd. 5022, 5026 (2004). This assertion of “we-know-it-when-we-see-it”—or worse, “we-know-it-when-someone-with-influence-on-us-says-we-see-it”—is not a plainly-expressed legal standard that allows for predictive judgments by broadcasters. Ironically, the “community standard” is supposed to be an objective measure of what the *public* thinks, to provide a check on the Commission’s discretion. *Cf. Hamling v. U.S.*, 418 U.S. 87, 107 (1974) (community standards approach meant to ensure that speech “is judged neither on the basis of each [decisionmaker]’s personal opinion, nor by its effect on a particularly sensitive or insensitive person or group”). Under the expanded policy, however, the “community standard” has become the opposite: a vehicle for the unfettered (and unpredictable) discretion of current Commissioners.<sup>6</sup> Applications of the indecency standard have become almost random, and the factors of patent offensiveness can be and have been manipulated to reach any desired conclusion. The resulting array of case-by-case results defies any reasonable explanation. *Compare Golden Globe Order* ¶ 12 (isolated broadcast of an expletive during live awards show is indecent) *with Saving Private Ryan Order* ¶ 8 (repeated use of the same expletive during World War II film is not indecent)<sup>7</sup> *with Omnibus Order* ¶ 78 (handful of uses of the same expletive during Martin Scorsese documentary about blues

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<sup>6</sup> See also *Omnibus Order* at 2727 (Adelstein, dissenting) (“Adelstein Statement”) (order “overreaches with its expansion of the scope of indecency and profanity law, without first doing what is necessary to determine the appropriate community standard”).

<sup>7</sup> *Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004 of the ABC Television Networks Presentation of the Film “Saving Private Ryan,”* Memorandum Opinion & Order, 20 FCC Rcd. 4507, ¶ 8 (2005) (“*Saving Private Ryan Order*”).

musicians are indecent). Any attempt to reconcile these outcomes, or to apply the stated standards to these examples as a means of predicting the outcome in the next case, is hopeless. The First Amendment does not tolerate this arbitrary regulation of speech.

The Commission also has never explained why in some cases the perceived merit of the material—even material that repeatedly uses expletives—saves some broadcasts from a finding of patent offensiveness but not others. In the *Saving Private Ryan Order*, for example, the Commission ruled that numerous uses of the word “fuck,” “shit,” and its variants were acceptable because deletions “would have altered the nature of the artistic work and diminished the power, realism, and immediacy of the film experience for viewers.” *Saving Private Ryan Order* ¶ 14. In contrast, in Martin Scorsese’s PBS documentary series *The Blues: Godfathers and Sons*, the Commission ruled that the much more isolated uses of the same expletives were actionable because the educational purpose of the documentary “could have been fulfilled and all viewpoints expressed without the repeated broadcast of expletives.” *Omnibus Order* ¶ 82; see also *id.* ¶ 77 (noting that “many of the expletives in the broadcast are not used by blues performers,” as if such words would have passed muster if uttered by musicians but were indecent because they were uttered by record producers); *id.* ¶ 134 (noting that expletives broadcast during *NYPD Blue* “may have made some contribution to the authentic feel of the program,” but nonetheless concluding “that purpose could have been fulfilled and all viewpoints expressed without the broadcast of expletives”). The difference is pure *ipse dixit*. There is no sensible or consistently valid way to distinguish *Saving Private Ryan* from *The Blues*; it simply reflects the tastes of the individuals with seats on the Commission.<sup>8</sup> There are no discernible,

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<sup>8</sup> Moreover, even the current commissioners do not agree on these matters of taste. Compare *Omnibus Order* ¶ 82 with Adelstein Statement, 21 FCC Rcd. at 2728 (prohibiting coarse

objective standards; rather, the current Commissioners are doing nothing more than rendering case-by-case judgments on whether, in their subjective opinions, a given expletive is essential to the nature of the artistic work, or whether a particular broadcast may be deemed to have sufficient social value to be permitted. *See, e.g., Without a Trace* ¶ 15 (making the judgment that a scene depicting sexual activity “goes well beyond what the story line could reasonably be said to require”).<sup>9</sup> This approach is inescapably unconstitutional.

3. Broadcasters are thus left without any guidelines that would enable them to understand what is forbidden and what is not, a situation the First Amendment does not allow. *See, e.g., Reno*, 521 U.S. at 871; *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983); *Grayned v. Rockford*, 408 U.S. 104, 108-09 (1972); *Gentile v. State Bar*, 501 U.S. 1030, 1048 (1991) (regulation of speech is unconstitutional when those subject to it can do no more than “guess at its contours”). The Commission’s vague indecency standard impermissibly chills speech by forcing broadcasters to “steer far wider of the unlawful zone,” *Speiser v. Randall*, 357 U.S. 513, 526 (1958), and to restrict their expression “to that which is unquestionably safe.” *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). According to the head of Broadcast Standards and Practices at Fox, the Commission’s vague indecency standards are having a “dramatic chilling effect.” Declaration of Nicole A. Bernard (attached as Appendix VII), ¶ 5 (noting that “content that previously was aired, or would have aired, on Fox, is left out of programs in this chilly environment” and citing specific examples of such programs); *id.* ¶ 9 (noting effects of expanded enforcement on the creative community). The lack of clear limits affords government officials

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language in “The Blues” would “undercut the ability of the filmmaker to convey the reality of the subject of the documentary”).

<sup>9</sup> *See Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program “Without a Trace,” Notice of Apparent Liability*, 21 FCC Rcd. 3110, ¶ 15 (2006) (“*Without a Trace*”).

far too much discretion to curb disfavored expression. *See, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992); *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988); *Kolender*, 461 U.S. at 358, 360; *Beal v. Stern*, 184 F.3d 117, 124 (2d Cir. 1999). Broadcasters thus are forced to speculate about what the Commission—and in practice, its current individual members—will deem to be indecent. *See* Bernard Declaration ¶ 4 (citing the lack of transparency in the Commission's indecency complaint process as “undermin[ing] the network's ability to more fully understand the agency's indecency case law and to determine what is and is not acceptable for broadcast”). Of course the losers in this regime are the viewers.

Live broadcasts are especially at risk, as unscripted news, sports or entertainment programs may unexpectedly include potentially offensive words. For example, Citadel Broadcasting imposed a 12-second tape delay for its professional football games because, during a live broadcast, “there are things that are outside of our control that could literally cost us hundreds of thousands of dollars.”<sup>10</sup> Tennessee Titans fans attending the games and listening to their portable radios in the stands were infuriated that the radio play-by-play lagged the game's action on the field before them. Other significant broadcasts have been cancelled or delayed out of fear of enormous fines for potentially indecent words. When CBS announced that it would broadcast the Peabody award-winning *9/11* documentary on the fifth anniversary of the September 11 attacks without editing potentially offensive words, numerous affiliates serving roughly 10% of U.S. households decided they would either not air the program at all, or else delay its start until after the 10 p.m. safe harbor—despite having previously aired the same

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<sup>10</sup> Mike Organ, “Titans fans rip radio delay of game: Fear of fine forces 12-second holdup,” *Tennessean.com* (Aug. 16, 2006), *available at* <http://tennessean.com/apps/pbcs.dll/article?AID=/20060816/SPORTS01/608160414>.

documentary twice.<sup>11</sup> Yet television audiences expect and demand that certain programs—especially news and sporting events—will be broadcast live. See Declaration of Dennis Swanson (attached as Appendix VIII), ¶ 2 (“Particularly during emergency situations and breaking news events, it is essential that viewers learn of vital news as it happens.”); Declaration of Ed Goren (attached as Appendix IX), ¶ 2 (“Viewers demand the most authentic and realistic presentation of sporting events in real time and without censorship.”); cf. Declaration of Peter Liguori (attached as Appendix X), ¶ 2 (“The live presentation of awards shows and other popular entertainment programming (such as *American Idol*) is what makes this content so compelling.”).<sup>12</sup> The Commission’s newly-expanded enforcement regime places all live broadcasts at risk. See Swanson Declaration ¶ 3; Goren Declaration ¶ 3; Liguori Declaration ¶ 3.<sup>13</sup>

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<sup>11</sup> See Jeremy Pelofsky, “Profanity Concerns Prompt CBS To Show ‘9/11’ on Web,” REUTERS (Sept. 9, 2006), available at [http://today.reuters.com/news/articleinvesting.aspx?type=governmentFilingsNews&storyID=2006-09-09T164501Z\\_01\\_N09438621\\_RTRIDST\\_0\\_SEPT11-CBS.XML](http://today.reuters.com/news/articleinvesting.aspx?type=governmentFilingsNews&storyID=2006-09-09T164501Z_01_N09438621_RTRIDST_0_SEPT11-CBS.XML). John Eggerton, “Pappas Won’t Air CBS’ 9-11 Doc,” *Broadcasting & Cable* (Sept. 7, 2006), available at <http://www.broadcastingcable.com/article/CA6369682.html> (describing affiliate’s decision to preempt the 9/11 documentary, which contains “unedited swearing from the first responders caught in the maelstrom of Ground Zero,” because affiliate believes that, “in the current regulatory climate, stations that air network programming with indecent or profane content are subject to significant fines and the threat of license revocation”) (internal quotations omitted); John Eggerton, “Sinclair to Delay 9/11 Doc,” *Broadcasting & Cable* (Sept. 1, 2006), available at <http://www.broadcastingcable.com/article/CA6368030.html> (describing Sinclair Broadcasting’s decision to delay airing of CBS’ 9/11 documentary until after 10 pm because it believes “the current rules, which promote censorship and impose excessive fines, coupled with the lack of clear or advance guidance from the FCC, impede broadcasters from airing programs that honor our heroes and memorialize significant events, such as 9/11, that have unified us as a nation”) (internal quotations omitted).

<sup>12</sup> See also Mike Starr, “Can Sasha Cohen Save the Olympics?” (Feb. 22, 2006), available at <http://www.msnbc.msn.com/id/11508207/site/newsweek/> (noting that sports fans “don’t like to see events on tape delay because if you are a real fan, it’s hard to maintain your ignorance of the results”); Neil Best, “Soccer Fans Won’t Have To Wait,” NEWSDAY, June 9, 2006, at A76, available at 2006 WLNR 9888687 (suggesting that showing the World Cup on tape delay “likely would have fomented a multi-ethnic, multi-thousand-strong protest march”).

<sup>13</sup> The threat to live broadcasts is especially significant given the competitive importance of such programming to broadcasters. See Swanson Declaration ¶ 5 (stressing the competitive importance of presenting news “live and unadulterated”); Goren Declaration ¶ 5 (emphasizing

To respond to the new indecency regime, many broadcasters have been forced to invest in expensive delay equipment and personnel to monitor broadcasts. *See* Allison Romano, “Reporting Live. Very Carefully.” *Broadcasting & Cable* (July 4, 2005), at 9, *available at* <http://www.broadcastingcable.com/article/CA623019.html?display=Feature> (noting that “local broadcasters are responding by altering—or halting altogether—the one asset that makes local stations so valuable to their communities: live TV” and that the costs of expensive delay equipment are prohibitive for small-market stations). The costs of delay equipment sufficient to cover all live sports and news programming, plus the personnel required to install and operate it, could run into the tens of millions of dollars.<sup>14</sup> The significant equipment and personnel costs associated with installing, maintaining, and operating delay equipment sufficient to cover all live news, sports, and entertainment programs could conceivably exceed the net profits of a small local station for an entire year.<sup>15</sup>

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that live sports programming is an example of “appointment television”); Liguori Declaration ¶ 6 (same with respect to awards shows and the like).

<sup>14</sup> To take but a single example, equipping the 35 Fox owned-and-operated local television stations with enough delay equipment to cover all live local news, sports and entertainment originally produced by such stations would require a capital expenditure of \$3.5 million. *See* Declaration of Andrew G. Setos (Attached as Appendix XI), ¶ 4. All of this delay equipment would need to be replaced every five years. *See id.* ¶¶ 2, 4. The annual personnel costs associated with operating and maintaining sufficient delay equipment for all Fox owned-and-operated local television stations would be approximately \$16 million. *See id.* ¶ 4. This estimate is based on employing two operating positions for each local station; if local stations were to employ four operating positions, as Fox does for its network programming, the cost would be approximately \$32 million for all Fox owned-and-operated stations. *See id.* And of course, these costs represent those of only one station group. To respond at the network level to the uncertainty created by the Commission’s increasingly aggressive indecency enforcement, Fox Broadcasting Group has already increased staffing in its Broadcast Standards and Practices department by 70%, at a cost of \$1,026,000. *See* Bernard Declaration ¶ 6.

<sup>15</sup> The median pre-tax profits for local stations in the smallest markets is only approximately \$225,000 per year. *See* NAB/BCFM, TELEVISION FINANCIAL REPORT, Table 17, at 35 (2005).

But the costs of trying to comply with the Commission’s newly-expanded enforcement regime are truly secondary; the real problem is the chill on protected speech. Even with time delay equipment and the personnel to operate it, broadcasters are not assured of preventing potentially offensive words during live broadcasts. For example, during the “2003 Billboard Music Awards,” a time delay effectively blocked one expletive but failed to prevent two other expletives only seconds later. *See Omnibus Order* ¶ 112 n.164 (quoting broadcast). Delaying live broadcasts so that potentially offensive words might be censored requires the quick reactions of individuals with their fingers on “dump” buttons, and human error is inevitable. *See Bernard Declaration* ¶ 7 (“[B]ecause this is an inherently human endeavor, it is impossible to ensure that content violative of the FCC’s vague indecency standard will never air on live television.”); *Swanson Declaration* ¶ 4 (noting inevitability of human error in using delay equipment to edit live content); *Goren Declaration* ¶ 4 (same); *Liguori Declaration* ¶ 4 (same). Broadcast standards employees are experienced network executives who undergo rigorous training about how and when to edit potentially offensive material, but despite this extensive training and preparation, perfect compliance with the network standards and practices is not possible. *See Bernard Declaration* ¶ 7. Given the possibility of not editing potentially objectionable content, broadcasters have no choice but to self-censor additional content to avoid the risk posed by massive fines. *See id.* ¶¶ 5, 9.

Worse, delaying live broadcasts to edit potentially offensive language inevitably results in overbroad censorship of appropriate material. For example, during a recent time-delayed broadcast of a music performance, a vigilant broadcast standards employee censored a portion of one song out of fear an expletive had been used; a later review found that no expletive had been uttered, but by then the television audience’s enjoyment of the program had already been

interrupted. *See* Liguori Declaration ¶ 5; *see also id.* ¶ 4 (noting danger of accidentally editing out even clearly legal content); Swanson Declaration ¶ 4 (same); Goren Declaration ¶ 4 (same). Fox now has four individuals monitoring every live broadcast to censor potentially offensive language. *See* Bernard Declaration ¶ 8. While this redundancy may catch some potentially offensive language that a single individual might miss, it greatly increases the likelihood that acceptable content will be censored accidentally. The fallibility of delay technology—both in failing to censor potentially offensive content and in censoring unobjectionable content—necessarily chills broadcasters’ constitutionally protected speech.

The chilling wind has only grown colder with the recent enactment of the Broadcast Decency Enforcement Act of 2005, Pub. L. 109–235, 120 Stat. 491 (June 15, 2006), *to be codified at* 47 U.S.C. 503(b)(2)(C)(ii), increasing ten-fold the maximum penalties for broadcasting obscene, indecent or profane language. Given the recent practice of treating the broadcasts of the same program by separate television affiliates as separate violations of § 1464,<sup>16</sup> the aggregate fines for a single, fleeting instance of indecent speech could exceed \$65 million. These harsh and unpredictable penalties have effectively compelled broadcasters to censor not just potentially indecent or what the Commission now deems to be “profane” speech, but any speech—like a live broadcast—that might inadvertently create the possibility that potentially offensive words will be broadcast. “The chilling effect of such absolute accountability . . . is incompatible with the atmosphere of free discussion contemplated by the First Amendment.” *Brown v. Hartlage*, 456 U.S. 45, 61 (1982).

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<sup>16</sup> *See Without a Trace* ¶ 18; *Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, Forfeiture Order, 21 FCC Rcd. 2760, ¶¶ 26-28 (2006); *Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program “Married by America” On April 7, 2003*, Notice of Apparent Liability, 19 FCC Rcd. 20191, ¶ 16 (2004).

## **B. The Current Indecency Regime Cannot Survive Strict Scrutiny.**

When the government wants to restrict the dissemination of protected speech, it must show that its regulation serves a compelling government interest. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 655 (1990). In addition, the government is required to use the least restrictive means of serving its asserted interest. *Playboy Entertainment*, 529 U.S. 803; *Reno*, 521 U.S. 844 (1997). The Commission bears an especially heavy burden to justify, with explanation and evidence, both the nature of its asserted interest and the harms it is meant to address. “When the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural . . . .” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (internal quotation marks omitted). There is no precedent for finding a compelling interest in regulating broadcast speech to prevent even fleeting exposure to a single word, as opposed to regulating the kind of “verbal shock treatment” at issue in *Pacifica*. See, e.g., *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975); cf. *Pacifica*, 438 U.S. at 750 (plurality); *id.* at 760 (Powell, J., concurring); *Cohen v. California*, 403 U.S. 15, 21 (1971). But even if the Commission could satisfy its burden of justifying the exponential increase in prohibited speech under its newly-expanded policy, the current indecency regime is not sufficiently tailored to survive constitutional scrutiny.

### **1. Blocking Technology Is A Less Restrictive Alternative To Content-Based Regulation of Speech.**

“[I]f a less restrictive means is available for the Government to achieve its goals, the Government *must* use it.” *Playboy Entertainment*, 529 U.S. at 815 (emphasis added); *Sable Commc’ns v. FCC*, 492 U.S. 115, 126 (1989). Put differently, “[i]f the First Amendment means anything, it means that regulating speech must be a last—not first—resort.” *Thompson v. W.*

*States Med. Ctr.*, 535 U.S. 357, 373 (2002). Moreover, the government must continually adjust its policies to account for technological advancements since the time of previous judicial decisions reviewing governmental restrictions on speech. *Ashcroft v. ACLU*, 542 U.S. at 671.

The Supreme Court has emphasized that “targeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests.” *Playboy Entertainment*, 529 U.S. at 815. Targeted blocking “enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners.” *Id.* The Supreme Court has relied on such “market-based solutions such as programmable televisions, VCRs, and mapping systems” in analogous contexts and has concluded that voluntary approaches of this type undermine the need for direct government regulation of the content of speech. *Id.* at 821.

In the years since *Pacifica*, Congress has enacted “V-Chip” requirements,<sup>17</sup> and every television now sold in the United States with a screen size of 13-inches or larger comes equipped with this blocking technology.<sup>18</sup> The V-Chip makes blocking available for broadcast television and thus represents an available, less-restrictive alternative to content-based regulation of speech

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<sup>17</sup> “The V-Chip reads information encoded in the rated program and blocks programs from the set based upon the rating selected by the parent.” *V-Chip: Viewing Television Responsibly*, <http://www.fcc.gov/vchip/> (last visited Sept. 21, 2006). The National Association of Broadcasters, the National Cable Television Association and the Motion Picture Association of America developed a “TV Parental Guidelines” rating system for television programs. For all rated programs, the assigned rating is displayed on the screen at the start of every program and after every commercial break. In conjunction with the V-Chip, the ratings permit parents to block programming with a certain rating. *See id.*

<sup>18</sup> More than 119 million television sets with V-Chips have been sold since 2000 to 109 million television households. *See* Kathy Roeder, *Every Family Has Easy to Use Parental Controls, Says TV Watch*, U.S. NEWSWIRE, Mar. 2, 2006, *available at* 3/2/06 USNWSW (Westlaw U.S. Newswire database). By 2009—when broadcasters abandon the analog spectrum and convert to digital broadcasts, and consumers respond by buying television sets capable of displaying digital video—nearly every television set in the United States is likely to have a V-Chip. *See Digital Television (DTV)*, <http://www.fcc.gov/cgb/consumerfacts/digitaltv.html> (describing the conversion process).

through indecency enforcement.<sup>19</sup> *Expanding* the substantive reach of its indecency regime cannot be justified given the increasing prevalence of technology like the V-Chip. “When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government’s obligation to prove the alternative will be ineffective to achieve its goals.” *Playboy Entertainment*, 529 U.S. at 816. The fact that individual blocking is now technologically feasible for the broadcast medium demonstrates that the expanded indecency regime is not narrowly tailored.<sup>20</sup> *Boos*, 485 U.S. at 329 (1988); *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992); *see also Carlin Commc’ns, Inc. v. FCC*, 749 F.2d 113, 122 (2d Cir. 1984) (government has burden to justify its choice of a more restrictive alternative). Certainly, the Commission has not shouldered its burden to show that this technology is not effective.

## **2. The Commission’s Enforcement Regime Does Not Materially Advance The Goal Of Protecting Children.**

When the government acts to restrict speech, the First Amendment requires that the measures at issue “in fact alleviate [the identified] harms in a direct and material way.” *Turner Broadcasting*, 512 U.S. at 664. It “must present substantial supporting evidence in order for a regulation that threatens speech to be upheld,” *Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63, 67 (2d Cir. 1997), and a statutory restriction on speech violates the First Amendment when it “provides only the most limited incremental support for the interest asserted,” *Bolger v. Youngs*

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<sup>19</sup> The Commission has cited the V-Chip and other blocking technologies as reasons to avoid direct content regulation in certain cases. *See, e.g., Saving Private Ryan Order*, ¶ 15 (citing the “voluntary parental code” transmitted at “each commercial break during the broadcast”); *Various Complaints Against the Cable/Satellite Television Program “Nip/Tuck,”* Memorandum Opinion & Order, 20 FCC Rcd. 4255, 4256-57 (2005).

<sup>20</sup> Indeed, given the prevalence of the V-Chip and the dramatic proliferation of content sources other than broadcast television, *Pacifica’s* determinations that broadcasting was “*uniquely* pervasive” and “*uniquely* accessible to children” no longer hold true, thus removing any basis for affording less First Amendment protection to broadcasters. *Pacifica*, 438 U.S. at 748–50 (emphases added); *see also Sable Communications*, 492 U.S. at 127 (emphasizing that *Pacifica’s* “narrow” holding was based on two “‘*unique*’ attributes of broadcasting”).

*Drug Prods. Corp.*, 463 U.S. 60, 73 (1983). “[A] prohibition that makes only a minute contribution to the advancement of a state interest can hardly be considered to have advanced the interest ‘to a material degree.’” *Bad Frog Brewery v. New York State Liquor Auth.*, 134 F.3d 87, 99 (2d Cir. 1998).

The Commission has made no attempt to establish that its expanded enforcement against isolated or fleeting exposure to potentially offensive language actually protects children, nor has it weighed the First Amendment costs to broadcasters and their adult listeners. The *Golden Globe Order* merely claimed that if children heard isolated expletives it “would likely lead to more widespread use of the offensive language,” with a citation to an academic study on the frequency and types of potentially offensive language spoken on television during prime-time in 2001. See *Golden Globe Order* ¶9. But the Commission has never addressed any of the relevant considerations: whether there are any cognizable harms from even fleeting exposure to certain words, given that those words are commonly heard by children on cable television, on the field at many sporting events, most likely at virtually every school playground, and sometimes even at home; whether a total ban on such words on broadcast television would be effective at shielding children from such words; and whether preventing such harms is proportionate to the vastly greater First Amendment costs such a ban would entail. Mechanically repeating the contention that “any” use of certain words “in any context” “invariably invokes a coarse image” and thus always constitutes an actionable indecency both defies common sense and is not constitutionally sufficient. This rote contention cannot explain how the expanded policy furthers the concerns underlying indecency enforcement, which has always been grounded in shielding

children from the “shock treatment” of prolonged exposure to disturbing subject matter, not simply from certain words *per se*.<sup>21</sup>

The Commission’s incomplete attempt to shield children from ever hearing fleeting expletives through draconian enforcement of § 1464 is not just ill-tailored to achieve the asserted interest; it is quixotic. Children today are exposed to potentially offensive words from many sources other than broadcast television. Most notably, the restrictions of § 1464 do not apply to cable television networks or satellite channels,<sup>22</sup> yet a recent study found that 82% of children have access to cable or satellite television,<sup>23</sup> allowing them to watch cable content that is not subject to indecency regime side-by-side with content that is so regulated. Based on census data and the Commission’s own statistics, only 5 percent of American television households have children under 18 and receive only broadcast content.<sup>24</sup> American children live in a “media saturated” environment that includes the internet, video game consoles, computers, and cable and

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<sup>21</sup> The Commission has effectively severed any sustainable link between the stated definition of indecency, which remains unchanged, and the policies the rule promotes. Officially, the indecency policy prohibits only shocking or patently offensive language that describes “sexual or excretory activities and organs.” But much of what was found to be indecent in the *Golden Globe Order* and the *Omnibus Order* did not involve descriptions or depictions of sexual or excretory activity. See *Golden Globe Order* ¶ 8; *Omnibus Order* ¶¶ 106, 120, 142.

<sup>22</sup> Cable and satellite television systems have blocking capabilities like that of the V-Chip, relying on the same TV Parental Guidelines used by broadcasters.

<sup>23</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 10 (Table 3-A), available at <http://www.kff.org/entmedia/entmedia030905pkg.cfm>.

<sup>24</sup> As of June 2005, there were 109.6 million TV households, of which 94.2 million households (or almost 86 percent) subscribe to a Multichannel Video Programming Distribution (MVPD) service. See *Annual Assessment of the Status of Competition in the market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd. 2503, ¶ 8 (2006). U.S. Census data confirms that nearly two-thirds of American households have no children age 18 or younger. U.S. Census Bureau, *American Community Survey* (2004), available at <http://www.census.gov/acs/www/index.html>. If two-thirds of the households without MVPD service have no children, then a mere 5% of households receiving only broadcast service also have children under 18.

satellite television in addition to broadcast television.<sup>25</sup> All of these media use expletives in ways that are isolated and fleeting, or much more. Given this environment, it is fanciful to believe that aggressive enforcement of § 1464 against broadcasters will be effective in preventing children from being exposed to potentially offensive words. *CBS, Inc. v. DNC*, 412 U.S. 94, 127 (1973) (“sacrifice [of] First Amendment protections for so speculative a gain is not warranted”); *see also Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 748 (1996) (plurality opinion). The Commission has failed to come to grips with the fundamental changes in the media marketplace since *Pacifica* was decided. Whatever the ills are from exposure to fleeting expletives, they will not be cured by the Commission’s indecency regime.

**C. The New Indecency Regime Routinely Relies On Prohibited Criteria.**

It is a fundamental precept of the First Amendment—and six Justices in *Pacifica* agreed—that the government is not entitled to punish protected speech based on the government’s judgment of the social value of the speech. *See Pacifica*, 438 U.S. at 761 (Powell, J., concurring) (refusing to join portions of the plurality opinion because “I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most ‘valuable’ and hence deserving of the most protection, and which is less ‘valuable’ and hence deserving of less protection”); *id.* at 762-63 (Brennan, J., dissenting, joined by Marshall, J.); *id.* at 777-79 (Stewart, J., dissenting, joined by Brennan, White, Marshall, JJ.); *see also Playboy Entertainment*, 529 U.S. at 826.

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<sup>25</sup> *Id.* Some of the very same content aired on broadcast TV subject to the Commission’s indecency enforcement is also accessible via the internet without scrutiny. For example, while some households could not watch the *9/11* documentary via broadcast because of affiliates’ fears of indecency enforcement actions, anyone with access to the internet could view the same content during the week following the broadcast when CBS made it available through streaming video over the internet. *See supra* note 11.

The current indecency regime, however, ignores these principles and makes decisions about what speech will be punished and what will not based expressly on the Commission's subjective opinion of the value of the speech.<sup>26</sup> The Commission has lost sight of what the First Amendment demands. The Commission must identify and articulate a compelling government interest, grounded in real and demonstrable harms, that is unrelated to the government's opinion of the value of the speech. Then, it must craft standards that are narrowly tailored to further that compelling interest. Under the current regime, broadcasters routinely attempt to defend their creative judgments by arguing that a particular expletive was necessary to the story or to understanding a socially valuable viewpoint, while the Commission determines whether each particular broadcast is actionable based expressly on subjective judgments about the value of the speech. It would be difficult to imagine a regime more inimical to the First Amendment, in which the Commission may intrude so heavily into the creative process, and where the members of the agency sit in judgment, show by show, of the value of the speech and levy huge fines—or worse, revoke a broadcast license<sup>27</sup>—if the broadcaster has guessed wrong about the social value and artistic necessity of the expletive.

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<sup>26</sup> *Saving Private Ryan Order* ¶ 14 (numerous expletives not actionable because “integral to the film’s objective of conveying the horrors of war through the eyes of these soldiers, ordinary Americans placed in extraordinary situations”); *Golden Globe Order* ¶ 9 (unlike *Saving Private Ryan*, expletive at awards show had no claim of “any political, scientific, or other independent value”); *Omnibus Order* ¶ 134 (finding that potentially offensive words in police drama were not “essential to the nature of an artistic or educational work” and concluding that, although the expletives may have “made some contribution to the authentic feel of the program,” the Commission “believe[d] that purpose could have been fulfilled . . . without the broadcast of expletives”); compare *id.* ¶ 82 (expletives in “The Blues” not of value) with *id.*, Adelstein Statement (expletives in “The Blues” necessary).

<sup>27</sup> See, e.g., *Golden Globes Order* at 4991 (Copps, approving in part, dissenting in part) (“In past cases, when there have been truly outrageous violations or repeat offenses, I have sought to have cases sent to hearings to determine if the license should be revoked.”).

### III. THE WILLFULNESS STANDARD IS CONTRARY TO THE STATUTORY AND CONSTITUTIONAL REQUIREMENT OF SCIENTER.

The new enforcement regime seeks to impose fines for “willfully” broadcasting fleeting expletives on live television, but the “willful” standard cannot be squared with § 1464 and the Communications Act, nor with the Constitution.

Section 1464 is a criminal statute, and where a Congressional enactment is silent as to the required state of mind, background principles of the common law dictate that scienter is required. *See Staples v. United States*, 511 U.S. 600, 605 (1994); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436-37 (1978). Courts have thus expressly held that § 1464 requires scienter. *See United States v. Smith*, 467 F.2d 1126, 1129 (7th Cir. 1972) (reversing § 1464 conviction where jury instructed only that defendant must have “intentionally committed the act”). Nor can § 1464 be given a separate interpretation in the context of forfeiture proceedings pursuant to the Communications Act, because “[t]here cannot be one construction for the Federal Communications Commission and another for the Department of Justice.” *FCC v. ABC*, 347 U.S. 284, 296 (1954).<sup>28</sup>

The Commission is bound by this interpretation of § 1464. The forfeiture statute, 47 U.S.C. § 503(b), authorizes the Commission to impose forfeitures only for “violations” of § 1464. *See* 47 U.S.C. § 503(b)(1)(D). Section 1464 is not violated unless the alleged offender acted with scienter. It follows, therefore, that the Commission cannot impose a forfeiture penalty for broadcast indecency unless the broadcaster acted with scienter. In effect, sub-paragraph (D)

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<sup>28</sup> If there were any doubt about this interpretation of § 1464, Congress’s recent increase in the statutory penalties for indecent broadcasts confirms that scienter must be required. *See Staples*, 511 U.S. at 616 (noting that harsh penalties attached to a violation confirms that scienter is required for the offense); *U.S. Gypsum*, 438 U.S. at 442 n.18. Further, if there are two reasonable constructions of such a statute, the court must adopt the rule that favors the defendant—which in this case is the interpretation requiring scienter. *See Crandon v. United States*, 494 U.S. 152, 168 (1990).

transposes the scienter requirement for a criminal violation of § 1464 into the Commission's statutory forfeiture power.

The Commission is improperly evading this scienter requirement. Specifically, the Commission has restated § 1464 as a rule, *see* 47 C.F.R. § 73.3999, and in recent years the Commission has asserted that this allows it to proceed instead under sub-paragraph (B) of the forfeiture statute, which separately authorizes penalties for willful violations of Commission rules, *see* 47 U.S.C. § 503(b)(1)(B). “Willful” is defined in the Communications Act as the “conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this chapter or any rule or regulation of the Commission . . . .” 47 U.S.C. § 312(f)(1). In practice, this standard imposes strict liability: for example, the Commission deems the mere broadcast of a fleeting expletive to be dispositive, even where it is undisputed that the network had no intention of broadcasting indecent material and that it actively took steps to prevent the broadcast of any indecency. *See, e.g., Omnibus Order* ¶¶ 106, 120, 131, 142; *Golden Globe Order* ¶ 12. In fact, the Commission typically makes only conclusory findings that a broadcast was even willful, based solely on the fact that the broadcaster consciously and deliberately broadcast the program, whether or not it consciously broadcast the alleged indecency itself. *See Omnibus Order* ¶¶ 30, 40, 50, 70, 84, 98, 110, 124, 136, 145.

This approach is impermissible. Under the Commission's current approach, it never has to invoke the more stringent sub-paragraph (D) or demonstrate that the broadcaster acted with scienter. The Commission cannot use its rulemaking authority to render a whole provision of the forfeiture statute superfluous, nor can it use its rulemaking authority to eradicate Congress's

careful distinction—maintained consistently elsewhere in the Act<sup>29</sup>—between willful violations of other Commission rules and scienter-based violations of § 1464. The Commission should limit its indecency enforcement to only those cases in which a broadcaster acts with scienter, as Congress intended.

Any other reading of § 1464 would raise serious questions under the First Amendment. Put simply, the First Amendment presupposes that any criminal offense implicating free expression will be subject to a scienter standard. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 71 (1994). Indeed, to avoid unconstitutional chill on protected speech, the First Amendment even requires scienter in any statute that punishes obscenity, even though obscenity is not protected speech. *See Smith v. California*, 361 U.S. 147 (1959); *New York v. Ferber*, 458 U.S. 747, 765 (1982); *Ginsberg v. New York*, 390 U.S. 629 (1968).

#### **IV. INDECENCY ENFORCEMENT AGAINST NEWS PROGRAMS REVERSES THIRTY YEARS OF PRECEDENT AND VIOLATES THE FIRST AMENDMENT.**

In light of the important First Amendment values associated with news programming, the Commission has historically given broadcasters an especially wide berth with respect to news coverage. *See, e.g., Peter Branton*, 6 FCC Rcd. 610 (1991) (interview with John Gotti that contained numerous uses of the word “fuck” and its variants not indecent when broadcast in a “legitimate news report”); *Infinity Broadcasting Corp. of Penn.*, Memorandum Opinion & Order, 3 FCC Rcd. 930, 934 (1987), *vacated in part by ACT I*, 852 F.2d 1332 (presence of potentially indecent material in a bona fide news program “of less concern” than in other contexts); *Petition for Clarification or Reconsideration of a Citizen’s Complaint Against Pacifica Foundation*, Memorandum Opinion & Order, 59 F.C.C.2d 892 (1976) (“*Pacifica Recon Order*”) (“we must

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<sup>29</sup> *See, e.g.*, 47 U.S.C. § 312.

take no action which would inhibit broadcast journalism”). The Commission did not punish the fleeting and isolated use of an expletive in a context of a news broadcast, even when the expletive was not a core part of the news report itself. *See Applications of Lincoln Dellar*, Memorandum Opinion & Order, 8 FCC Rcd. 2582, 2585 (MMB 1993) (news announcer’s use of the word “fucked” not indecent “in light of the isolated and accidental nature of the broadcast”). The Commission frankly acknowledged that fining such live news broadcasts would be inequitable. *Pacifica Recon Order* ¶ 4 n.1 (recognizing that “it would be inequitable for us to hold a licensee responsible for indecent language” when “public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing”).

In contrast, apparently even broadcast journalism is not protected from the Commission’s new expanded regime. For example, the *Omnibus Order* concluded that the isolated expletive “bullshitter” in the context of an interview on CBS’s morning news program, “The Early Show,” was actionably indecent. *Omnibus Order* ¶ 142. The Commission simply applied the same indecency analysis to this show that it applied to all others in the *Omnibus Order*, without any acknowledgement of its longstanding concerns regarding news programming. Indeed, the Commission has never even explained how its decision with respect to the news program “The Early Show” comports with concerns expressed earlier in the *Omnibus Order* about the “need for caution with respect to complaints implicating the editorial judgment of broadcast licensees in presenting news and public affairs programming.” *Omnibus Order* ¶ 15.

Extending indecency enforcement to broadcast news is especially ominous in light of the First Amendment importance of freedom of the press. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975); *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring). The expansion of the enforcement regime to include broadcast journalism alters a

network's ability to cover newsworthy events live, thereby burdening significant First Amendment rights. The Commission's order has already led to substantial self-censorship: for example, when President Bush recently told British Prime Minister Tony Blair that the G-8 needed to "get Syria to get Hezbollah to stop doing this shit," some NPR affiliates declined to air President Bush's comments unedited.<sup>30</sup> In light of the special importance of broadcast news, the Commission should return to its previous practice of declining to bring indecency enforcement actions against such news programs.

#### **V. SECTION 1464'S PROHIBITION OF "PROFANITY" IS CONSTITUTIONALLY UNENFORCEABLE.**

As an independent ground for its recent indecency decisions, the Commission has found various programs to be "profane" as well as "indecent." See *Omnibus Order* ¶¶ 107-09, 121-23, 143-44; *Golden Globe Order* ¶ 13. Section 1464's prohibition on "profanity," however, has been a dead letter for decades. It cannot be revived now.

The plain meaning of the term "profane" in § 1464 is blasphemous or sacrilegious and that clearly was how Congress would have understood the term in 1927.<sup>31</sup> Since 1927, the courts have consistently adhered to this interpretation of the statute. In the early days of § 1464, the government used the ban on "profane" speech to prosecute broadcasters for blasphemous language, and the courts affirmed this reading of the Radio Act. See, e.g., *Duncan v. United States*, 48 F.2d 128, 134 (9th Cir. 1931) (by "announc[ing] his intention to call down the curse of

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<sup>30</sup> See "FCC Seen Taking Break from Indecency Orders during Appeals," COMMUNICATIONS DAILY (Sept. 11, 2006), at 9 (describing NPR affiliate's decision to bleep out expletive by President Bush because of the fear of an indecency fine from the FCC "no matter what the context").

<sup>31</sup> BLACK'S LAW DICTIONARY 1246 (8th ed. 2004) (defining "profanity" as "blasphemy"; "profanity is distinguished from mere vulgarity and obscenity by the additional element of irreverence toward or mistreatment of something sacred"); WEBSTER'S THIRD NEW INT'L DICTIONARY 1810 (defining "profane" as "serving to debase or defile that which is *holy* or worthy of reverence: contemptuous of beautiful or *sacred* things") (emphasis added).

God upon certain individuals, [defendant] was properly convicted of using profane language within the meaning of that term as used in [Section 1464]”). Courts have continued to express this view through the years. *See, e.g., Gagliardo v. United States*, 366 F.2d 720, 725 (9th Cir. 1966) (“the only words attributed to appellant which could even remotely be considered as being ‘profane’ [under Section 1464] were ‘God damn it’”).

The Commission has also consistently held this view. Indeed, by the 1970’s, the Commission recognized that punishing “profane” speech would raise serious questions under the Establishment Clause, and therefore it not only omitted “profane” speech from its rule authorizing enforcement of § 1464,<sup>32</sup> it also urged Congress to repeal the statutory ban on profane speech. *See* 122 Cong. Rec. at 33359-61, 33364-65 (“[b]ecause of the serious constitutional problems involved,” the Commission “recommended deletion of the ‘profanity’ provision [in § 1464]”); *see id.* at 33365 (longstanding definitions of profane “are fraught with religious connotations which raise . . . questions of vagueness and overbreadth”); *see also* FCC, THE PUBLIC AND BROADCASTING, 1999 WL 391297 (June 1999); *Raycom America, Inc.*, 18 FCC Rcd. 4186, ¶ 3 (2003); *Complaint by Warren B. Appleton, Brockton, Mass. Concerning Personal Attack Re Station WEEI*, 28 F.C.C.2d 36 (1971).<sup>33</sup>

Nevertheless, the Commission has now held that the term “profane” includes “vulgar, irreverent or coarse language” and is “‘construable 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.’” *Golden Globe Order* ¶ 13 & n.35 (quoting *Tallman v. United States*, 465 F.2d 282, 286 (7th Cir. 1972)).

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<sup>32</sup> *See* 47 C.F.R. § 73.3999 (authorizing Commission enforcement against only “obscene” and “indecent” speech).

<sup>33</sup> The *Golden Globe Order* itself acknowledged that its “limited case law on profane speech has focused on . . . blasphemy.” *See Golden Globe Order* ¶ 14 & n.37.

The Commission “further refine[d]” its new definition of “profane” in the *Omnibus Order* (¶ 2), again relying on *Tallman*, to include “vulgar and coarse language,” “limited to the universe of words that are sexual or excretory in nature or are derived from such terms,” that are “so grossly offensive to members of the public that they amount to a nuisance.” *Id.* ¶¶ 16-19.

This new definition of “profane” is unsustainable for several reasons. First, contrary to the Commission’s apparent assumption, it is not free to revisit the meaning of the statutory term “profane.” Section 1464 is a criminal statute, and the Supreme Court has held in a similar context that “[t]here cannot be one construction for the Federal Communications Commission and another for the Department of Justice. If we should give the [statute] the broad construction urged by the Commission, the same construction likewise would apply in criminal cases.” *FCC v. ABC*, 347 U.S. at 296 (construing 18 U.S.C. § 1304, also enforced by the FCC in forfeiture proceedings). The meaning of “profane” as blasphemous has been fixed in criminal prosecutions, and these judicial interpretations are now binding on the Commission. Accordingly, the Commission has no authority to re-interpret this criminal statute, nor would its interpretation of § 1464 (to the extent it is ambiguous) be entitled to any deference. *See Michel v. INS*, 206 F.3d 253, 262 (2d Cir. 2000) (“[C]ourts owe no deference to an agency’s interpretations of state or federal criminal laws, because the agency is not charged with the administration of such laws.”); *see also Gonzales v. Oregon*, 126 S. Ct. 904, 919 (2006) (denying federal agency had power “to make an independent assessment of the meaning of federal law”).<sup>34</sup>

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<sup>34</sup> Indeed, if § 1464 is ambiguous, the principle of lenity applies and the statute must be interpreted narrowly. *See United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517 (1992) (applying the rule of lenity in a civil setting because the statute had to be interpreted consistently with its criminal applications).

Moreover, the Commission's reliance on *Tallman* is misplaced. *Tallman* involved a criminal prosecution that was tried solely as an obscenity case. Accordingly, the trial court did not even attempt to define the term "profane," and the definition was not at issue on appeal. *Tallman*, 465 F.2d at 287 ("[W]e shall not address the belatedly advanced claim of error respecting the trial court's failure to define 'profane' or 'indecent.'"). To the extent that the Seventh Circuit did comment on "profane" speech in *dicta*, it noted that other courts had defined the term "profane," and cited with approval the *Duncan* and *Gagliardo* cases cited above, which construe "profane" to mean blasphemous. *Id.* at 296. Thus, *Tallman* actually refutes the Commission's current, broad reading of "profane."

The Commission's application of the term "profane" is thus directly contrary to the "unambiguously expressed intent of Congress" that the term is limited to "blasphemy." *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). But even if the term were ambiguous, the Commission's new interpretation of "profane" also is implausible and must fail. A statute should not be construed to render any word superfluous. *TRW, Inc. v. Andrews*, 534 U.S. 19, 32 (2001). In the *Omnibus Order*, however, "profane" was defined as "limited to the universe of words that are sexual or excretory in nature or are derived from such terms" that are "grossly offensive." *Omnibus Order* ¶¶ 18-19. In other words, the Commission has redefined "profane" as synonymous with its newly-expanded notion of "indecent." Indeed, in every case in which the Commission has found a broadcast to be indecent under its new standard, it has also found the broadcast to be profane. The Supreme Court itself recognized in *Pacifica* that "the words 'obscene,' 'indecent,' and 'profane' are written in the disjunctive, implying that each has a separate meaning." *Pacifica*, 438 U.S. at 739-40. "Profane" is readily severable from § 1464, *see Champlin Refining Co. v. Corp. Comm'n of*

*Oklahoma*, 286 U.S. 210, 234 (1932), and the Commission should abandon any attempt to equate “profane” with “indecent” (or use the one as a back-up theory for the other).

Finally, the new approach to profane speech violates the Administrative Procedure Act. The rule authorizing enforcement of § 1464 permits punishment of “obscene” or “indecent” speech, but it does not include “profane” speech. 47 C.F.R. § 73.3999. The Commission has no power to ignore this rule-based constraint on its enforcement authority. If it wishes to expand its authority to regulate “profane” speech, it must do so in a notice-and-comment rulemaking, *see* 5 U.S.C. § 553; it cannot do so in adjudication, as it has attempted in the *Golden Globe Order* and the *Omnibus Order*.

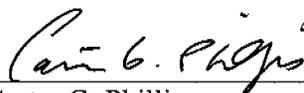
**VI. BROADCASTS FOUND TO BE INDECENT UNDER THE NEW POLICY ARE NOT INDECENT UNDER THE PRE-*GOLDEN GLOBE ORDER* STANDARD.**

Finally, the Commission has already conceded that the broadcasts at issue in the Second Circuit appeal could not have been found to be actionably indecent under the Commission’s pre-*Golden Globe Order* standard, and based on that concession the Commission declined to issue forfeitures for those broadcasts. *See Omnibus Order* ¶¶ 111, 124, 136, 145 (recognizing that precedent at the time of these broadcasts would not have supported an enforcement action against the isolated use of potentially offensive words); *Golden Globe Order* ¶ 15 (noting that “precedent prior to our decision today permitted the broadcast at issue”). The Commission should return to the pre-*Golden Globe Order* standard for broadcast indecency, and in doing so, it must conclude that those broadcasts found to be indecent under the new standard are not indecent.

## CONCLUSION

The Commission should abandon its new policy on broadcast indecency and return to a restrained enforcement regime that respects the First Amendment rights of broadcasters.

Respectfully submitted,



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September 21, 2006

**CERTIFICATE OF SERVICE**

I hereby certify that on the 21st day of September, 2006, I caused true and correct copies of the foregoing motion to be served on the following parties by U.S. mail, postage prepaid, to the following addresses:

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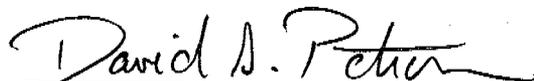
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**APPENDIX I**

**PETITION FOR PARTIAL RECONSIDERATION OF NATIONAL BROADCASTING  
COMPANY, INC, COMPLAINTS AGAINST VARIOUS BROADCAST LICENSEES  
REGARDING THEIR AIRING OF THE "GOLDEN GLOBE AWARDS" PROGRAM  
(APRIL 19, 2004)**

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

**STAMP & RETURN  
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APR 19 2004

In the Matter of )  
)  
**COMPLAINTS AGAINST VARIOUS** )  
**BROADCAST LICENSEES** )  
**REGARDING THEIR AIRING OF** )  
**THE "GOLDEN GLOBE AWARDS"** )  
**PROGRAM** )

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY  
File No. EB-03-IH-0110

To: The Commission

**PETITION FOR PARTIAL RECONSIDERATION**

**I. INTRODUCTION**

National Broadcasting Company, Inc. ("NBC"), by its attorneys and pursuant to Section 1.106(b) of the Commission's rules, hereby petitions on behalf of itself and its owned and operated affiliated stations for reconsideration of certain aspects of the Commission's Memorandum Opinion and Order in *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, FCC 04-43 (March 18, 2004) (the "*Order*").

The Commission was correct in ruling that there was no legal basis for imposing a forfeiture or any other penalty, either now or in the future, against NBC or NBC affiliates because of the airing of the 2003 Golden Globe Awards program in which U2 lead singer Bono exclaimed the f-word. The Commission refused to fine NBC for multiple reasons, including fundamental issues of notice and retroactivity. This decision was solidly grounded in common sense and a long line of constitutional and administrative precedent.

The remainder of the *Order*, however, raises serious constitutional, policy, and regulatory concerns. In previous decisions upholding the FCC's past efforts to regulate indecency as

developed in *FCC v. Pacifica*<sup>1</sup> and subsequent rulings,<sup>2</sup> the courts have imposed a high hurdle for what constitutes permissible content regulation. In particular, the courts have stressed that even in the context of the broadcast medium, the FCC must identify a compelling governmental interest that warrants regulation and must explain how the regulations were narrowly tailored to serve those interests effectively.<sup>3</sup> Remarkably, the *Order* significantly expands content regulation without even attempting to meet this judicial standard or acknowledging all the relevant changes in the broadcasting environment since *Pacifica*, including v-chip blocking technology and the broad availability of television programming not subject to Section 1464.<sup>4</sup> In particular,

1. The *Order* contradicted years of precedent by creating strict liability for certain offensive words regardless of their fleeting nature or context. This policy reversal is ambiguous as to whether it preserves the Commission's long-standing news programming safe harbor and appears not to protect other forms of time-critical or informative programming.
2. The *Order* suggested a sweeping new definition of profane utterance that has never been cited in any prior Commission case involving allegedly offensive language, even those in which no action was taken under the Commission's indecency policy.

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<sup>1</sup> 438 U.S. 726 (1978).

<sup>2</sup> See, e.g., *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) ("*ACT I*"); *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 913 (1992) ("*ACT II*").

<sup>3</sup> *ACT I*, 852 F.2d at 1343 n.18; *ACT II*, 932 F.2d at 1508-09; see also *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989) ("The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest") (holding unconstitutional blanket ban on indecent commercial telephone message services).

<sup>4</sup> Cf. *United States v. Playboy Entertainment Group Inc.*, 529 U.S. 803 (2000). As the Commission is aware, the v-chip has been required on all television sets 13 inches or larger manufactured since January 1, 2000. Recent studies suggest that between 6-10% of parents use the v-chip in combination with program ratings to block particular programming. See, e.g., The Annenberg Public Policy Center, University of Pennsylvania Washington, *Parents' Use of the V-Chip to Supervise Children's Television Use* (Apr. 2003); Ad Council News Release, *The Advertising Council and the Four Major Broadcast Television Networks Announce Unprecedented Partnership to Educate Parents About the V-Chip* (Mar. 30, 2004).

The First Amendment demands clear and narrowly tailored limitations on all protected speech, even those broadcast or otherwise communicated electronically. The *Order* does not satisfy constitutional, statutory, and administrative requirements. NBC urges the Commission to modify the *Order* to resolve these issues so as to preclude its current chilling effect on broadcast speech, including news and other live coverage.

**II. THE ORDER'S APPARENT REVERSAL OF YEARS OF PRECEDENT BY CREATING STRICT LIABILITY FOR CERTAIN OFFENSIVE WORDS REGARDLESS OF THEIR CONTEXT OR FLEETING NATURE HAS NO CLEAR BASIS IN LAW OR FACT.**

**A. The Commission's Precedents Do Not Prohibit Isolated and Fleeting Utterances of Offensive Words.**

The Commission acknowledged in the *Order* that the broadcast in question was permitted by existing precedent interpreting the statute and the rules. That precedent – including a *Policy Statement* developed over a seven-year period and issued just three years ago – consistently held that isolated and fleeting uses of the f-word in broadcasts were not actionable as indecent.<sup>5</sup> Nor was there any suggestion that they would be separately actionable as “profane.” Those rulings applied in the contexts of entertainment programs as well as in newscasts, sports programming, and other types of programs.<sup>6</sup> The *Order* appears for the first time to have adopted a *per se* rule

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<sup>5</sup> See *Industry Guidance On the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999, 8002, 8009 (2001), and cases cited therein.

<sup>6</sup> See, e.g., *Peter Branton*, 6 FCC Rcd 610 (1991) (refusing to find indecent repeated use of the f-word in a broadcast of an interview with organized crime figure John Gotti); cf. *WUHY-FM*, 24 F.C.C.2d 408 (1970) (distinguishing coverage of bona fide news events from expletive-laced interview with Grateful Dead lead guitarist Jerry Garcia), *on recon.*, 59 F.C.C.2d 892, 893 (1976) (“... RTNDA's Petition calls to our attention the fact that ‘in some cases, public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing.’ Under these circumstances we believe that it would be inequitable for us to hold a licensee responsible for indecent language”).

Although the *Peter Branton* decision is not included in the list of published decisions identified in the *Order* from which the Commission now “departs,” *Order* at n.43, the *Order* nevertheless appears to create a *per se* rule that today would subject a broadcaster who aired the John Gotti interview to liability under Section 1464 and Section 73.3999. The chilling effect of such a decision is immediate and significant, as broadcasters everywhere are forced to reconsider how they may present their many hours of local and national news in light of the *Order*.

– overruling years of Commission-level precedent without adequate explanation – that disregards context and sweeps newscasts, sporting events and other live programming within its purview.<sup>7</sup>

Live and uncensored programming is the hallmark of a free society. Former President Jimmy Carter made headlines in 2002 when he traveled to Cuba to meet with Fidel Castro and made a plea for free speech and democratic elections in Cuba.<sup>8</sup> A 70-minute exchange between President Bill Clinton and China’s President Jiang Zenin in 1998 provoked a similar reaction around the world as President Clinton probed the Chinese leader about free speech and human rights in China.<sup>9</sup> What attracted worldwide attention was less the substance of the exchange than the fact that in each case the event was televised in a live uncensored broadcast on national television in a country known for its suppression of free speech and control of the press.<sup>10</sup> In each case, the medium truly was the message.

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<sup>7</sup> See *Office of Communication of United Church of Christ v. FCC*, 590 F.2d 1062 (D.C. Cir. 1978) (holding that in expanding its interpretation of Section 315(a) of the Communications Act, FCC has discretion to decide whether to proceed by adjudication or rulemaking as long as Commission provides reasoned explanation of its action and interested groups who were not parties to the proceeding had an opportunity to comment), citing *Chisholm v. FCC*, 538 F.2d 349 (D.C. Cir. 1976).

<sup>8</sup> See, e.g., Gregory Bull, *Bush Squeezes Cuba to Keep Miami’s “Little Havana” Sweet*, THE INDEPENDENT, May 19, 2002, at 18 (“the . . . dictator made unprecedented concessions of his own – . . . broadcasting live the former president’s call at Havana University for human rights and the restoration of democracy”); accord Mark Fineman, *Carter Hopes His Cuba Visit Fosters Ties*, LOS ANGELES TIMES, May 18, 2002, at 3; James Bone, *Castro Will Not Loosen Grip, Says Carter*, THE TIMES (LONDON), May 18, 2002; Kevin Sullivan, THE WASHINGTON POST, May 19, 2002, at A3; Tracey Eaton and Alfredo Corchado, *Cubans Weigh Carter’s Words with Cautious Optimism*, THE DALLAS MORNING NEWS, May 16, 2002.

<sup>9</sup> See, e.g., Conor O’Clery, *TV Discussion of Forbidden Topics Amazes Viewers*, THE IRISH TIMES, June 29, 1998, at 9 (“Long after President Clinton has returned to the United States, millions of people in China will remember and talk about his trip here for one reason alone, the astonishing decision of the Communist Chinese government to televise live the press conference held by Mr. Clinton and the Chinese President . . . .”); accord David Lague, *China, US in Historic Debate*, THE AGE (MELBOURNE), June 29, 1998, at 1; Mary Kwang, *Chinese Press Hails “Broad Consensus,”* THE STRAITS TIMES (SINGAPORE), June 29, 1998, at 13; Simon Beck, *Early Honours Even in Beijing*, SOUTH CHINA MORNING POST (HONG KONG), June 29, 1998, at 17; Stephen Fidler and James Kynge, *Clinton in China, President Can Claim Success in Broadening “Strategic Dialogue,”* FINANCIAL TIMES, June 29, 1998, at 4; Terrence Hunt, *Debate Has Them All Talking*, THE DAILY TELEGRAPH (SYDNEY, AUSTRALIA), June 29, 1998, at 23 (“Never before had China’s 1.2 billion people seen one of their leaders arguing with a Western visitor live on state television about subjects ranging from Tiananmen Square to Tibet, human rights and trade”).

<sup>10</sup> See *supra* notes 8 & 9.

The Commission suggests, almost in passing, that broadcasters no longer should aspire to present uncensored news or other live programming and should instead routinely employ delay mechanisms or other self-censorship. Yet the mere availability of delay technology cannot justify overruling long-standing statutory interpretation. The *per se* rule apparently established by the Commission in the *Order* inevitably will encourage a “play-it-safe” attitude by broadcasters in the exercise of their editorial judgment – a chilling effect that cannot be squared with the public interest or the Constitution. Worse, the *Order* implies, without any further guidance, that the list of “curse” words will grow over time, thus leaving broadcasters to guess at the future evolution of FCC judgments.

**B. Any Per Se Rule Improperly Disregards the Critical Element of Context.**

By ignoring context, the *Order's per se* rule cannot be squared with the Supreme Court's ruling in *FCC v. Pacifica*.<sup>11</sup> In *Pacifica*, the U.S. Supreme Court stressed the importance of context when it upheld the authority of the FCC to regulate the broadcast of “patently offensive words dealing with sex and excretion.”<sup>12</sup> In the agency ruling on appeal, the FCC had concluded that the broadcast of George Carlin's “Filthy Words” monologue included several words that referred to excretory or sexual activities or organs; that the repetitive, deliberate use of those words in an afternoon broadcast when children were in the audience was patently offensive; and that the broadcast was therefore indecent within the meaning of 18 U.S.C. § 1464. The Court agreed that the broadcast was indecent. The Court also recognized, however, that “[a]lthough these words ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment. Some uses of even the most offensive words are

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<sup>11</sup> 438 U.S. 726 (1978).

<sup>12</sup> *Id.* at 745.

unquestionably protected. . . . Indeed, we may assume arguendo that this monologue would be protected in other contexts.”<sup>13</sup>

*Pacifica* stands for the proposition that, even in the case of offensive words that are by their nature not entitled to absolute constitutional protection, the *context* of such speech must be considered in order to determine whether FCC censorship is constitutionally permissible: “This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. *We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution.* The Commission’s decision rested entirely on a nuisance rationale under which context is all-important.”<sup>14</sup> The *per se* rule established by the *Order*, however, impermissibly disregards the context of offensive utterances.

### **III. THE ORDER SUGGESTED A SWEEPING NEW DEFINITION OF PROFANE UTTERANCE THAT HAS NOT BEEN CITED IN ANY PRIOR COMMISSION CASE, INCLUDING THOSE INVOLVING ALLEGEDLY OFFENSIVE LANGUAGE.**

Even though the Commission acknowledged that its “limited case law on profane speech has focused on . . . blasphemy,” the agency nevertheless found as an “independent ground” for its ruling in the *Order* that Bono’s expletive on the broadcast constituted “profane” language under 14 U.S.C. § 1464. Prior to the Commission ruling, no party, including the Media Bureau, even suggested, that the language in question was profane. Nor has the Commission ever suggested, in the many cases in which the Commission found language similar to that used by Bono was not indecent, that such incidents were separately actionable as profane.

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<sup>13</sup> *Id.* at 746.

<sup>14</sup> *Id.* at 750 (emphasis added). *Cf.* “*Petition for Clarification or Reconsideration*” of a Citizen’s Complaint Against *Pacifica Foundation*, 59 F.C.C.2d 892, 893 (1976) (relying on context to exempt certain offensive words in live broadcasts).

Citing the Seventh Circuit’s “most recent” decision, which was rendered over three decades ago and purportedly defined “profane” under Section 1464,<sup>15</sup> the Commission ruled that, in the future and in addition to blasphemy or divine imprecation, “profane” will now encompass the f-word “and those words (or variants thereof) that are as highly offensive as the ‘F-Word’ . . . .”<sup>16</sup> Rather than provide examples of what such words might be, however, the FCC stated that it would “analyze other potentially profane words or phrases on a case-by-case basis.”<sup>17</sup> This ruling is impermissibly vague.

As for the Seventh Circuit’s “most recent” decision, that involved a case dealing with a criminal conviction for obscenity, not indecency. Accordingly, the decades-old Seventh Circuit’s proffer of a definition in its opinion was nothing more than dicta and should not be the basis for any Commission action.

The Commission also impermissibly collapsed the distinct meanings of “obscene, indecent, or profane” in Section 1464, thereby exacerbating the vagueness of the new standard for profane material. The Supreme Court in *Pacifica* stated that “the words ‘obscene, indecent, or profane’ are written in the disjunctive, implying that each has a separate meaning.”<sup>18</sup> The variety of definitions proposed for “profane utterance” by the FCC apparently overlooked this teaching.<sup>19</sup>

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<sup>15</sup> *Tallman v. United States*, 465 F.2d 282 (7<sup>th</sup> Cir. 1972).

<sup>16</sup> *Order*, ¶ 14. According to the Seventh Circuit, profanity is “construable 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.” *Tallman*, 465 F.2d at 286.

<sup>17</sup> *Order*, ¶ 14.

<sup>18</sup> 483 U.S. at 739-40.

<sup>19</sup> The *Order* also creates substantial confusion about the breadth of the new standard for profane material by apparently overruling – without discussion – the Commission’s very recent decision in *Raycom America, Inc.*, 18 FCC Rcd 4186 (2003), holding that an episode of “The West Wing” did not violate Section 1464’s proscription on profanity when the program’s lead character, President Bartlet, made an impassioned lament to God. That lament

**IV. THE ORDER MUST BE MODIFIED BECAUSE IT INCORRECTLY FOUND AN INDECENCY VIOLATION BY MEASURING THE PROGRAM AGAINST A STANDARD THAT DID NOT EXIST AT THE TIME OF THE BROADCAST.**

Although the Commission stated repeatedly in the *Order* that the broadcast was permitted by existing precedent, it nevertheless concluded – without any effort to explain what seems to be a clear internal contradiction – that NBC and the affiliates who broadcast the f-word “violated” 18 U.S.C. § 1464. It is a fundamental principle of due process that a party cannot be held liable for conduct that complied with the law at the time it was undertaken, even if such conduct is later declared to be unlawful.<sup>20</sup> The Commission acknowledged that NBC and its affiliates did not have the requisite notice to justify any penalty in this action.<sup>21</sup> Accordingly, the Commission must modify the *Order* by removing all references to NBC and its affiliates having “violated” the law. Allowing this to stand also implies that in the future the FCC may similarly find violations of standards that are only announced years after the fact.

It is no answer to respond that the Commission has not “penalized” NBC and its affiliates because it has disclaimed any intent to consider the broadcast adversely as part of the license renewal process. The harm caused to NBC and its affiliates flows from the finding of a violation memorialized in the official and permanent record of the Commission, the “inherently coercive”

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contained *none* of the language at issue in *Pacifica* or the Golden Globe Awards program. By “departing” from that decision without explanation, the *Order* appears to make unlawful the broadcast of categories of speech that have already been determined by the *courts* to be fully protected under the First and Fourteenth Amendments. *See Order* at n.43. The *Order* treats in similar fashion an earlier case holding that use of the word “damn” was not profane under Section 1464. *Id.* (citing *Warren B. Appleton*, 28 F.C.C.2d 36 (1971)).

<sup>20</sup> *See, e.g., Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3 (1987) (“Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule”).

<sup>21</sup> The Commission also acknowledged that it had an insufficient factual basis to take any action against individual stations. In fact, many of the complained-about stations did not even broadcast the challenged word. *See Order* at n.46.

nature of the finding, and the risk that the Commission will disregard its disclaimer at some point in the future.<sup>22</sup>

## V. CONCLUSION

For the foregoing reasons, the Commission must reconsider the *Order* to resolve the multiple constitutional, statutory and policy issues raised by its sweeping decision in the *Golden Globe Awards* matter.

Respectfully submitted,

NATIONAL BROADCASTING  
COMPANY, INC.

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Its Attorneys

April 19, 2004

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<sup>22</sup> See *Meredith Corp. v. FCC*, 809 F.2d 863 (1987), where the Commission found that Meredith Corp. had violated the Fairness Doctrine, but also concluded that the licensee had subsequently acted in good faith. The Commission therefore imposed no fine or other sanction and did not include in its ruling any express warning about future conduct. The reviewing court found that the FCC's finding of a violation was "inherently coercive" because it was binding on Meredith, it was an implicit admonition as to future conduct, and it could be used against Meredith in a renewal hearing. At oral argument, counsel for the FCC advised the court that the Commission would be estopped, based on its position before the court, from ever using the finding of a fairness doctrine violation against Meredith in a future proceeding. The court was unpersuaded by this argument: "We doubt that the Commission would be estopped as a matter of law, and we put little faith in the Commission's assurance, since the FCC's position on enforcement is admittedly so heavily influenced by non-legislatively-expressed congressional concerns." *Id.* at 869 n.4.

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Partial Reconsideration of National Broadcasting Company, Inc. was sent via first-class, U.S. mail on this 19th day of April, 2004 to the following:

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Washington, D.C. 20554

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KARE  
Multimedia Holdings Corporation  
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KARK-TV  
909 Lake Carolyn Parkway  
#1450  
Irving, TX 75039

KBTB-TV  
Nexstar Broadcasting of Beaumont/Port Arthur  
909 Lake Carolyn Parkway  
#1450  
Irving, TX 75039

KCEN-TV  
Channel 6, Inc.  
P.O. Box 6103  
17 South Third Street  
Temple, TX 76503

KCRA-TV  
KCRA Hearst-Argyle Television, Inc.  
888 Seventh Avenue  
New York, NY 10106

KFDM-TV  
Freedom Broadcasting of Texas, Inc.  
P.O. Box 7128  
Beaumont, TX 77706

KGW  
King Broadcasting Company  
400 South Record Street  
Dallas, TX 75202

KING-TV  
King Broadcasting Company  
400 South Record Street  
Dallas, TX 75202

WNBC, et al.  
National Broadcasting Company, Inc.  
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Washington, DC 20004

KATV  
KATV, LLC  
P.O. Box 77  
Little Rock, AR 72203

KCBD  
Libco, Inc.  
639 Isbell Road  
#390  
Reno, NV 89509

KCNC-TV  
CBS Television Stations, Inc.  
2000 K Street, NW  
#725  
Washington, DC 20006

KETK-TV  
KETK Licensee L.P.  
Shaw Pittman (K.R. Schmeltzer)  
2300 N Street, NW  
Washington, DC 20037

KFOR-TV  
New York Times Management Svcs.  
Corp. Center 1  
2202 NW Shore Blvd., #370  
Tampa, FL 33607

KHAS-TV  
Greater Nebraska Television, Inc.  
6475 Osborne Drive West  
Hastings, NE 69801

KKCO  
Eagle III Broadcasting, LLC  
2325 Interstate Avenue  
Grand Junction, CO 81505

KOAA-TV  
Sangre de Cristo Communications, Inc.  
2200 Seventh Avenue  
Pueblo, CO 81003

KOB-TV  
KOB-TV, LLC  
3415 University Avenue  
ATTN: L. Wefring  
St. Paul, MN 55114

KPRC-TV  
Post-Newsweek Stations, Houston, LP  
8181 Southwest Freeway  
Houston, TX 77074

KRIS-TV  
KVOA Communications, Inc.  
409 South Staples Street  
Corpus Christi, TX 78401

KSDK  
Multimedia KSDK, Inc.  
c/o Gannett Co., Inc.  
7950 Jones Branch Drive  
McLean, VA 22107

KSNF  
Nexstar Broadcasting of Joplin, LLC  
909 Lake Carolyn Parkway  
#1450  
Irving, TX 75039

KTIV  
KTIV Television, Inc.  
3135 Floyd Boulevard  
Sioux City, IA 51105

KWES-TV  
Midessa Television Company  
P.O. Box 60150  
Midland, TX 79711

KYTV  
KY3, Inc.  
999 West Sunshine Street  
Springfield, MO 65807

KPNX  
Multimedia Holdings Corporation  
7950 Jones Branch Drive  
McLean, VA 22107

KRBC-TV  
Mission Broadcasting, Inc.  
544 Red Rock Drive  
Wadsworth, OH 44281

KTGF  
MMM License LLC  
900 Laskin Road  
Virginia Beach, VA 23451

KSHB-TV  
Scripps Howard Broadcasting Company  
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Cincinnati, OH 45202

KTEN  
Channel 49 Acquisition Corporation  
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KUSA-TV  
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McLean, VA 22107

KWWL  
Raycom America, Inc.  
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Montgomery, AL 36104

WANE-TV  
Indiana Broadcasting, LLC  
4 Richmond Square  
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WAVE  
Libco, Inc.  
639 Isbell Road  
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Reno, NV 89509

WBOY-TV  
West Virginia Media Holdings, LLC  
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WCNC-TV  
WCNC-TV, Inc.  
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WCYB-TV  
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WDSU  
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New York, NY 10106

WFIE  
Libco, Inc.  
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WHDH-TV  
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WBRE-TV  
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Irving, TX 75039

WCSH  
Pacific & Southern Co., Inc.  
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WDIV-TV  
Post-Newsweek Stations, Michigan, Inc.  
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New York, NY 10106

WFLA-TV  
Media General Communications, Inc.  
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WGAL  
WGAL Hearst-Argyle Television, Inc.  
888 Seventh Avenue  
New York, NY 10106

WHEC-TV  
WHEC-TV, LLC  
c/o Hubbard Broadcasting, Inc.  
3415 University Avenue  
St. Paul, MN 55114

WHO-TV  
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WJFW-TV  
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WLWT  
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WMFE-TV  
Community Communications, Inc.  
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WMTV  
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WNYT  
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WOWT-TV  
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WILX-TV  
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WMC-TV  
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Montgomery, AL 36104

WMGT  
Endurance Broadcasting, LLC  
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WNDU-TV  
Michiana Telecasting Corp.  
P.O. Box 1616  
South Bend, IN 46634

WOOD-TV  
Wood License Company, LLC  
120 College Avenue, S.E.  
Grand Rapids, MI 49503

WPMI  
Clear Channel Broadcasting Licenses, Inc.  
2625 South Memorial Drive  
#A  
Tulsa, OK 74129

WPXI  
WPXI-TV Holdings, Inc.  
3993 Howard Hughes Parkway  
#250  
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WRIC-TV  
Young Broadcasting of Richmond, Inc.  
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WSAZ-TV  
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WSMV-TV  
Meredith Corp., Television Stations  
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WTMJ-TV  
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WVLA  
Knight Broadcasting of Baton Rouge Lic.  
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WWLP  
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WRCB-TV  
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WSAV-TV  
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WSFA  
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WTHR  
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**APPENDIX II**

**JOINT PETITION FOR RECONSIDERATION OF ACLU, ET AL., COMPLAINTS  
AGAINST VARIOUS BROADCAST LICENSEES REGARDING THEIR AIRING OF  
THE "GOLDEN GLOBE AWARDS" PROGRAM (APRIL 19, 2004)**

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of )  
 )  
COMPLAINTS AGAINST VARIOUS ) File No. EB-03-IH-0110  
BROADCAST LICENSEES REGARDING )  
THEIR AIRING OF THE "GOLDEN )  
GLOBE AWARDS" PROGRAM )

**PETITION FOR RECONSIDERATION**

**American Civil Liberties Union  
American Federation of Television  
and Radio Artists  
Beasley Broadcast Group, Inc.  
Citadel Broadcasting Corporation  
The Creative Coalition  
Directors Guild of America, Inc.  
Entercom Communications Corp.  
The First Amendment Project  
Fox Entertainment Group, Inc.  
Freedom to Read Foundation  
Margaret Cho  
Media Access Project**

**Minnesota Public Radio®  
National Coalition Against Censorship  
National Federation of Community Broadcasters  
Penn & Teller  
People For the American Way Foundation  
Radio One, Inc.  
Recording Artists' Coalition  
Recording Industry Association of America, Inc.  
Screen Actors Guild  
Viacom Inc.  
When in Doubt Productions, Inc.  
Writers Guild of America, west**

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April 19, 2004

## SUMMARY

On March 18, 2004, the Federal Communication Commission reversed an Enforcement Bureau order involving a live telecast of the Golden Globe Awards and in the process overruled well-established precedent to announce a broad new policy, applicable to all broadcasters, that significantly expands its regulation of programming content. *Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, Mem. Op. and Order, FCC 04-43 (Mar. 18, 2004). The Commission’s decision that the isolated use of an unplanned and unscripted expletive is both “indecent” and “profane” represents an unconstitutional expansion of the government’s intrusion into broadcast content. It is not a narrow as-applied ruling in which the full Commission decided only that the Enforcement Bureau erred in failing to sanction a broadcaster for airing a given word in a particular context. Rather, the FCC’s decision is a rule of general applicability that already is exerting a substantial chilling effect on constitutionally-protected speech.

Petitioners urge the Commission to reconsider its aggressive new approach to regulating broadcast indecency, its newly-crafted profanity standard, and its revised enforcement procedures. The Petitioners are a diverse group of broadcast licensees, public interest organizations, professional associations, production entities, programmers, writers and performers that have a direct stake in the FCC’s enforcement of 18 U.S.C. § 1464.

The *Golden Globe Awards* decision asserts FCC power to regulate broadcasting far beyond anything the Supreme Court contemplated or approved in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). It puts broadcast licensees on notice that the Commission in the future will punish broadcasters for “isolated” or “fleeting” expletives even if they are accidental or unintentional, and adds the broad, vague and unbounded term “profanity” to the types of

speech the government will restrict. With this decision the Commission has abandoned the regulatory restraint mandated by well-established judicial precedent. The indecency policy has long been recognized as a very limited exception to the basic constitutional command that the government cannot reduce viewers or listeners to viewing or hearing only what is fit for a child. Reviewing courts accordingly have confined the enforcement of indecency restrictions exclusively to the broadcast medium during certain times of the day, and only so long as the government exercises considerable restraint.

The Commission also has changed its procedural approach to indecency regulation, thus announcing its intention to apply its increasingly muddled standard more harshly. The *Golden Globe Awards* decision confirms that the FCC no longer requires that complaints be substantiated, and that, in some cases, no complaint need be filed at all. And when the FCC concludes that the indecency rules have been violated – as it may do in any case where it deems words or images to be “offensive” – its stated intention is to impose greatly magnified fines and possible license revocation as sanctions.

The Commission’s aggressive crackdown on “coarse” speech has sent shock waves through the broadcast industry and the lack of clear guidelines, coupled with threats of draconian administrative action, has forced licensees to censor speech that unquestionably is protected by the First Amendment. By prescribing delayed broadcasts as an “element” of its indecency calculus and putting station licenses at risk even for unintentional slips of the tongue, the FCC is undermining the ability to engage in live broadcasting in America. Radio stations also are scouring their play lists and dropping or heavily editing songs, many of which have been played for years – some for decades – without ever having drawn a complaint. The *Golden Globe Awards* decision also has resulted in significant self-imposed restrictions on television

programming. It has led to changes in acclaimed network drama series and prompted some public television stations to edit, and in some cases drop, serious documentary programs.

The Golden Globe Awards decision amounts to a rulemaking through adjudication that imposes sweeping new content controls on the broadcast industry. Because the Commission adopted this new approach without notice or opportunity for public comment, Petitioners urge the Commission to reconsider this decision. Upon doing so, the Commission should: (1) reverse its finding that the isolated or fleeting broadcast of an expletive may constitute actionable indecency; (2) rescind its decision to add “profanity” as a separate category of proscribed speech under the law; (3) require complaints to be supported by credible evidence, such as a tape or transcript; (4) cease imposing disproportionate fines on a “per utterance” basis; and (5) seriously examine whether the system of government regulation of content announced in this Order, including its threats of potential license revocations, is fundamentally incompatible with the First Amendment of the Constitution.

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**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	
COMPLAINTS AGAINST VARIOUS	)	File No. EB-03-IH-0110
BROADCAST LICENSEES REGARDING	)	
THEIR AIRING OF THE "GOLDEN	)	
GLOBE AWARDS" PROGRAM	)	

**PETITION FOR RECONSIDERATION**

Pursuant to 47 U.S.C. § 405 and 47 C.F.R. § 1.106, American Civil Liberties Union; American Federation of Television and Radio Artists; Beasley Broadcast Group, Inc.; Citadel Broadcasting Corporation; The Creative Coalition; Directors Guild of America, Inc.; Entercom Communications Corp.; The First Amendment Project; Fox Entertainment Group, Inc.; Freedom to Read Foundation; Margaret Cho; Media Access Project; Minnesota Public Radio®; National Coalition Against Censorship; National Federation of Community Broadcasters; Penn & Teller; People For the American Way Foundation; Radio One, Inc.; Recording Artists' Coalition; Recording Industry Association of America, Inc.; Screen Actors Guild; Viacom Inc.; When in Doubt Productions, Inc.; and Writers Guild of America, west (together, "Petitioners"), by counsel, hereby submit this Petition requesting that the Commission reconsider its aggressive new approach to regulating broadcast indecency, its newly-crafted profanity standard, and its revised enforcement procedures as articulated in *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Mem. Op. and Order, FCC 04-43 (Mar. 18, 2004) ("*Golden Globe Awards*"). The new indecency enforcement

policy exceeds the Commission's authority under the Communications Act and violates the First Amendment rights of broadcast licensees, performers, program producers, writers, and broadcast viewers and listeners.

## I. INTRODUCTION

On March 18, 2004, the Commission adopted four orders fundamentally altering the standards of what the government deems acceptable broadcast fare.<sup>1</sup> Each of the decisions, most prominently the Commission's decision to reverse a staff ruling in *Golden Globe Awards*, applied new interpretations of the FCC's indecency policies that depart significantly from established precedent.<sup>2</sup> In *Golden Globe Awards* the Commission put all broadcast licensees, performers and audience members on notice that the Commission will apply new substantive and procedural standards that vastly expand the government's control over "indecent" or "profane" speech. In doing so, the FCC upset the delicate balance in what it inexplicably continues to characterize as its "very limited" role in regulating broadcast content, and it cast a significant pall over constitutionally-protected speech that already is having a substantial chilling effect.

Despite the obvious constitutional ramifications of the Commission's actions, it did not conduct a notice and comment rulemaking before adopting sweeping new rules of general application, despite recently being asked to do so by a broadly based consortium.<sup>3</sup> Rather, it simply announced the new policies in the context of a Commission reversal of a staff ruling that was consistent with longstanding precedent. Thus, the FCC upended decades of

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<sup>1</sup> *Golden Globe Awards*, FCC 04-43; *Infinity Radio License, Inc.*, Mem. Op. and Order, FCC 04-48 (rel. Mar. 18, 2004) ("*Infinity Radio License*"); *Infinity Broad. Operations, Inc.*, Notice of Apparent Liability for Forfeiture, FCC 04-49 (rel. Mar. 18, 2004) ("*Infinity Broadcasting*"); *Capstar TX Ltd. P'ship*, Notice of Apparent Liability for Forfeiture, FCC 04-36 (rel. Mar. 18, 2004) ("*Capstar*") (together, the "*March 18 Indecency Orders*").

<sup>2</sup> This Petition seeks reconsideration of the Commission's *Golden Globe Awards* decision. However, to the extent any of the issues raised in this Petition implicate one or more of the other *March 18 Indecency Orders*, the Petitioners also seek reconsideration of such orders.

<sup>3</sup> See *Infinity Broad. Operations, Inc.*, 18 FCC Rcd. 26360, 26363 n.7 (2003).

established case law and extended its authority to regulate broadcast content well beyond judicially-approved narrow limits with virtually no participation by broadcasters and other parties most directly affected.<sup>4</sup>

On very similar facts the FCC has in the past recognized the propriety of review of constitutionally sensitive issues arising from its indecency rules. In *Infinity Broadcasting Corporation of Pennsylvania*, 3 FCC Rcd. 930 (1987), the Commission considered several petitions and comments addressing a public notice that summarized three indecency decisions and “put[ ] all broadcast . . . licensees on notice as to new standards” that the Commission said “will apply in enforcing the prohibition against obscene and indecent” content. *New Indecency Standards to be Applied to All Broadcast and Amateur Radio Licensees*, 2 FCC Rcd. 2726 (1987). Where adjudication of specific broadcasts resulted in the adoption of “new standards” that “could have an impact on all licensees,” the Commission deemed it appropriate “to address the uncertainty created by those rules” by “treat[ing] the filings . . . as requests for reconsideration of the three specific cases” and issuing a substantive reconsideration decision. *Infinity Broad.*, 3 FCC Rcd. at 936 n.18. Similarly, the court of appeals treated the FCC’s actions as more like “the result of a notice-and-comment rulemaking than . . . an ad hoc adjudicatory proceeding.” *ACT I*, 852 F.2d at 1337.

The Petitioners here seek similar substantive reconsideration of the new course in Section 1464 regulation that the Commission charted in *Golden Globe Awards*. The Petitioners

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<sup>4</sup> In view of the Commission’s election to proceed in this manner, Petitioners who were not parties to *Golden Globe Awards* satisfy the requirements in 47 C.F.R. § 1.106(b)(1) for seeking reconsideration. Each Petitioner will be adversely affected by the new standards and policies adopted or relied upon in *Golden Globe Awards*, as they apply prospectively to all broadcasters and thus directly control their programming, and individuals appearing in the programs, as well as their viewers. See *Action for Children’s Television v. FCC*, 852 F.2d 1332, 1334, 1336-37 (D.C. Cir. 1988) (“*ACT I*”) (citing, *inter alia*, *SEC v. Chenery Corp.*, 332 U.S. 194 (1947)). Petitioners did not participate in earlier stages of the proceeding as it was not foreseeable the Commission would adopt standards of general application in an indecency adjudication involving a single program aired by specific licensees, nor that it would reverse what the Commission acknowledges is long-standing precedent.

represent a coalition of broadcast licensees, programmers, producers, directors, public interest organizations, professional associations, writers, and performers that share concerns about the effect of FCC policies on freedom of expression for the broadcast medium. Petitioners are described, in a manner disclosing how their interests are adversely affected by the *Golden Globe Awards*, in the Appendix to this Petition.

## II. BACKGROUND

This controversy arose from an initial October 2003 Enforcement Bureau decision declining to impose a penalty on NBC and its affiliates for a live telecast of the 2003 Golden Globe Awards during which U-2's lead singer Bono uttered a phrase to the effect "this is really, really, fucking brilliant" when accepting an award.<sup>5</sup> Applying well-established Commission precedent, the Bureau ruled the licensees did not violate the law because, in the context of a live unscripted event, "fleeting and isolated remarks of this nature do not warrant Commission action."<sup>6</sup> Additionally, while acknowledging that many people might find Bono's statement "crude and offensive," the Bureau staff reasoned that "the material aired . . . does not describe or depict sexual and excretory activities and organs" as required by the Commission's long-standing definition of indecency.<sup>7</sup>

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<sup>5</sup> *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 18 FCC Rcd. 19859 (2003) (Enf. Bur., 2003) ("Bureau Order"). At the time of the staff ruling, 93 percent of the complaints on file with the Commission had been submitted by persons associated with one organization – the Parents Television Council. The exact phrasing at issue was variously stated on the face of the complaints, which did not include a tape or transcript of the broadcast. *Golden Globe Awards* ¶ 3 & n.4.

<sup>6</sup> *Bureau Order*, 18 FCC Rcd. at 19861 (citing *Entercom Buffalo License LLC (WGR(AM))*, 17 FCC Rcd. 11997 (Enf. Bur. 2002); *L.M. Communications of S.C., Inc. (WYBB(FM))*, 7 FCC Rcd. 1595 (MMB 1992); *Peter Branton*, 6 FCC Rcd. 610 (1991); *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Their Broadcast*, 16 FCC Rcd. 7999, 8008-09 (2001) ("Industry Guidance"). The Bureau also found the material was not obscene. *Id.* at 19862 (citing *Miller v. California*, 413 U.S. 15 (1973); *WGBH Educ. Found. (WGBH-TV)*, 69 F.C.C.2d 1250 (1978)).

<sup>7</sup> *Id.* at 19861-62 (citing *Industry Guidance* and *FCC v. Pacifica Found.*, 438 U.S. 726 (1978)). The Bureau found the cited use of the word was as an "adjective or expletive to emphasize an exclamation," and thus not indecent under FCC precedent.

The full Commission, acting on an application for review filed by the Parents Television Council, reversed the Bureau’s decision. Though the Commission purported to acknowledge that its “role in overseeing program content is very limited” under the Communications Act and First Amendment, the agency concluded it was compelled to act in part because, if it “were routinely not to take action against isolated and gratuitous uses of such language on broadcasts,” it “would likely lead to more widespread use.” *Golden Globe Awards* ¶¶ 4, 9. The Commission rejected the Bureau’s analysis of the usage of the word “fucking,” finding that “within the scope of our indecency definition . . . it does depict or describe sexual activities.” *Id.* ¶ 8. It then held that prior agency decisions holding “that isolated or fleeting broadcasts of the ‘F-Word’ . . . are not indecent or would not be acted upon” are “no longer good law.” *Id.* ¶ 12. The Commission also found as “an independent ground” that the material violated 18 U.S.C. § 1464 because it “constitutes ‘profane’ language” under that provision. *Id.* ¶ 13.

The Commission announced that “broadcasters are on clear notice that, in the future, they will be subject to potential enforcement action for any broadcast of the ‘F-Word’ or variations thereof,” and it took the “opportunity to reiterate . . . that serious multiple violations of our indecency rule . . . may well lead to . . . license revocation proceedings, and that we may issue forfeitures for each indecent utterance in a particular broadcast.”<sup>8</sup> Notwithstanding these findings, the Commission by a 3-2 vote refrained from imposing a forfeiture on the licensees that aired the offending material. *Golden Globe Awards* ¶ 15. The majority declined to impose a forfeiture because precedent at the time of the broadcast would have permitted airing the material so that the licensees “lacked the requisite notice to justify a penalty.” *Id.* But the full Commission acknowledged that it was taking “a new approach to profanity.” *Id.* Moreover, as

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<sup>8</sup> *Id.* ¶ 17. The Commission first issued this warning about “serious violations” in *Infinity Broadcasting Operations, Inc.*, 18 FCC Rcd. 6915 (2003).

discussed more fully below, the Commission also changed its procedural approach to indecency regulation, thus announcing its intention to apply these nebulous rules more harshly in the future. The *Golden Globe Awards* thus represents a sea change in the Commission's approach to regulating broadcast indecency.

### **III. THE FCC'S NEW APPROACH TO SECTION 1464 ENFORCEMENT IS UNCONSTITUTIONAL AND SIGNIFICANTLY CHILLS PROTECTED SPEECH**

Despite acknowledging that the First Amendment is a “critical constitutional limitation” that requires “restraint” in enforcing the indecency rules, the Commission devotes only a single paragraph of *Golden Globe Awards* to constitutional analysis, concluding that its aggressive new policy is “not inconsistent” with *FCC v. Pacifica Foundation*. But this cursory treatment of a “critical” limitation is predicated on the Commission's mistaken assumption that the Court in *Pacifica* “explicitly left open the issue of whether an occasional expletive could be considered indecent.” See *Golden Globe Awards* ¶ 16. This is wrong. Although Justice Powell, who supplied a crucial swing vote for *Pacifica*'s 5-4 majority, noted “[t]he Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word,” he also stressed that the FCC does not have “unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from momentary exposure to it in their homes.”<sup>9</sup> Justice Powell expressly distinguished “the isolated use of a potentially offensive word” from “the verbal shock treatment administered by respondent,” and explained that the order under review

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<sup>9</sup> *Pacifica*, 438 U.S. at 760-761 (Powell, J., joined by Blackmun, J., concurring). See also *id.* at 772 (Brennan J., dissenting) (“I believe that the FCC is estopped from using either this decision or its own orders in this case . . . as a basis for imposing sanctions on any public radio broadcast other than one aired during the daytime or early evening and containing the relentless repetition, for longer than a brief interval, of [offensive language].”).

“was limited to the facts of this case.”<sup>10</sup> He noted the danger of chilling protected speech in what he described as a “relatively new and difficult area of law,” but allowed the FCC some latitude because “the Commission may be expected to proceed cautiously, as it has in the past.”<sup>11</sup> Here however, the Commission consciously decided to extend its power to restrict content far beyond what was approved by the Court in *Pacifica*. Consequently, the Commission has an obligation to reconsider carefully the constitutionality of its actions.

**A. *Golden Globe Awards Expands the Scope of Actionable Indecency Beyond Permissible Constitutional Limits By Applying Arbitrary and Vague Standards to the Regulation of Protected Speech***

Even at its most expansive, the Commission’s authority to regulate indecent speech is narrow and has been considered constitutionally permissible only so long as the FCC exercised considerable restraint. Even within such limits, judicial tolerance for this anomalous legal doctrine has eroded since *Pacifica* was decided in 1978, as more recent cases have subjected the indecency rationale to far less forgiving constitutional review. The Court has confirmed that “indecent” speech is fully protected by the First Amendment and is not subject to diminished scrutiny as “low value” speech, as three Justices who joined the *Pacifica* plurality opinion had suggested.<sup>12</sup> Since *Pacifica*, the Supreme Court has invalidated government-imposed indecency restrictions on cable television access channels despite finding them “as ‘accessible to children’ as over-the-air broadcasting, if not more so.”<sup>13</sup> Additionally, in *Reno v.*

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<sup>10</sup> *Id.* at 761 (Powell, J., concurring) (emphasis added).

<sup>11</sup> *Id.* at 756, 760, 761 (Powell, J., concurring). Justice Powell wrote that the Commission should take into account the chilling effect on speech “as it develops standards in this area.” *Id.* at 760.

<sup>12</sup> Rather, it stressed that the government cannot assume it has greater latitude to regulate because of its assumption that “the speech is not very important” or that the speech is “shabby, offensive, or even ugly.” *United States v. Playboy Entmt. Group, Inc.*, 529 U.S. 803, 826 (2000).

<sup>13</sup> *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 717, 744 (1996). The Court upheld a provision that permitted cable operators to adopt editorial policies for leased access channels, but rejected government-imposed restrictions on indecent programs on leased and public access channels.

*ACLU*, the Court for the first time subjected the indecency definition (in the Internet context) to rigorous scrutiny and found it significantly overbroad. 521 U.S. 844, 871-881 (1997). These decisions addressed the underlying logic of the indecency standard, thus extending their significance beyond the broadcast-specific context. The factual underpinnings of *Pacifica* have been superseded by significant changes as well, including the rise of cable television and the Internet as equally pervasive electronic media.<sup>14</sup>

In these circumstances, the Commission should be more circumspect about regulating broadcast content, not less. But *Golden Globe Awards* eliminates many interpretive restraints the Commission previously used to ensure that its enforcement of 18 U.S.C. § 1464 does not cross the constitutional line. For example, by overruling its previous precedents which held that isolated or fleeting references to “indecent” words are not actionable, the Commission opened a broad new area of enforcement. But the Supreme Court stressed in *Pacifica* that it was not empowering the Commission to act in such isolated instances, and it emphasized that the context in which words are used is “all-important.” *Pacifica*, 438 U.S. at 750. *Golden Globe Awards* drains the FCC’s contextual approach of meaning because the agency’s focus is on whether a particular word will “enlarge a child’s vocabulary” regardless of the setting in which the word is used. *Golden Globe Awards* ¶ 9 (the fact that the broadcast of vulgar language is

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<sup>14</sup> As the Commission has found, “the modern media marketplace is far different than just a decade ago.” *2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd. 13620, 13648 (2003). It noted that traditional media “have greatly evolved,” and “new modes of media have transformed the landscape, providing more choice, greater flexibility, and more control than at any other time in history.” *Id.* Of particular relevance here, the Commission noted that “[t]oday’s high school seniors are the first generation of Americans to have grown up with this extraordinary level of abundance in today’s media marketplace.” It found that most teens have access to cable television and high speed Internet access, many live in households that receive 100 to 200 channels of video programming and thus “have come to expect immediate and continuous access to news, information, and entertainment.” *Id.* at 13648-49. In this environment, imposing special speech restrictions on the broadcast medium because a teenager might hear something that could “enlarge[ ] a child’s vocabulary in an instant,” *Pacifica*, 438 U.S. at 749, is futile, and needlessly reduces broadcast content to only what is fit for children.

isolated and unintentional “is irrelevant; it still has the effect of exposing children to indecent language”).

The Commission’s insistence that the context of speech continues to be “critically important” in indecency determinations is belied by its reasoning in *Golden Globe Awards*. Although it suggests that the “merit” of a work may be considered as part of its indecency analysis, the FCC confines this review to whether “there was any political, scientific or other independent value of use of the word here.” *Golden Globe Awards* ¶ 17. Such a narrow, atomistic view of merit word-by-word is about as far as one can get from the “work as a whole” requirement for evaluating obscenity, which, paradoxically, is unprotected by the First Amendment.<sup>15</sup> This approach vests the Commission with standardless discretion to pick and choose between favored and disfavored speakers. Such arbitrariness is precisely what the vagueness doctrine in First Amendment law is designed to prevent. *NAACP v. Button*, 371 U.S. 415, 432-433 (1963). The government’s ability to assist favored speakers and penalize disfavored ones is the principal vice of vagueness in speech regulation. *Kolender v. Lawson*, 461 U.S. 352, 360 (1983).

Arbitrariness also is a chronic problem with the FCC’s indecency policy that is greatly exacerbated by *Golden Globe Awards*, which gives no guidance for when the “context” of a given program will outweigh its presumed offensiveness. For example, the Commission in the past has held that use of the word “‘fuck’ or ‘fucking’ 10 times in 7 sentences” in a “legitimate news report” on NPR is not actionably indecent, *Industry Guidance*, 16 FCC Rcd. at 8012 (citing *Peter Branton*, 6 FCC Rcd. 610), but it more recently held that the inadvertent, split-

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<sup>15</sup> The Commission’s overly narrow view of “context” and “merit” is a significant constitutional defect. See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 248 (2002) (“work as a whole” requirement is “an essential First Amendment rule [that t]he artistic merit of a work does not depend on the presence of a single explicit scene”); *ACLU v. Ashcroft*, 322 F.3d 240, 252 (3d Cir. 2003) (reviewing material considered to be harmful to minors “in context” is constitutionally deficient because “[t]he taken ‘as a whole’ language is crucial”).

second flash of a penis during a news interview with cast members of a critically-acclaimed off-Broadway production was indecent.<sup>16</sup> With respect to literary or artistic works, the merit of the material may save it from an indecency finding,<sup>17</sup> or, more likely, it may not.<sup>18</sup> There simply is no way to predict when the “context” will save speech from an indecency finding, and there are ominous indications that the Commission plays favorites when it applies its vague standards.<sup>19</sup>

Despite its purported attempt to clarify its indecency standards by decreeing that “any use of [the ‘F-Word’] or a variation, in any context, inherently has a sexual connotation,” the Commission has only made matters more confusing.<sup>20</sup> To begin with, it is not even clear whether the FCC is purporting to ban just the word “fuck” or would also restrict its euphemisms, including the term “F-Word.”<sup>21</sup> While in other circumstances it might be reasonable to assume the government intends only to ban the actual word and not its semantic replacements, it is not

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<sup>16</sup> *Young Broadcasting of San Francisco, Inc.*, 19 FCC Rcd. 1751 (2004). Some radio stations have declined even to carry advertising for the stage production after the FCC decision. See News Release, *Puppetry of the Penis – Indecent or Art?*, Mar. 30, 2004, attached as Exhibit 1.

<sup>17</sup> See *WPBN/WTOM License Subsidiary, Inc.*, 15 FCC Rcd. 1838 (2000) (considering context, the depiction of full frontal nudity in the film *Schindler’s List* is not actionably indecent).

<sup>18</sup> *Golden Globe Awards* ¶ 9 & n.25 (warning broadcasters that “social or political value” of a work does not save it from an indecency finding and noting that “the works of Joyce, [and] words and phrases found in the writings of D.H. Lawrence [and] James Baldwin” may be considered indecent) (quoting *ACT I*, 852 F.2d at 1340).

<sup>19</sup> When the FCC declined to sanction NPR for its newscast about mob boss John Gotti, for example, Commissioner Ervin S. Duggan suggested that his fellow Commissioners had been influenced by the fact that “the broadcast in question was by National Public Radio.” *Peter Branton*, 6 FCC Rcd. at 611 (dissenting statement of Commissioner Ervin S. Duggan). Now, the FCC has ruled that, even without the evidence of a tape or transcript, and without evidence of what words were actually broadcast, it can determine that material is actionably indecent because of the subject matter discussed “and the *identities of the participants* (a ‘shock jock’ and a porn star).” *Emmis Radio License Corp.*, Mem. Op. and Order, FCC 04-62 (rel. Apr. 8, 2004) (“*Emmis Radio*”) (emphasis added).

<sup>20</sup> *Golden Globe Awards* ¶ 8. The Commission’s initial premise that the word at issue has *only* a sexual connotation is simply wrong. See, e.g., WEBSTER’S NEW COLLEGIATE DICTIONARY 463 (1977) (including among the definitions “sometimes used in the present participle as a meaningless intensive”). See also THE F WORD (2d ed., Random House 1999) (a 272-page book with an introduction by Roy Blount, Jr. which traces the etymology of the word “fuck” and sets forth its myriad meanings and usages).

<sup>21</sup> The Commission order and separate statements use the expression “F-Word” thirty-five times, including in the legal analysis and in the Order’s conclusion, while the words “fuck” or “fucking” appear only in footnotes, largely involving parenthetical references to other cases. See *Golden Globe Awards* ¶ 8 n.32.

safe for licensees to rest on such an assumption where a wrong guess can cost a station a huge fine or lead to license revocation. In the three other *March 18 Indecency Orders*, for example, the FCC reinforced the notion that even innuendo and colloquial references can be actionable where the FCC concludes the sexual connotation is “unmistakable.”<sup>22</sup> In this regard, the expression “F-Word” appears easily to qualify since the Commission found it unnecessary to define the term even though roughly eight thousand six hundred other words in the English language also begin with the letter “F.”<sup>23</sup> Moreover, the Commission warned broadcasters that it intends to interpret its mandate broadly, to prohibit “vulgar and coarse language” including “words (or variants thereof) that are as highly offensive as the “F-Word.”<sup>24</sup> As a consequence, many other commonly understood euphemisms in addition to the “F-Word” may be unsafe to broadcast.<sup>25</sup> But it is impossible to tell from the FCC’s newly-announced standard which words are acceptable and which ones are not.

Which words may be deemed “highly offensive” is a function of contemporary community standards for the broadcast medium – a concept the Commission has never previously defined other than to say it is a national standard based on the “average broadcast viewer or listener.” *Industry Guidance*, 16 FCC Rcd. at 8002. Now, however, in its *March 18 Indecency Orders*, the FCC claims to rely on its “collective experience and knowledge, developed through *constant interaction* with lawmakers, courts, broadcasters, public interest

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<sup>22</sup> *Capstar* ¶ 9; *Infinity Broadcasting* ¶ 10; *Infinity Radio License* ¶ 5.

<sup>23</sup> WEBSTER'S 3<sup>RD</sup> NEW INT'L DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 811-926 (1986).

<sup>24</sup> *Golden Globe Awards* ¶¶ 13-14.

<sup>25</sup> Some commonly understood euphemisms of the “F” variety include “eff” (or “effing”), “fug,” “frig,” “freaking,” “having fun,” “funch,” “fungoo,” and “futz.” Hugh Rawson, *DICTIONARY OF EUPHEMISMS AND OTHER DOUBLETALK* 173, 177, 179, 182-183 (Revised ed. 1995). Many other well-worn expressions similarly stand in for the word. *Id.* at 232 (listing more than 40 examples). Compare *Palmetto Broad. Co.*, 33 FCC 250, 251 (1962), *aff'd on other grounds*, *Robinson v. FCC*, 334 F.2d 534 (D.C. Cir. 1964) (DJ’s use of expressions such as “let it all hang out” considered “obscene, coarse, vulgar, and suggestive material susceptible of indecent double meaning”).

groups and ordinary citizens, to keep abreast of contemporary community standards for the broadcast medium.” *Infinity Radio License* ¶ 12 (emphasis added). This dubious explanation of the methodology employed in assessing contemporary community standards is legally deficient and further compounds the confusion that attends the Commission’s Section 1464 enforcement scheme.

In fact, there has been no “constant interaction” by the Commission with the courts on the subject of indecency. To the contrary, the last time a court opined on the Commission’s indecency enforcement scheme was nearly ten years ago, and that was at the behest of broadcasters. *See Action for Children’s Television v. FCC*, 59 F.3d 1249 (D.C. Cir. 1995). To the extremely limited extent courts have interacted with the Commission, they have expressly relied on FCC commitments to exercise restraint and caution when regulating indecent material. *E.g.*, *ACT I*, 852 F.2d at 1340 n.14. More significantly, such interactions have been in the context of facial challenges in which the definition and application of community standards are not at issue. Indeed, the Commission has *never* been involved in a case that resulted in a judicial application of “community standards” as currently defined by the FCC. The only case that came close to doing so was a decade ago, but it resulted instead in a settlement that produced (seven years later, in 2001) the Commission’s *Industry Guidance* – a document that now appears to be of limited utility.<sup>26</sup>

The Commission’s interaction with public interest groups and ordinary citizens is generally one-sided, and clearly tends to reflect the interests of those who choose to complain about broadcast material, at the expense of the interests of the vast majority of listeners and viewers, who cannot reasonably be expected to contact the Commission in support of their

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<sup>26</sup> *See Evergreen Media Corp. v. FCC*, Civil No. 92 C 5600 (N.D. Ill. Feb. 22, 1994) (agreeing to publish guidelines as to the meaning of the term “indecency” within 9 months).

favorite stations and programming.<sup>27</sup> Individual complaints, especially those filed as part of an orchestrated campaign by one or two organizations (as was the case in *Golden Globe Awards*) are a poor substitute for the objective measurement of contemporary community standards through such means as polling or analysis of ratings results, the latter of which the Commission irrationally discounts.<sup>28</sup> It should correct that error through reconsideration here.

**B. *Golden Globe Awards* Substantially Expands Content Regulation by Adopting a New Standard for Profanity**

The Commission's independent rationale for *Golden Globe Awards* – that the isolated use of the word “fuck” was “profane” – further undermines the constitutionality of its indecency policy. This alternative basis for reversing the Bureau decision has the effect of replacing one vague standard with several – broadcasters now must excise any words or images that may be indecent, blasphemous, or vulgar. This new regime defines “profanity” in at least four ways: (1) “personally reviling epithets naturally tending to provoke violent resentment”; (2) “language so grossly offensive to members of the public who actually hear it as to amount to a nuisance”; (3) blasphemy, or divine imprecation; and (4) “vulgar, irreverent, or coarse language.” The decision unhelpfully adds that “[w]e will analyze other potentially profane words or phrases on a case-by-case basis,” while providing no meaningful guidance as to what those words might be. *Golden Globe Awards* ¶¶ 13-14.

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<sup>27</sup> The Commission periodically issues reminders that “[t]he Commission receives many informal complaints that do not involve violations of the Communications Act, a rule or order of the Commission. The existence of a complaint does not necessarily indicate wrongdoing by the company at issue.” Consumer and Governmental Affairs Bureau, *Report on Informal Consumer Inquiries and Complaints*, Nov. 20, 2003, at 1.

<sup>28</sup> See *Infinity Broad. Operations*, 17 FCC Rcd. 27711, 27715 (Enf. Bur. 2002). Contemporary surveys demonstrate far different attitudes among members of the broadcast audience than the FCC presumes. See Kavla McCabe, *Study Reveals Rock Listeners' Views on Indecency*, RADIO & RECORDS, Apr. 9, 2004 at 1; *Rated R for Rock*, RADIO & RECORDS, Apr. 9, 2004 at 15 (reporting results of surveys by Jacobs Media and Edison Media Research on contemporary listeners' attitudes), attached hereto in Exhibit 2.

None of these definitions can survive constitutional scrutiny, as each suffers from obvious vagueness and overbreadth. The range of statements encompassed by blasphemy and divine imprecation, both religiously based, is far removed from the sphere of indecency which the Commission had heretofore sought to regulate. The most commonplace of divine imprecations, such as “Go to Hell” or “God Damn It,” are now actionable under *Golden Globe Awards*.<sup>29</sup> By encompassing such protected speech, the profanity standard’s blasphemous and divine imprecation components are impermissibly and unconstitutionally vague and overbroad. By bringing its suddenly heavy hand down into this area of religiously oriented speech, the Commission also has impermissibly breached the First Amendment wall that separates church and state.

The “nuisance” and “personally reviling epithet” prongs fare no better. The “nuisance” definition on its face ranges far beyond indecency to include “grossly offensive” words that do not have a sexual or excretory meaning. The Commission relies on a definition of “nuisance” as including speech that “is prejudicial to the . . . sense of decency or morals of the citizens at large.”<sup>30</sup> This open-ended definition wholly encompasses the concept of “indecency” and suggests no logical stopping point. “Personally reviling epithets,” which require a tendency to provoke, are the constitutional equivalent of “fighting words.”<sup>31</sup> This definition, too, suffers from fatal vagueness and overbreadth, opening up broadcasters to an entirely new range of

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<sup>29</sup> *Duncan v. United States*, 48 F.2d 128, 134 (9th Cir.), *cert. denied*, 283 U.S. 863 (1931). To the extent the FCC has shown restraint in the recent past and refrained from regulating blasphemous words, such decisions are of little help now since *Golden Globe Awards* reaffirmed the FCC’s authority to do so. *Golden Globe Awards* ¶ 14 (“Broadcasters are on notice that the Commission in the future *will not limit* its definition of profane speech to *only* those words and phrases that contain an element of blasphemy or divine imprecation . . .”) (emphasis added).

<sup>30</sup> *Golden Globe Awards* ¶ 13 & n.36 (citing definition from BALLENTINE’S LAW DICTIONARY (3d ed. 1969). The same dictionary defines “profane” as “Common rather than sacred. Irreverent toward or contemptuous of sacred things.”

<sup>31</sup> *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (finding that there are “fighting words” that by their ordinary meaning are “likely to cause a fight” or “are threatening, profane or obscene revilings”).

prohibitions on speech that have nothing to do with sexual or excretory organs and activities. The Supreme Court has repeatedly held that “fighting words” regulations must be carefully drawn so as to avoid application to protected expression.<sup>32</sup> Moreover, an essential element of “fighting words” is that they be uttered face-to-face, which obviously is impossible in the typical broadcast setting. The vagueness and overbreadth of the new test for profanity is fatal.<sup>33</sup>

### **C. The Commission’s Enforcement Procedures Violate the First Amendment and Basic Principles of Due Process**

The procedures and penalties affirmed in *Golden Globe Awards* demonstrate a further lack of regard for constitutional limitations. The Commission’s new approach eviscerates due process requirements in determining whether an indecent broadcast has occurred and, upon finding a transgression, imposes wholly disproportionate and punitive sanctions. The Commission used the decision to reiterate the policy that “serious multiple violations” of the indecency rule could lead to license revocations and that forfeitures may be issued for each indecent utterance in a particular broadcast.<sup>34</sup> Furthermore, the Commission reserved to itself the right to declare particular words profane on a case-by-case basis, with all the attendant dire consequences, without giving any indication of what those words might be. Not only are these changes already having a profound chilling effect on speech, *see infra* Section III.D, they are eliminating live broadcasting as it is currently practiced, since *Golden Globe Awards* articulates a technological delay requirement as an “element” of its indecency calculus. *Golden Globe Awards* ¶¶ 11, 17.

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<sup>32</sup> *See, e.g., Gooding v. Wilson*, 405 U.S. 518, 523 (1972); *Cohen v. California*, 403 U.S. 15, 20 (1971). *See also Lewis v. New Orleans*, 415 U.S. 130 (1974).

<sup>33</sup> *See, e.g., State v. Poe*, \_\_\_ P.3d \_\_\_, 2004 WL 396052 (Idaho 2004) (striking down state law against using profanity “within the presence or hearing of children”).

<sup>34</sup> The Commission has since issued Notices of Apparent Liability based on this new approach. *See Clear Channel Broad. Licenses, Inc.*, FCC 04-88 (rel. Apr. 8, 2004) (“*Clear Channel*”) (proposing a \$495,000 fine based on a “per utterance” calculation).

Even worse, the FCC would now place the burden on licensees to prove that their broadcasts are not indecent. The Commission no longer finds it necessary for complaints to accurately report and substantiate the contents of the broadcast.<sup>35</sup> It appears to presume that a broadcast is indecent because of the subject matter at issue and the identity of the speakers. *See Emmis Radio* ¶¶ 10-12. It also has indicated its intention to take action against stations even if they have received no complaints at all. *E.g., Clear Channel* ¶ 16. Moreover, in evaluating licensees' responses to complaints, the Commission has said that broadcasters' good faith attempts to understand and comply with the rules are "irrelevant," *Golden Globe Awards* ¶ 9, thus effectively reading out of the law any requirement that a violation be "willful."<sup>36</sup> The Commission also moved recently to implement an increase in indecency fines as threatened in *Golden Globe Awards*, by basing the forfeiture on each individual "indecent" utterance, but the Commission's methodology for doing so is vague and confusing. *Clear Channel*, *supra* note 34 (NAL for a \$495,000 forfeiture). Although the Commission has not yet instituted license revocation proceedings against a licensee, the threat to do so is quite real and has a significant *in terrorem* effect.<sup>37</sup>

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<sup>35</sup> In *Golden Globe Awards*, for example, the Commission was untroubled by the fact that certain complainants inaccurately recollected or reported what was actually said. *Golden Globe Awards* ¶ 3 n.4. The decision establishes a new enforcement process in which no tape or transcript need be supplied, or even a precise recollection of the actual broadcast. *See also Emmis, supra*, and *Capstar, supra*.

<sup>36</sup> The FCC's new approach conflicts with the Communications Act. Section 503(b) of the Act requires that a violation of the Commission's rules be "willful" or "repeated" before the government may assess a forfeiture, but the approach applied in *Golden Globe Awards* eliminates any such requirements. The fact that an "isolated" reference now may constitute actionable indecency cannot be reconciled with a requirement that the violation be repeated. Moreover, the FCC's disregard of broadcaster intent as "irrelevant" eviscerates not just a "willfulness" requirement, but would punish broadcasters even without a showing of negligence. This approach also conflicts with the First Amendment. *See ACT I*, 852 F.2d at 1340 n. 14 (Commission promised court that it would accord weight to "reasonable licensee judgments" in assessing potential sanctions).

<sup>37</sup> *Golden Globe Awards* ¶ 17. As the Nixon Administration's Director of Telecommunications Policy explained to *The Washington Post*, "The main value of the sword of Damocles is that it hangs, not that it drops. Once you take a guy's license away, you no longer have leverage against him." *Yale Broad. Co. v. FCC*, 478 F.2d 594, 605 n.22 (D.C. Cir. 1971) (Bazelon, C.J., dissenting from denial of rehearing *en banc*) (quoting Clay T. Whitehead).

These procedural changes, combined with the new substantive standard for indecency and profanity, converts the FCC into a “roving Commission” capable of broadly suppressing speech it dislikes. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 59 (1963) (condemning commission charged with reviewing material “manifestly tending to the corruption of the youth”). In these circumstances, “the Commission must discharge its constitutional obligations by explicitly considering [a] claim that the FCC's enforcement of [its policies] against [the licensee] deprives it of its constitutional rights.” *Meredith Corp. v. FCC*, 809 F.2d 863, 874 (D.C. Cir. 1987).

**D. The FCC’s New Policies Already Are Significantly Chilling Protected Speech**

The vagueness and overbreadth of the indecency and profanity standards, and the FCC’s ability to engage in discriminatory enforcement guarantees that broadcasters will “steer far wider of the unlawful zone” and restrict their expression “to that which is unquestionably safe.”<sup>38</sup> Indeed, the Commission’s new approach to indecency enforcement already is having this effect across the board in the broadcast industry. Already broadcasters have eliminated or curtailed live programming for fear a single uttered indecency by an individual over which the broadcaster lacks control could lead to fines or other punishment. Radio stations have fired on-air personnel for even inadvertent broadcasts of a single expletive, and numerous songs, long staples of radio playlists, have been removed or edited as too risky to continue airing as they have in the past, in some cases for over twenty years. Television and radio shows once deemed perfectly acceptable – in some cases by the FCC itself – have been canceled or altered. These

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<sup>38</sup> *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). See also *Kolender*, 461 U.S. at 358; *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 678 (1968) (“the permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children”).

actions, most occurring in but the first month since *Golden Globe Awards* issued, vividly illustrate the constitutional defects of the Commission's actions and the need for reconsideration.

Among the first casualties of *Golden Globe Awards* have been other live broadcasts, the unpredictability of which, coupled with uncertainty over the new FCC standards, has caused broadcasters to shy away from live fare. A number of radio stations have stopped airing live performances by visiting artists, opting instead to record them for broadcast at a later time, thus losing the spontaneity of the live format. Others have abandoned any use of a live call-in format.<sup>39</sup> Broadcasters also have felt compelled to terminate a variety of on-air talent in the new environment the FCC has fostered. This is not limited to the much-publicized purging of Howard Stern from several stations and termination of Todd Clem (either of which is troublesome enough from a constitutional perspective),<sup>40</sup> but also has included others such as writer, actress, and six-year "fixture" on non-commercial educational station KCRW(FM) Sandra Tsing Loh. She was terminated in "a precautionary measure to show the station had distanced itself . . . in case the FCC investigates" after broadcast of a Loh monologue including a single expletive that was intended to be "bleeped" but inadvertently aired in unedited form.<sup>41</sup>

Radio stations also have found themselves constrained to eliminate or edit songs considered classics of middle-of-the road formats and which previously aired in unexpurgated

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<sup>39</sup> See, e.g., Mark Brown, *Broadcast Words, Actions Stir Efforts to Clean Up "Dirty" Airwaves*, ROCKY MTN. NEWS, Mar. 27, 2004 at 1D ("in Denver, live radio is history"); John Eggerton, *Stations Consider Tape-Delayed News*, BROADCASTING & CABLE, Apr. 6, 2004. These articles and others referenced in this Section III.D are attached in Exhibit 2.

<sup>40</sup> See, e.g., Sarah McBride, *Clear Channel Dumps Stern After Big Fine*, WALL ST. J., Apr. 9, 2004, at B1; Jube Shiver, Jr., *Radio Chain Boots Stern Off Stations; Clear Channel Makes the Temporary Move Permanent After FCC Proposes Fining it for Airing the Shock Jock*, L.A. TIMES, Apr. 9, 2004, at C1; *Clear Channel Fires Fla Radio DJ Bubba The Love Sponge*, DOW JONES INT'L NEWS, Feb. 24, 2004. Cf. W. Scott Bailey, *Union Calling Clear-Channel's Zero-Tolerance Plan Indecent*, SAN ANTONIO BUS. J., Mar. 12, 2004.

<sup>41</sup> Greg Braxton, *KCRW Fires Loh Over Obscenity*, L.A. TIMES, Mar. 4, 2004, at B1. The station later offered to reinstate Ms. Loh, but she declined, citing a "toxic environment" at the station. Scott Collins, *et al.*, *The Decency Debate*, L.A. TIMES, Mar. 28, 2004, at E26. See Exhibit 2.

form.<sup>42</sup> Classic Rock format stations have dropped several such songs from their rotation, including The Who's "Who Are You," Pink Floyd's "Money," Lou Reed's "Walk on the Wild Side," Steve Miller's "Rock 'n Me" and "Jet Airliner," Warren Zevon's "Lawyers, Guns & Money," and Steppenwolf's "The Pusher."<sup>43</sup> Stations also have been forced to drop or edit more recent songs by such critically acclaimed artists as Pearl Jam ("Jeremy" and "Why Go"), Alice in Chains ("Man in the Box" and "Heaven Beside You"), Guns 'n' Roses ("Its So Easy" and "Mr. Brownstone") and OutKast ("Roses"). Even pop songs generally thought innocuous, such as John Mellencamp's "Jack and Diane" or "Play Guitar" and Sheryl Crow's "A Change Would Do You Good" have been edited for radio, or in some cases, dropped altogether.

Other programming also has been directly affected by sensitivity to the new FCC standards. Principals involved in this year's annual Victoria's Secret fashion show – a telecast the Commission staff has in the past deemed not indecent<sup>44</sup> and which already had been filmed – elected to scrap the program.<sup>45</sup> An episode of *ER* was edited to eliminate a brief shot of the

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<sup>42</sup> See *Rated R For Rock*, supra note 28, at 54, 60; Mark Brown, *Broadcast Words, Actions Stir Efforts to Clean Up "Dirty" Airwaves*, ROCKY MTN. NEWS, Mar. 27, 2004 at 1D ("Rock songs that have been played for a quarter-century are suddenly being pulled and re-edited."); *Stations Are Pruning Their Pink Floyd and Cleaning Up Steve Miller's "Jet Airliner,"* INSIDE RADIO, Mar. 23, 2004 at 1; Bram Teitelman, *Radio Reacts to Indecency Flak*, BILLBOARD, Mar. 13, 2004; Hotline, THE BOSTON HERALD, Mar. 26, 2004 at E4 ("classic rock stations around the country are 'retiring' hit songs because a word or two in the lyrics might irk the FCC"); Tom Feran, *Indecency Uproar Stirs a Loud Silence*, CLEVELAND PLAIN DEALER, Mar. 26, 2004 at E1 (Pink Floyd's "Dark Side of the Moon" dropped from airplay, along with Warren Zevon's "Lawyers, Guns and Money," Steve Miller's "Jet Airliner," and the Who's "Who Are You?"); Jason Bracelin, *The \$500K #!\*@%*, CLEVELAND SCENE, Apr. 7, 2004.

<sup>43</sup> Songs such as the Rolling Stones' "Bitch," Nazareth's "Hair of the Dog," and Elton John's "The Bitch is Back" also have been dropped or edited due to use of the word "bitch" (which involves neither sexual nor excretory references).

<sup>44</sup> See Letter from Charles W. Kelley, File No. EB-01-1H-0661/RBP (Mar. 21, 2002) (dismissing complaint against the Victoria's Secret special because complainant failed to demonstrate "the sexual aspects of the material was, in context, so graphic or explicit as to be patently offensive").

<sup>45</sup> Shelly Branch and Joe Flint, *Limited Brands Decides to Cancel Lingerie TV Show*, WALL ST. J., Apr. 12, 2004, at B2; Michele Gershberg, *Indecency Uproar Taming U.S. Network TV*, REUTERS, Apr. 12, 2004.

exposed breast of an 80-year-old woman receiving emergency care.<sup>46</sup> On ABC, the network darkened for some Central and Mountain time zone affiliates a love scene between two characters on a show known for over a decade to feature such material.<sup>47</sup> Public broadcaster WGBH edited a hint of cleavage out of its *American Experience* documentary “Emma Goldman.”<sup>48</sup> Further, on “Every Child is Born a Poet: The Life and Work of Piri Thomas” for the *Independent Lens* series, PBS felt it must edit certain expletives (including nonsexual but offensive epithets) even though they appear in the poetry of subject Piri Thomas, a renowned poet, writer and educator, on a program that featured him reading excerpts from some of his work and other parts being dramatized.<sup>49</sup> The Commission’s recent actions undermine previous attempts by the Bureau to moderate the censorial effects of a vague indecency policy.<sup>50</sup>

The FCC’s new Section 1464 enforcement scheme forces broadcasters to follow the maxim “when in doubt, leave it out.” The chilling effect of this more restrictive regime is obvious. As one experienced observer of the medium put it, “[i]t’s as if someone turned the thermostat down 20 degrees.”<sup>51</sup> The new scheme is antithetical to the First Amendment guarantee that speech in the United States will be “uninhibited, robust, and wide-open.” *New*

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<sup>46</sup> See *The Decency Debate*, *supra* note 41. This article provides a catalog of other television and radio programs that were edited, cancelled or thematically altered in response to the FCC’s actions.

<sup>47</sup> Dusty Sanders, *Some States Not Exposed to “Blue” Nudity*, ROCKY MTN. NEWS, Mar. 27, 2004, at 1D.

<sup>48</sup> Lisa de Moraes, *Even Buttoned-Down PBS Gets Caught in the Wringer*, WASH. POST, Mar. 11, 2004. See Exhibit 2.

<sup>49</sup> See Press Release, PBS Edits “Offensive” Content From Independently-Produced Documentary *Every Child is Born a Poet: The Life and Work of Piri Thomas* in Order to Comply With New FCC Indecency Rules, April 6, 2004, attached as Exhibit 3. Some public broadcasting systems, such as Nebraska Public Television, dropped the documentary altogether.

<sup>50</sup> Compare *The KBOO Foundation*, 16 FCC Rcd. 10731 (Enf. Bur. 2001) (\$7,000 NAL for broadcast of “Your Revolution”), with *The KBOO Foundation*, DA 03-469 (Enf. Bur., Feb. 20, 2003) (rescinding NAL). In the current environment, it is no longer safe to assume that the Bureau’s latest analysis remains operative.

<sup>51</sup> David Hinckley, *Across the Dial, Tone-Down*, N.Y. DAILY NEWS, Apr. 1, 2004 (quoting Tom Taylor, editor of INSIDE RADIO and citing numerous examples).

*York Times v. Sullivan*, 376 U.S. 254, 270 (1964). The effect is not limited to having broadcasters edit out a few naughty words here or there, for as the Supreme Court has noted, “we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.” *Cohen v. California*, 403 U.S. at 26. The general manager of two radio stations owned by Bonneville International Corp. explained:

You have to watch the theme to make sure you’re not offending someone, whether you are discussing gay marriages or the disabled or African-Americans . . . . We really don’t want to go there anymore.”<sup>52</sup>

Such editorial skittishness is widespread on radio and television stations across the nation even though the *Golden Globe Awards* decision is less than a month old. Already this newly restrictive environment has exacted a significant financial toll in the form of canceled programs (that already had been produced) and higher editing and production costs. The Commission must reconsider the decision before the chilling effect becomes even more pronounced.

#### IV. CONCLUSION

Sweeping changes approved in *Golden Globe Awards* belie the Commission’s claim that its role in overseeing program content is “very limited” and that “the First Amendment is a critical constitutional limitation that demands that . . . we proceed cautiously and with appropriate restraint.” *Golden Globe Awards* ¶¶ 4, 5. The FCC’s new indecency regime cannot fairly be characterized as “limited” or “restrained” to the extent it expands the scope of the indecency standard, adds a “profanity” element, reduces due process protections, and imposes harsher penalties. The FCC is seeking not to enforce contemporary community standards for the broad-

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<sup>52</sup> Diane Torioian Keaggy, *Radio’s “Shock” Therapy*, ST. LOUIS POST-DISPATCH, Apr. 11, 2004 (quoting John Kijowski, general manager of WVRV-FM and WSSM-FM). See also David Hinckley, *DJ Fired For Race Remark*, N.Y. DAILY NEWS, Mar. 23, 2004.

cast medium, but to remake them. *Golden Globe Awards* takes the Commission well beyond established precedent and raises questions about the continuing validity of *Pacifica* itself.

For these reasons, Petitioners respectfully request that the Commission reconsider its new standards for enforcing indecency under 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999. Upon doing so, the Commission should: (1) reverse its finding that the isolated or fleeting broadcast of an expletive may constitute actionable indecency; (2) rescind its decision to add “profanity” as a separate offense under the law; (3) require complaints to be supported by credible evidence, such as a tape or transcript; (4) cease imposing disproportionate fines on a “per utterance” basis; and (5) the Commission should grant reconsideration to seriously examine whether the system of government regulation of content announced in this Order, including its threats of potential license revocations, is fundamentally incompatible with the First Amendment of the Constitution.

Respectfully submitted,



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April 19, 2004

## **APPENDIX**

**The American Civil Liberties Union** is a nationwide, non-profit, non-partisan organization with more than 400,000 members dedicated to the principles of liberty and equality embedded in the Constitution. The ACLU has been in the forefront of numerous cases involving free expression, filing including an amicus brief in *FCC v. Pacifica*, acting as lead plaintiff and counsel in *Reno v. ACLU*, 521 U.S. 844 (1997), which concerned regulation of indecency on the Internet, and recently filing an amicus brief in the Second Circuit concerning the procedures used by the FCC in its recent decisions involving indecency. *Jones v. FCC*, 02-6248 (brief filed Jan. 31, 2003). The ACLU appears on its own behalf and on behalf of its members which includes both artists and others who appear on broadcast television and individuals who watch broadcast television.

**The American Federation of Television and Radio Artists** (“AFTRA”), affiliated with the AFL-CIO, is a diverse union representing close to 80,000 professional performers and broadcasters nationwide who work in news, information and entertainment programming on television and radio as well as in the sound recordings industry, commercials and industrials, and new technologies such as interactive programming and CD ROMs.

**Beasley Broadcast Group, Inc.**, is the nation’s 17th largest radio broadcasting company. Founded in 1961 and headquartered in Naples, Florida, Beasley Broadcast Group owns or operates 41 radio stations (26 FM and 15 AM) in ten large and mid-sized markets in the United States.

**Citadel Broadcasting Corporation** is a radio broadcaster serving primarily mid-sized markets in the United States. Through its operating subsidiary, Citadel Broadcasting Company, Citadel owns and/or operates 156 FM stations and 68 AM stations in 44 markets.

**The Creative Coalition** is the leading nonprofit, nonpartisan social and public advocacy organization of the arts and entertainment community. Founded by prominent members of the creative community, The Creative Coalition is dedicated to educating its members on issues of public importance, primarily the First Amendment, arts advocacy, runaway production and public education. The Creative Coalition does not endorse or raise funds for political parties or candidates.

**Directors Guild of America, Inc.** is a nonprofit corporation that serves as the duly recognized labor organization and exclusive representative for the purposes of collective bargaining of, among others, directors, assistant directors, and unit production managers of theatrical and television motion pictures. DGA has no parent corporation, and has no stock and hence no shareholders.

**Entercom Communications Corp.** is the nation's fourth largest radio broadcaster, operating in Boston, Seattle, Denver, Portland, Sacramento, Kansas City, Milwaukee, Norfolk, New Orleans, Memphis, Buffalo, Greensboro, Rochester, Greenville/Spartanburg, Wilkes-Barre/Scranton, Wichita, Madison, Gainesville/Ocala and Longview/Kelso, Washington.

**The First Amendment Project** is a nonprofit organization that is dedicated to protecting and promoting freedom of information, expression, and petition. The First Amendment Project provides advice, educational materials, and legal representation to its core constituency of activists, journalists, and artists in service of these fundamental liberties.

**Fox Entertainment Group, Inc.** is a multi-faceted entertainment company with operations in four business segments: (1) the production and distribution of filmed entertainment,

including the production of programming for television and cable distribution; (2) television station ownership; (3) the FOX Network; and (4) cable network programming channels.

**The Freedom to Read Foundation** is a non-profit membership organization established in 1969 by the American Library Association to promote and defend First Amendment rights and to set legal precedent for the freedom to read on behalf of all citizens.

**Margaret Cho** starred in the ABC sitcom, *All-American Girl* and a series of critically-acclaimed one-woman shows, including *Notorious C.H.O.* and *I'm The One That I Want*, which toured the country and was made into a best-selling book and feature film. Both are now airing on the Showtime Networks. Her newest concert film, *Revolution*, premieres on Sundance Channel in June 2004. Ms. Cho has been honored by, among others, American Women in Radio and Television, Lambda Legal Defense and Education Fund, the Asian American Legal Defense and Education Fund, and the National Organization for Women for “making a significant difference in promoting equal rights for all, regardless of race, sexual orientation or gender identity.”

**Media Access Project** is a thirty-year-old non-profit public interest law firm which represents the public’s First Amendment right to have access to diverse and antagonistic civic and artistic expression via the electronic mass media.

**Minnesota Public Radio**<sup>®</sup> operates a 35-station radio network serving virtually all of Minnesota and parts of surrounding states and produces local, regional and national programming for radio, Internet and face-to-face audiences. Minnesota Public Radio reaches 12 million listeners nationwide each week. Of those, 650,000 listen regionally in Minnesota and surrounding states. With nearly 83,000 members, it has the highest percentage of listener membership of any community-supported public radio network in the United States. Minnesota

Public Radio produces more national programming than any other station-based public radio organization in the country. National programs include A Prairie Home Companion<sup>®</sup>, Saint Paul Sunday<sup>®</sup>, Marketplace<sup>®</sup>, Sound Money<sup>®</sup>, The Splendid Table<sup>®</sup>, Pipedreams<sup>®</sup>, and Classical 24<sup>®</sup>, a live, nationally broadcast classical music service.

**The National Coalition Against Censorship**, founded in 1974, is an alliance of 50 national non-profit organizations, including religious, educational, professional, artistic, labor, and civil rights groups, united in the conviction that freedom of thought, inquiry, and expression are indispensable to a healthy democracy. Positions advocated in these comments do not necessarily reflect the positions of each of the participating organizations in the Coalition.

**The National Federation of Community Broadcasters** is a twenty-nine year old grassroots organization which was established by and continues to be supported by member stations, comprising large and small, rural and urban broadcasters distinguished by their commitment to local programming, community participation and support. The Federation's nearly 250 members come from across the United States, from Alaska to Florida; from every major market to the smallest Native American reservation. While urban member stations provide alternative programming to communities that include New York, Minneapolis, San Francisco and other major markets, rural members are often the sole source of local and national daily news and information in their communities. This membership reflects the true diversity of the American population, with 41% serving rural communities, and 46% that are minority radio services.

**Penn & Teller** are “a couple of eccentric guys who have learned how to do a few cool things” to the tune of a critically acclaimed Off Broadway show, national tours, best-selling books, lectures at Oxford University and the Smithsonian Institution, and Visiting Scholar status at the Massachusetts Institute of Technology. The duo has a long history in television, including

their Emmy award-winning PBS special “Penn & Teller Go Public,” more than 20 appearances on “Late Night with David Letterman” and appearances on “The Tonight Show with Jay Leno,” “Late Night with Conan O’Brien,” “The Today Show,” “Saturday Night Live,” “The Drew Carey Show,” and “Friends.”

**People For the American Way Foundation** is a non-partisan citizens’ organization established in 1980 to promote and protect civil and constitutional rights, including First Amendment freedoms. With over 600,000 members and supporters nationwide, the Foundation frequently has been involved in litigation and other efforts to prevent overbroad regulation of free expression in the name of “indecentcy.”

**Radio One, Inc.**, is the nation’s seventh largest radio broadcasting company and is the country’s largest radio broadcasting company primarily targeting African-Americans. Headquartered in Lanham, Maryland, Radio One owns and/or operates 67 stations (53 FM and 14 AM) in 22 markets. Radio One also programs one channel on the XM Satellite Radio system.

**The Recording Artists Coalition** is a nonprofit, non-partisan coalition formed to represent the interests of recording artists in public policy and legal debates that affect the music industry and the well being of recording artists.

**Recording Industry Association of America, Inc.** (“RIAA”) is a trade association whose member companies produce, manufacture and distribute over 90% of the sound recordings sold in the United States. The RIAA is committed to protecting the free expression rights of its member companies.

**Screen Actors Guild** (“SAG”) represents 120,000 professional actors. Headquartered in Los Angeles, SAG has branches across the United States and members work on television and feature films throughout the world.

**Viacom Inc.** is a leading global media company, with preeminent positions in broadcast and cable television, radio, outdoor advertising, and online. With programming that appeals to audiences in every demographic category across virtually all media, the company is a leader in the creation, promotion, and distribution of entertainment, news, sports, music, and comedy. Viacom's well-known brands include CBS, MTV, Nickelodeon, Nick at Nite, VH1, BET, Paramount Pictures, Infinity Broadcasting, Viacom Outdoor, UPN, TV Land, Comedy Central, CMT: Country Music Television, Spike TV, Showtime, Blockbuster, and Simon & Schuster.

**When In Doubt Productions, Inc.** is a film production company dedicated to producing films about social and historical issues and the way in which these subjects are reflected and explored through arts and letters.

**Writers Guild of America, west** represents writers in the motion picture, broadcast, cable and new media industries. Founded in 1933, the Guild represents 9500 writers of news and entertainment programming.



# PUPPETRY OF THE PENIS

FOR IMMEDIATE RELEASE  
March 30, 2004

Press Contact: Ted Bobrow  
(414) 319-5700 ext. 241

## Puppetry of the Penis – Indecent or Art?

*The Ancient Australian Art of Genital Origami Creates Advertising Controversy in Madison*

MADISON – Amid a national uproar centered on the over-exposure of private parts, Puppetry of the Penis proudly announces its arrival in Wisconsin in April. The show will open in Madison at the Barrymore Theatre April 2-4 and move to the Miramar Theatre in Milwaukee April 13-25. But the issue is who *will* announce it?

Recent indecent exposure incidents have been the subject of much national debate. Recently the FCC has fined many stations for airing indecent material, causing stations to use more conservative judgment in programming and advertisements. For instance, Clear Channel radio stations in Madison have rejected airing the “Puppetry of the Penis” ads with the concern that the ads would be considered offensive material to the FCC. However, other Madison stations such as WMMM and WBZU don’t see any issue with the ads and are currently airing them – adding to the growing gray area of what the FCC considers “indecent”.

“We’re excited to play in Madison, as a follow-up to our successful sold out 4-week run in Minneapolis,” said David Foster, the show’s producer. “Our show has taken world’s stages by storm, creating a runaway comedy hit unlike any other. The puppeteers have performed their unique repertoire of ‘genital origami’ for stunned, impressed and amused crowds around the world.

We’d really like to thank Janet Jackson and Justin Timberlake for bringing nudity to a national audience. With everyone talking about exposed body parts, our show fits right in.”

Some people disagree. In London, religious leaders have cried foul, calling Puppetry of the Penis “absolutely vile.” On the contrary, explains David Friend, one of the show’s creators. “Puppetry of the Penis is a comedy. It is not sexual. We do not ever swear. And we certainly make no references to the Bible, Christianity or any religion. However, you may hear the phrase ‘Jesus that’s huge!’ during a performance.”

Since making its debut at the 1998 Melbourne International Comedy Festival, Puppetry of the Penis has grown into a global phenomenon, spreading glorious Aussie culture across the planet. To date, over a million people around the world have seen the show.

Puppetry of the Penis plays at the Barrymore Theatre April 2-4 at 7:00 pm. Tickets are available by calling Barrymore Theatre at 608-241-8633, TicketMaster at 608-255-4646 or visiting ticketmaster.com. Tickets are available for the Milwaukee performances by calling the Miramar Theatre at 414-967-0302 or by calling TicketMaster at 414-276-4545.



# Study Reveals Rock Listeners' Views On Indecency

Jacobs, Edison Media collaborate for groundbreaking research

By Kevin McCabe

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Jacobs Media and Edison Media Research recently released findings of a sweeping study gauging public opinion on the suddenly hotly debated topic of indecency. Employing an approximately 60/40 ratio of men to women, the study revealed that among listeners of Classic Rock, Active Rock and Alternative, programming on network TV, cable TV and radio is rarely, if ever, perceived as too dirty or explicit.

The research clashes with the views of some Washington, DC policymakers, who, since Janet Jackson's breast-baring incident at this year's Super Bowl, have raced to clamp down on broadcast indecency through a series of investigations and fines.

The respondents were overwhelmingly familiar with the self-proclaimed

poster boy for indecency, Howard Stern, and said that his program should not be susceptible to government involvement. Some 93% responded that they were aware that Stern's nationally syndicated radio program was taken off the air at some radio stations but responded to a subsequent question by indicating that people who want to listen to Stern

should be allowed to do so.

Similar consensus was found in another portion of the study, where a substantial percentage of respondents replied that they would simply change stations if something on the radio offended them. Nearly 81% agreed that even if a small group of listeners

**INDECENCY · See Page 10**

*Indecency*

Continued from Page 1

is offended by a radio show's content, the FCC should not take action against it. The results indicate sharply conflicting opinions of what constitutes indecency among Rock listeners and FCC watchdogs.

To present a comprehensive look at the study's implications, R&R is dedicating two format columns for two consecutive weeks to the Jacobs/Edison project. Part One of the research recap begins on Page 54 of this week's issue.

"Today's radio shows are too dirty and explicit for my taste."

	Percent	Count	Answers
	3.2%	434/13,693	Frequently
	19.3%	2,648/13,693	Sometimes
	34.1%	4,664/13,693	Rarely
	43.4%	5,947/13,693	Never
	<b>100%</b>	<b>13,693/13,693</b>	<b>Summary</b>

Source: Edison/Jacobs survey of Rock listeners.



**CYNDEE MAXWELL**  
cmaxwell@radioandrecords.com



PART ONE OF A TWO-PART SERIES

## Rated R For Rock

New survey finds Rock audience is not offended by edgy content

**H**opefully, you TiVo'd or taped the halftime show from this year's Super Bowl. If you did, you may find yourself in possession of a historical artifact worthy of inclusion in the Smithsonian. The Janet Jackson "wardrobe malfunction" was the match that ignited the bonfire of backlash against perceived indecency on TV and radio and brought us to a turning point in American culture.

In much the same way that we look back at the early 1960s and say, "The Beatles changed pop music forever," and look back the late '60s and know with absolute certainty that the effects of psychedelics irrevocably transformed rock music forever, we will look back at 2004 as the time when consciousness of content in American media shifted.

The past two months have been filled with outrage from the FCC, Congress and the NFL. The flames of this conflagration have now reached the front door of one of the most hallowed — and family-friendly — television shows of the past 15 years, *The Oprah Winfrey Show*. In the latest example of the new sensitivity to indecency, the FCC is investigating complaints about an episode of *Oprah* in which the sexual activities of teens were discussed.

In a classic example of a snake eating its own tail, clips from that episode were aired on both Howard Stern's radio show and on ABC-TV's *Jimmy Kimmel Live*. Both hosts were making the point that the standards for indecency are anything but clear. Complaints to the FCC followed forthwith, and now that agency is investigating *Oprah*.

### Radio Radio

Back in radio, the focus has recently shifted from air personalities (and their language) to the music. Reports are now surfacing that some Classic Rock stations are going back to songs that have aired for years and editing out expletives contained within the lyrics. "Money" by Pink Floyd and "Jet Airliner" by Steve Miller are two examples that have been cited.

This begs the question "What do the listeners think?" No one had thought to ask this — until now. A new survey by broadcast research company Edison Media Research and consulting firm Jacobs Media that polled almost 14,000 listeners of Active Rock, Classic Rock and Alternative stations provides some important answers.

This is the second survey on indecency performed by these two companies; the first was in fall 2002. With the current white-hot level of interest in this subject, the two companies felt it was time to talk to Rock listeners again.

It probably comes as no surprise that the Rock audience (we'll use the all-encompassing term of Rock as shorthand for all the Rock formats)

is, in general, less hysterical about all this hoopla than listeners to other formats, although it's hard to tell, since no surveys of the other music formats have been done. In fact, one of the conclusions of this survey is that it might be helpful to do surveys of other formats to see what those listeners think.

### Nuts & Bolts

Jacobs Media President Fred Jacobs says, "Our new survey argues quite convincingly that, while some of the material on the radio may be shocking, it's what the audience wants."

"These Rock radio listeners are telling us in overwhelming numbers that they want to decide for themselves whether to listen to a radio program, and they believe that the marketplace, not the FCC or watchdog groups, should make the decision about what's available on the radio. The study implies that the people who are offended by edgy morning radio shows are not the people listening."

An overwhelming majority (70%) of the Rock radio listeners in the respondent pool believe that the current focus on some radio shows is an overreaction to the Janet Jackson incident.

"What is fascinating about these people is their ability to separate the Super Bowl episode from their feelings about morning radio programs," says Edison Media Research President Larry Kosin. "A majority of these people think that the Jackson affair was wrong, and yet these same people think that radio personalities should be allowed to say whatever they please. Clearly, what Rock listeners are saying is that the reaction to material depends on the context."

For the next two weeks, R&R is devoting both the Rock and Alternative columns to the results of this very important survey. Here now are the key findings as presented by Edison Media Research and Jacobs Media.

### Key Findings

Few Rock radio listeners are offended by what they hear on the radio. We asked respondents, "Think about the radio station you listen to most often in the morning,

## Study Methodology

Jacobs Media and Edison Media Research collectively designed and administered this survey via the Internet. In total, 40 Rock radio stations around the United States invited their listeners to participate in the survey. The number of respondents who could come from any individual radio station was capped at 6% of the total sample. The interviews were conducted between March 12-19, 2004.

As with all Internet-based research projects of this kind, the results reflect only those who choose to participate in the survey and do not necessarily represent the views of all Rock radio listeners in the country.

Still, the 40 radio stations that invited their listeners to participate represent a broad cross-section of Rock stations, including large and small stations from large and small markets. Some have very edgy morning shows and some have very mild ones; and some play the newest rock music, and some play only classic rock.

According to audience estimates from Arbitron, just over 50 million people listen to Rock radio stations every week.

### Sample Demographics

In total, there were 13,798 Rock radio listeners who completed the survey. These people were distributed as follows:

Male	61%
Female	39%
Under 18	5%
18-24	19%
25-34	28%
35-44	29%
45-54	17%
Over 55	2%
Democrat	26%
Republican	27%
Independent	34%
Attend church regularly	27%
Attend church a few times per year	19%
Rarely or never attend church	54%
Listen to station with "very edgy" morning show	49%
Listen to station with "moderately edgy" morning show	24%
Listen to station with "not edgy" morning show	27%
Listen to Alternative station	24%
Listen to Active Rock station	36%
Listen to Classic Rock station	40%

**Graph 1**

Think about the radio program you listen to most often in the morning. How often does it offend you in some way?

	Percent	Count	Answers
	2.0%	274/13,678	Frequently
	9.2%	1,265/13,678	Sometimes
	34.2%	4,675/13,678	Rarely
	54.6%	7,464/13,678	Never
	100.0%	13,678/13,678	Summary

How often does it offend you in some way?" (See Graph 1.) More than half (55%) of respondents said "never." Only 11% of respondents said "frequently" or "sometimes."

Significantly, the answers are nearly identical among those who listen to stations with all kinds of shows, from the most to the least

Continued on Page 60

**Rated R For Rock**

Continued from Page 54

"edgy." This implies that people choose a show that is unlikely to offend them.

Women were only slightly more likely than men to be offended by what they hear (40% of women are "never offended"; men, 60%). Parents with children under 13 were no more likely to be offended than the group as a whole. Republican and Democrat Rock listeners had no significant difference between them with regard to this question.

As one respondent pointed out, "I am the parent of a 13-year-old boy. If I hear something potentially offensive, I have the right to change the station with my own hand. I am disturbed that the government will 'parent' me by choosing what I can and cannot choose to listen to."

One interesting twist: There was a sizable minority of respondents who said, "Shock-jock radio personalities have gone too far." (See Graph

2.) More than one-quarter of respondents (28.3%) agreed with this statement. Certain subgroups, such as women (32%), parents (32%), frequent churchgoers (40%), Republicans (35%) and Classic Rock listeners (43%), agreed with this statement in larger numbers. Among those who listen to the mildest morning radio shows, 43% agreed with this statement.

**Janet Incident A Major Issue**

While not personally offended by it, a majority found the Janet Jackson Super Bowl incident to be a "major issue." Our respondents had interesting views on the Jackson kerfuffle. Only 14% of respondents said they were personally offended by it, yet just over half said it is an "important issue."

We see the implication that our respondents can separate what is offensive to them and what is appropriate in different contexts. (See Graphs 3, 4 and 5.)

This is summarized by one of the web poll's participants, who said, "I believe in freedom of speech, and I believe that even shock jocks are entitled to this right. However, I think that programmers should be cognizant of what the expected audience will be."

"Without a doubt, the expected audience for the Super Bowl half-time show included children. That act was totally inappropriate, and anyone who was privy to the planned exposure should be held responsible for abusing the broadcast."

Perhaps not surprisingly, men were much less likely to be offended by Jackson's "costume reveal" than women were, but only 17% of our female respondents said they were personally offended by the stunt. Frequent churchgoers (24%) and Republicans (20%) were slightly more likely than the group as a whole to have been personally offended, but overwhelming majorities of these groups were not offended.

As might be expected, those who listen to the edgiest morning shows were the most likely to say that the incident was not an important issue (56%). Among those who listen to the mildest morning shows, only 39% thought the incident was "not important."

Well over half of all respondents, including many who thought the issue "not important," felt that someone should be punished or sanctioned for it. The entity most felt should be held accountable was Jackson herself (59%), followed by Justin Timberlake (50%) and MTV (21%). Only 34% of our respondents felt that no one should be punished for what transpired.

**Howard Is Cool**

Rock listeners overwhelmingly support Howard Stern. Howard Stern is the rare radio personality who, because of his exposure across many media, is well known even in markets where his show doesn't run.

Fully 98% of respondents (from a mix of markets where Stern is and isn't aired) said they have heard of him. More than 90% of those respondents were aware that Stern's show had recently been taken off the air in a handful of radio markets because of indecency concerns. (See Graphs 6, 7 and 8.)

Those who knew of Stern's removal in these markets overwhelmingly believe this was an unfair decision. When given the choice between two statements about Stern's elimination, they answered as follows:

- "They were right to take Howard Stern off the air": 20%
- "People who want to listen to Howard Stern should be allowed to do so": 80%

In every subgroup a strong majority said that people who want to listen to Stern should be allowed to do so. The groups most likely to say

**Graph 5**  
Which of these — if any — should be punished or sanctioned as a result of the Super Bowl incident? (Choose as many as apply.)

	Percent	Count	Answers
	10.5%	1,436/13,693	CBS Television
	21.2%	2,906/13,693	MTV
	4.0%	548/13,693	NFL
	2.1%	290/13,693	CBS local TV stations that carried the game
	6.4%	871/13,693	ADL, the halftime show sponsor
	10.6%	1,458/13,693	Viacom, CBS's and MTV's parent company
	58.7%	8,041/13,693	Janet Jackson
	49.7%	6,810/13,693	Justin Timberlake
	34.1%	4,675/13,693	None of these

**Graph 2**  
Shock-jock radio personalities have gone too far.

	Percent	Count	Answers
	28.3%	3,851/13,597	Agree
	42.6%	5,819/13,597	Disagree
	28.9%	3,927/13,597	Neutral
	100.0%	13,597/13,597	Summary

**Graph 3**  
Were you personally offended by the Janet Jackson/Super Bowl incident?

	Percent	Count	Answers
	14.3%	1,961/13,721	Yes
	80.5%	11,047/13,721	No
	5.2%	713/13,721	Not sure/don't know
	100.0%	13,721/13,721	Summary

**Graph 4**  
Which of these statements best describes your attitude about the Janet Jackson/Super Bowl incident? (Choose one only.)

	Percent	Count	Answers
	9.0%	1,233/13,749	It's an important issue; the government needs to ensure it doesn't happen again.
	42.0%	5,780/13,749	It's an important issue, but it's not worthy of government involvement.
	49.0%	6,736/13,749	It's not that important of an issue.
	100.0%	13,749/13,749	Summary

**Graph 6**  
Have you heard of the radio personality Howard Stern?

	Percent	Count	Answers
	98.3%	13,516/13,750	Yes
	1.7%	234/13,750	No
	100.0%	13,750/13,750	Summary

**Graph 7**  
Are you aware that Howard Stern's program was taken off the air at some radio stations recently because of indecency concerns?

	Percent	Count	Answers
	93.1%	12,571/13,498	Yes
	6.9%	927/13,498	No
	100.0%	13,498/13,498	Summary

**Graph 8**  
Which of these statements best describes your feelings about those stations taking Howard Stern off the air?

	Percent	Count	Answers
	19.5%	2,473/12,656	They are right to take Howard Stern off the air.
	80.5%	10,183/12,656	People who want to listen to Howard Stern should be allowed to do so.
	100.0%	12,656/12,656	Summary

"They were right to take Howard Stern off the air" were listeners to stations with mild morning shows (30%) and listeners who are frequent churchgoers (32%).

Next week: More poll results and a comprehensive wrap-up with specific recommendations that address the question "So, what's next?"

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## **Stations Consider Tape-Delayed News**

By John Eggerton -- Broadcasting & Cable, 4/6/2004 4:00:00 PM

Conventional wisdom says news and sports are traditionally exempt from indecency concerns.

But in a climate of fear, some station executives are discussing adding a tape delay.

An incident at KRON raised a red flag. The newscast was fined by the FCC after a *Puppetry of the Penis* troupe member exposed his "marionette" during a news segment.

Radio-Television News Directors Association has launched a preemptive strike: a seminar on news and indecency at April's convention. The topic was also broached between station execs and First Amendment attorney John Crigler.

Job one: How to avoid fines.

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<http://www.calendarlive.com/tv/cl-ca-rogues28mar28,2,1881873.story>

THE DECENCY DEBATE

## Pulled into a very wide net

**Unusual suspects have joined the censors' target list, making for strange bedfellows (wait — can we say that?).**

March 28 2004

Janet Jackson's bare breast was one thing. But for a real sign of how sensitive the broadcast indecency issue has become, consider the case of Raquel Smashenburn.

The sight of her bare bottom was too much for executives at UPN, who ordered it obscured in the first episode of their new sitcom "Game Over." Oh, and for the millions who didn't see it, Raquel is an animated character.

Hoping to avoid millions of dollars in fines and protect their licenses, the networks' gatekeepers are now rushing to cover naked body parts, cut foul language and monitor anything that smacks of poor taste ... except when they're not. The only consistent thread running through the current crackdown — which has ensnared culprits ranging from a chronic provocateur like ousted radio personality Bubba the Love Sponge to an accidental offender like NBC's "ER" — is how wildly inconsistent it all seems.

ABC's venerable "NYPD Blue" had to darken one of its trademark sex scenes, yet cops still utter one common barnyard epithet every episode, and the bloody corpses pile up. Radio giant Clear Channel Radio dropped Howard Stern's show from six stations, citing its "inappropriate material"; Viacom's Mel Karmazin, Stern's employer, told a U.S. senator that Stern's show "does not fall within the ... indecency definition." MTV, which produced the Super Bowl halftime show in which Jackson's wardrobe "malfunctioned," has relegated some racy videos to late-night hours, yet FX's gritty, often obscene cop drama "The Shield" is back for its third season in prime time.

In 2001, NBC chief Bob Wright sent a memo to TV executives urging them to ponder the long-term effects of HBO's "The Sopranos." For all the series' success, Wright wrote, "we could not and would not air [the show] on NBC because of the violence, language and nudity."

Staking a position is one thing, but withstanding the audience erosion caused by cable's aggressive programming is something else. Since Wright's memo surfaced, NBC has aired "Kingpin," a hard-hitting series about a Mexican drug lord, as well as envelope-pushing unscripted series such as "Fear Factor" and "Meet My Folks."

Stern has used his show to decry what he calls censorship in the culture. But it's important to note that at least so far, the media companies are censoring themselves — mostly from fear that the indecency debate will end up affecting their balance sheets. As always, it's the bottom line — and not so much a naked bottom — that gets the attention of the big media companies.

## Caught in the maelstrom

### **Josh Schwartz**

*Creator and executive producer, Fox's "The O.C."*



**Busted for:** Attempted sexual relations between Ryan (Benjamin McKenzie) and Marissa (Mischa Barton).

**Punishment:** Ryan and Marissa engaged in some grab-fanny last November but, post-Janet Jackson, were told by Fox to chill; the TV couple will stay celibate through the end of the season. Some double-entendres have been scrapped too.

**Prior offenses:** Quick snippets of hot tub threesomes, background cocaine use, underage keg parties.

**His reaction:** "It's kind of scary what's going on now. But the show was never going to be about drugs or sex. Because you can never get away with that much on network television anyway."

**Going forward:** "We've had to pull back on some of the more extreme behavior the kids do over the course of the season. There's not nearly as much drinking. There's not nearly as much drug use."

**What else:** "I still can't believe that we got away with this, but in the pilot, our hero and heroine, Ryan and Marissa, bonded over a cigarette. It was true to the characters, but something we were never going to be allowed to do again."

### **'Raquel Smashenburn'**

*Character on "Game Over," a UPN prime-time series*



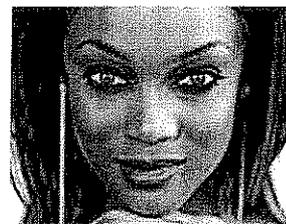
**Busted for:** The March 10 premiere of this computer-generated, animated sitcom featured a female character's bare backside.

**Punishment:** Network executives forced the producers to blur the image.

**The reaction:** The producers were reportedly not pleased but declined to comment. The network likewise declined to comment. But then, few people noticed anyway; that debut episode attracted fewer than 2 million viewers.

### **Tyra Banks**

*Creator and executive producer, UPN's "America's Next Top Model"*



**Busted for:** A March 16 "orgy episode" that depicted four female contestants engaged in a late-night tryst with men in Milan, Italy.

**Punishment:** UPN reportedly ordered the producers to cut certain scenes deemed "inappropriate for broadcast." But as one of UPN's biggest hits, it has been renewed for two more seasons.

**Her reaction:** Banks wouldn't comment for this story. But she told Conan O'Brien in January that the women "were doing the nasty ... I don't want to say 'orgy' — but I just said it."

**John Wells**

*Executive producer, NBC's "ER"*



**Busted for:** A Feb. 5 episode of the hospital drama contained a glimpse of an 80-year-old patient's breast.

**Punishment:** Under pressure from its affiliate stations, NBC forced the producers to obscure the shot.

**His reaction:** "The incidental exposure of an elderly woman's breast in the context of a medical trauma is not comparable" to Jackson's "wardrobe malfunction" at the Super Bowl, he said in a statement.

**Going forward:** Wells also said such pressure is why "so many of today's producers and viewers are increasingly turning to HBO and other cable outlets that do not censor responsible storytelling."

**JC Chasez**

*Pop singer*



**Busted for:** What were deemed offensive lyrics.

**Punishment:** Dropped as a performer at the halftime show for the NFL's Pro Bowl Feb. 8, one week after the Super Bowl. NFL officials worried that the song he was scheduled to sing, "Blowin' Me Up (With Her Love)," would be too provocative with such lines as: "She was leaning on me / Getting horny / Maybe we'll get naughty."

**Prior offenses:** None

**His reaction:** "The NFL's shallow effort to portray my music as sexually indecent brings to mind another era when innocent artists were smeared with a broad brush by insecure but powerful people," Chasez said in a statement he released after being dumped.

**What else:** The NFL said Chasez *could* sing the national anthem at the Pro Bowl. He declined, saying, "That's not the America I love. Nor is this the NFL I love."

**Sandra Tsing Loh**

*Humorist, author and creator of "The Loh Life" commentaries that aired for six years on public radio's KCRW-FM (89.9)*



**Busted for:** Using the F-word in a pre-recorded Feb. 29 commentary about her star-struck admiration for Bette Midler and her musician husband's onstage proximity to the singer.

**Prior offenses:** None

**Punishment:** Station manager Ruth Seymour fired Loh on March 1, saying her use of the word might endanger the station's license and/or result in heavy fines.

**Punishment reconsidered:** After an outpouring of support from fans and friends in the media, several cause célèbre interviews and a conversation with Loh's engineer in which Seymour says she learned he was supposed to bleep her comments for comic effect, Seymour offered to rehire Loh, in a better time slot. Loh refused, citing a "toxic environment" at the station.

**Her reaction:** "It wasn't exactly a free-speech issue since I didn't intend to say that. Now I'm a free-speech pioneer along with Lenny Bruce."

**Going forward:** On Tuesday, KCRW's crosstown rival, KPCC-FM (89.3), announced it had hired Loh, who'll start at the Pasadena station in June. KCRW, meanwhile, shot back at Loh, claiming she's not as innocent as she's been portrayed.

## Chronic offenders

### **Howard Stern**

*Syndicated talk-radio personality*

**Busted for:** Lewd talk



**Punishment:** Clear Channel Radio removed Stern from six stations after he allowed a guest to utter a racial epithet on his Feb. 23 broadcast. On March 18, the FCC fined his employer, Infinity Broadcasting Corp., for a 2001 broadcast. He remains on about three dozen other stations.

**Prior offenses:** One broadcasting research group estimates that half of all FCC fines for broadcast indecency since 1990 — about \$2 million — have been assessed against Stern.

**His reaction:** He claims that Clear Channel acted after he began attacking President Bush and urging the election of Sen. John Kerry. "They thought this would be a good political issue, to keep everyone distracted from what's happening in the Bush administration," he said on a recent show.

**Going forward:** Has threatened to quit broadcast radio and take his show to the less-regulated satellite radio services if Congress passes legislation drastically increasing maximum fines for indecency.

**What else:** Compares his agony to "Jesus on the cross, having his skin pulled."

### **Steven Bochco**

*Executive producer and co-creator, ABC's "NYPD Blue"*

**Busted for:** A steamy sex scene between "Blue" costars Esai Morales and Jacqueline Obradors on the March 2 episode. After 11 seasons of partial nudity and strong language on the series, ABC censors struck.



**Punishment:** ABC darkened the scene to obscure certain body parts.

**His reaction:** After ABC asked him to alter the scene, Bochco compiled a highlight reel of previous episodes when "Blue" had shown at least as much skin. "I'm disregarding them and doing the show to the same standards and rules we established 11 years ago," he says.

**Going forward:** "I don't know if [this] is a battle you can win these days." On the other hand, he doesn't think the current climate will suppress television for long. "Inevitably, even kicking and screaming, the medium does get pulled into the future," he says.

## **Bubba the Love Sponge**

*Radio personality*



**Busted for:** Airing seven conversations in 2001 from cartoon characters like Scooby Doo in which they spoke about sexual acts including masturbation and described in detail a male's genitals. Some of these conversations were, according to the FCC, "inserted between advertisements for Cartoon Network's Friday night cartoons that are identified as 'provocative adult cartoons to help you get your freak on.' " Dialogue included Alvin the Chipmunk complaining that he hadn't had sex in almost six weeks.

**Punishment:** Clear Channel fired Bubba on Feb. 24, after the FCC imposed a \$755,000 fine against the company — the steepest fine ever levied against a broadcaster by the commission.

**Prior offenses:** In 1998 the FCC fined Bubba (whose birth certificate reads Todd Clem) \$23,000 for indecent material that stemmed from several segments aired in 1997 and 1998 that included descriptions of enemas, child molestation, prison rape and a fictitious serenade between President Clinton and White House intern Monica Lewinsky. In February 2000, Clem broadcast from the studio a stunt in his station's parking lot in which three other men castrated and killed a boar during the station's "Roadkill Barbecue" show. Clem and his cohorts pleaded not guilty to animal cruelty charges. On Feb. 28, 2002, all four men were acquitted.

**His reaction:** "I am deeply saddened and confused by the actions of Clear Channel," he said in a statement posted on his website Feb. 26. "I have always striven to be a responsible broadcaster and entertainer. The success of my shows, my deep involvement in the community ... fully attests to that belief."

## **Provocateurs**

### **Bono**

*Lead singer of U2*



**Busted for:** Using the F-word while accepting a Golden Globe Award on Jan. 19, 2003, for U2's song "The Hands That Built America."

**Punishment:** None yet. On March 18 of this year, the FCC deemed the singer-activist's comment "indecent," overturning an earlier ruling by its enforcement bureau. No fines were imposed against the singer or NBC.

**Prior offenses:** None.

**His reaction:** "You can always cause a stir with an expletive, and it's not something that I'm conscious of.... I don't mean to offend anyone," he told Reuters.

**Going forward:** "I swear I won't swear," Bono told Reuters before this year's Golden Globes.

**Janet Jackson***Pop singer*

**Busted for:** Exposing her right breast on national television during the halftime show at Super Bowl XXXVIII on Feb. 1.

**Punishment:** Lost her spot as a presenter on the annual Grammy Awards telecast one week later. CBS instituted a five-minute video and audio delay for the Grammy telecast. She's also out of the running to portray Lena Horne in an ABC-TV movie about the singer's life.

**Prior offenses:** Sexually provocative song lyrics, music videos and album covers. In 1993, Jackson appeared topless on the cover of Rolling Stone, her then-husband's hands strategically covering her breasts.

**Her reaction:** Tearful videotaped apology. In her first interview on the subject, printed in Ebony magazine's April issue, Jackson says: "It was not intentional. It was a costume accident ... That was basically it."

**Going forward:** Her new album, "Damita Jo," is due Tuesday and is widely expected to enter the national sales chart at No. 1. (Review on Page E-44.) The cover photo shows Jackson from the side, nude from the waist up, her arms crossed over her chest. She has appearances slated for Monday on CBS' "The Late Show With David Letterman" and subsequently on ABC's "Good Morning America" — which will use a five-second audio and video delay — Fox's as well as "On Air With Ryan Seacrest" and NBC's "Saturday Night Live."

**Justin Timberlake***Pop singer*

**Busted for:** Ripping the bodice off Jackson's outfit during the Super Bowl performance.

**Punishment:** Reportedly required to apologize during the Grammy Awards broadcast to keep his role as a performer.

**Prior offenses:** None

**His reaction:** "I know it's been a rough week on everybody," he said on the Grammy telecast. "What occurred was unintentional, completely regrettable, and I apologize if you guys are offended."

**Going forward:** Recently backed out of co-hosting ABC-TV's "Motown 45" anniversary special, which will be taped on April 4 in Los Angeles and air May 3. Timberlake says it is because he is too busy working on his first movie, not because of criticism over his role in the Super Bowl incident or flak he got because he is white and never recorded for Motown.

**And yet, life goes on**

OK, so there's a decency crusade raging through the airwaves. Yet in keeping with the seeming

arbitrariness of the current media crackdown, there is no shortage of opportunities to see or hear programming that pushes the taste boundaries. Consider these examples:

**Violence:** USA Network, a basic cable service that reaches nearly 90 million homes, aired the first 10 minutes of Universal Pictures' "Dawn of the Dead" on March 15, a teaser for the sister studio's very bloody horror remake. And USA's new series "Touching Evil" debuted March 12 with a protagonist who has been shot in the head; plots haven't really calmed down since.

**Profanity:** Amid the usual intra-judge bickering on "American Idol" last Tuesday, cameras caught Simon Cowell with his head on his right hand, just the middle finger extended. It was accidental, he said in a release: "I certainly would never make a gesture like that toward Paula or on national television."

**Sex:** VH1's breakfast-time show has been airing Britney Spears' "Toxic" video, featuring the singer as a flight attendant introducing a passenger to the mile-high club, and also writhing around in a skin-toned body suit with strategically placed spangles.

**Nudity:** Perpetually addled rocker Courtney Love revisited her stripping past, showing up on CBS' "Late Show with David Letterman" March 17 and blurting "FCC!" as she raised her top for the nonplused host. Maybe it's because the show aired so late at night or because Love was shot from behind. Either way, it generated much more head scratching over Love's antics than outrage over her skin baring, perhaps a sign that the nation has moved on.

*Staff writers Scott Collins, Lynn Smith, Randy Lewis, John Horn and Bob Baker, as well as Times researcher Scott Wilson and contributor Dana Calvo, contributed to this report.*



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## Rocky Mountain News

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### Learn no evil

Broadcast words, actions stir efforts to clean up 'dirty' airwaves

By **Mark Brown, Rocky Mountain News**

March 27, 2004

Forget Reaganomics. This is how the trickle-down theory works in 2004:

Janet Jackson flashed a breast at the Super Bowl.

Advertisement

So now in Denver, live radio is history.

Jackson is old news, but the fallout is finally raining down. After years of setup by shock jocks Howard Stern, Opie and Anthony, some guy called Bubba the Love Sponge and more, Jackson's stunt put the match to the fuse.

None of the offending disc jockeys is from here. None of their syndicated programs was even carried in Denver. No station in this market has ever received an indecency violation notice from the Federal Communications Commission.

Yet because of the blowup, radio throughout Colorado has changed from the way it was only a few weeks ago. Because of the threats of huge fines and vague decency guidelines:

- ▶ Virtually everything you hear on Denver airwaves now is either prerecorded or tape-delayed.
- ▶ DJs feel muzzled by new restrictions on what they can say. They've been told to keep it clean or else.
- ▶ Rock songs that have been played for a quarter-century are suddenly being pulled and re-edited.
- ▶ Songs that already have been censored with editing equipment are being re-edited to make them even cleaner.
- ▶ From here on out, DJs have to sign contracts personally taking the blame for any indecent material on their shows.

### Hands are tied

Even KBCO's hallowed Studio C - the bastion of rock tastefulness - is put on a four-second delay now on the unlikely chance that Dave Matthews or Lyle Lovett will take off on a profane rant if they break a guitar string.

"It has swept the country so fast everyone is reeling from it. It's a brave new world out there and we have to figure out how to navigate it," says Mark Remington, vice president for Clear Channel Radio, which owns KBCO-FM (97.3), KRFX-FM (103.5, the Fox), KTCL-FM (93.3), KBPI-FM (106.7) and a host of AM stations in Colorado.

It's like punishing your kid because a kid three states away did something wrong, but broadcasters feel their hands are tied. Even as radio professionals think it's unfair - and privately they seethe about the hypocrisy of it all - they're scrambling to have nothing to chance.

"This is just like another witch hunt," says Jeff Pollack, head of the Pollack Media Group, an L.A.-based international radio



Linda McConnell © News/2003

KRFX-FM morning DJs Rick Lewis, left, and Michael Floorwax have taken intense indecency awareness training.

consulting firm. "It *does* affect you. People are going to be much more conservative. People are running in fear. Broadcasters are very concerned, as they should be. This is about as bleak as it has ever been for an environment of being creative."

"I am paid to help protect our license against these things," says Cat Collins, program director at KQKS-FM (KS107.5), Denver's successful rap/hip-hop station. "It doesn't matter politically how I feel about it."

### **Big chill**

The threat of new half-million-dollar fines and the possibility of a station losing its license to broadcast has tossed a distinct chill into the industry that up till now has been the front line of free speech.

"Even for one violation, if it's bad enough . . . you can lose your license. For a general manager, that's a death knell. Nobody wants to be the scapegoat," Remington says.

The result is a wave of self-censorship on a national and local level. The FCC has given only broad guidelines on what's acceptable; it's up to the stations to make sure they don't cross a line that they can't even see.

"What we're trying to do is insulate ourselves from a mistake," says Mike O'Connor, director of programming for Clear Channel. "These are really just extra precautions to protect us at a time when, frankly, there *is* a witch hunt going on."

"I don't blame the broadcasters. The broadcasters are put in a very difficult place," says Pollack. "The commission has forced broadcasters into a very tough position and a lot of it is unwarranted. Clear guidelines really need to be established. In the climate that we're facing, everything seems to be under scrutiny."

### **Drawing the line**

FCC chairman Michael Powell has been adamant about cleaning up the airwaves, and thus far has levied more fines than ever before in FCC history. When the Jackson flap happened, Powell immediately condemned it and pushed for stricter fines.

Former Clear Channel head Randy Michaels held a conference call with his station managers shortly after Bush came into office to tell them the climate had changed and "pleaded with managers to make sure we're in total and complete compliance," O'Connor says.

"They've been waiting for something to happen to create an environment where they could go after these jocks," Pollack contends. Even though it's apples-and-oranges - a singer on a sports halftime TV broadcast during prime time versus radio shows designed for adults - Jackson's stunt pushed all the buttons.

"That's part of what happened here - people were so outraged that you can't even watch a football game anymore without someone sneaking something in," Remington says. "It was like a lightning rod."

"Yes, (radio talk shows) go over the line once in a while. Of course they do. You slap them for that. But is this the case for the mass hysteria we're seeing around the country?" says Pollack. "The whole question is if I'm disgusted, I can turn off the radio. I don't like the government telling us what they perceive as being decent or indecent."

"If you have one or two people or even 1,000 people complaining about a show, should that be enough to take a show off the air? Should it be enough to create such an environment of financial crisis in terms of the amount of fines?" Pollack says. "There will always be people who have problems with everything."

FCC officials confirmed some information for this article, but wouldn't speak on the record as of press time.

### **Fines that hurt**

Many thought Infinity wrote off the Howard Stern fines as the cost of doing business - he has garnered about \$2 million in fines in the past 14 years while bringing in a reported \$100 million in revenue a year.

The FCC is raising those fines to make them more painful.

"The previous fines were a max of \$27,500 (per violation)," Remington says. "Take it up to a half-million dollars and when someone starts messing up, that gets your attention."

Everyone at Clear Channel has had renewed indecency awareness training, including sales people, Remington says. KBPI's morning-show team was pulled off the air for two days when management thought they may have said something inappropriate; they were reinstated when management found no wrongdoing.

Air talent on the front lines - the Fox's *Rick Lewis & Michael Floorwax's* morning show, KBPI's morning Locker Room crew, KHOW-AM (630) talk-show hosts Scott Redmond and Bob Newman - have been sat down for even more intense talks about what they say and do on the air.

"We *had* to. To not do so would be suicidal, for them and for us. So yeah, we seriously sat down with folks," Remington says. "We've seriously looked at our way of doing business differently."

Clear Channel acknowledges that some of its on-air personalities aren't happy with the new guidelines, but they have no choice.

"If we don't have a license, they don't get to yap on the radio. It's that simple," O'Connor says.

"Sophomoric humor is not banned by the FCC," O'Connor notes, saying the FCC is focused on "patently offensive descriptions of sexual and excretory organs or acts."

## When in doubt, drop it

Context also plays a vital role in whether something is deemed indecent. If a morning show team makes graphic sexual jokes, it could bring down the wrath of the FCC. However, when talk radio is tackling subjects such as Kobe Bryant or the CU rape allegations, graphic descriptions of the allegations are generally seen as protected free speech.

That's the dilemma Howard Stern finds himself in. The FCC has gone after him for blunt talk about sex on his syndicated radio show. Stern has fought back, showing that Oprah Winfrey has broadcast similarly explicit descriptions of sex acts without a problem.

"Most of what our guys do is on the up-and-up anyway. It's more the occasional caller who might get through and drop a few f-bombs. It's not like they have to change their whole shtick," Remington says.

But, he says, "if you have any doubt . . . pull it off until we find out where the lines are."

That includes classic rock songs that have been played on the air for decades up till now. Clear Channel went back through its song database and made changes to everything from Steve Miller's *Jet Airliner* to Nine Inch Nails' sexually explicit *Closer*.

"We're scrutinizing every song, both new and existing. The law doesn't discriminate," O'Connor says.

"But the most important thing is to get hold of our (on-air) talent. The FCC seems to be focused on performances or speech. We're going to get to everything we can and hopefully not make any fineable mistakes," O'Connor says.

KS107.5's Collins went through much of the same tweaking, even though the focus of the FCC so far has been on talk rather than music content.

"I've had a meeting with my staff to explain potentially how serious one of their mistakes could be," Collins says. But "knowing the FCC is putting more scrutiny on radio stations . . . my oversight has become a little more focused on the content and the lyrics of the songs we play."

Representatives for Entercom, which owns KQMT-FM (99.5, The Mountain) and KALC-FM (105.9 Alice), were unavailable to talk about changes.

## Listening again

Jefferson Pilot-owned KS107.5's format by nature is more risqué and cutting-edge than most other stations. Hot new hits by Ludacris, Eamon and Frankee are not only filled with expletives (edited out for airplay) but extreme sexual content as well.

"I've always been well aware of the sexual content of the music," Collins says. "I don't believe KQKS has ever been indecent since I've been here in 1998."

The station receives

edited, cleaned-up versions of hip-hop songs from the record companies, but Collins and music director John Kage go through each one again to make sure nothing slips by. They'll actually re-edit the songs if they feel the company didn't do a good enough job clipping out obscenities.

Despite the explicit sexual content of some rap songs, the FCC doesn't pursue those complaints as aggressively as those about talk radio. As a song, rap lyrics have more First Amendment protection than talk. In 2000, the FCC went after Pueblo radio station KKMG-FM in a landmark case after the station had played an Eminem song, *The Real Slim Shady*. A \$7,000 fine was eventually assessed, but in 2002, the FCC reversed itself, declaring the song not obscene after all.

"I haven't taken any music off the air. I have gone back and listened to every song we play to see if we should do additional edits," Collins says. "We have done some editing. Now that there's more scrutiny on us, I have completely eliminated (any obscenities) in the music."

They have kept songs off the air that they just didn't feel right about. Last year's track *Purple Stuff* by Big Moe "was actually about drinking cough syrup at parties and getting high on that. I remember telling my music director 'We're not playing this.' To me, it was offensive," Collins says.

*Mark Brown is the popular music writer. Brownm@RockyMountainNews.com He hosts a weekly radio show at 6:30 p.m. Sundays on Clear Channel's KRFX-FM.*

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# INSIDE RADIO

Tuesday, March 23, 2004

Editor: Tom Taylor (609) 883-3321

**Stations are pruning their Pink Floyd and cleaning up Steve Miller's "Jet Airliner."** What's going on? The indecency scare has rippled down to station playlists, causing programmers to pull or edit some of the real staples of rock and CHR. Gone is the "BS" in Pink Floyd's "Money", and the "funky s-t in the city" line from Steve Miller Band's "Jet Airliner." Also getting sanitized are The Who's "Who Are You?" and "Jeremy" by Pearl Jam. One classic rock programmer says it's odd that 25-year-old songs that have literally made billions of impressions now get neutered. It may be that rock listeners expect to hear those words and don't object to the FCC. While CHR and urban radio have their own issues — dating back to the explicit language in Prince's "Erotic City." And the actual f-word in the title of at least one current CHR track. Consultant Guy Zapoleon tells *Inside Radio* that "with most Top 40s being mothers-and-daughters stations, broadcasters have to be responsible and mindful of what the audience can tolerate in terms of objectionable content. The problem is what the leading-edge audience thinks about bleeping out or editing. If the song becomes massively edited, you have to question whether to play the song altogether."

**No FCC indecency fines yesterday.** If the FCC was indeed working on about a dozen possible fines as it said a couple of weeks ago, we've still got a half dozen or more to go. Last Friday's FCC confirmation of an ancient fine against Infinity's "Wild" WLLD in Tampa set the Wonder Machine going again: that fine dated from a broadcast of the live "Last Damn Concert" in 1999. That was five years ago. The case is old enough to go to kindergarten.

**Entercom buys Providence's WWRX from Stephen Mindich — and will simulcast Boston's WEEI on it.** David Field takes the \$14.5 million opportunity to enter the southern New England market and simulcast his highly successful Boston sports talker. There will be some local Providence content. But the deal gives Entercom a chance to spread its big new investment in afternoon talker Glenn Ordway. He signed a five-year deal with 'EEI three months ago (December 22, 2003 *Inside Radio*). Speculation then was that Entercom would aggressively look to syndicate him, and now it can do that in-house, when the LMA with WWRX begins May 1. So who's the seller? Boston Phoenix publisher and station owner Stephen Mindich. He acquired WWRX, Westerly, RI in late Summer 2000 and paid \$16 million for it. That's when he was extending his 'FNX Network both north and south from his Boston base of WFNX. But Providence never really fit in, and eventually WWRX started doing separate programming. It's a class B at 103.7 and should fill out WEEI's signal south and west of Beantown. Broker: Dick Foreman, for the seller.

**Arizona station owner Rick Murphy has his eyes set on a new career — in the U.S. House.** Murphy announces he'll work to win the Republican nomination for a congressional seat currently held by freshman Rep. Trent Franks. There's a GOP primary September 7 and Murphy says he plans to spend as much as

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Billboard March 13, 2004

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Billboard

March 13, 2004

**SECTION:** UPFRONT; Articles

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**HEADLINE:** Radio Reacts To Indecency Flak

**SOURCE:** Print

**BYLINE:** BRAM TEITELMAN

**BODY:**

It all started with Janet Jackson's breast.

The singer's "wardrobe malfunction" at the Super Bowl put the Federal Communications Commission on the warpath to stamp out **indecent** and hold congressional **indecent** hearings.

As the federal storm gathered, Clear Channel led **radio** self-regulation on the issue. It fired longtime Florida-based morning host Todd "Bubba the Love Sponge" Clem and pulled Howard Stern's syndicated morning show from the six Clear Channel stations carrying it. Clem's program was cited by the FCC in a recent \$715,000 **indecent** fine against Clear Channel in January.

Viacom-owned Infinity, the company from which Stern's show originates, also reacted. Infinity executives John Sykes and Joel Hollander issued an internal memo Feb. 18 outlining the FCC's current definition of **indecent** and mandating that any show with live phone calls or controversial content should have a delay in place.

The memo also issues content guidelines on avoiding **indecent**. "Failure to abide by this policy is grounds for harsh discipline, including immediate termination," the memo states.

An Emmis Communications spokesperson tells Billboard sister publication Airplay Monitor that Emmis is preparing a zero-tolerance policy on **indecent** as well.

Clear Channel's new Responsible Broadcasting Initiative issued one day before **radio** division CEO John Hogan took the stand before Congress states that any DJ accused of **indecent** will be suspended and immediately terminated if the jock is found to have violated **indecent** codes. It also states, "There will be no appeals and no intermediate steps."

In addition to the measure, Clear Channel is modifying its talent contracts so that any jocks accused of **indecent** will be financially liable for part of any fines levied against the station by

the FCC.

## LISTENING CLOSELY

Now stations like modern KBZT (FM 94/9) San Diego are re-examining the music they play.

"The main thing we've done with this FCC witch hunt that's going on is taken a real close look at the music library and made sure there weren't any **songs** in there that we have overlooked," PD Garret Michaels says. "There are quite a number of **songs**, particularly from the grunge era, that occasionally sneak in an f word, and sometimes those are buried in the mix.

"In light of what's going on out there, there's so much watchdogging that we want to be careful and make sure we don't get fined on a technicality," he says.

Michaels cites such core library tracks as Tools "Sober" and Alice in Chains "Heaven Beside You" as **songs** that the station has re-edited.

Regardless of the outcome of the congressional hearings, the FCC's guidelines or individual **radio** groups mandates, the developments of the past several weeks prove that **radio** is entering previously uncharted territory.

"Everything has changed," says one PD who requested to remain anonymous. "It's obvious now that **radio** companies that have 1,300 stations or 600 stations or 200 stations will not hesitate to blow somebody out and ruin one particular **radio** station, or even one particular network, for the protection of its entire network."

## SLIPPERY SLOPE

And the commission might be stepping over the line in attempting to decide what's **indecent**. A poll conducted by USA Today found that popular opinion did not back the FCC's crackdown on **indecentcy**. Twenty-seven percent of the respondents said that if people did not like what they were watching or hearing, they should just turn it off, while 16% said the FCC should label shows with questionable content and let listeners decide for themselves.

The FCC's current guidelines consider three criteria when determining whether something is **indecent**: the explicitness or graphic nature of the description of sexual or excretory organs or activities, whether the material dwells on or repeats at length those descriptions and whether the material appears to pander to or is used to titillate or is presented for shock value.

But many of the programmers contacted for this story say the FCC's current guidelines for **indecentcy** are too vague for them to be completely sure that they're avoiding the use of **indecent** material.

"We've scrutinized some bits that have been on the station for years and given the current, scary environment have moved to edit them somewhat to try to ensure that they don't violate a very vague set of rules," another PD who asked for anonymity says.

"That's based on the Bubba decision, where it appears that [the FCC was] fining WXTB [Tampa, Fla.] and Clear Channel for what was inferred rather than what was said," the PD adds. "To my knowledge, that hasn't happened in the past. In my mind, we're now headed down a particularly slippery slope."

"Any time you start to talk about regulating free speech or limiting free speech, that can be a scary topic," another programmer says. "The biggest thing this has done is really made talent uneasy about what to say and what can be said . . . It would be beneficial if the FCC would come out and let everybody know what's **indecent** and what's not."

Some stations have taken a closer look at their production. "It's more than just what the jocks are saying, it's also the messages that were relaying in between the records," another programmer

says.

"There were a couple of liners that we thought were inappropriate," the PD adds. "For us, its not just the sex stuff but any sort of drug references." That includes the liner "Theres a fine line between genius and insanity. Unfortunately, we snorted it."

Others say theyre keeping things status quo.

"So far, I havent changed a thing," active KRFR (Real Rock 104.3) PD Alex Quigley says. That includes the stations risqu liners, which remain on the air.

"What was good enough two weeks ago should be good enough now," Quigley says. "Were not going to change everything suddenly, which is what I feel Clear Channel did. Howard Stern wasnt **indecent** one week ago? Its the same show it has always been."

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**HOTLINE:[All Editions]**

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ewport Jazz sets 50th bash

George Wein sure knows how to throw a party. The founder of the Newport Jazz Festival is marking the 50th anniversary of the event with a 2004 lineup that's literally a Who's Who of modern jazz.

Among those appearing on one of the three stages (up from two in the past) at Fort Adams State Park on Aug. 14 are George Wein, Branford Marsalis, Ron Carter, James Moody, Jackie McLean, Dave Brubeck, Marian McPartland, Phil Woods, Harry Connick Jr. and Clark Terry. The Aug. 15 slate includes Ornette Coleman, Wynton Marsalis and the Lincoln Center Jazz Orchestra, Wayne Shorter, Herbie Hancock, Roswell Rudd, Dave Douglas, Regina Carter, Chico Hamilton, Lee Konitz, Peter Cincotti, James Carter and the Mingus Big Band.

"I wanted to do a different kind of festival from what we've been doing," Wein said. "I wanted to bring in a lot of individual musicians, older and younger, to reflect that jazz is still a great music and doesn't have to be just a music of the past. At the same time it's got a great history, so let's acknowledge both aspects of it."

The JVC Jazz Festival-Newport kicks off on Aug. 11 with a sacred music concert by Brubeck at Rogers High School in Newport. Tickets go on sale today at 10 a.m. Call 866-468-7619 or go to [www.ticketweb.com](http://www.ticketweb.com). For more information, go to [www.newportjazz50th.com](http://www.newportjazz50th.com). - BOB YOUNG

**CAN WE SAY THAT?**

Rock jocks aren't the only radio people feeling the heat from the Federal Communication Commission's crackdown on broadcast indecency in the wake of Janet Jackson's Super Bowl surprise. Now classic rock stations around the country are "retiring" hit songs because a word or two in the lyrics might irk the FCC.

In Boston, WZLX-FM (100.7) program director Beau Raines said his station has taken Steve Miller's "Jet Airliner," Pink Floyd's "Money" and the late Warren Zevon's "Lawyers, Guns and Money" off the air because there's at least one cuss word in each.

The irony, of course, is all three songs have been played for decades on thousands of stations. But until the FCC clearly defines what it finds objectionable, programmers are being extremely cautious.

Raines said he preferred to at least temporarily retire those tunes rather than play edited versions. "We don't play edits," he said.

**DRIVING A STAKE INTO 'ANGEL' FANS**

TVguide.com confirmed yesterday that former "Buffy the Vampire Slayer" star Sarah Michelle Gellar will not be appearing on her spinoff's finale set for May 19. Joss Whedon, creator of both series, said it was both the actress' busy schedule and creative reasons that pre-empted a final appearance by Gellar - whose character is the object of the affections of both Angel (David Boreanaz) and Spike (James Marsters).

Whedon doesn't want Angel's send-off to "revolve around a guest star. We will deal with the issue of Buffy and how much she means to Angel and Spike, but I want to end the show with the people who've been in the trenches together, the characters who have lived - and occasionally died - together . . . the regulars." - SARAH RODMAN

**MERRIMACK REP SETS FALL SEASON**

Merrimack Repertory Theatre celebrates its 26th season this fall with a world premiere, classics by Arthur Miller and Harold Pinter and the return of the Reduced Shakespeare Company.

The season opens with "The Complete History of America (abridged)" by the trio of the Reduced Shakespeare Company (Sept. 10- Oct. 30), followed by Miller's "The Price" (Nov. 11-Dec. 11).

The world premiere of a new adaptation of Leo Tolstoy's "The Kreutzer Sonata," adapted by and featuring Larry Pine, will bow Dec. 30-Jan. 29, followed by Ronald Harwood's "Quartet" (Feb. 10-March 12, 2005), Tazewell Thompson's "Constant Star" (March 24-April 23, 2005) and Pinter's "The Homecoming" (May 5-June 4, 2005).

Subscriptions are available at 978-454-3926. - TERRY BYRNE

O INSTEAD WE . . . ZZZZZZZZZZZZZZ

Boston's all-politics-all-the-time-summer of 2004 just got even nerdier with the news that the Boston Globe Jazz & Blues Festival, previously announced as moving to a time closer to the Democratic National Convention, is now going "on hiatus" until 2005. Among the choices offered by the paper in the music festival's stead: the Globe Presidential Film Series, IDEAS Boston 2004 and Globe Talks. - BOB YOUNG

Correction

The Provincetown Repertory Theatre is planning an all-star staged reading of "All About Eve" as a benefit this summer. Earlier this week we named another P-Town theater company.

Compiled by Joel Brown from staff and wire reports.

Caption: GELLAR

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**March 26, 2004 Friday, FINAL / ALL**

**SECTION:** ARTS & LIFE; Pg. E1

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**HEADLINE:** **Indecency** uproar stirs a loud silence

**BYLINE:** TOM FERAN, PLAIN DEALER COLUMNIST

**BODY:**

Warren Zevon saw what was coming, long before and entirely apart from the diagnosis of lung cancer that killed him in September.

Bill Louis remembers the musician visiting WNCX FM/98.5 six years ago to promote a new album. He performed for an hour in the studio on Louis' lunchtime "Classic Cafe."

"One of the **songs**, 'Lawyers, Guns and Money,' had an S-word," Louis said. "He wouldn't talk on the air, but off the air we were talking. He said that **song** is 3 minutes, 29 seconds on the 'Excitable Boy' album and said he got into a back-and-forth about not editing it for a greatest-hits package. They took out '[expletive] hits the fan,' and he said it bummed him more than anything he'd been associated with in music.

"He said if it came to that **song** being played edited, he'd rather not have it played. He requested the **song** never be played again."

Be careful what you ask for.

"Lawyers, Guns and Money," which played for years without complaint about its fleeting use of what has been called a "barnyard epithet," is one of the **songs** that was pulled from the **playlist** at WNCX amid the current frenzy over "on-air **indecentcy**."

"I think he would have some great things to say about this if he were around," said Louis, the program director who has worked at WNCX since 1987. "After Super Bowl Sunday, everything changed."

After Super Bowl Sunday - when a stupid stunt by Justin Timberlake and Janet Jackson provided a nanosecond glimpse of her right breast that became the most-played footage since the Zapruder film - the S-word and a few others hit the fan.

The Federal Communications Commission started imposing big fines for past indiscretions. The U.S. House of Representatives voted to dramatically increase fines for broadcast **indecentcy** up to \$500,000 per infraction. The U.S. Senate, considering similar legislation, could approve the House bill or its own. President Bush has promised to sign it.

But the standards remain vague. The U.S. Supreme Court has defined obscenity but not clearly defined "**indecentcy**."

So **broadcasters** started running for cover by selectively dropping shows and announcing "zero-tolerance" policies.

The S-word runs downhill. It landed at WNCX, among other places, and became an odd blend of crusade, promotion and self-defense.

"The way it started," Louis said, "was we had people vote for the greatest album of all time to get the top 98. We played entire album sides for 30 days at 2 o'clock, and we were going to play the entire No. 1 album two weeks ago Friday. But within three days of starting, the Super Bowl thing happened."

The No. 1 album was Pink Floyd's "Dark Side of the Moon." The first track on side 2, "Money," has the line, "Don't give me that do goody good [expletive]."

"No one has edited that version of the **song** ever in Cleveland," Louis said. "It's probably played a solid 5,000 times since it was released in 1973."

Under the zero-tolerance policy, and a potential fine of \$275,000, Louis felt he couldn't risk playing it. "There's no such thing as safe harbor," he said. "We had to pull it or modify it. It could be edited, but even fleeting references can be handled as gratuitous usage. The law hasn't changed, but the enforcement has changed. And if they hear a bleep, I'll be [bleeped] off, which is another word you can't say."

Louis explained the situation to listeners. "Reaction was remarkable," he said. "There was a sense of outrage and rightfully so." About 23,000 e-mails and maybe a couple thousand phone messages went to Sens. George Voinovich and Michael DeWine in support of "Money."

For now, however, it remains unplayed - along with **songs** such as Zevon's, Steve Miller's 1977 "Jet Airliner" and The Who's "Who Are You" - in a climate of fear and confusion.

How much fear and confusion? "American Idol" judge Simon Cowell propped his head against his middle finger on Tuesday's show. He had to issue a statement the next day that he did not intend an "inappropriate gesture."

Or, presumably, an **indecent** one. That could be a fine situation. Literally.

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## The \$500K #!\*@%

### The FCC's latest mission: Dumbing-down our airwaves.

BY JASON BRACELIN

**Craig Callander's** business card pretty much says it all. "669: Helping You Hurt Yourself" it reads, an apt encapsulation of his on-air antagonism. As the anti-everything radio personality **Sweet Ass Sassafrass**, Callander is among the funniest and fiercest on Cleveland airwaves. 669, his twice-weekly show on WCSB-FM 88.3, is a mix of scabrous punk rock and humor as abrasive as steel wool. It's Callander's playground, where he violates listeners, airs randy prank calls, and occasionally hosts f-bomb-filled interviews with acts like **Insane Clown Posse**.

Well, not anymore. In the wake of Janet Jackson's **Nipplegate**, the **FCC** has come down hard on stations that air off-color humor or the occasional curse word, which had been permissible in the past.

How bad has it gotten? Even the Butt Trumpet's been silenced.

"Butt Trumpet has a song, 'Fucking Asshole,' that used to be a big request. I won't play that now because I'm kind of nervous about it," says Callander, whose show airs at 5 p.m. Thursdays and 1 a.m. Saturdays. "It's a nasty song, but it's something that I've played for 10 years. Now, in this climate, I won't even consider it, because I don't want to get busted on some stupid technicality. It's so weird how, after all the freedoms that I've enjoyed for so long, I'm nervous about a lot of stuff now."

**Rover**, an equally pugnacious personality at 92.3 Xtreme, also feels the duct tape on his mouth. The host of *Rover's Morning Glory* (weekdays 5:30 to 10 a.m.), he's had to tone down his show's mix of bawdy comedy and modern rock.

"One of the segments the lawyers made us ax was a daily feature called '**Dear Porn Star**,' where porn star Carmen Luvana would answer listeners' love, sex, and relationship questions," Rover says. "In fact, they said the mere title 'Dear Porn Star' had to go, no matter what the content of the feature was. If she was to give lawn and garden advice or talk about politics, we still couldn't call it 'Dear Porn Star.' Twelve-year-old girls are wearing T-shirts emblazoned with the words 'Porn Star' across their chests, but I can't say the term on the air."

The FCC's regulatory powers were amplified last month, when the commission reversed its decision on an indecency ruling from October 2003. That ruling followed U2 frontman **Bono's** nationally broadcast speech at the Golden Globes, in which he uttered, "This is really, really fucking brilliant." At the time, the FCC said the curse was permissible because it was fleeting and didn't describe sexual or excretory functions -- long the standard for forbidden words.

By March, the excretory functions had hit the fan. After an appeal filed by the Parents Television Council, the FCC did an about-face, ruling that Bono's words were in fact indecent and broadening the definition of "profane" speech to include just about all swear words or racy commentary, regardless of context. A new "Indecency Bill" before the Senate would greatly amplify fines: First offenses, currently \$27,500, would jump to \$275,000; by



**A fine mess: Rover (center) and his friends just got a little less Xtreme.**

your third slipup, the tab hits \$500,000. After that, stations' broadcasts licenses may be revoked. Even DJs can be fired.

That's why, after decades of spinning classic rock, WNCX Program Director **Bill Louis** had to slash his playlist, removing songs by the Who ("Who Are You"), Warren Zevon ("Lawyers, Guns and Money"), and the Steve Miller Band ("Jet Airliner") because they contain mild profanity. He'd been spinning Pink Floyd's "Money" for 17 years without a single complaint, but its use of "bullshit" forced Louis to shelve it. "This puts everybody on red alert for anything that could create a fine in that area," he says.

Stations like WCSB, whose annual budget is well under \$50,000, could easily be put out of business by a single violation.

"You're not going to take any chances," Callander says. "I wouldn't even care if I got a fine, but I don't want to be the person who gets the station in trouble just for taking a stand. It seems like the FCC wants to baby-proof and Nerf everything and make it so safe that no one could possibly be offended. You never know what they're going to go after. You could be next."



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## Indecency uproar taming US network TV

Mon Apr 12, 2004 05:07 PM ET

By Michele Gershberg

NEW YORK, April 12 (Reuters) - Whether you believe it is a new sexual McCarthyism, or you see it as a long-awaited campaign against programming that's crossed the line into indecency, U.S. television is about to get toned down a notch.

Broadcasters may stage a retreat from edgy shows over the next few seasons as a regulatory campaign to clean up the airwaves gains surprising strength from election-year politics, media analysts said on Monday.

In a sign of what's to come, even underwear vendors are rethinking how they use sex to sell. Television network CBS confirmed on Monday that the much-hyped Victoria's Secret lingerie fashion show, an annual special, would not air this year.

Shari Anne Brill, director of programming at media buyer Carat USA, said racy programs have not lost their popularity, but networks are becoming more wary of being labeled indecent.

"There will be stricter self-regulatory guidelines because it seems that in this climate, everyone is afraid to cross the line," Brill said.

Provocative programs known to win ratings might receive a partial scrubbing to tone down storylines. Networks may be quicker to scrap weaker shows famed mainly for their shock value and scrutinize new scripts far more closely.

"This new hypersensitivity of the past year or so is changing the content of broadcasting," said Robert Thompson, professor of media and popular culture at Syracuse University. "Right now everybody is looking to take the heat off, turn the public attention down a few notches for a season or two."

Analysts said Victoria's Secret owner Limited Brands (LTD.N: Quote, Profile, Research) appeared keen to avoid negative publicity as Washington boosts indecency fines, especially since its last runway show drew lukewarm ratings and failed to push up sales.

Industry insiders largely declined to comment on the pressure an anti-indecency campaign could exert on their new program strategies.

But media watchers said the chilling effect of a Federal Communications Commission crackdown -

- which radio shock jock Howard Stern has likened to a "McCarthy-type witch hunt" -- is already creeping into programming plans.

It is a shift from the past five or six years, when broadcasters have sought to emulate daring and popular shows on cable television -- including HBO's Mafia crime series "The Sopranos" and sexual misadventure story "Sex and the City."

"They're going with a very homogenized, much more family-centric route, moving completely away from the edgy type of content," said media industry commentator Jack Myers. "The ability to take risks and break down established taboos is at an end for now."

Broadcast networks and the media conglomerates that own them -- including Viacom (VIAb.N: Quote, Profile, Research), Walt Disney Co. (DIS.N: Quote, Profile, Research) and News Corp. (NCP.AX: Quote, Profile, Research), are loath to fight for foul language during a U.S. election year, especially as they seek regulatory concessions on other issues, including ownership laws, analysts said.

Public outrage against televised nudity and foul language mushroomed after singer Janet Jackson's breast was exposed during the Super Bowl telecast in February, adding fuel for raising FCC fines on indecent material.

Some advertisers turned skittish even earlier as protests over perceived indecency gained ground ahead of the 2004 vote.

Youth retailer Abercrombie & Fitch (ANF.N: Quote, Profile, Research) pulled a catalog featuring scantily clad and naked models off store shelves, while automaker Chrysler cut a sponsorship of the "Lingerie Bowl" -- a televised game of tackle football between models in bras and panties.

Last week, broadcasters got a stronger taste of their vulnerability when the FCC proposed a \$495,000 fine against Clear Channel Communications (CCU.N: Quote, Profile, Research) for comments by Howard Stern. Clear Channel had already dropped Stern. (Additional reporting by Jean Scheidnes)

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## ACROSS DIAL, TONE-DOWN 'Indecency' flap has radio stations edgy:[SPORTS FINAL Edition]

DAVID HINCKLEY DAILY NEWS STAFF WRITER. **New York Daily News**. New York, N.Y.: Apr 1, 2004. pg. 91

**Full Text** (735 words)

*copyright Daily News, L.P. Apr 1, 2004*

After Patty Steele of WPLJ read a Daily News gossip tease Tuesday morning about a "Sopranos" star possibly being "outed," she joked that co-hosts Scott Shannon and Todd Pettengill were "in the corner whispering."

"You can't whisper about something like that on the air anymore," Pettengill shot back. "Or you'll have the whole FCC raining down on you."

The national frenzy about media indecency - launched when Janet Jackson's breast was exposed during the Feb. 1 Super Bowl half-time show - has cast a cloud on radio shows far beyond its most prominent target, Howard Stern of WXRK.

Consider this: - At one time, the Star and Buc Wild morning show on WQHT let the f- and s-words regularly slip onto the air and spoke about sex in terms like "twist the b-out."

The current show, under DJ Sway, has none of that.

"We have to be careful what we say, what we do, everything," said show member Miss Info. "We can't have a sex therapist in the studio to do a demonstration."

- Virtually all call-ins are now tape-delayed, to avoid the Ryan Seacrest problem. On his first day at KIIS in Los Angeles in February, he had two live callers say the f-word. So great is the demand for radio tape-delay equipment that manufacturers are back-ordered for at least a month.

- Hip-hop stations WQHT (97.1 FM) and WWPR (105.1 FM) have become more vigilant about editing words out of rap songs.

"The record companies send edited versions," said Andy Rosen, regional vice president for WWPR parent Clear Channel. "Then we listen and if necessary do our own further edit."

- Even callers to sports-talk radio are affected. "We prefer not to have someone on the air saying, 'The Mets suck,'" said Tim McCarthy, general manager of WEPN (1050 AM). "It isn't a big problem, but we want to err on the side of caution."

- Stern, of course, has been telling listeners daily that parts of his riffs with strippers and other staples of his show are being killed. "It's making it less funny," he said. "It's not my show anymore."

McCarthy, Rosen and others stress that despite the fury of the current flap, most shows and hosts are not "at risk."

In addition, New York stations aren't as draconian as other stations around the country that have refused ads for "Puppetry of the Penis" and edited four-letter words out of rock warhorses like Pink Floyd's "Money" and Steve Miller's "Jet Airliner."

or is anyone in New York picking up the new ultra-clean syndicated shows from John Tesh and Marie Osmond.

However, the potential for increased FCC fines - with the potential for individuals being hit, too - for indecent material that gets on the airwaves has everyone thinking twice.

"What's going on is still very scary," said Tracy Cloherty, vice president of WQHT's parent, Emmis Broadcasting. "We're under all this pressure not to be 'indecent,' but the FCC won't tell us what 'indecency' is. It's an unbelievable position. I've never seen anything like it."

"You double-check everything you're going to say," said Freddie Colon, long-time New York deejay who's now in Arizona. "I wouldn't tell a joke now that might have any racial overtone. I'll see a funny story in the paper about a naked guy in the paper that I would have used three months ago. Now, I won't."

The concern over this issue was underscored yesterday when the National Association of Broadcasters (NAB) convened an extraordinary "summit" on indecency.

The NAB hopes to formulate an industry-wide response that would defuse current legislation that threatens much higher fines and potential license revocation for indecency violations.

"The curtain has come down fast," said Tom Taylor, editor of the radio trade sheet Inside Radio. "And it affects everyone. Even if you're the safest adult contemporary station, you could be doing a remote from an auto dealership and someone passing by could yell a word and you could conceivably be held liable.

"It's as if someone turned the thermostat down 20 degrees. It's had a very chilling effect."

**[Illustration]**

Caption: WATCHING THEIR WORDS: Scott Shannon (left) and Todd Pettengill of the "Scott and Todd in the Morning Show" on WPLJ. AP Howard Stern (above) THOMAS MONASTER DAILY NEWS DELAYED REACTION: Two crude callers to Ryan Seacrest's KIIS show have led to tape-delayed call-ins. COREY SIPKIN DAILY NEWS CLEANER AIR: DJ Sway of WQHT

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**DJ FIRED FOR RACE REMARK:[SPORTS FINAL Edition]**

DAVID HINCKLEY DAILY NEWS STAFF WRITER. **New York Daily News**. New York, N.Y.: Mar 23, 2004. pg. 74

**Full Text** (316 words)

*copyright Daily News, L.P. Mar 23, 2004*

Weekend jock Raqiyah Mays was fired yesterday by WWPR (105.1 FM) after criticizing interracial dating during her weekend show.

Power-105 officials said in a statement that the station "decided to release her based upon inappropriate remarks she made to listeners during her broadcast on Saturday.

"The station received many E-mails, phone calls and messages from listeners who were displeased and felt alienated as a result of her actions."

Mays' comments on interracial dating came while she was running a station contest in which listeners could win tickets to an Usher concert by making a confession. "Confession" is the title of Usher's latest record, which has sparked heavy buzz in radio.

"I made a confession of my own," Mays said yesterday. "I said I was concerned about interracial relationships when the African-American community has our own inner work and healing to do. If I see a white woman dating an African-American man, I feel, as do many African-American women, that there is one less black man available to us."

The host of a 10 a.m. to 2 p.m. shift on Saturdays, Mays said she was shocked by getting the boot from the Clear Channel station.

She claimed she was the victim of a "climate of pins and needles" stemming from the firestorm over indecency following the Janet Jackson and Howard Stern controversies.

"I wasn't speaking against anybody," Mays said. "I was just being honest. Unfortunately, the industry is under FCC scrutiny and the climate is ripe for reactionary measures."

"I am being censored not for sexual indecency, but racial indecency."

A hip-hop writer who is executive editor of The Ave magazine, Mays came to WWPR a little over a year ago from Sirius Satellite Radio.

WWPR said no one was ticketed to replace Mays on Saturdays, but it could turn out to be Egypt, who recently left WBLS and has done some weekend shifts at Power.

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## THE TV COLUMN

Lisa de Moraes

## Even Buttoned-Down PBS Gets Caught in the Wringer

**V**iacom CEO Sumner Redstone confided to investors this week that "a woman's breast is not such a big deal" to him. We wish him a speedy recovery.

Ironic, isn't it, that thanks to Mr. Redstone's MTV and CBS, which produced and aired, respectively, the little Super Bowl halftime number that's come to be known as the Breast Heard Round the World, TV execs all over the country have been engaged in vigorous debate about that part of the female anatomy which no longer holds any interest for the 80-year-old Mr. Redstone.

Take PBS station WGBH, for example, where suits went back and forth about how much cleavage to show in its upcoming "American Experience" documentary "Emma Goldman."

You cannot expect to make a documentary about a colorful 20th-century anarchist and advocate of free speech and free love—a woman J. Edgar Hoover once called one of the most dangerous people in America—without including a little anarchy, a little free speech and a little free love in the piece.

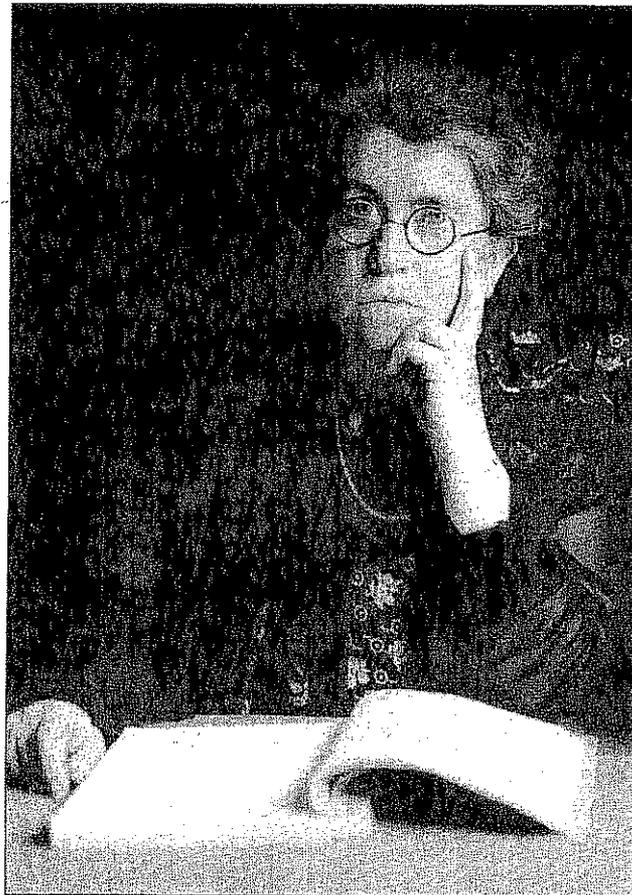
In calmer times, this would not be a problem.

But since Justin Timberlake unleashed Janet Jackson's right breast during the Super Bowl halftime show and it began its scorched-earth march through the TV industry, it's a big problem.

So the executive producer of "American Experience" agreed to cut a couple of seconds of a scene re-creation in the documentary, in which Goldman's lover is seen unbuttoning the front of her chemise, revealing about as much cleavage as Susan Sarandon showed off in that black number she wore to this year's Academy Awards.

According to "American Experience" executive producer Mark Samels, during the normal finishing process this documentary, like all "American Experience" documentaries, went to an attorney at WGBH for what's called "errors and omissions" analysis. While screening the project, Samels reports, the attorney raised concerns about the love scene.

Here is where Samels's version of what happened differs from that of the public TV



INTERNATIONAL INSTITUTE OF SOCIAL HISTORY

**A documentary about activist Emma Goldman included a scene regarded by a PBS station's lawyer as too revealing.**



**Viacom CEO Sumner Redstone told investors that a woman's breast "is not such a big deal."**

source who was among those who brought this to the attention of The TV Column.

According to our source, the showing of cleavage was what knotted the attorney's knickers; he thought it would be objectionable to the Federal Communications Commission,

which has been on a sort of shock-and-awe campaign against TV smut—at least the broadcast stuff—since its chief wandered in on the halftime show while watching the Super Bowl with his family.

According to Samels, it wasn't the cleavage that had the attorney grinding his teeth; it was the question of nippleage.

Mel Buckland, who wrote, produced and directed the documentary, declined to comment for this article, nervously telling The TV Column that she had been expressly told by folks at "American Experience" not to discuss the situation and explaining that she was afraid of the career consequences if she did talk to the press. (Just to refresh your memory: This is still about a documentary on the life of a woman who lobbied in this country, back in the early 1900s, for freedom of—among other things—speech.)

Samels says the "American Experience" team assured the

WGBH attorney that there was no nippleage in the scene.

According to Samels, the attorney passed along the documentary to an outside attorney who does work for WGBH on communications issues, for a second opinion.

"That person also agreed that it looked like a full breast was exposed, which was a pretty common-sense line of decency we haven't crossed," Samels explained.

However, a spokeswoman for "American Experience" with whom we spoke yesterday afternoon said the outside attorney did not screen the documentary; rather, the in-house attorney had described the scene in question and the outside attorney advised that "he didn't perceive any legal issues with it."

Back to Samels, who tells The TV Column that the "American Experience" people "went back and did a frame-by-frame analysis, because we had only looked at it 50 times while making it.

"I didn't see a fully exposed breast, and sure enough, there isn't," he said.

"What there is is a shadow of a blouse which gives the appearance of the revealing of a nipple, the full breast."

That, he says, is why they agreed to remove what he calls 51 frames and our source says is about two seconds of the love scene.

Samels insists, however, that even after the nip and tuck, there is "enough cleavage to drive a truck through in this scene."

We will pause here for a minute while you try to get that image out of your head.

Our public TV source and Samels do agree that it's pretty ironic that a documentary about a woman who preached free love and free speech should be mired in a discussion about whether it's okay to show a breast on TV.

"What I love about it is that it shows the country has never gotten away from its Puritanical roots," Samels said. "Which once again calls for exploration of American history. You can only understand who we are by knowing how we got this way."

That, of course, is a shameless plug for "American Experience," which bills itself as television's longest-running history series.

Oh well, that's showbiz.



**Contact:**

Jonathan Robinson, Producer (203) 777-1690 [whenindoubtproductions@yahoo.com](mailto:whenindoubtproductions@yahoo.com)

Program website: <http://www.pbs.org/everychildisbornapoet>

**PBS EDITS "OFFENSIVE" CONTENT  
FROM INDEPENDENTLY-PRODUCED DOCUMENTARY  
EVERY CHILD IS BORN A POET: THE LIFE & WORK OF PIRI THOMAS  
IN ORDER TO COMPLY WITH NEW FCC INDECENCY RULES**

The FCC has made sweeping changes in the past few weeks regarding the use of language on television with the "Decency Enforcement Act of 2004." There has been a rapid transformation in policy in the wake of Bono saying "fuck" on the Golden Globes and Janet Jackson exposing her nipple during the Super Bowl. In short, language that used to be at the discretion of the broadcaster (i.e. station or network) is now at the discretion of the FCC. The FCC is now leveling fines of up to \$250,000 against stations that do not comply with the new regulations approved by Congress.

The independently-produced film EVERY CHILD IS BORN A POET: THE LIFE & WORK OF PIRI THOMAS, scheduled to be broadcast on the national PBS series INDEPENDENT LENS tonight, April 6<sup>th</sup> at 10:00 p.m., is right smack in the middle of these new controversial policies. EVERY CHILD IS BORN A POET tells the story of renowned poet, writer, educator Piri Thomas. The film includes the author reading excerpts from, as well as dramatizations of selections from his classic autobiographical novel Down These Mean Street (Random House, 1967). The book chronicles Thomas' coming-of-age in the 1930's, 1940's and 50's, his experiences as a teen gang member in East Harlem, as a junkie and an armed robber, and the six years he spent in prison, before becoming an educator and activist, pioneering gang violence prevention, drug rehabilitation, and educational reform efforts in New York City in the 1960's and 70's.

Following the issuance of the new FCC rules, PBS has decided it must edit out of EVERY CHILD IS BORN A POET "obscene" words like "fuck" and "shit." In fact, some PBS affiliate stations are requesting that additional words such as "piss," "nigger" and "spic," not mandated by the FCC rules, be removed as well. Nebraska Public Television has decided to pull the show completely. All the language in question is from Thomas' literary texts, not from interviews or other extemporaneous material.

It seems that history repeats itself, yet again. At the time of its publication, Down These Mean Streets was hailed for its unflinching description of ghetto life and racism in America, while decried by some as being obscene. Down These Mean Street was banned in a number of schools and libraries in the early 1970's, due to concerns about its language. The "offensive" language currently being censored by the government brings into question how the FCC rules effect not only freedom of speech, but artistic

- more -

integrity, as well. In 1972, before the decision was overturned, the Supreme Court upheld a lower court's ruling to allow School District 25 in Flushing, Queens to ban Down These Mean Streets from student libraries. In a dissenting opinion, Justice Potter Stewart and Justice William O. Douglas asked, "Are we sending children to school to be educated by the norms of the school board or are we educating our youth to shed the prejudices of the past, to explore all forms of thought, and to find solutions to our world's problems?"

The new FCC rules effect content involving "offensive" language and sexuality, but do not touch upon violence. Before the new regulations went into effect, the FCC went as far as to try to mandate that broadcasters pixilate the mouths of individuals speaking offensive words, but backed off before Congress gave its approval. Major networks and cable programmers may be willing to test or openly flaunt the new rules, but PBS stations, already struggling with limited resources and annual budget re-authorization hearings in Congress, are unwilling to take on the challenges to freedom of speech and expression.

The series INDEPENDENT LENS is a co-production of The Independent Television Service (ITVS) and PBS. The Mission Statement for ITVS is as follows:

The Independent Television Service (ITVS) brings to local, national and international audiences high-quality, content-rich programs created by a diverse body of independent producers. ITVS programs take creative risks, explore complex issues, and express points of view seldom seen on commercial or public television. ITVS programming reflects voices and visions of underrepresented communities and addresses the needs of underserved audiences, particularly minorities and children.

In an era that encompasses both the explosion of commercial information enterprises and a consolidation of media empires, the role of public sector media becomes critical to a free, open, and informed society. ITVS holds the following values as essential to carrying out the organization's work:

- Freedom of expression is a human right.
- A free press and public access to information are foundations of democracy.
- An open society allows unpopular and minority views to be publicly aired.
- A civilized society seeks economic and social justice.
- A just society seeks participation from those without power, prominence, or wealth.
- A free nation allows all citizens forums in which they can tell their own stories and express their own opinions.

[www.itvs.org](http://www.itvs.org)

### **About When In Doubt Productions, Inc.**

When In Doubt Productions, Inc. is dedicated to producing films about social issues and the way in which these issues are reflected and explored in arts and letters. More information about When In Doubt Productions, Inc. is available at [www.everychildisbornapoet.org](http://www.everychildisbornapoet.org).

\* \* \*

**APPENDIX III**

**JOINT PETITION FOR STAY OF FOX ENTERTAINMENT GROUP, INC., NBC  
UNIVERSAL, INC. AND VIACOM, INC., COMPLAINTS AGAINST VARIOUS  
BROADCAST LICENSEES REGARDING THEIR AIRING OF THE “GOLDEN GLOBE  
AWARDS” PROGRAM (JUNE 18, 2004)**



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## INTRODUCTION AND SUMMARY

Petitioners request a stay of an order that announced a dramatic new standard for when licensees' broadcasts may lead to the imposition of forfeiture penalties and other sanctions for violations of 18 U.S.C. § 1464's prohibition against the broadcast of "obscene, indecent, or profane language."<sup>2</sup> The *Order* addressed complaints against petitioner NBC Universal's live broadcast of the annual "Golden Globe Awards" program, during which the performer Bono, who received an award, stated: "This is really, really fucking brilliant. Really, really great." The *Order* expressly abandoned aspects of the Commission's established policy governing enforcement of Section 1464 and established a new enforcement policy. Under the new policy, an isolated, fleeting use of the word "f\*\*\*" or "any of its variants" "in any context" -- even when used as an intensifier, without any intention on the part of the licensee, and potentially without regard to the social value of the speech at issue -- is both "indecent" and "profane" for purposes of Section 1464 and the subsequent imposition of forfeiture liability under 47 U.S.C. § 503(b). Petitioners own and operate licensed broadcast stations and own and manage broadcast networks. This new policy limits and inhibits their speech, imposes substantial costs upon them, and exposes them to serious potential liability as described below.<sup>3</sup>

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<sup>2</sup> On the same day, the Commission released three additional orders addressing aspects of the enforcement of its indecency policy. See *Infinity Radio License, Inc.*, Mem. Op. and Order, FCC 04-48 (rel. Mar. 18, 2004); *Infinity Broad. Operations, Inc.*, Notice of Apparent Liability for Forfeitures, FCC 04-49 (rel. Mar. 18, 2004); *Capstar TX Ltd. Partnership*, Notice of Apparent Liability for Forfeiture, FCC 04-36 (rel. Mar. 18, 2004). One (*Capstar TX Ltd. Partnership*) has been resolved by consent. To the extent the issues raised in this petition implicate those remaining orders, a ruling staying the *Order* may affect those additional orders as well.

<sup>3</sup> Further information and background material are set forth in Petition for Reconsideration of ACLU et al., *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globes Awards" Program*, File No. EB-03-1H-0110 (filed Apr. 19, 2004) ("*Multiparty Recon. Petition*"), and Petition for Partial Reconsideration of NBC, Inc., *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globes Awards" Program*, File No. EB-03-1H-0110 (filed Apr. 19, 2004) ("*NBC Partial Recon. Petition*").

The Commission should grant a stay of the *Order* because petitioners are likely to succeed on the merits while showing irreparable injury or, alternatively, present a serious question regarding the merits coupled with a showing that the balance of equities tips in their favor. As to the merits, the broadcast at issue was neither “indecent” nor “profane” under the plain meaning of Section 1464’s terms or under the tests that the Commission itself established to govern the interpretation of Section 1464. The Commission’s reasoning is internally contradictory, lacks record support, and impermissibly departs from the Commission’s own controlling rules. The scope of the speech encompassed by the new standard, and especially the open-ended, multiple definitions of “profane” language, is insufficiently sensitive to the First Amendment interests that compel a narrower construction of the statute.

For related reasons, the *Order* is unconstitutional. The *Order*’s standard is vague and thus fails to provide notice to broadcasters of what speech is proscribed or to cabin the Commission’s discretion as required by the First and Fifth Amendments. The standard is also overbroad, and regulates far too much protected speech in light of the asserted interest even under the less protective standard historically applied to broadcast speech. And the *Order* even more clearly fails the traditional First Amendment standards that should be applied to broadcast and non-broadcast speech alike.

Petitioners will suffer irreparable harm in the absence of a stay. The uncertainty created by the *Order* is “chilling” and has “chilled” petitioners’ speech, which is the archetype of irreparable harm. Although the Commission did not “envision that [the *Order*] will lead to licensees abandoning program material,” *Order* ¶ 11 n.30, there is ample evidence that the *Order* is having precisely that effect. In addition, petitioners are burdened by changes to production

practices, legal expenditures, and other costs imposed by the new policy announced in the *Order*. Those costs are irrecoverable.

The balance of equities also clearly favors a stay. In contrast to the harm petitioners will suffer in the absence of a stay, no third party will suffer appreciable harm if a stay is granted. This is especially so because the Commission's prior policy, which the Commission has deemed sufficient to protect the public interest for a quarter century, would remain in place. The public interest, and especially the interests of third parties, also favors the grant of a stay. The *Order* operates to burden and to chill the speech of a broad range of broadcasters, with commensurate harm to listeners and viewers whose own First Amendment interests are harmed by the *Order's* inhibition of broadcasters' speech.

#### ARGUMENT

The *Order* should be stayed if petitioners show (i) a likelihood of success on the merits together with a showing of irreparable injury or (ii) the existence of a "serious" legal question and a more "substantial" showing that the balance of equities favors petitioners. *See Washington Metro. Area Transit Comm'n*, 559 F.2d 841, 844 (D.C. Cir. 1977); *see also Order, Hickory Tech Corp. & Heartland Telecomms. Co.*, 13 FCC Rcd. 22,085, ¶ 3 & n.9 (1998) (no need to demonstrate likelihood of success on merits "if little harm will befall others if the stay is granted and denial of the stay would inflict serious harm"). Petitioners readily meet each alternative standard because they are likely to succeed on the merits and the equities clearly favor a stay.

## I. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS.

There is unquestionably a “serious” legal question underlying petitioners’ challenge to the *Order*, and the statutory, administrative and constitutional grounds for that challenge establish that petitioners are very likely to prevail in their challenge.

### A. The *Order* Misconstrues Section 1464 and Is Arbitrary and Capricious.

Each principal component of the *Order* misconstrues Section 1464 or constitutes arbitrary agency action.

First, the Commission itself construed the term “indecent” in Section 1464 as requiring a statement that “does depict or describe sexual activities,” yet the *Order* clearly misapplied even that definition. The Commission “recognize[d] NBC’s argument that the ‘F-Word’ here was used ‘as an intensifier’” and that the dictionary definition of the word includes an independent meaning of “‘really’” or “‘very,’” but the Commission nonetheless concluded that “given the core meaning of the ‘F-Word,’ *any use* of that word or a variation, in any context, inherently has a sexual connotation.” *Order* ¶ 8 & n.23 (emphasis added). This construction is plainly wrong. Once the Commission recognized, as it must, that certain meanings of the word are intensifiers and *distinct* from meanings that describe sexual activities, it has removed any basis for its conclusion that “any” use of the word or its variants inevitably depicts or describes sexual activity. It simply defies credulity to conclude that Bono’s reference to “fucking brilliant” denoted or connoted any sexual meaning.

Second, no record support or other rational basis exists for the Commission’s conclusion that “the phrase at issue here is patently offensive under contemporary community standards for the broadcast medium.” *Id.* ¶ 9. The Commission reasoned that use of the “‘F-Word’” “invariably invokes a coarse sexual image” and was “shocking and gratuitous.” *Id.* The conclusion that the term “invariably” invokes a sexual image is wrong and unsupportable for the

reasons just noted. More important, the Commission and its staff have consistently concluded for many years that isolated or fleeting uses of vulgar words, including “f\*\*\*,” are not indecent. There is no basis in the record to conclude that the “community standards” during the last decade have become less, rather than more, accepting of such use of language, and the *Order* points to none.

Third, the Commission’s own reasoning and conclusion do not comport with the factors that the Commission itself determined ought to control the proper interpretation of Section 1464. The *Order* reaffirmed that “the context in which the material appeared is critically important” and that an indecency determination under Section 1464 required consideration of three factors:

“(1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.”

*Order* ¶ 7 (emphasis removed). But the phrase “really, really fucking brilliant. This is really, really great” cannot rationally be characterized as meeting any of the three factors, and the Commission did not explain how it might do so. Nor could “every” or “any” use of the word “f\*\*\*” and its variants satisfy these factors.

Fourth, the Commission improperly construed the statutory term “profane.” The Commission used multiple standards to attempt to define the term, resulting in an open-ended and hopelessly meaningless construction. For example, the Commission erred in reasoning that “‘profanity’ is commonly defined as ‘vulgar, irreverent, or coarse language’” and that the word “f\*\*\*ing” is clearly the “vulgar and coarse” language that falls within Section 1464’s term

“profane.” *Order* ¶ 13.<sup>4</sup> “Profanity” is not, of course, the statutory term at issue, and the meaning of “profane” is tied closely to actions directed to the sacred or holy.

The Commission’s introduction of “profane” as a separate ground for regulating speech also improperly departed in an adjudicatory proceeding from its rules addressing enforcement of Section 1464. Those rules and their underlying orders equate the “[e]nforcement of 18 U.S.C. § 1464” with enforcement of “restrictions on the transmission of obscene and indecent material,” and the rules do not prohibit broadcasts of language that is profane but not indecent or obscene.<sup>5</sup> These rule-based constraints on the Commission’s enforcement powers are consistent with the Commission’s policy statement addressing enforcement of Section 1464, which does not address profanity independently of indecency, and with the Mass Media Bureau’s conclusion that “[p]rofanity that does not fall under one of the above two categories [indecency or obscenity] is fully protected by the First Amendment and cannot be regulated.”<sup>6</sup> It is black-letter law that an agency’s rules bind its determinations in subsequent adjudications and that an agency can change its rules only through a notice-and-comment rulemaking process.<sup>7</sup> The Commission’s departure from its rules in this adjudicatory proceeding independently renders the *Order* unlawful.

Finally, the Commission’s statutory construction ignored two factors that should have led it to a much narrower interpretation of Section 1464. Initially, the Commission acknowledged that it must “take into account the fact that such speech is protected under the First Amendment,”

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<sup>4</sup> The *Order*’s reliance on dicta in *Tallman v. United States*, 465 F.2d 282, 286 (7th Cir. 1972), is misplaced. *Tallman* itself limited its discussion to words without First Amendment protection, which clearly does not encompass the word “f\*\*\*” after *Cohen v. California*, 403 U.S. 15 (1971) (protection for display of words “Fuck the Draft”).

<sup>5</sup> 47 C.F.R. § 73.3999.

<sup>6</sup> See *Order* at Statement of Commissioner Abernathy (alteration in original) (describing Mass Media Bureau publications and policy); Policy Statement, *Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency*, 16 FCC Rcd. 7999 (2001) (“*Section 1464 Enforcement Policy Statement*”).

requiring “that, in such determinations, we [must] proceed cautiously and with appropriate restraint.” *Order* ¶ 5; see *Action for Children’s Television v. FCC*, 852 F.2d 1332, 1344 (D.C. Cir. 1988) (“*ACT F*”). Sensitivity to the constitutional concerns outlined below, however, would compel a narrow construction of Section 1464 that did not extend to isolated, unintentional uses of the word “f\*\*\*” or its variants, to their use as an intensifier, or to language that might be deemed “profane.” In addition, section 1464 is a criminal statute, which requires *scienter* for violation and implicates the rule of lenity.<sup>8</sup>

**B. The Order Violates the First and Fifth Amendments.**

The networks are also likely to prevail on their constitutional challenges to the *Order*.

The *Order* cannot survive scrutiny even if First Amendment standards that provide lesser protections for broadcast speech are applied. In *Pacifica*, the majority opinion expressly limited its holding and disavowed any approval of a regulation that might extend to “an occasional expletive.” *FCC v. Pacifica Found.*, 438 U.S. 726, 750 (1978) (plurality opinion); Memorandum Opinion and Order, *Application of WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1254 (¶ 10) (1978) (“the Commission’s opinion, as approved by the Court, relied in part on the repetitive occurrence of the ‘indecent’ words in question”). Rather, that opinion indicated that “context is all-important.” 438 U.S. at 750. Justices Powell and Blackmun concurred on the express understanding that “[t]he Commission’s holding, and certainly the Court’s holding today, does not speak to cases involving the isolated use of a potentially offensive word in the course of a

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<sup>7</sup> See, e.g., *United States v. Nixon*, 418 U.S. 683, 694-96 (1974); 1 K. Davis & R. Pierce, Jr., *Administrative Law Treatise* § 6.3 (3d ed. 1994).

<sup>8</sup> While the Court in *Pacifica* declined to evaluate the Commission’s construction of Section 1464 in light of the statute’s criminal nature, the Court has elsewhere held to the contrary, in addressing a parallel criminal statute, 18 U.S.C. § 1304, enforced by the Commission in forfeiture proceedings. See *FCC v. American Broad. Co.*, 347 U.S. 284, 296 (1954) (“There cannot be one construction for the Federal Communications Commission and another for the

radio broadcast, as distinguished from the verbal shock treatment administered by respondent here.” *Id.* at 760-61. And, of course, four other Justices would have barred the Commission from regulating even the extensive monologue, with repeated vulgarities, at issue in *Pacifica*.

Furthermore, the *Order*’s vagueness and overbreadth create additional constitutional infirmities that were not before the Court in *Pacifica* and that cannot be defended by reference to that decision. The policy announced in the *Order* exacerbates the uncertainty of the statute’s application. See *Reno v. ACLU*, 521 U.S. 844, 870-71 (1997); *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (constitutional infirmity if persons “of common intelligence must necessarily guess at its meaning and differ as to its application”). Specifically, the Commission’s decision expands the scope of Section 1464 in two fatal respects: liability may now attach to isolated broadcasts of words (or variations thereon) that the Commission finds offensive, and to language that falls within the Commission’s open-ended and yet-to-be developed definition of “profane.” What isolated instances of broadcast material may offend in this manner and what constitutes vulgarity or nuisance for purposes of the Commission’s interpretation of “profane” are entirely unclear, and have as a result resulted in substantial chilling of protected speech.<sup>9</sup> The *Order* thus neither provides notice to broadcasters nor constrains the Commission’s discretion as the First Amendment requires.

The Commission’s newly broadened Section 1464 enforcement policy is also not “the least restrictive means to further the articulated interest” achieved through “narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First

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Department of Justice. If we should give [the statute] the broad construction urged by the Commission, the same construction would likewise apply in criminal cases.”).

<sup>9</sup> See *Multiparty Recon. Petition* at 7-13, 17-21; Comments of Public Broadcasters on Petition for Reconsideration, *Complaints Against Various Broad. Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, File No. EB-03-1H-0110, at 3-7 (filed May 4, 2004) (“*Public Broadcasters’ Comments*”); *infra* Part II.A.

Amendment freedoms.” *Action for Children’s Television v. FCC*, 58 F.3d 654, 663-64 (D.C. Cir. 1995) (en banc) (“*ACT III*”) (quoting *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989)). Even if the Commission has a legitimate interest in regulating indecent language to prevent “the coarsening of impressionable minds that can result from a persistent exposure to sexually explicit material just this side of legal obscenity,” *id.* at 662; *see id.* at 660-62, this interest diminishes considerably as applied to isolated or fleeting uses of offensive language. The newly expansive definition reaches so broad a category of speech that it is not plausibly narrowly tailored to the Commission’s asserted interests, and for this reason does not serve the government’s interests “without unduly infringing on the adult population’s right to see and hear indecent material.” *Id.* at 665.

The Commission has also failed to create any record that establishes the degree to which, or whether, isolated uses of offensive or profane language may harm children, or the benefits that justify the *Order*’s restrictions on speech. “When the Government defends a regulation on speech as a means to ... prevent anticipated harms, it must do more than simply ‘posit the existence of the disease sought to be cured.’ It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 632, 664 (1994) (citation omitted). Here, the Commission has not shown that children must be protected from isolated broadcast vulgarities, that the magnitude of any harm outweighs the harm to adult viewers’ or listeners’ First Amendment interests in receiving broadcasts that will be inhibited by the *Order*, or, in light of the multitude of non-broadcast information sources, that expansion of its indecency regulation will materially reduce children’s exposure to even fleeting uses of offensive language.

In addition, the Commission's order is unconstitutional because its regulation of indecent speech violates traditional First Amendment standards.<sup>10</sup> While the Commission's *Order* is predicated on the applicability of a lesser First Amendment standard to broadcast speech, the basis for that assumption has disappeared as new media and information sources have expanded dramatically in the years since *Pacifica*. The growth of alternative sources of information has eliminated the basis for *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), and its progeny, which rested a lower level of First Amendment protection for broadcast speech on the uniquely important role of broadcast media in providing information to citizens. Now, as the Commission has recognized repeatedly, Americans secure their information and entertainment from a multitude of sources and distribution systems.<sup>11</sup> See *Reno v. ACLU*, 521 U.S. at 849-54 (surveying Internet-enabled communications).

The growth of new media also exposes an additional flaw in the Commission's order. The *Order* fails to explain why its policy is directed solely to broadcast licensees. The equal protection component of the Fifth Amendment bars the Commission from "singling out" a particular medium, *Turner Broad. Sys., Inc.*, 512 U.S. at 640-41, and places the burden on the Commission to explain why its policies have focused on imposing liability on broadcast licensees rather than considering less intrusive measures to reduce the prevalence of offensive speech on all television media.

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<sup>10</sup> Under any applicable First Amendment standard, the Commission separately would be precluded from regulating "profane" speech that is not otherwise properly subject to regulation as indecent or obscene language. Such speech addressing religious issues is often linked to valuable political and social commentary, and regulation of such speech is inconsistent with the Establishment Clause.

<sup>11</sup> See, e.g., Report and Order and Notice of Proposed Rulemaking, *2002 Biennial Regulatory Review- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996*, 18 FCC Rcd. 13620 (2003) ("*Cross-Ownership Order*"). Cable television, the Internet, satellite broadcasting, DVDs, and other

## II. THE BALANCE OF EQUITIES FAVORS THE GRANT OF A STAY

Even absent a finding that petitioners are likely to succeed on the merits, a stay of a new policy that presents serious legal issues is appropriate when denial of a stay would inflict serious, irreparable harm and little harm would befall others if the stay is granted.<sup>12</sup> A stay in these circumstances is warranted “even though [the Commissioner’s] own approach may be contrary to movant’s view of the merits.” *Washington Metro. Area Transit Comm’n*, 559 F.2d at 843. These equitable factors must be balanced in light of the particular circumstances at hand, and a stay may be warranted if the Commission finds that there is a particularly strong showing for at least one of the factors, even if it finds no support in relation to others. Memorandum Opinion and Order, *AT&T v. Ameritech Corp.*, 13 FCC Rcd. 14508, 14515-16 (¶ 14) (1998).<sup>13</sup> In this case, a stay is warranted because petitioners are suffering significant irreparable harm, no party would appreciably be harmed by the grant of a stay, and the stay would advance the public interest, particularly the First Amendment interests of viewers and listeners of broadcast material and of speakers other than petitioners.

### A. The Commission’s New Policy is Causing Petitioners Irreparable Harm.

A stay of the *Order* is warranted because petitioners are suffering severe irreparable injuries and will continue to suffer them. See *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (requiring a showing that serious irreparable harm “has occurred in the past and

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information sources have expanded rapidly since *Red Lion* and *Pacifica*, and most Americans receive even their network television broadcasts via cable television systems.

<sup>12</sup> See, e.g., *Hickory Tech Corp.*, 13 FCC Rcd. at ¶ 3 n.9; *Cuomo v. United States NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985) (per curiam); *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-34 (D.C. Cir. 1985) (per curiam); *Washington Metro. Area Transit Comm’n*, 559 F.2d at 843-44.

<sup>13</sup> See also Order, *Revisions to Broad. Auxiliary Serv. Rules in Part 74 & Conforming Technical Rules for Broad. Auxiliary Serv., Cable Television Relay Serv. & Fixed Servs. in Parts 74, 78 & 101 of the Commission’s Rules*, 18 FCC Rcd. 7032, 7033-34 (¶ 15)(2003); *Telephone Number*

is likely to occur again” or “that the harm is certain to occur in the near future”). Petitioners’ speech is being inhibited, which is a quintessential form of irreparable injury. It has long been settled that “‘the loss of First Amendment freedoms, for even minimal periods of time,’ may constitute irreparable injury.” *National Treasury Employees Union v. United States*, 927 F.2d 1253, 1254 (D.C. Cir. 1991) (alteration omitted) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).<sup>14</sup> Petitioners and other speakers have been deprived of the reasonable latitude afforded by the Commission’s prior indecency policy, related to isolated uses of offensive language. In these circumstances, “[f]acing the uncertainty generated by a less than precise definition of indecency *plus* the lack of a safe harbor for the broadcast of (possibly) indecent material, broadcasters surely would be more likely to avoid such programming altogether than would be the case were one area of uncertainty eliminated.” *ACT I*, 852 F.3d at 1342.

As prior filings in this proceeding have demonstrated at considerable length, the *Order* has inhibited protected speech in just this way.<sup>15</sup> Broadcasters have repeatedly chosen to edit televised content and curtail live broadcasts rather than risk potential FCC enforcement actions.<sup>16</sup> Radio stations have likewise scoured their playlists for songs – some of which have been played for years – and have dropped or edited potentially offensive songs.<sup>17</sup> Nor are only mainstream commercial broadcasts affected. A segment of “Antiques Roadshow,” for example, was subject

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*Portability*, FCC 03-298 (2003); Memorandum Opinion and Order, *Biennial Regulatory Review*, 14 FCC Rcd. 9305, 9307 & n.10 (¶ 4) (1999).

<sup>14</sup> See *Wolff v. Selective Serv. Local Bd. No. 16*, 372 F.2d 817, 824 (2d Cir. 1967) (“It has been held repeatedly that the mere threat of the imposition of unconstitutional sanctions will cause immediate and irreparable injury to the free exercise of rights as fragile and sensitive to suppression as the freedoms of speech and assembly and the right to vote.”) (citing *Baggett v. Bullitt*, 377 U.S. 360 (1964); *NAACP v. Button*, 371 U.S. 415 (1963); *Smith v. California*, 361 U.S. 147 (1959)).

<sup>15</sup> See, e.g., *Multiparty Recon. Petition* at 7-13, 17-21; *Public Broadcasters’ Comments* at 3-7.

<sup>16</sup> S. Brown, *Nipple Effect: The FCC Steps Into the Censorship Booby Trap*, *Entertainment Weekly*, Feb. 27, 2004, at 10; see *Multiparty Recon. Petition* at 19-20.

to review to address the display of a nude image of Marilyn Monroe, and PBS affiliates have dropped strong language from a Masterpiece Theatre series.<sup>18</sup>

Contrary to the Commission's prediction that "today's action will [not] lead to licensees abandoning program material solely over uncertainty surrounding whether the isolated use of a particular word is indecent," *Order* ¶ 11 n.30, there is ample evidence to the contrary. Broadcast licensees recently limited coverage of the eulogies delivered at the memorial service for former pro football player and war hero Pat Tillman.<sup>19</sup> Broadcasts of programs by prominent conservatives, including Rush Limbaugh and Sean Hannity, have been regularly "beeped" due to uncertainties regarding the scope of liability under the Commission's new policy.<sup>20</sup> And now that broadcasters have had ample time to assess the *Order*'s effect, they are broadly concluding that it has considerably limited protected speech. The chief executive of Emmis Communications has concluded that "there has been overcaution on the part of broadcasters today" because "[e]veryone is going to err on the side of caution. There is too much at stake. People are just not sure what the standards really are."<sup>21</sup> As public broadcasters recently concluded, "[f]or the first time, producers and broadcasters of public television programming have engaged in significant self-censorship out of fear of government penalty."<sup>22</sup>

In addition to limiting petitioners' and others' speech, the *Order* has caused irreparable harm by imposing other costs and burdens that cannot be recovered even if petitioners prevail in

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<sup>17</sup> M. Brown, *No Evil; Broadcast Words, Actions Stir Efforts to Clean Up 'Dirty' Airwaves*, Rocky Mountain News, March 27, 2004, at 1D; see also *Multiparty Recon. Petition* at 18-19.

<sup>18</sup> *Talk of the Nation; FCC: Chill Factor?* (NPR radio broadcast May 19, 2004); see *Public Broadcasters Comments* at 3-7. One educational station, KCRW(FM) even fired a reporter after the inadvertent broadcast of an expletive which the radio station had intended to "bleep." G. Brown, *KCRW Fires Loh Over Obscenity*, L.A. Times, Mar. 4, 2004, at B1.

<sup>19</sup> C. Baker, *CBS Stations Protest to FCC; Decency Rules Can Stifle News*, Wash. Times (May 6, 2004).

<sup>20</sup> J. Steinberg, *Eye on F.C.C., TV and Radio Watch Words*, N.Y. Times, May 10, 2004, at A1.

<sup>21</sup> *Id.*

this or subsequent proceedings.<sup>23</sup> Certain of petitioners have purchased or will purchase time-delay equipment, have hired additional broadcast standards personnel, and have incurred and will continue to incur costs related to training and implementing time-delay and additional editing processes in circumstances required only as a result of the *Order*.<sup>24</sup> Also as a result of the Commission's new enforcement policy, petitioners have incurred significant legal and operational costs, especially in providing formal responses to Letters of Inquiry from Commission staff that sometimes result in no enforcement action. Such inquiries and related proceedings have become much more common, requiring petitioners to incur hundreds of thousands of dollars of legal and other expenses.<sup>25</sup> In addition, under the Commission's heightened enforcement of its indecency rules, these Letters of Inquiry now contain detailed interrogatories and document requests that may include inquiries into the creation of content. Such intrusive inquiries into the creative process itself inherently chill speech, because content creators will have to be concerned about how the government will subsequently evaluate the drafting of a script or the direction of a series episode. More broadly, these inquiries illustrate the breadth of the Commission's new policy as well as the potentially open-ended burden that it

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<sup>22</sup> *Public Broadcasters' Comments* at 3.

<sup>23</sup> *Washington Metro. Area Transit Comm'n*, 559 F.2d at 843 n 2 (financial losses may be irreparable if unrecoverable); see also Order, *Dumont Tel. Co. & Universal Communications, Inc.*, 13 FCC Rcd. 17,363 (1998); Order Granting Motion for Partial Stay, *Florida Pub. Serv. Comm'n, Request for Interpretation of the Applicability of the Limit on Change in Interstate Allocation, Section 36.154(f) of the Commission's Rules.*, 11 FCC Rcd. 14324 (1996).

<sup>24</sup> *Compare Public Broadcasters' Comments* at 3 ("We have spent inordinate amounts of time scouring news, documentary and dramatic programming for words and visual elements that might be found to be 'indecent' in isolation, despite clear support in the context of the work, and for words that might be found to be 'profane.' We have been forced, at increased expense, to provide multiple nationwide feeds of programs that would have been unthinkable to edit only weeks ago.").

<sup>25</sup> Because Letters of Inquiry are not publicly released, the Commission itself is the best source of information concerning how many Letters of Inquiry have been sent to broadcasters since the beginning of 2004, and how this compares to the numbers sent during the first six months of 2003.

has placed on petitioners. While these burdens are not as significant as the inhibition of speech caused by the *Order*, they nonetheless constitute irreparable harm. And for smaller broadcasters, the costs and burdens of participating in Commission proceedings may be devastating, and the resulting burden on speech particularly severe.<sup>26</sup>

**B. Third Parties Would Suffer No Appreciable Harm from a Stay.**

Third parties would not be appreciably harmed if a stay is granted. Even if the Commission's new policy were stayed and eventually upheld in its entirety, the Commission's prior policy would remain in place in the interim. The Commission had deemed that policy adequate to protect the public against indecent broadcasts for more than a quarter century, and the grant of a stay would not limit the Commission's ability to employ that policy to enforce the pre-existing standard.

During the period of the stay, whatever harm to the public that arises from broadcasts of material that falls within the Commission's new policies addressing Section 1464 -- but not its old indecency policy -- is almost certain to be *de minimus*. No record evidence suggests that "profane" broadcasts, not already encompassed in the Commission's prior indecency policy, are common. Indeed, prior to the *Order*, the Commission has during the past decades apparently rested *no* enforcement actions solely on the "profane" nature of a broadcast. Nor is there any record support or other basis to believe that isolated and fleeting uses of offensive words are common or that, however common, they would cause harm.

Furthermore, the substantial uncertainty regarding the *Order*'s lawfulness further reduces the prospect that a stay would harm third parties. No legal cognizable harm can flow from the

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<sup>26</sup> See, e.g., Comments of CBS Television Network Affiliates Association on Petition for Reconsideration, at 2-3, File EB-03-IH-0110 (May 4, 2004); Comments of NBC Television Affiliates in Support of the Petition for Partial Reconsideration of the National Broadcasting Company, Inc., at 1-3, File No. EB-03-IH-0110 (May 5, 2004).

stay of invalid policy. Moreover, even if there is only a *substantial likelihood* that the new policy is statutorily unsupported or lacking in constitutional support, “no substantial harm to others can be said to inhere” in the stay of such a policy. *See Déjà Vu of Nashville, Inc. v. Metropolitan Gov’t of Nashville & Davidson County, Tenn.*, 274 F.3d 377, 400 (6th Cir. 2002), *cert. denied*, 535 U.S. 1073 (2002).

**C. A Stay Would Further the Public Interest.**

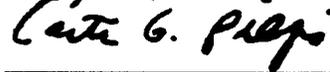
Additional public interest considerations also favor the grant of a stay. A stay would clearly advance the First Amendment interests of speakers other than petitioners and of listeners and viewers of broadcast material. *Compare CBS, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 122 (1973) (plurality opinion) (“the ‘public interest’ standard necessarily invites reference to First Amendment principles”). As explained at length in prior filings in this proceeding, the *Order* is having a chilling effect on the speech of a wide array of broadcasters, writers, performers, musicians, and other producers of materials protected by the First Amendment. For the reasons and in the respects outlined above in relation to petitioners’ activities, the *Order* is also imposing irrecoverable administrative, programming, and legal burdens and costs on petitioners and other broadcast licensees.

The public interest necessarily encompasses the interests of viewers and listeners of broadcast materials, and they, too, are harmed by the reduction of broadcast speech that results from the *Order*’s vagueness and overbreadth. Even a properly crafted restriction would infringe adult viewers’ First Amendment interest in viewing indecent material, *see ACT III*, 58 F.3d at 665, and a stay advances those constitutional interests even if the *Order* is eventually upheld. If the *Order* is invalidated, of course, the stay will have protected and advanced the First Amendment interests of the entire viewing public by ensuring that broadcasters and other speakers are not inhibited from producing materials entitled to First Amendment protection.

## CONCLUSION

For the foregoing reasons, the Commission should promptly grant a stay of the *Order* and thereby limit the implementation of its new enforcement policy announced therein until the conclusion of these proceedings and any subsequent proceedings seeking judicial review of the *Order* or other orders in this proceeding.

Respectfully submitted,



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June 18, 2004

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Joint Petition for a Stay was sent via first-class mail on this 18th day of June, 2004 to the following:

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**KARK-TV**

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**KATV**

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**KCEN-TV**

Channel 6, Inc.  
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Temple, TX 76503

**KCNC-TV**

CBS Television Stations, Inc.  
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Washington, DC 20006

**KCRA-TV**

KCRA Hearst-Argyle Television, Inc.  
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New York, NY 10106

**KETK-TV**

KETK Licensee L.P.  
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**KFDM-TV**

Freedom Broadcasting of Texas, Inc.  
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**KFOR-TV**

New York Times Management Services  
Corporation Center 1  
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**KGW**

King Broadcasting Company  
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**KHAS-TV**

Greater Nebraska Television, Inc.  
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Hastings, NE 69801

KING-TV  
King Broadcasting Company  
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KOB-TV  
KOB-TV, LLC  
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ATTN: L. Wefring  
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KPRC-TV  
Post-Newsweek Stations, Houston, LP  
8181 Southwest Freeway  
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KRIS-TV  
KVOA Communications, Inc.  
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KTGF  
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St. Paul, MN 55114

WOWT-TV  
Gray MidAmerica TV Licensee Corp.  
3501 Farnam Street  
Omaha, NE 68131

WGAL  
WGAL Hearst-Argyle Television, Inc.  
888 Seventh Avenue  
New York, NY 10106  
WHEC-TV  
WHEC-TV, LLC  
c/o Hubbard Broadcasting, Inc.  
3415 University Avenue  
St. Paul, MN 55114

WILX-TV  
Gray MidAmerica TV Licensee Corp.  
500 American Road  
Lansing, MI 48911  
WKYC-TV  
WKYC-TV, Inc.  
c/o Gannett Co.  
7950 Jones Branch Drive  
McLean, VA 22107

WMC-TV  
Raycom America, Inc.  
RSA Tower, 20<sup>th</sup> Floor  
201 Monroe Street  
Montgomery, AL 36104

WMGT  
Endurance Broadcasting, LLC  
c/o Dan Smith  
104 North Main Street  
Stillwater, MN 55082

WNDU-TV  
Michiana Telecasting Corp.  
P.O. Box 1616  
South Bend, IN 46634

WOOD-TV  
Wood License Company, LLC  
120 College Avenue, S.E.  
Grand Rapids, MI 49503

WPXI

WPXI-TV Holdings, Inc.  
3993 Howard Hughes Parkway  
#250  
Las Vegas, NV 89109

WRIC-TV

Young Broadcasting of Richmond, Inc.  
301 Arboretum Place  
Richmond, VA 23236

WSAZ-TV

Emmis Television License Corporation  
3500 West Olive Avenue  
#300  
Burbank, CA 91505

WSMV-TV

Meredith Corp., Television Stations  
1716 Locust Street  
Des Moines, IA 50309

WTMJ-TV

Journal Broadcast Corporation  
3355 S. Valley View Boulevard  
Las Vegas, NV 89102

WVLA

Knight Broadcasting of Baton Rouge Lic. Corp.  
700 St. John Street, #301  
Lafayette, LA 70501

WWLP

WWLP Broadcasting LLC  
4 Richmond Square  
Providence, RI 02906

WYFF

WYFF Hearst-Argyle Television, Inc.  
888 Seventh Avenue  
New York, NY 10106

WPMI

Clear Channel Broadcasting Licenses, Inc.  
2625 South Memorial Drive  
#A  
Tulsa, OK 74129

WRCB-TV

Sarkes Tarzian, Inc.  
205 North College Avenue  
Bloomington, IN 47402

WSAV-TV

Media General Communications, Inc.  
333 East Franklin Street  
Richmond, VA 23219

WSFA

Libco, Inc.  
639 Isbel Road  
#390  
Reno, NV 89509

WTHR

VideoIndiana, Inc.  
1000 North Meridian Street  
Indianapolis, IN 46204

WTVY

Gray MidAmerica TV License Corp.  
P.O. Box 1089  
Dothan, AL 36302

WWBT

Jefferson-Pilot Communications Co. of VA  
P.O. Box 12  
Richmond, VA 23218

WXIA-TV

Gannet Georgia, LP  
c/o Gannett Co., Inc.  
7950 Jones Branch Drive  
McLean, VA 22107

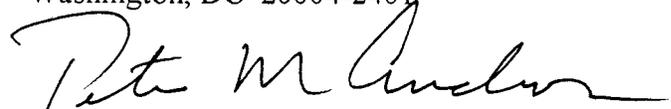
Brent Bozell  
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Washington, DC 20004-2401



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Peter M. Andros

**APPENDIX IV**

**LETTER FROM F. WILLIAM LEBEAU TO WILLIAM H. DAVENPORT RE: FCC  
FILE NO. EB-04-IH-0512 (FEB. 2, 2005)**



1299 Pennsylvania Avenue, N.W.  
11<sup>th</sup> Floor  
Washington, D.C. 20004  
Tel: (202) 637-4535  
Fax: (202) 637-4530

February 2, 2005

William H. Davenport  
Chief, Investigations and Hearings Division  
Enforcement Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 4-A462  
Washington, DC 20554

**Attn: David Brown, Assistant Chief, Investigations & Hearings Division**

**Re: NBC Telemundo License Co.  
Station WRC-TV, Washington, DC  
File No. EB-04-IH-0512**

Dear Chief Davenport:

NBC Telemundo License Co. ("NBC"), the licensee of Television Broadcast Station WRC-TV, Washington, DC (the "Station"), and the licensee or corporate parent of thirteen other NBC affiliated Stations (the "NBC Stations"), hereby responds to the Commission's correspondence dated January 3, 2005 (the "Request").<sup>1</sup> The Request seeks NBC's response to a complaint that alleges that the Station broadcast indecent or profane speech during the afternoon of October 3, 2004.

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<sup>1</sup> This response is timely filed pursuant to Commission Staff grant of an extension of time – until February 2, 2005 – for NBC to submit responses to the Request. NBC is commonly controlled with the NBC broadcast television network (the "NBC Network") and NBC Sports, which transmitted and produced the challenged programming.

## INTRODUCTION AND SUMMARY

Prior to a single instance last year, the Commission, heeding Supreme Court precedent, its own 2001 Policy Statement and sound judgment, had never asserted that a single word, and any of its variations in any context, is invariably indecent and profane, or that a broadcaster would be sanctioned for airing a live program based upon a single utterance. The “one word” standard for indecent and profane speech announced in *Golden Globes* was a sudden break from Commission precedent, ignored express constitutional warnings from the Supreme Court, and overrode the essential role of context in any regulation of objectionable speech.

The Commission now is investigating a single complaint – *out of nearly 18.2 million viewers* – that a live, post-race interview with NASCAR Nextel Cup driver Dale Earnhardt, Jr., violated federal law because of a single inadvertent word slip. The lone complaint did not note the context of the interview, which immediately followed a crucial race that Earnhardt won by mere tenths of a second, and did not acknowledge the immediate on-air apologies for the remark.

The Supreme Court’s decision in *FCC v. Pacifica Foundation* expressly rejected a flat ban against “the isolated use of a potentially offensive word” or a prohibition which ignored the context in which a word was spoken. Subsequent court decisions, and most of the Commission’s rulings, reaffirm that a case-by-case determination, considering all the circumstances surrounding a broadcast and the manner in which the language is used, is necessary to survive constitutional scrutiny and to ensure reasonable enforcement.

No Commission precedent has deemed a single use of the word "shit" to be so offensive as to be indecent or profane. Recent Commission rulings have in fact found that other words, which may be as or more objectionable to some viewers, are not indecent. Indeed, only a single viewer apparently complained about Earnhardt's unfortunate choice of word. These numbers alone belie the assertion that this language is patently offensive. The Commission's indecency policy, and NBC's ultimate liability for Earnhardt's inadvertent expletive, should not be determined based upon a single individual – out of nearly 18.2 million total viewers – who claims to be offended by the broadcast of this single word, especially when that word, in context, had no apparent sexual or excretory meaning.

Furthermore, while *Golden Globes* implied that networks should know that live programming may involve offensive language, the facts here prove otherwise. The incident during Earnhardt's post-game interview was unprecedented: the NBC Network alone has aired more than 180 hours of NASCAR Nextel Cup coverage since 2000 without a similar slip. NBC immediately apologized on air following the interview, and Earnhardt also apologized for his error.

NBC does not condone a speaker saying "shit" on broadcast television. Rather, NBC strives to avoid such language on any NBC program through both its own broadcast standards personnel and by working with sports leagues and other participants in live programming to ensure compliance with these standards. NBC is certainly not seeking permission or the right to air this word or any variant on its programs. Indeed, NBC immediately apologized for Earnhardt's remark, vehemently rejecting any notion that this was acceptable. In NBC's view, the important issue raised

here is not whether a particular word should be broadcast, but whether the Commission can ignore context and circumstances in determining whether language is indecent or profane, contrary to Supreme Court rulings and the Commission's own precedent.

Even if the Commission does not reverse *Golden Globes* in response to the pending petitions for reconsideration, that ruling should not be extended to words other than the "f-word." Nor should that ruling be extended to live sports or other on-the-spot live broadcasts, including local and national news. The chilling and boundless ramifications for live, breaking broadcast coverage that will result from any extension of *Golden Globes* to this case compel dismissal.

#### **BACKGROUND**

The race would come down to the final tenths of a second. The EA Sports 500, held at the Talladega SuperSpeedway in Talladega, Alabama, on October 3, 2004, was a critical event in the 2004 Nextel Cup competition. Winning the Nextel Cup is NASCAR's single most prestigious annual honor, and depends on each team's finishes in multiple events.

In 2004, the EA Sports 500 was even more critical than in years past. NASCAR recently had introduced a new method for determining the sport's champion to ensure that the year's final events were decisive. Under the new Nextel Cup system, the season's last 10 events, including the EA Sports 500 at Talladega, served as a sort of playoff for the year's top finishers.

As the 2004 season entered its final two months, the Cup championship was proving to be among the closest in history.<sup>2</sup> Dale Earnhardt, Jr., Kurt Busch, Mark Martin, Jimmie Johnson and Jeff Gordon were battling for the crown with just a few events left. Other than Gordon, none of the five had won the championship before.

Of the five, Earnhardt carried a unique burden. His father, Dale Earnhardt, Sr., was a NASCAR legend: "Earnhardt [Senior] was no ordinary driver. He was Winston Cup's version of Michael Jordan, winning seven points championships and 76 races."<sup>3</sup> But his storied career was tragically cut short just three years earlier in a fatal racing accident that had saddened fans across the nation. For Earnhardt, the EA Sports 500 was critical to following his father's footsteps and winning his first points championship.

Earnhardt entered the race trailing both four-time points champion Jeff Gordon and Kurt Busch in the Nextel Cup standings. Earnhardt needed a win. Fortunately, the Talladega SuperSpeedway had been one of his more successful NASCAR venues; at one point he had won four straight races at the site.<sup>4</sup>

Earnhardt led the pack early in the race. However, a prolonged pit stop late in the race dropped Earnhardt back into eleventh place. Earnhardt did not give up. With just four laps to go, Earnhardt began to recover the lost ground. As described by one account, "Earnhardt's red No. 8 Chevrolet shot forward, moving up and down the

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<sup>2</sup> Associated Press, "5 Drivers Have Just One Goal in Mind", WASHINGTON POST at E06 (Nov. 14, 2004) (last viewed on January 30, 2005).

<sup>3</sup> See <http://www.nascar.com/2002/kyn/families/02/01/earnhardts/> (last viewed Jan. 31, 2005). The Winston Cup was a predecessor of the Nextel Cup series.

<sup>4</sup> See <http://sportsillustrated.cnn.com/2004/racing/10/03/bc.car.nascar.talladega.ap> (last viewed Jan, 30, 2005).

steeply banked track, passing cars on the outside and inside seemingly at will before finally moving past Kevin Harvick for the lead” with just two laps to go.<sup>5</sup> The two continued to battle for the final laps, with Earnhardt, clinching the split-second win by just two car lengths. The final margin of victory was 0.117 seconds.<sup>6</sup>

The win catapulted Earnhardt to the lead in the Nextel Cup competition. The win also was Earnhardt’s fifth at Talladega – second only to his father. Within seconds of Earnhardt’s triumphant emergence from his car, NBC Sports, which had broadcast the race live in all U.S. time zones over the NBC Network, sought to capture the significance of the victory to “Junior.” In the emotion of the moment, Earnhardt responded exuberantly: “It don’t mean shit right now. Daddy’s done won here ten times. So, I gotta do a little more, do more winning. But we’re sorry to get there. He was the master, and I’m just following his tracks.”

Upon cutting back to the studio from the interview, NBC announcer Bill Weber apologized immediately for Earnhardt’s unfortunate “enthusiastic language,” an apology that was noted in many press reports relating to the event. NASCAR also took prompt action. Following a policy adopted earlier in the year, NASCAR deducted 25 points from Earnhardt’s Nextel Cup point totals, which dropped him from being in the overall lead at the time to trailing Kurt Busch (the ultimate winner of the 2004 Nextel Cup). Earnhardt also was fined. This penalty caused much consternation among NASCAR fans, but was intended to minimize the likelihood of future potential issues. Indeed, a

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<sup>5</sup> See *id.*

<sup>6</sup> See *id.*

later live interview between NBC Sports with Earnhardt after a subsequent race proceeded without incident.<sup>7</sup>

Later that week, NBC took further difficult steps to limit future issues, including incorporating a five-second delay on NASCAR coverage for the remainder of the season. This very difficult decision to institute a delay necessarily complicates coverage throughout and following the race and is contrary to NBC's efforts to deliver live coverage of sports whenever possible, as the American public clearly prefers. As an experimental matter, however, NBC was willing to impose a five-second delay for its NASCAR coverage, even though the ambient noise present in NASCAR coverage – from the roar of the crowd to the hectic nature of the pits – means that there is no way to ensure that NBC coverage will be free of any single word that might result in a complaint. Since NASCAR itself has taken a proactive stand against such language, NASCAR did not challenge NBC's decision to introduce this brief delay in its coverage for the remainder of the 2004 NASCAR season.

Following the event, and despite the well-publicized nature of the incident, the public did not demonstrate notable concern regarding the clearly unintentional slip. According to Nielsen data, nearly 18.2 million total viewers nationwide saw all or part of the relevant telecast.<sup>8</sup> Of these 18.2 million total viewers, apparently only a single person in the entire country – Brent Bozell, founder of an advocacy group on this issue –

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<sup>7</sup> See [http://www.nascar.com/2004/news/headlines/cup/11/07/dearnhardtjr\\_victory](http://www.nascar.com/2004/news/headlines/cup/11/07/dearnhardtjr_victory) (last viewed on January 31, 2005).

<sup>8</sup> See Declaration of Alan Wurtzel (attached as Exhibit A).

complained in a manner that merited further investigation.<sup>9</sup> The Complaint does not state whether Bozell even watched the relevant program, but asserts, without support, that “millions of children” were in the audience. The Complaint barely noted the context of Earnhardt’s remarks and completely ignored NBC announcer Bill Weber’s immediate apology to viewers for Earnhardt’s “enthusiastic language.” Even though the Complaint was filed nearly two weeks after the relevant broadcast, the Complaint failed to note that Earnhardt’s language already had caused NASCAR to deduct 25 critical points from Earnhardt’s Nextel Cup effort and to fine Earnhardt, and that NBC was considering an experimental 5-second delay with respect to future live NASCAR coverage.

This incident was unprecedented. During the past four years, the NBC Network has aired approximately 183 hours of NASCAR coverage, an average of more than 45 hours per year.<sup>10</sup> In 2004 alone, NBC aired nearly 50 hours of NASCAR coverage. Apart from the challenged interview, NBC is not aware of any instance in all this coverage in which any variant of the word uttered by Earnhardt or other similar language was uttered audibly on air. Similarly, NBC is not aware of any other incident

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<sup>9</sup> Notably, the Complaint does not assert that Bozell actually watched the relevant programming. Press reports following the event suggested that a “couple of dozen” of persons complained to the Commission. See Liz Clarke and Dan Steinberg, “The New Language of NASCAR,” WASHINGTON POST at A01 (Oct. 6, 2004) (noting that many decry NASCAR’s new language policy as distancing NASCAR from its roots). As the FCC has failed to forward these complaints to NBC, however, NBC must assume that these complaints do not offer an independent basis for the Commission’s further investigation in this proceeding. Otherwise, NBC should, as a matter of due process, presume that it would have the opportunity to respond to all such complaints prior to any formal Commission action or proposal.

<sup>10</sup> See *id.*

involving a Nextel Cup Series driver using such language while on air on any broadcast station in recent years.<sup>11</sup>

***I. No Existing Commission Standard or Precedent Deems Earnhardt's Isolated Utterance To Be Indecent or Profane***

The sole basis for the Complaint is Earnhardt's slip in saying "shit." In all Commission precedent, including *Golden Globes*,<sup>12</sup> the only single word deemed able to transform a live broadcast into an indecent or profane live broadcast (independent of clear and unmistakable intent to pander or titillate based on the word's context) has been the "f-word" and its variants. Earnhardt did not use any form of that word. His use of "shit" did not mean to titillate, but was a visceral response in the heat of the moment. His live postgame interview thus cannot be found indecent under the Commission's own rules and policies.

Under those policies, a broadcast is not indecent unless the challenged material:<sup>13</sup>

- "describe[s] or depict[s] sexual or excretory organs or activities"; and
- is "*patently offensive* as measured by contemporary community standards for the broadcast medium."

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<sup>11</sup> Early in 2004, two Busch Series drivers – which is a different NASCAR circuit than the Nextel Cup circuit covered by NBC – each used a similar word to Earnhardt's during separate radio broadcasts. NBC is not aware of any Commission action against either radio broadcast.

<sup>12</sup> *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globes Awards" Program*, 18 FCC Rcd 19859 (Enf. Bur. 2003), *rev'd*, Memorandum Opinion and Order, FCC 04-43 (¶ 15) (March 18, 2004), *recon. pending* (the "*Golden Globes Order*" or "*Golden Globes*").

<sup>13</sup> See *Indecency Policy Statement*, 16 FCC Rcd at 8002 (2001) (emphasis in original).

The Commission recently reiterated that speech will not be deemed indecent unless it meets each of these independent and separate criteria.<sup>14</sup> Only that material which satisfies both prongs of the Commission's own tests qualifies as indecent.<sup>15</sup>

Earnhardt's inadvertent slip satisfies neither standard. First, there is no evidence that the word used by Earnhardt, in context, intended anything sexual or excretory. The phrase "don't mean shit" is a slang idiom indicating the worthlessness of the matter referenced; it has nothing to do with excretory activities. Indeed, Bureau precedent – which was not addressed by *Golden Globes* -- has held that the repeated use of variants of a similar word ("piss") during a live broadcast not to be indecent when the term was not used in an excretory sense.<sup>16</sup> Just last week, the Commission confirmed that a single use of the word "piss" does not cause even a prerecorded broadcast to become indecent.<sup>17</sup>

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<sup>14</sup> See *Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, Memorandum Opinion and Order, FCC 04-279 (released January 24, 2005) ("*January 25 Denial Order I*") (denying complaints against 21 programs); *Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, Memorandum Opinion and Order, FCC 04-280 (released January 24, 2005) ("*January 25 Denial Order II*") (denying complaints against 15 programs).

<sup>15</sup> See *Indecency Policy Statement*, 16 FCC Rcd at 8002 (2001) (emphasis in original).

<sup>16</sup> *Entrecom Buffalo License, LLC (WGR(AM))*, 17 FCC Rcd 11997, 11999-12000 (EB 2002) ("*WGR*") (finding use of term "pissed on" to mean something other than excretory activity in context of relevant material). "Piss," like "shit," was one of the original "Filthy Words" highlighted in Carlin's monologue addressed in *Pacifica*. Also notable is that *Entrecom* apparently did not involve just a single use of the relevant word.

<sup>17</sup> See *January 25 Denial Order I* at ¶6(e). One Commission precedent has found a broadcast to be indecent because of a single use of the word "shit," but only because of

As to “patent offensiveness,” the Commission has stated that the “full context in which the material appeared is critically important.”<sup>18</sup> Three “principal factors” are to be considered (1) the explicitness or graphic nature of the description of sexual or excretory organs or activities; (2) whether descriptions of sexual or excretory organs or activities are dwelled upon or repeated at length; and (3) whether the material is used to pander, titillate or for shock value.

Earnhardt’s slip of the tongue is not patently offensive under any of the three standards. First, Earnhardt’s use of the word was not graphic – it had no excretory meaning at all. Second, the word was used once and not repeated. Third, the word was not intended to pander – it was a visceral and elated response by a man who had just won a race by a tenth of a second to claim first place in the NASCAR Nextel championship. The Commission has found any number of other comparable words not to be indecent, including similarly “fleeting uses” of the words dick, hell, damn, ass, bastard, bitch, pissed, crap, penis, testicle, vaginal, orgasm, breast or nipples.<sup>19</sup>

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the context of the word, which clearly intended to titillate and pander as the punchline of a joke as to what words referring to excrement can be said on the radio. *See Liability of L.M. Communications of South Carolina*, Memorandum Opinion and Order, 1998 WL 312534 (MMB, June 16, 1998). This decision, which predates *Golden Globes* by several years, just underscores that the Commission, in the appropriate context, has been able to sanction uses of the challenged term. However, the Commission should not sanction such terms when clearly fleeting and isolated, and without excretory meaning, during a live broadcast.

<sup>18</sup> See *January 25 Indecency Denial Order I* at ¶ 5.

<sup>19</sup> See *January 25 Indecency Denial Order I & II*. See also *Entrecom Buffalo License, LLC (WGR(AM))*, 17 FCC Rcd 11997, 11999-12000 (EB 2002) (“WGR”) (finding use of term “pissed on” to mean something other than excretory activity in context of relevant material).

Earnhardt's interview also is not profane. Even under the *Golden Globes* standard, the use of the word "shit," in the relevant context, was not so highly offensive as to be deemed actionably profane. The word most similar to "shit" – "piss" – already has been deemed not actionable when used in any sense other than to refer specifically and clearly to excrement. Here, Earnhardt's impassioned statement included the word as part an expression meaning worthless or immaterial, and was not used in any context that would equate the word to any sort of excretory activity.

At a very minimum, no station can be sanctioned for its transmission of the NBC live broadcast. Even in *Golden Globes*, the Commission recognized that constitutional and statutory due process requirements have long precluded any sanction against any station based on any new Commission pronouncement regarding the standards for indecent or profane utterances.<sup>20</sup> Otherwise, the Commission's indecency enforcement would be hopelessly and unconstitutionally vague.

At the time of broadcast, neither *Golden Globes* nor any other Commission precedent has changed decades of Commission precedent and declared the challenged word to be actionably indecent or profane independent of context. *Golden Globes*

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<sup>20</sup> See *Golden Globes* at ¶ 15 (citing *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618 (D.C. Cir. 2000, where court reversed Commission decision that denied a renewal application for abuse of process in connection with the Commission's minority ownership rules because the court found the Commission had not provided sufficiently clear notice of what those rules required). *Golden Globes* added that "given that existing precedent would have permitted this broadcast, we will not require any of the stations that broadcast the program to report our finding here to us as part of its renewal application and we will not consider the broadcast of this program adversely to such licensees as part of the renewal process." *Id.* See also *Infinity Broadcasting Corp.*, 3 FCC Rcd 930, *aff'd in part, vacated in part, remanded sub nom ACT I*, 852 F.2d 1332 (D.C. Cir. 1988) (subsequent history omitted) (refusing to sanction broadcasters because indecency finding resulted from changed Commission policy).

merely indicated that certain words other than the one used in that case may likewise be deemed *per se* indecent or profane, but expressly refused to define other such words. Just as the Commission did not find the *Golden Globes* matter actionable because the decision was a clear break from precedent without prior notice, the Commission cannot find the Earnhardt interview actionable based on the isolated use of a completely different word, which, at the time of broadcast, had not been placed in the *Golden Globes* category of *per se* indecent or profane words.

**II. *Because of the Dangers Golden Globes Poses to All Live Broadcasts, Golden Globes Should Be Reversed***

A. *Golden Globes*

*Golden Globes* has not been and should not be interpreted to apply to the word used by Earnhardt. However, *Golden Globes* may have been viewed as laying the groundwork for the Commission to add Earnhardt's momentary slip to the class of words that are *per se* actionable. In order to preclude future complaints based on an isolated and fleeting utterance in the live context presented by this case, and to limit federal government intervention in the content of live broadcasts, *Golden Globes* should be reversed.

*Golden Globes* addressed complaints against petitioner NBC Universal's live broadcast of an annual "Golden Globe Awards" program during which the performer Bono, who received an award, stated: "This is really, really fucking brilliant. Really, really great."<sup>21</sup> The *Order* expressly abandoned aspects of the Commission's

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<sup>21</sup> *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globes Awards" Program*, 18 FCC Rcd 19859 (Enf. Bur. 2003), rev'd,

established policy governing enforcement of Section 1464 and established a new enforcement policy. Long-standing Commission precedent consistently held that isolated and fleeting uses of any particular word in broadcasts were not indecent and that the context in which the word was used must be taken into account.<sup>22</sup> Under the new policy, an isolated, fleeting use of the f-word or “any of its variants” and “in any context” – even when used as an intensifier, without any intention on the part of the licensee, and potentially without regard to the social value of the speech at issue – is both “indecent” and “profane” for purposes of Section 1464 and the subsequent imposition of forfeiture liability under 47 U.S.C. § 503(b). *Golden Globes* appeared to have adopted an unprecedented *per se* rule that disregards each and every aspect of the broadcast, including even its impact on the viewers, and myopically focuses solely on a single word.

*Golden Globes* effectively eliminated the two separate determinations that had been necessary to any indecency analysis, as it concluded that certain words would be

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Memorandum Opinion and Order, FCC 04-43 (¶ 15) (March 18, 2004), *recon. pending* (the “*Golden Globes Order*” or “*Golden Globes*”).

<sup>22</sup> See *Industry Guidance On the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999, 8002, 8009, (2001) (“*Indecency Policy Statement*”), and cases cited therein; See, e.g., *Peter Branton*, 6 FCC Rcd 610 (1991) (refusing to find indecent repeated use of the f-word in a broadcast of an interview with organized crime figure John Gotti); *cf. WUHY-FM*, 24 F.C.C.2d 408 (1970) (distinguishing coverage of bona fide news events from expletive-laced interview with Grateful Dead lead guitarist Jerry Garcia), *on recon.*, 59 F.C.C.2d 892, 893 (1976) (“...RTNDA’s Petition calls to our attention the fact that ‘in some cases, public events likely to produce offensive speech are covered live, and there is not opportunity for journalistic editing.’ Under these circumstances we believe that it would be inequitable for us to hold a licensee responsible for indecent language”).

deemed inherently sexual *and* inherently patently offensive. It ignored the judicial axiom that “indecent” and “profane” must have separate meanings, and so expanded the definition of profane -- to include all highly offensive speech -- as to make any indecent utterance profane as well.

NBC Universal, as well as Fox Entertainment Group, Viacom and other parties, urged the Commission to reconsider the *Golden Globes Order*, arguing that the ruling was unconstitutional, violated the Commission’s statutory mandate and was poor policy. Those petitions have been pending since April 2004. In June 2004, NBC Universal, Fox Entertainment Group and Viacom jointly petitioned the Commission for a stay of the *Golden Globes Order*. The Commission has not ruled on that request.

B. Supreme Court Precedent Prohibits A Flat Ban Against Fleeting or Isolated Use of A Word Without Context or Circumstances

In *FCC v. Pacifica Foundation*,<sup>23</sup> the Supreme Court stressed the importance of context when it upheld the authority of the FCC to regulate the broadcast of “patently offensive words dealing with sex and excretion.” In the agency ruling on appeal, the Commission had concluded that the broadcast of George Carlin’s “Filthy Words” monologue included several words that referred to excretory or sexual activities or organs (including “piss” and “shit”); that the repetitive, deliberate use of those words in an afternoon broadcast when children were in the audience was patently offensive and therefore indecent within the meaning of 18 U.S.C. § 1464. The Court agreed that the broadcast was indecent. The Court also recognized, however, that “[a]lthough these words ordinarily lack literary, political, or scientific value, they are not entirely outside the

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<sup>23</sup> 438 U.S. 726 (1978).

protection of the First Amendment. Some uses of even the most offensive words are unquestionably protected....Indeed, we may assume arguendo that this monologue would be protected in other contexts." The Court emphasized "the narrowness of our holding" and made clear it was not addressing whether "an occasional expletive" would justify a sanction.<sup>24</sup>

Justice Powell, who provided the crucial fifth vote for *Pacifica's* slim majority, buttressed this limitation on the Commission's authority:<sup>25</sup>

The Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast . . . .

Since *Pacifica*, the Supreme Court has further narrowed what might constitute constitutional restrictions on media speech. Less than a decade ago, the Court struck down indecency regulation of cable television leased and public access channels, although these channels were found to be as "'accessible to children' as over the air broadcasting, if not more so."<sup>26</sup> Other Supreme Court decisions, including those

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<sup>24</sup> See *id.* at 750.

<sup>25</sup> *Id.* at 760-61 (Powell and Blackmun, JJ., concurring in part, and concurring in judgment).

<sup>26</sup> *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 717, 744 (1996). The Court concluded that the ability of parents to block particular channels on a household by household basis – even though more difficult to do than the V-chip now required on all television sets thirteen inches or larger that were manufactured since January 1, 2000, and which applies to all rated broadcast programming on a program by program basis -- was a more narrowly tailored alternative than government censorship.

relating to the regulation of indecent content on the Internet, likewise have questioned the logic underlying any indecency standard.<sup>27</sup>

C. Section 1464 Does Not Authorize A Flat Ban Against Isolated Use of a Word Without Considering Context or Circumstances

In addition to constitutional constraints, the Commission cannot exceed its statutory mandate and authority. As construed by the Commission, and as approved by the courts, Section 1464 requires at least two separate “fundamental determinations to support a finding of indecency:”<sup>28</sup>

- the material alleged to be indecent “must describe or depict sexual or excretory organs or activities”; and
- the material “must be *patently offensive* as measured by contemporary community standards for the broadcast medium.”

The Commission recently reiterated that speech will not be deemed indecent unless it meets each of these independent and separate criteria.<sup>29</sup> Only that material which satisfies both prongs of the Commission’s own tests qualifies as indecent.<sup>30</sup>

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<sup>27</sup> See, e.g., *Reno v. ACLU*, 521 U.S. 844, 871-81 (1997).

<sup>28</sup> See *Indecency Policy Statement*, 16 FCC Rcd at 8002 (2001) (emphasis in original).

<sup>29</sup> See *Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, Memorandum Opinion and Order, FCC 04-279 (released January 24, 2005) (“*January 25 Denial Order I*”) (denying complaints against 21 programs); *Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, Memorandum Opinion and Order, FCC 04-280 (released January 24, 2005) (“*January 25 Denial Order II*”) (denying complaints against 15 programs).

<sup>30</sup> See *Indecency Policy Statement*, 16 FCC Rcd at 8002 (2001) (emphasis in original).

In determining whether speech is “patently offensive,” the Commission also just reiterated that the “full context in which the material appeared is critically important.”<sup>31</sup> Three “principal factors” are to be considered (1) the explicitness or graphic nature of the description of sexual or excretory organs or activities; (2) whether descriptions of sexual or excretory organs or activities are dwelled upon or repeated at length; and (3) whether the material is used to pander, titillate or for shock value.

*Golden Globes* misapplied the Commission's own standards. The Commission “recognize[d] NBC's argument that the ‘F-Word’ here was used ‘as an intensifier’” and that the dictionary definition of the word includes an independent meaning of “‘really’” or “‘very,’” but the Commission nonetheless concluded that “given the core meaning of the ‘F-Word,’ any use of that word or a variation, in any context, inherently has a sexual connotation.”<sup>32</sup> This construction is plainly wrong. Once the Commission recognized, as it must, that certain meanings of the word are intensifiers and *distinct* from meanings that describe sexual activities, it has removed any basis for its conclusion that “any” use of the word or its variants inevitably depicts or describes sexual activity.

*Golden Globes* also improperly construed the statutory term “profane,” reasoning that “‘profanity’ is commonly defined as ‘vulgar, irreverent, or coarse language’” and that the f-word word is clearly the “vulgar and coarse” language that falls with Section 1464's term.<sup>33</sup> Even though the Commission acknowledged that its prior precedent has

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<sup>31</sup> See *January 25 Indecency Denial Order I* at ¶ 5.

<sup>32</sup> *Order* ¶ 8 & n.23 (emphasis added).

<sup>33</sup> The *Order* does not explain why it substituted a definition for “profanity” in lieu of a definition of “profane,” which is the actual statutory term, but this substitution may

focused on “blasphemy,” the agency nevertheless found as an “independent ground” for its ruling that Bono’s expletive constituted “profane” language under 14 U.S.C § 1464. Prior to the Commission ruling, no party, including the Media Bureau, even suggested, that the language in question was profane. Nor has the Commission ever suggested, in the many cases in which the Commission found similar language not indecent, that such incidents were separately actionable as profane.<sup>34</sup> Nevertheless, citing the Seventh Circuit’s “most recent” decision, which was rendered over three decades ago in a case dealing with a criminal conviction for obscenity,<sup>35</sup> and several years prior to the Supreme Court’s order in *Pacifica* that made no mention of any “profane” utterance in the entire “Filthy Words” monologue that featured the f-word repeatedly, the Commission ruled that, in addition to blasphemy or divine imprecation, “profane” will now encompass the f-word and its variants.

The Commission also impermissibly collapsed the distinct meanings of “obscene, indecent, or profane” in Section 1464, thereby exacerbating the vagueness of the new standard for profane material. The Supreme Court in *Pacifica* stated that “the words” ‘obscene, indecent, or profane’ are written in the disjunctive, implying that each has a

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have contributed to the *Order’s* incorrect reasoning. Just as an obscenity is not necessarily legally obscene, a profanity should not be assumed to be legally profane.

<sup>34</sup> See, e.g., *Lincoln Deller, Renewal of License for Stations KPRL(AM) and KDDB(FM)*, 8 FCC Rcd 2582, 2585 (MMB 1993) (holding that news announcer’s live statement that he “fucked that one up” was not indecent). See also *Golden Globes* at n. 32 (listing several cases in which the “fleeting or isolated use of the ‘F-Word’ or a variation thereof” had been deemed not indecent without mention that they also, implicitly or otherwise, did not find the word to be profane).

<sup>35</sup> *Tallman v. United States*, 465 F.2d 282 (7<sup>th</sup> Cir. 1972).

separate meaning.”<sup>36</sup> The Commission’s new definition of profane contravenes the Supreme Court’s ruling and creates an open-ended and standardless prohibition under which any word may be deemed sanctionable.

*Golden Globes* violates the limitations imposed by both the Constitution and Section 1464 on the Commission’s authority to regulate indecent and profane speech. The Order should be reversed or modified on reconsideration. Regardless, the Order should not be extended beyond its facts or applied to the even more benign facts present in this case: an unintentional and completely unexpected use of a word that was not addressed by *Golden Globes* or subsequent Commission precedent by an emotional and excited race car driver within seconds of his win in a major Nextel Cup race, an event which has never before been marred by offensive language (indeed, in which drivers faced significant penalties for such language), that was followed by an immediate on-air and other apologies and that provoked only a single Complaint to the Commission.

**III. The Golden Globes Per Se Violation Rule Should Not Be Applied Here**

Golden Globes was premised on several erroneous assumptions and assertions, including that the f-word is always patently or highly offensive, that the f-word always has a sexual connotation, that broadcasters should know that any live programming might include offensive language and that offensive language is easily avoided through use of technology to delay the broadcast and bleep the word. None of these assumptions likewise apply with regard to Earnhardt’s use of “shit” here.

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<sup>36</sup> 483 U.S. at 739-40.

A. An Inadvertent Slip During Live Programming Is Not Always Patently or Highly Offensive

The Commission's test for indecent or profane language is whether material is "patently offensive as measured by contemporary community standards" (indecent) or "highly offensive" (profane).<sup>37</sup> With the advent of email and other communication advances, as well as campaigns launched by single interest groups, people now can and do easily complain to the Commission. In 2004, more than one million complaints about purportedly indecent or profane broadcast programming were submitted to the Commission, as compared to fewer than 400 in 2001.<sup>38</sup>

Out of the 18-million plus total viewers that tuned into all or some of the relevant telecast, only a single person apparently complained to the Commission. Speech simply cannot be deemed patently offensive as measure by contemporary community standards, or highly offensive, when less than one of more than 18 million viewers complain. The sheer numbers refute that determination. If "patently offensive" and "contemporary community standards" have any legitimate meaning at all, they cannot mean speech that provokes a complaint from a single individual out of more than 18

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<sup>37</sup> See *Golden Globes Order* at ¶¶ 9, 14. The *Golden Globes Order* based what is a new (for the Commission) definition of profane on a 1972 Seventh Circuit decision, which predated the Supreme Court's decision in *Pacifica*, the Indecency Policy Statement and many other Commission decisions to the contrary. See *Tallman v. United States*, 465 F.2d 282 (7<sup>th</sup> Cir. 1972). According to the Seventh Circuit in 1972, profanity is "construable 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." *Id.* at 286.

<sup>38</sup> See <http://www.fcc.gov/eb/broadcast/ichart.pdf>.

million (especially when the complainant does not even allege that he had watched the relevant coverage).

The lack of any public reaction -- much less outrage -- to this event establishes that under the *Golden Globes* standards for an indecent utterance -- "patently offensive" -- or a profane utterance -- "highly offensive" -- the Earnhardt interview was neither indecent nor profane. Not even *Golden Globes* suggested that every use of a variant of "shit" is not *per se* offensive in a manner that justifies Commission sanction.

Moreover, NBC's immediate response undoubtedly limited any initial concern. As noted above, NBC issued an immediate on-air statement of regret for Earnhardt's language. Earnhardt himself subsequently regretted the mistake, and both NASCAR and NBC have voluntarily taken further steps intended to preclude a recurrence.

In these circumstances, a finding that a single word, uttered inadvertently and subject to the immediate statements of regret and rebuke, still justifies Commission action would be completely contrary not only to Constitutional and statutory limitations, but to the Commission's own criteria for determining indecency. Indeed, the Commission has just recently and correctly reaffirmed that many words some viewers may find offensive, and which clearly do connote sexual or excretory activity, do not meet the "patently offensive" factor of the indecency analysis. In two Orders issued on January 24, 2005, in response to a total of thirty-six complaints filed by the Parents Television Council against a host of television broadcast licensees, the Commission found that the "fleeting uses" of the words dick, hell, damn, ass, bastard, bitch, pissed,

crap, penis, testicle, vaginal, orgasm, breast or nipples were not patently offensive.<sup>39</sup>

The descriptions in the *Denial Orders* make clear that some of these words were used to connote sexual or excretory activity, although the *Orders* concluded that the Commission “need not address whether any of the complaints fail to depict or describe sexual or excretory organs or activities” as none of the words were patently offensive.<sup>40</sup> Nevertheless, Earnhardt’s inadvertent use of “shit” as part of a slang expression cannot conceivably be considered more patently offensive than other phrases which the Commission has correctly determined do not satisfy that standard.

B. The S-Word Did Not Have an Excretory Connotation.

NBC Network's own standards restrict any use of the “s-word” (or its variants) during NBC Network broadcasts, even within the mandated safe harbor period from 10 p.m. to 6 a.m. Accordingly, even under pre-Golden Globes Commission precedent, when isolated utterances did not violate the Commission's standards on indecent or profane utterances, instances of any audible form of the challenged word on NBC (or NBC television stations) were extraordinarily rare. Regardless of the outcome of this matter, NBC does not intend to relax these standards in this respect.

However, *Golden Globes* failed to follow the Commission's own established standards as to what constitutes indecent speech. Under the Commission's own standards, as approved by the Supreme Court, no word can be judged indecent unless

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<sup>39</sup> See *January 25 Indecency Denial Order I & II*. See also *Entrecom Buffalo License, LLC (WGR(AM))*, 17 FCC Rcd 11997, 11999-12000 (EB 2002) (“WGR”) (finding use of term “pissed on” to mean something other than excretory activity in context of relevant material).

<sup>40</sup> See *id.* at nn. 12 & 13.

it "describes or depicts" sexual or excretory activities or organs. *Golden Globes* just overrides this requirement with respect to the "f-word," stating that "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." *Golden Globes'* *per se* rule that any variant of the f-word describes sexual activity contravenes both *Pacifica* and the Commission's obligation to achieve its objectives through "narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms."<sup>41</sup>

The *Pacifica* Court expressly rejected such a blanket ban on a particular word. The Court characterized its 5-4 vote decision as "an emphatically narrow holding." As Justice Powell explained in his concurring opinion, the Court approved "only the Commission's holding that Carlin's monologue was indecent 'as broadcast' at two o'clock in the afternoon, and not the broad sweep of the Commission's opinion."<sup>42</sup> Justices Powell and Blackmun noted "[t]he Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word."<sup>43</sup> They stressed that the FCC does not have "unrestricted license to

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<sup>41</sup> *Action for Children's Television v. FCC*, 58 F.3d 654, 663-64 (D.C. Cir. 1995) (en banc) ("ACT III") (quoting *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989)).

<sup>42</sup> *Pacifica*, 438 U.S. at 755-56 (Powell, Jr., concurring).

<sup>43</sup> The concurring opinion expressly distinguished "the isolated use of a potentially offensive word" from "the verbal shock treatment administered by respondent," and explained that the order under review "was limited to the facts of this case." *Pacifica*, 438 U.S. at 760-61 (Powell, J., joined by Blackmun, J., concurring).

decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from momentary exposure to it in their homes."<sup>44</sup>

To determine whether Earnhardt's single word constituted indecency, the Commission must make a determination that the word was both patently offensive and depicted sexual or excretory activities or organs, based upon the facts and the context, and not upon a flat ban against a single word. This case demonstrates that variants of the challenged word are used in many contexts that are clearly do not intend *any* excretory connotation. The word was again used as part of slang phrase meaning "meaningless" or "of little worth" – and was Earnhardt's visceral choice to convey the emotion overwhelming Earnhardt regarding his just-concluded thrilling victory and in reference to the successes of his recently deceased father.

C. Broadcasters Should Not Be Required to Anticipate Indecent or Profane Material During Live Programming.

*Golden Globes* asserted that NBC was "on notice that an award presenter or recipient might use offensive language during the live broadcast" because of two prior instances in which a presenter or recipient, including Bono, had used such language during other entertainment awards programming.<sup>45</sup> The Commission noted that NBC could have imposed a tape delay on its live broadcast to ensure that no offensive language was aired. Indeed, based upon this meager record, the Commission broadly

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<sup>44</sup> *Id.* See also *id.* at 772 (Brennan J., dissenting) ("I believe that the FCC is estopped from using either this decision or its own orders in this case...as a basis for imposing sanctions on any public radio broadcast other than one aired during the daytime or early evening and containing the relentless repetition, for longer than a brief interval, of [offensive language].").

<sup>45</sup> See *Golden Globes Order* at ¶ 10.

asserted that “we encourage networks and broadcasters to undertake such technological measures.”<sup>46</sup>

The Commission’s logic transforms a criminal statute that should have *scienter* as an essential element into a strict liability standard that is not appropriate for an enforcement action related to speech. NBC had never experienced a similar incident in its years of airing the *Golden Globes* and other award ceremonies. No law or reasonable policy justified the wholesale technological delay mechanism or live award or entertainment shows based on an isolated incident.

Similarly, every year, broadcasters air much NASCAR coverage. In the past four years alone, NBC has aired more than 180 hours of NASCAR coverage.<sup>47</sup> During all of that television coverage, NBC is not aware of any prior instances in which there were any audible utterances of language similar to Earnhardt’s. To NBC’s knowledge, of the millions of words uttered in the past several years during NASCAR television broadcast coverage, exactly one – Earnhardt’s slip -- has been alleged to be indecent. Accordingly, although NBC is attempting an experimental 5-second delay, the Commission should not require all broadcasters to adopt a similar system for NASCAR or other live event coverage or risk being deemed liable for any isolated or fleeting language that is heard during that coverage.

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<sup>46</sup> See *id.*

<sup>47</sup> See *id.*

D. A Delay System Should Not Be Required For Live, On-the-Spot Coverage

*Golden Globes* blithely assumes that “broadcasters can easily ensure that they are not subject to enforcement action under our decision today” if they “adopt and successfully implement a delay/bleeping system for live broadcasts.”<sup>48</sup> Even if such a system can be effective in the relatively controlled environment of an entertainment awards program, the same assumption does not apply to on-the-spot sports or news coverage.

In the wake of the relevant incident, the NBC Network has experimentally adopted a five-second delay on its NASCAR coverage in an effort to limit a recurrence of the extraordinarily rare use of language that is not consistent with the Network’s own standards and in recognition of NASCAR’s own enforcement actions in this area. However, NBC Network does not believe such a delay system to be a panacea. Accordingly, NBC urges the Commission not to imply that such systems are required.

First, the effectiveness of any delay/bleeping system depends on trained personnel being able to catch the questionable word, sometimes amid a sea of ambient noise, and being able to time the “bleep” to obscure a questionable word without affecting other speech. Human error, or judgment calls, will not be uncommon. A delay system is likely to block protected speech and may result in fewer live broadcasts.

This case highlights the problems. The setting was an on-the-track interview a few moments after a thrilling Earnhardt victory. It would have been a real challenge to pre-screen any inappropriate language within a short delay even if a screening mechanism

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<sup>48</sup> *Golden Globes Order* at ¶ 17.

would have been in place. An audio review would have but a few seconds to determine, among all the ambient noise, whether there was a vulgarity that might be contrary to the Commission's current standards. Because of these challenges inherent in an uncontrolled environment that is common to on-the-spot sports or news coverage, a 5 or 10-second delay is often likely to be insufficient to censor all questionable language.

Second, a compelled time delay of all live on-the-spot coverage is likely to preclude many live reports in their entirety. Often, for example, a reporter in the field is responding to questions heard over the live broadcast feed; the reporter is not hearing the questions from a news or sports anchor through a separate line. As a result, a five-second delay on the over-the-air feed would mean a news anchor or sports announcer would ask a question and the on-the-spot reporter would not hear it until five or 10 seconds later. In other words, any sort of short delay would effectively deny such further questioning of an on-site reporter.

Third, multiple venues pose further issues for delay mechanisms. In multiple venue or game coverage, it would be nearly impossible to synchronize the delays between one site and another site. Events like the Olympics, which involve coverage at multiple sites, are meticulously planned months in advance in an effort to maximize coverage. The synchronization of swimming's 10-second delay with that of the javelin would introduce an additional degree of difficulty that could result in missed nightlights, dead air and frustrated viewers during the coverage.

Fourth, the cost of delay systems would risk much existing live sports and news coverage, especially on the local level. Local television and radio stations would have

to implement costly tape-delay mechanisms or abandon the live broadcasts of sports, news and other local events. Each local television and radio station would have to choose between running the risk of strict liability for a single vulgar word (and the possible threat to a station's licenses) or run every aspect of its on-the-spot coverage – whether it is a local “man on the street” interview or national coverage of a hurricane – through the appropriate and expensive “bleeping” equipment and trained personnel before it can go on air. The ultimate result will be less live programming, both local and national, on free, over the air broadcast television, all because of the threat of a rare slip of the tongue or uncontrollable audio during a live event.

E. Live Broadcasts, Without Delays, Serve The Public Interest

The public interest will not be served by a flat ban against certain words and a policy that penalizes broadcasters who do not implement a delay system. *Golden Globes* wrongly ignored that the true value of the speech lost is not just the value of the already extraordinarily rare expletive, but all speech that will be deleted, chilled or altered if the Commission can impose sanctions because of a single word in any live programming. Any Commission sanction in this case may allow one or two complaints to dictate the extent to which millions of Americans can enjoy free, unfettered over-the-air broadcast coverage of many live sporting events.

Viewers value witnessing sports, or other breaking news, as events unfold in a live broadcast. Indeed, what made this race so compelling was that its outcome was in doubt until literally the final second – a thrill that would have been lost if the broadcast had been subject to a delay and fans had already heard the final outcome

on a local radio station or saw it on one of thousands of unregulated Internet sites.<sup>49</sup>

The importance of live sports broadcasts to viewers is illustrated by the sheer number of such broadcasts, sometimes in unusual time slots.<sup>50</sup> Many nationally televised games and events frequently start at 9 p.m. in order to facilitate live viewing for the entire continental United States. NBC even airs certain international events in the morning in the Eastern time zone, including its annual Wimbledon coverage or coverage of other international events like the Olympics, in order to air the programming live. Sanctioning a broadcaster based on the absence of a delay/bleeping mechanism will have ramifications for hundreds of televised events, both local and national, every year.

Furthermore the Commission's action may have ramifications far beyond sports and extend to live and on-the-spot news coverage. The Commission should not endanger live news coverage as part of a quixotic effort to purge the extraordinarily rare instances of accidental vulgarities from such broadcasts. The principle of live, uncensored coverage of breaking events is fundamental to a free society and protected by the Constitution. That this case involved an on-the-spot interview with a NASCAR driver, rather than an interview with another newsmaker, political figure

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<sup>49</sup> A delayed broadcast presents a competitive issue as well: even a short delay between the end of the game and its broadcast can cause passionate viewers to look to other media – such as 24-hour sports cable networks – for truly up-to-the-second game coverage. In an environment where much sports programming already has fled from free and universally available over-the-air broadcasts to national pay television because of the exploding costs of that programming, broadcasters and sports fans want to avoid other reasons for their sports programming to move elsewhere.

<sup>50</sup> Indeed, certain Commission policies treat sports programming differently from other programming because of its extreme sensitivity. See, e.g., 47 C.F.R. § 76.95.

or witness to a newsworthy event does not alter the underlying risk: any live interview can result in Commission sanction for a single word. The obvious result will be a chilling effect on actual live broadcasts, and the loss of much spontaneous speech.

**III. *The Commission Should Not Extend Golden Globes to Live Event Coverage of Sports and News At Issue Here***

Even if the Commission declines to modify or reverse *Golden Globes* upon reconsideration, *Golden Globes* should not be extended to live coverage of sports and news, and should not lead to a finding of indecency in this case. In *Golden Globes*, the Commission justified its abrupt break from longstanding precedent stretching back to *Pacifica* by focusing on the extent of public outcry regarding the word uttered, the nature of the event, the asserted ease and effectiveness of a delay system in the relevant environment, and the past improprieties of Bono, the speaker of the word at issue.<sup>51</sup> It also altered its past definition of profane to include the “f-word” and its variants based on a claim that, in the *Golden Globes* context, the word amounted to a nuisance. Each of these four factors is inapplicable in this case:

- Here, only a single viewer – of more than 18 million total viewers who tuned into NBC coverage of the event – complained about the challenged term, which was a far different word than that expressly addressed by *Golden Globes*.
- Here, the live nature of the programming was even more important to viewers. Unlike the *Golden Globes* awards ceremony, which was scheduled to air on a

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<sup>51</sup> See *Golden Globes Order* at n. 6, ¶¶ 10, 11 (noting, respectively, the thousands of public communications to the Commission, the claim that at least two prior entertainment awards programs had instances of vulgar language, the asserted, without proof, “ease with which broadcasters today can block even fleeting words in a live broadcast,” and past statements of Bono, the speaker in question).

delayed basis in the Mountain and Pacific time zones, the Game was aired live across the country.

- Here, a delay/bleeping system is less likely to be effective and more likely to filter out non-offensive speech. On-the-spot programming in crowded, unregulated environments, such as Earnhardt's postgame interview, must deal not only with the pressures inherent in split-second screening common to any live programming, but also the challenges of a live event, ambient noise, verbal exchanges with remote or offsite reporters and crowd noise. The resulting cacophony makes it difficult to review and, if necessary, delete words during the seconds afforded by a typical delay.
- Here, Earnhardt's slip was unprecedented: the NBC Network alone has aired more than 180 hours of NASCAR coverage since 2001 without a similar incident and Earnhardt had no prior history of using offending language during an NBC Network television interview.

These circumstances also present even less reason to find the challenged language patently offensive under the Commission's traditional three-pronged test:

- Earnhardt's language was neither a graphic nor explicit description of excretory activity; the context of the phrase "don't mean shit," makes clear that it had no excretory component.
- The challenged word was even more fleeting and isolated than in *Golden Globes*. The word was pronounced in Earnhardt's strong accent, which further diminished the word's impact.
- The immediate warning and prompt apology and rebuke by NBC on-air further served to isolate and limit the word's impact.
- Earnhardt's language was clearly not intended to titillate or pander. Earnhardt was weary and extremely excited. His response was visceral, not calculating. NBC on-air talent apologized for Earnhardt's language immediately following the interview.

The facts of this case compel the conclusion that Earnhardt's utterance was neither indecent nor profane. A contrary ruling simply cannot be reconciled with Supreme Court precedent, the Commission's prior ruling or sound policy.

#### **IV. *The Complaint Does Not Justify Further Investigation***

The sole Complaint filed against the relevant programming does not include specific allegations of fact sufficient to justify further Commission investigation. The Commission should refuse to pursue any complaint unless that complaint includes specific allegations of fact that, if true, would substantiate a violation of the Commission's Rules.<sup>52</sup>

A decision by the Commission to investigate viewer complaints, even when no description sufficient to substantiate an alleged violation is included in the complaint, compounds the challenge to free speech posed by the Commission's admittedly case-by-case indecency policies. If parties' complaints are not required to meet some factual minimum before the Commission launches an inquiry, the Commission is well on its way down the slippery slope of government oversight of all programming. In addition, stations have no safeguard against the costs involved in defending against even pretextual complaints, other than neutering their content to suit even the most sensitive viewers at the expense of what many others in the audience would prefer to be able to watch on free, over the air television.

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<sup>52</sup> Much precedent suggests that the actual threshold should require far more reliable evidence. See *Emmis License Corporation*, Memorandum Opinion and Order, 17 FCC Rcd 18343 (Enf. Bur. 2002) (implying that "significant excerpts" were needed for Commission to commence indecency investigation). However, no Commission policy suggests that less than a *prima facie* complaint can trigger a Commission request for additional information regarding a claim of indecent or profane broadcasts. Cf. *Infinity Broadcasting Operations, Inc.*, Notice of Apparent Liability for Forfeiture, FCC 03-234, n. 38 (Oct. 2, 2003) (determining that "once a complainant makes a *prima facie* case, it is appropriate for the staff to seek from the licensee a tape or transcript not only of the relevant material, but also of a reasonable amount of preceding and subsequent material.") In this case, the Complaint failed even to allege sufficient facts, unsupported or otherwise, to establish a *prima facie* case of indecency.

Furthermore, a low factual bar for Commission investigation will encourage motivated parties to send unsubstantiated “nuisance” complaints, even when those parties have not viewed the programming in question. This is not mere speculation. *Golden Globes* noted a flood of complaints about Bono’s language airing on dozens of stations that never actually aired that word because NBC deleted it for broadcasts in later time zones.<sup>53</sup> These complaints are a waste of Commission and licensee resources to resolve, as they do not truly reflect legitimate concerns of a station’s viewers.

The marked increase in Commission complaints since 2000 is directly tied to organized campaigns conducted by advocacy groups to generate a high volume of electronic complaints against programming which is demonstrably popular with the vast majority of viewers. According to the Commission, over 99 percent of the indecency complaints submitted to the Commission in 2003 were generated by the Parents Television Council.<sup>54</sup> Through October 1, 2004, the Commission reported that over 99 percent of indecency complaints – other than those related to the Super Bowl half-time show – were generated by the same group.<sup>55</sup> Another group, the American Family Association, provides emails alerting members to programs it deems objectionable and

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<sup>53</sup> See, e.g., *Golden Globes Order* at ¶ 19 & n. 46 (acknowledging that “many of the stations were not proper subjects of the complaint because they aired the program . . . after NBC had deleted the offending material”).

<sup>54</sup> See Todd Shields, “Activists Dominate Content Complaints,” *MediaWeek* (Dec. 6, 2004) (available at [www.mediaweek.com/mediaweek/headlines/article\\_display.jsp?vnu\\_content\\_id=1000731656](http://www.mediaweek.com/mediaweek/headlines/article_display.jsp?vnu_content_id=1000731656)) (last viewed January 31, 2005).

<sup>55</sup> See *id.*

prepares model complaint letters to be sent to the Commission. These singular campaigns generate a large number of complaints that require careful scrutiny.

Lax application of indecency pleading requirements creates a vague standard that cannot be applied fairly and in an even-handed fashion. The Commission should not have discretion to target particular stations based on certain "fact-less" indecency complaints.<sup>56</sup> The ambiguity inherent in the Commission's current treatment as to what constitutes indecency<sup>57</sup> should not be compounded by investigating complaints.

The lone Complaint should be dismissed as insufficient.<sup>58</sup> The Complaint does not offer any meaningful context for Earnhardt's remarks, focusing solely on the word used. As context remains critical to any determination of indecent or profane utterances, the Complaint should be dismissed on this ground alone.

### **GENERAL RESPONSES AND OBJECTIONS**

1. NBC objects to any aspect of the Request to the extent it seeks the discovery of information protected by attorney-client privilege, that constitutes attorney work product, or that is otherwise privileged or protected from disclosure.
2. NBC objects to any aspect of the Request to the extent it exceeds a scope reasonably pertinent to the issues raised by the Investigation.

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<sup>56</sup> Cf. *Melody Music v. FCC*, 345 F.2d 730 (D.C. Cir. 1965) (requiring that similarly situated parties be treated similarly.)

<sup>57</sup> See, e.g., American Civil Liberties Union, et al., Petition for Reconsideration of *Golden Globes Order*, File No. EB-03-IH-0110, at 6-19 (filed April 19, 2004). Several comments to this and other reconsideration petitions raised similar points. Comments of NBC Affiliates at 2; Comments of Radio-Television News Directors Association at 4.

<sup>58</sup> As the Commission's own *Indecency Policy Statement* underscored, even an allegation that certain explicit words or descriptions were used "is not sufficient" to justify a finding of indecency. See *Indecency Policy Statement*, 16 FCC Rcd at 8002 (¶ 9).

3. NBC objects to any aspect of the Request to the extent it seeks discovery of information outside NBC's possession, custody or control.
4. In providing answers to any aspect of the Request, NBC does not waive, and expressly reserves, all objections as to competency, relevancy, materiality and admissibility of the Responds or the subject matter thereof, as well as all objections to any other discovery request.

Each of the General Objections is hereby incorporated by reference into each and every Response as set forth below.

### **SPECIFIC RESPONSES AND OBJECTIONS**

#### **Query No. 1**

**With regard to each segment of material described in the Complaint, state whether NBC broadcast the segment over Station WRC-TV on the respective date and time for segment indicated in the Complaint and/or on that or any other date between 6:00 a.m. and 10:00 p.m. local time.**

Subject to the General Objections, NBC responds that WRC-TV aired a live broadcast of EA Sports 500 at Talladega, including the post-game interview with winning driver Dale Earnhardt, Jr., during the afternoon and evening of October 3, 2004, as delivered by the NBC Network.

#### **Query No. 2**

**With regard to each broadcast referred to in the response to Inquiry 1 above, if the programming described in the Complaint does not accurately reflect the material broadcast over Station WRC-TV, describe any inaccuracies.**

Subject to the General Objections and other matters as discussed at length elsewhere in this submission, NBC responds that the lone Complaint does not accurately reflect the material broadcast and the applicable legal standards. The Complaint neither accurately described the context of Earnhardt's remark nor referenced the on-air apologies for any inadvertent slip by Earnhardt.

**Query No. 3**

**State whether the Licensee broadcast all or any portion of the material described in Inquiry 1 over any station licensed to it other than Station WRC-TV and, if answered in the affirmative, provide, with regard to each such station, the following:**

- a. the call sign, community of license and licensee;**
- b. the date(s) and time(s) of the broadcast(s);**
- c. if only a portion of the material was broadcast, describe the material so broadcast.**

Subject to the General Objections, other NBC-owned stations beyond WRC-TV also broadcast the relevant program segment live. NBC hereby submits Exhibit B, which responds to this query (inclusive of WRC-TV). Each of the Stations listed on Exhibit C concur with the inaccuracies in the Complaint as addressed in response to Query No. 2 and elsewhere in this response.

**Query No. 4**

**With regard to each segment of material described in the Complaint, identify each station licensed to an entity or individual other than the Licensee that had the contractual right with Licensee to air the material in question and, for each such station, state whether the Licensee has reason to believe that the station did not air the material in question and the basis for that belief.**

In addition and subject to the General Objections, NBC raises two specific objections to this query. First, this question is irrelevant, as the Commission never has sanctioned a station not commonly controlled with the relevant programming network for a single word in live programming.<sup>59</sup> The Commission has reasoned that non-owned affiliates

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<sup>59</sup> See *Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, Notice of

should not be held liable for a spontaneous, isolated utterance during live programming unless there was prior reason for concern. Indeed, the Commission should be ready to apply a similar policy with respect to all stations, including owned and operated stations, as there is no evidence that the NBC Network, had reason to think that an unprecedented event would occur in the challenged postgame interview.<sup>60</sup> Regardless, any change in the Commission's policy with respect to network affiliates' liability for a live broadcast cannot be applied retroactively without violating both constitutional and statutory due process protections.<sup>61</sup>

Second, subject to the specific objection that NBC does not have actual knowledge as to whether any of its non-owned affiliates aired the lone challenged word, NBC hereby submits Exhibit C, which identifies all stations that had a contractual right to air

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Apparent Liability for Forfeiture, FCC 04-209 (rel. September 22, 2004) (limiting indecency action in cases involving live programming to network owned and operated stations).

<sup>60</sup> Also, as the Commission is aware, the NBC Stations do not have identical ownership with the NBC Network, although GE ultimately exercises control of both the NBC Stations and the NBC Network. See, e.g., FCC File No. BALCT-20031106AJY.

<sup>61</sup> See *Golden Globes* at ¶ 15 (citing *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618 (D.C. Cir. 2000), which reversed Commission decision that denied a renewal application for abuse of process in connection with the Commission's minority ownership rules because the court found the Commission had not provided sufficiently clear notice of what those rules required). *Golden Globes* added that "given that existing precedent would have permitted this broadcast, we will not require any of the stations that broadcast the program to report our finding here to us as part of its renewal application and we will not consider the broadcast of this program adversely to such licensees as part of the renewal process." *Id.* See, e.g., *Infinity Broadcasting Corp.*, 3 FCC Rcd 930, *aff'd in part, vacated in part, remanded sub nom ACT I*, 852 F.2d 1332 (D.C. Cir. 1988) (subsequent history omitted) (refusing to sanction broadcasters because indecency finding resulted from changed Commission policy).

such programming. At this time, NBC does not have reason to conclude that the stations included on this matrix did not air the material in question.

**Query No. 5**

**Provide copies of all Documents that provide the basis for or otherwise support the responses to Inquiries 1-4, above.**

Subject to the General Objections, NBC objects to this inquiry with respect to documents developed in response to the Commission's investigation into this matter, as such documents should not be subject to Commission discovery. NBC references the declaration(s) of its personnel with respect to factual matters cited herein.

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FCC Enforcement Bureau  
February 2, 2005  
Page 40

Please direct any further communications regarding this matter to  
the undersigned.

Respectfully Submitted,



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F. William LeBeau

Senior Regulatory Counsel & Ass't Secretary  
NBC Telemundo License Co.  
1299 Pennsylvania Avenue, NW  
Washington, DC 20004  
202-637-4535

February 2, 2005

**EXHIBIT A**  
**(Declaration of Alan Wurtzel)**

### DECLARATION

I, Alan Wurtzel, President, NBC Research and Development, under penalty of perjury, hereby declare that the following statements are true and accurate to the best of my personal knowledge and belief:

1. According to data available to NBC, approximately 18.16 million total viewers watched all or part of NBC Network coverage of the EA Sports 500 at the Talladega SuperSpeedway between 2:25 p.m. and 6:10 p.m. Eastern Standard Time.
2. Since 2001, NBC Network had aired approximately 183 hours of NASCAR coverage.



Alan Wurtzel

February 1, 2005

**EXHIBIT B**

**(List Of NBC-Affiliated Stations Owned Or Controlled By NBC)**

**EXHIBIT B**

<b>Call Sign</b>	<b>Community of License</b>	<b>Time Aired *</b>	<b>Licensee</b>
KNBC(TV)	Los Angeles, CA	11:30 AM to 3 PM	NBC Telemundo License Co.
KNSD(TV)	San Diego, CA	11:30 AM to 3 PM	Station Venture Operations, LP
KNTV(TV)	San Jose, CA	11:30 AM to 3 PM	NBC Telemundo License Co.
KXAS-TV	Fort Worth, TX	1:30 PM to 5 PM	Station Venture Operations, LP
WCAU(TV)	Philadelphia, PA	2:30 PM to 6 PM	NBC Telemundo License Co.
WCMH-TV	Columbus, OH	2:30 PM to 6 PM	NBC Telemundo License Co.
WJAR(TV)	Providence, RI	2:30 PM to 6 PM	NBC Telemundo License Co.
WMAQ-TV	Chicago, IL	1:30 PM to 5 PM	NBC Telemundo License Co.
WNBC(TV)	New York, NY	2:30 PM to 6 PM	NBC Telemundo License Co.
WNCN(TV)	Goldsboro, NC	2:30 PM to 6 PM	NBC Telemundo License Co.
WRC-TV	Washington, DC	2:30 PM to 6 PM	NBC Telemundo License Co.
WTVJ(TV)	Miami, FL	2:30 PM to 6 PM	NBC Telemundo License Co.
WVIT(TV)	New Britain, CT	2:30 PM to 6 PM	NBC Telemundo License Co.
WVTM-TV	Birmingham, AL	1:30 PM to 5 PM	NBC Telemundo License Co.

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\* In all cases, date aired is October 3, 2004. All times expressed are local time.

**EXHIBIT C**

**(Affiliate List)**

**NASCAR-TALLADEGA****Primary\_Affiliate**

<b>CALL_LETTERS</b>	<b>NBC_MARKET_NAME</b>	<b>DMA_MARKET_NAME</b>
KALB	ALEXANDRIA LA	ALEXANDRIA LA
KAMR	AMARILLO TX	AMARILLO TX
KARE	MINNEAPOLIS MN	MINNEAPOLIS-ST. PAUL MN
KARK	LITTLE ROCK AR	LITTLE ROCK-PINE BLUFF AR
KBJR	DULUTH MN	DULUTH-SUPERIOR MN
KBTB	BEAUMONT TX	BEAUMONT-PORT ARTHUR TX
KBZ	BOZEMAN MT	BOZEMAN MT
KCBD	LUBBOCK TX	LUBBOCK TX
KCEN	TEMPLE TX	WACO-TEMPLE TX
KCFW	KALISPELL MT	MISSOULA MT
KCRA	SACRAMENTO CA	SACRAMENTO-STOCKTON CA
KCWY	CASPER WY	CASPER-RIVERTON WY
KDLT	SIOUX FALLS SD	SIOUX FALLS SD
KDLV	MITCHELL SD	SIOUX FALLS SD
KECI	MISSOULA MT	MISSOULA MT
KENV	ELKO NV	RENO NV
KETK	JACKSONVILLE TX	TYLER TX
KFDX	WICHITA FALLS TX	WICHITA FALLS-LAWTON TX/OK
KFOR	OKLAHOMA CITY OK	OKLAHOMA CITY OK
KFTA	FORT SMITH AR	FT. SMITH AR
KFYR	BISMARCK ND	MINOT-BISMARCK-DICKINSON ND
KGET	BAKERSFIELD CA	BAKERSFIELD CA
KGNS	LAREDO TX	LAREDO TX
KGW	PORTLAND OR	PORTLAND OR
KHAS	HASTINGS NE	LINCOLN-HASTINGS-KEARNEY NE
KHBC	HILO HI	HONOLULU HI
KHNL	HONOLULU HI	HONOLULU HI
KHQ	SPOKANE WA	SPOKANE WA
KIEM	EUREKA CA	EUREKA CA
KING	SEATTLE WA	SEATTLE-TACOMA WA
KJRH	TULSA OK	TULSA OK
KJWY	JACKSON, WY	IDAHO FALLS-POCATELLO ID
KKCO	GRAND JUNCTION CO	GRAND JUNCTION-MONTROSE CO
KLSB	TYLER TX	TYLER TX
KMAY	BRYAN TX	WACO-TEMPLE TX
KMCC	LAUGHLIN NV	LAS VEGAS NV
KMIR	PALM SPRINGS CA	PALM SPRINGS CA
KMOH	KINGMAN AZ	PHOENIX AZ
KMOT	MINOT ND	MINOT-BISMARCK-DICKINSON ND
KMTR	EUGENE OR	EUGENE OR
KMTX	ROSEBURG OR	EUGENE OR
KMTZ	COOS BAY OR	COOS BAY OR
KNAZ	FLAGSTAFF AZ	PHOENIX AZ
KNBC	LOS ANGELES CA	LOS ANGELES CA
KNDO	YAKIMA WA	YAKIMA WA
KNDU	RICHLAND WA	YAKIMA WA
KNOP	NORTH PLATTE NE	NORTH PLATTE-HAYES-MC COOK NE
KNSD	SAN DIEGO CA	SAN DIEGO CA
KNTV	SAN FRANCISCO CA	SAN FRANCISCO-OAKLAND CA

KNVN  
KNWA  
KOOA  
KOB  
KOBF  
KOBG  
KOB  
KOB  
KOGG  
KOMU  
KOTI  
KPLC  
KPNX  
KPRC  
KPMI  
KQCD  
KRBC  
KRIS  
KRN  
KSN  
KSBW  
KSBY  
KSCT  
KSDK  
KSEE  
KSHB  
KSL  
KSNC  
KSNF  
KSN  
KSNK  
KSNT  
KSNW  
KSWY  
KTAL  
KTEN  
KTFT  
KTGF  
KTIV  
KTSM  
KTTC  
KTUU  
KTVB  
KTVE  
KTVF  
KTVH  
KTVM  
KTVZ  
KULR  
KUMV  
KUSA  
KVBC

CHICO CA  
FAYETTEVILLE AR  
COLORADO SPRINGS CO  
ALBUQUERQUE NM  
FARMINGTON NM  
SILVER CITY NM  
MEDFORD OR  
ROSWELL NM  
WAILUKU HI  
COLUMBIA MO  
KLAMATH FALLS OR  
LAKE CHARLES LA  
PHOENIX AZ  
HOUSTON TX  
IDAHO FALLS ID  
DICKINSON ND  
ABILENE TX  
CORPUS CHRISTI TX  
RENO NV  
SAN ANGELO TX  
SALINAS CA  
SAN LUIS OBISPO CA  
SITKA, AK  
ST. LOUIS MO  
FRESNO CA  
KANSAS CITY MO  
SALT LAKE CITY UT  
GREAT BEND KS  
PITTSBURG KS  
GARDEN CITY KS  
MCCOOK NE  
TOPEKA KS  
WICHITA KS  
SHERIDAN WY  
SHREVEPORT LA  
ARDMORE OK  
TWIN FALLS ID  
GREAT FALLS MT  
SIOUX CITY IA  
EL PASO TX  
ROCHESTER MN  
ANCHORAGE AK  
BOISE ID  
ELDORADO AR  
FAIRBANKS AK  
HELENA MT  
BUTTE MT  
BEND OR  
BILLINGS MT  
WILLISTON ND  
DENVER CO  
LAS VEGAS NV

CHICO-REDDING CA  
FT. SMITH AR  
COLORADO SPRINGS-PUEBLO CO  
ALBUQUERQUE-SANTE FE NM  
ALBUQUERQUE-SANTE FE NM  
ALBUQUERQUE-SANTE FE NM  
MEDFORD-KLAMATH FALLS OR  
ROSWELL NM  
HONOLULU HI  
COLUMBIA-JEFFERSON CITY MO  
MEDFORD-KLAMATH FALLS OR  
LAKE CHARLES LA  
PHOENIX AZ  
HOUSTON TX  
IDAHO FALLS-POCATELLO ID  
MINOT-BISMARCK-DICKINSON ND  
ABILENE-SWEETWATER TX  
CORPUS CHRISTI TX  
RENO NV  
SAN ANGELO TX  
MONTEREY-SALINAS CA  
SANTA BARBARA-SAN LUIS OBISPO  
JUNEAU AK  
ST. LOUIS MO  
FRESNO-VISALIA CA  
KANSAS CITY MO  
SALT LAKE CITY UT  
GREAT BEND KS  
JOPLIN-PITTSBURG MO/KS  
ENSIGN-GARDEN CITY KS  
NORTH PLATTE-HAYES-MC COOK NE  
TOPEKA KS  
WICHITA-HUTCHINSON KS  
RAPID CITY SD  
SHREVEPORT LA  
ADA-ARDMORE OK  
TWIN FALLS ID  
GREAT FALLS MT  
SIOUX CITY IA  
EL PASO TX  
MASON CITY-AUSTIN ROCHESTER  
ANCHORAGE AK  
BOISE ID  
MONROE-EL DORADO AR  
FAIRBANKS AK  
HELENA MT  
BUTTE MT  
BEND OR  
BILLINGS MT  
MINOT-BISMARCK-DICKINSON ND  
DENVER CO  
LAS VEGAS NV

KVEO	BROWNSVILLE TX	HARLINGEN-BROWNSVILLE TX
KVLY	FARGO ND	FARGO-VALLEY CITY ND
KVOA	TUCSON AZ	TUCSON AZ
KWAB	BIG SPRINGS TX	ODESSA-MIDLAND TX
KWES	MIDLAND TX	ODESSA-MIDLAND TX
KWNV	WINNEMUCCA NV	RENO NV
KWQC	DAVENPORT IA	DAVENPORT-ROCK IS.-MOLINE IL
KWWL	WATERLOO IA	CEDER RAPIDS-WATERLOO DUBUQUE
KXAM	LLANO TX	AUSTIN TX
KXAN	AUSTIN TX	AUSTIN TX
KXAS	FORT WORTH-DALLAS TX	DALLAS-FT WORTH TX
KXTS	VICTORIA TX	VICTORIA TX
KYMA	YUMA AZ	YUMA-EL CENTRO AZ/CA
KYTV	SPRINGFIELD MO	SPRINGFIELD MO
KYUS	MILES CITY MT	BILLINGS MT
WAFF	HUNTSVILLE AL	HUNTSVILLE-DECATUR AL
WAGT	AUGUSTA GA	AUGUSTA GA
WALB	ALBANY GA	ALBANY GA
WAVE	LOUISVILLE KY	LOUISVILLE KY
WAVY	NORFOLK VA	NORFOLK-PORTSMOUTH VA
WBAL	BALTIMORE MD	BALTIMORE MD
WBBH	FORT MYERS FL	FT. MYERS-NAPLES FL
WBGH	BINGHAMTON NY	BIMGHAMTON NY
WBIR	KNOXVILLE TN	KNOXVILLE TN
WBOY	CLARKSBURG WV	CLARKSBURG-WESTON WV
WBRE	WILKES-BARRE PA	WILKES BARRE-SCRANTON PA
WCAU	PHILADELPHIA PA	PHILADELPHIA PA
WCBD	CHARLESTON SC	CHARLESTON SC
WCMH	COLUMBUS OH	COLUMBUS OH
WCNC	CHARLOTTE NC	CHARLOTTE NC
WCSH	PORTLAND ME	PORTLAND-AUBURM ME
WCYB	BRISTOL VA	TRI-CITYES TN/VA
WDAM	HATTIESBURG MS	HATTIESBURG-LAUREL MS
WDIV	DETROIT MI	DETROIT MI
WDSU	NEW ORLEANS LA	NEW ORLEANS LA
WDTN	DAYTON OH	DAYTON OH
WEAU	EAU CLAIRE WI	LA CROSSES-EAU CLAIRE WI
WECT	WILMINGTON NC	WILMINGTON NC
WEEK	PEORIA IL	PEORIA-BLOOMNIGTON IL
WESH	DAYTONA BEACH FL	ORLANDO-DAYTONA BEACH FL
WETM	ELMIRA NY	ELMIRA NY
WEYI	SAGINAW-BAY CITY MI	FLINT-SAGINAW-BAY CITY MI
WFIE	EVANSVILLE IN	EVANSVILLE IN
WFLA	TAMPA FL	TAMPA-ST. PETERSBURG FL
WFMJ	YOUNGSTOWN OH	YOUNGSTOWN OH
WGAL	LANCASTER PA	HARRISBURG-LANCASTER-YORK PA
WGBA	GREEN BAY WI	GREEN BAY-APPLETON WI
WGBC	MERIDIAN MS	MERIDIAN MS
WGEM	QUINCY IL	QUINCY-HANNIBAL IA/MO
WGRZ	BUFFALO NY	BUFFALO NY
WHAG	HAGERSTOWN MD	WASHINGTON DC
WHDH	BOSTON MA	BOSTON MA

WHEC  
WHIZ  
WHO  
WICD  
WICS  
WICU  
WILX  
WIS  
WISE  
WITN  
WJAC  
WJAR  
WJFW  
WJHG  
WKTV  
WKYC  
WLBT  
WLBZ  
WLEX  
WLIO  
WLTZ  
WLUC  
WLWT  
WMAQ  
WMC  
WMGM  
WMGT  
WMTV  
WNBC  
WNCN  
WNDU  
WNKY  
WNNE  
WNWO  
WNYT  
WOAI  
WOOD  
WOWT  
WPBN  
WPMI  
WPSD  
WPTV  
WPTZ  
WPXI  
WRC  
WRCB  
WREX  
WSAV  
WSAZ  
WSFA  
WSLS  
WSMV

ROCHESTER NY  
ZANESVILLE OH  
DES MOINES IA  
CHAMPAIGN IL  
SPRINGFIELD IL  
ERIE PA  
LANSING MI  
COLUMBIA SC  
FORT WAYNE IN  
WASHINGTON NC  
JOHNSTOWN PA  
PROVIDENCE RI  
RHINELANDER WI  
PANAMA CITY FL  
UTICA NY  
CLEVELAND OH  
JACKSON MS  
BANGOR ME  
LEXINGTON KY  
LIMA OH  
COLUMBUS GA  
MARQUETTE MI  
CINCINNATI OH  
CHICAGO IL  
MEMPHIS TN  
WILDWOOD NJ  
MACON GA  
MADISON WI  
NEW YORK NY  
RALEIGH-DURHAM NC  
SOUTH BEND IN  
BOWLING GREEN  
HANOVER NH  
TOLEDO OH  
ALBANY-SCHENECTADY NY  
SAN ANTONIO TX  
GRAND RAPIDS MI  
OMAHA NE  
TRAVERSE CITY MI  
MOBILE AL  
PADUCAH KY  
PALM BEACH FL  
PLATTSBURGH NY  
PITTSBURGH PA  
WASHINGTON DC  
CHATTANOOGA TN  
ROCKFORD IL  
SAVANNAH GA  
HUNTINGTON WV  
MONTGOMERY AL  
ROANOKE VA  
NASHVILLE TN

ROCHESTER NY  
ZANESVILLE OH  
DES MOINES-AMES IA  
CHAMPAIGN SPRINGFIELD-DECATUR  
CHAMPAIGN SPRINGFIELD-DECATUR  
ERIE PA  
LANSING MI  
COLUMBIA SC  
FT. WAYNE IN  
GREENVILLE-WASHINGTON NC  
JOHNSTOWN-ALTOONA PA  
PROVIDENCE-NEW BEDFORD RI/MA  
WAUSAU-RHINELANDER WI  
PANAMA CITY FL  
UTICA NY  
CLEVELAND OH  
JACKSON MS  
BANGOR  
LEXINGTON KY  
LIMA OH  
COLUMBUS GA  
MARQUETTE MI  
CINCINNATI OH  
CHICAGO IL  
MEMPHIS TN  
PHILADELPHIA PA  
MACON GA  
MADISON WI  
NEW YORK NY  
RALEIGH-DURHAM NC  
SOUTH BEND-ELKHART  
BOWLING GREEN KY  
BURLINGTON-PLATTSBURGH NY  
TOLEDO OH  
ALBANY-SCHENECTADY-TROY NY  
SAN ANTONIO TX  
GRAND RAPIDS-KALAMAZOO MI  
OMAHA NE  
TRAVERSE CITY-CADILLAC MI  
MOBILE-PENSACOLA FL  
PADUCAH-HARRISBURG IL  
WEST PALM BEACH-FT. PIERCE FL  
BURLINGTON-PLATTSBURGH NY  
PITTSBURGH PA  
WASHINGTON DC  
CHATTANOOGA TN  
ROCKFORD IL  
SAVANNAH GA  
CHARLESTON-HUNTINGTON WV  
MONTGOMERY AL  
ROANOKE-LYNCHBURG VA  
NASHVILLE TN

WSTM  
WTAP  
WTHR  
WTLV  
WTMJ  
WTOM  
WTOV  
WTVA  
WTVJ  
WTWC  
WTWO  
WVIR  
WVIT  
WVLA  
WVTM  
WVVA  
WWBT  
WWLP  
WXIA  
WXII  
WYFF

SYRACUSE NY  
PARKERSBURG WV  
INDIANAPOLIS IN  
JACKSONVILLE FL  
MILWAUKEE WI  
CHEBOYGAN MI  
WHEELING WV  
TUPELO MS  
MIAMI FL  
TALLAHASSEE FL  
TERRE-HAUTE IN  
CHARLOTTESVILLE VA  
HARTFORD CT  
BATON ROUGE LA  
BIRMINGHAM AL  
BLUEFIELD WV  
RICHMOND VA  
SPRINGFIELD MA  
ATLANTA GA  
WINSTON-SALEM NC  
GREENVILLE SC

SYRACUSE NY  
PARKERSBURG WV  
INDIANAPOLIS IN  
JACKSONVILLE FL  
MILWAUKEE WI  
TRAVERSE CITY-CADILLAC MI  
WHEELING-STEUBENVILLE WV/OH  
COLUMBUS-TUPELO-WEST POINT MS  
MIAMI-FT. LAUDERDALE FL  
TALLAHASSEE-THOMASVILLE FL  
TERRE HAUTE IN  
CHARLOTTESVILLE VA  
HARTFORD-NEW HAVEN CT  
BATON ROUGE LA  
BIRMINGHAM AL  
BECKLEY-BLUEFIELD-OAK HILL WV  
RICHMOND-PETERBURG VA  
SPRINGFIELD-HOLYOKE MA  
ATLANTA GA  
GREENSBORO-WINSTON SALEM NC  
GREENVILLE-SPARTANBURG SC

**APPENDIX V**

**LETTER FROM F. WILLIAM LEBEAU TO WILLIAM H. DAVENPORT RE: FCC  
FILE NO. EB-04-IH-0591 (FEB. 2, 2005)**



1299 Pennsylvania Avenue, N.W.  
11<sup>th</sup> Floor  
Washington, D.C. 20004  
Tel: (202) 637-4535  
Fax: (202) 637-4530

February 2, 2005

William H. Davenport  
Chief, Investigations and Hearings Division  
Enforcement Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 4-A462  
Washington, DC 20554

**Attn: David Brown, Assistant Chief, Investigations & Hearings Division**

**Re: NBC Telemundo License Co.  
Station WRC-TV, Washington, DC  
File No. EB-04-IH-0591**

Dear Chief Davenport:

NBC Telemundo License Co. ("NBC"), the licensee of Television Broadcast Station WRC-TV, Washington, DC (the "Station"), and the licensee or corporate parent of thirteen other NBC affiliated Stations (the "NBC Stations"), hereby responds to the Commission's correspondence dated December 14, 2004 (the "Request").<sup>1</sup> The Request seeks NBC's response to a complaint that alleges that the Station broadcast indecent or profane speech during the afternoon of November 13, 2004.<sup>2</sup>

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<sup>1</sup> This response is timely filed pursuant to Commission Staff grant of an extension of time – until February 2, 2005 – for NBC to submit responses to the Request. NBC is commonly controlled with the NBC broadcast television network (the "NBC Network") and NBC Sports, which transmitted and produced the challenged programming.

<sup>2</sup> A second complaint makes a similar allegation against WDTN(TV), Dayton, Ohio, but misstates both the time of the broadcast and the allegedly indecent word aired. WDTN(TV) is not owned by NBC or any entity that is a corporate affiliate with NBC, but is a station affiliated with the NBC Network that may or may not have aired the relevant program segment. To facilitate Commission dismissal of both complaints, this response

### INTRODUCTION AND SUMMARY

Prior to a single instance last year, the Commission, heeding Supreme Court precedent, its own 2001 Policy Statement and sound judgment, had never asserted that a single word, and any of its variations in any context, is invariably indecent and profane, or that a broadcaster would be sanctioned for airing a live program based upon a single utterance. The Supreme Court's decision in *FCC v. Pacifica Foundation* expressly rejected a flat ban against "the isolated use of a potentially offensive word" or a prohibition which ignored the context in which a word was spoken. Subsequent court decisions, and indeed most of the Commission's rulings, reaffirm that a case-by-case determination considering all the circumstances surrounding a broadcast and the manner in which the language is used is necessary to survive constitutional scrutiny and to ensure reasonable enforcement. Accordingly, the "one word" standard for indecent and profane speech announced in *Golden Globes* was a sudden break from Commission precedent, ignored these express constitutional warnings from the Supreme Court, and overrode the essential role of context in any regulation of objectionable speech.

The Commission now is investigating two complaints – out of more than thirteen million viewers – that a live, post-game interview with a college football player, Tyler Palko, violated federal law because of a single inadvertent word slip. Neither complaint noted the context of the interview, which followed a last-second and record-breaking

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will address this second complaint as well (collectively with the WRC-TV complaint, the "Complaints").

victory over Notre Dame, nor accurately described Palko's language or acknowledged the immediate on-air apologies for the remark.

Contrary to the *Golden Globes'* assertion that variants of the "f-word" are always patently or highly offensive, *only 2 of more than 13,000,000 viewers* complained about Palko's language. The numbers alone belie the assertion that this language is patently offensive. The Commission's indecency policy, and NBC's ultimate liability for Palko's inadvertent expletive, should not be determined based upon these two individuals – out of more than thirteen million total viewers – who claim to be offended by the broadcast of this single word.

Furthermore, while *Golden Globes* implied that networks should know that live programming may involve offensive language, the facts here prove otherwise. The incident during Palko's post-game interview was unprecedented: the NBC Network alone has aired more than 100 hours of Notre Dame football coverage since 2000 without a similar slip. NBC immediately apologized on air following the interview, and Palko also apologized for his error.

NBC does not condone the use of the "f-word" on broadcast television. Rather, NBC and the NBC Network strives to avoid the use of this language on any NBC program through both its own broadcast standards personnel and by working with sports leagues and other participants in live programming to ensure compliance with these standards. NBC is certainly not seeking permission or the right to air any variant of the "f-word" on its programs. Indeed, the NBC Network immediately apologized for Palko's remark and expressly criticized his language, vehemently rejecting any notion that this was acceptable. In NBC's view, the important issue raised here is not whether

the "f-word" should be broadcast, but whether the Commission can ignore context and circumstances in determining whether language is indecent, contrary to Supreme Court rulings and the Commission's own precedent.

Even if the Commission does not reverse *Golden Globes* in response to the pending petitions for reconsideration, that ruling -- concerning a seasoned entertainer on an annual entertainment awards show -- should not be extended to live sports or other on-the-spot live broadcasts, including local and national news. The chilling and boundless ramifications for live, breaking broadcast coverage that will result from any extension of *Golden Globes* to this case compel dismissal.

### **BACKGROUND**

Tyler Palko attended West Allegheny High School in the small town of Imperial, Pennsylvania. The son of the school's football coach, Palko was an outstanding high school quarterback. He was selected as the 2001 Pennsylvania Big School Player of the Year and was a *USA Today* second-team high school All-American.<sup>3</sup> Rather than play at a college elsewhere, he chose to attend the University of Pittsburgh ("Pitt"), located less than 20 miles from his home town.

At Pitt, Palko lettered as a freshman and worked hard to better his skills; he was named "Chairman of the Board" by the coaching staff for his dedication to winter

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<sup>3</sup> [http://www.pittsburghpanthers.com/sports/football/bio.asp?PLAYER\\_ID=1568](http://www.pittsburghpanthers.com/sports/football/bio.asp?PLAYER_ID=1568)  
(reviewed Jan. 18, 2005).

workouts.<sup>4</sup> As Pitt entered its 2004 schedule, Palko, just a 21-year-old college junior, was named the team's starting quarterback.<sup>5</sup>

On November 13, 2004, Pitt played the fabled Fighting Irish of Notre Dame in what was its most important game of the year (the "Game"). Pitt dedicated the Game to Billy Gaines, a Pitt receiver who had died the preceding summer. Pitt needed just one more win to become eligible for a postseason bowl, but had not won at Notre Dame for nearly two decades. The Game did not seem likely to break that streak; at game time, Pitt was unranked in the polls, while Notre Dame was a top-25 team.

The Game did not begin well for Pitt. Notre Dame jumped out to a 7-0 lead, but Pitt, led by Palko, fought back to lead by a touchdown at halftime. At the end of third quarter, the score was tied at 28, with Palko already having thrown for four touchdowns.

In the final quarter, after Notre Dame regained the lead at 35-31, Pitt responded with another come-from-behind touchdown, as Palko became the first quarterback in college football history to throw five touchdown passes against Notre Dame. But Notre Dame did not admit defeat. With just over a minute left, it answered Palko's history-making performance with a tying field goal.

At that critical moment, with the score again tied, Palko later said that he tried to rally his team:<sup>6</sup>

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<sup>4</sup> *See id.*

<sup>5</sup> <http://www.pittnews.com/vnews/display.v/ART/2004/09/10/41410fb4dfa67> (reviewed Jan. 21, 2005).

<sup>6</sup> <http://sports.yahoo.com/ncaaf/recap?gid=200411130104> (viewed Jan. 18, 2005).

You'll remember this for the rest of your lives. You'll remember this, so make sure it's a good feeling . . . I looked every one of them in the eyes. I saw the look in their eyes, they saw the look in my eyes. We were just kind of sick of not coming up big in big games.

Palko then led his team down the field one last time. With just one second left on the clock, Pitt kicked a 32-yard field goal for a thrilling 41-38 victory. The jubilant Panthers swarmed the field.

Moments later, the NBC Network sideline reporter, Lewis Johnson, worked his way through the crowd to claim a post-game interview with the triumphant Palko. Johnson identified himself as located in "a chaotic scene down here in the Pittsburgh end zone," which may have understated the joyous bedlam of the Pittsburgh players and coaches. Thanks to Palko's history-making performance, Pitt now was eligible for a bowl game, had further honored their deceased teammate, and had beaten Notre Dame at Notre Dame for the first time since 1986.

Amid the surrounding pandemonium, Palko, his face flushed with weariness and elation, responded viscerally to Johnson's questions. Johnson first asked what viewers most wanted to know: what did it mean to Palko to make history by becoming the first quarterback ever to throw five touchdown passes against Notre Dame. Ultimately shouting to be heard above the surrounding din, Palko's impassioned response reflected the emotion of the moment:

I don't really care about stats right now. All I care about is we got the win. And that's . . . My teammates know that from me. That's the bottom line. I don't care if I threw for three yards. We got a win. We needed this win so badly over a great Notre Dame team. I'm so proud of our fucking football team. Man, we're awesome.

Immediately upon hearing Palko's slip of the tongue, Johnson cautioned Palko through a still-audible "Watch yourself," reminding the college junior that some words do not meet NBC's broadcast standards. Palko then briefly answered a quick follow up query, and Johnson cut back to announcer Tom Hammond.

Hammond's first words upon returning to air were both an immediate apology and a clear rebuke regarding Palko's unfortunate language:

All right. We apologize for Tyler Palko's language in the heat of the moment. After the brilliant game he had, too bad that it was marred by that moment.

Palko likewise was immediately apologetic for his regrettable choice of word. Before beginning any of his other postgame interviews, Palko earnestly and promptly apologized for his slip, explaining that:<sup>7</sup>

I lost my composure on the field and said something in the heat of the moment. That's not me. That's not Tyler. It was just a heat of the moment kind of thing. I apologize to my teammates, my family and anybody that was watching.

Palko subsequently sent a letter of apology to NBC Sports. The letter, attached as Exhibit A, reiterated Palko's remorse regarding his mistake in the immediate postgame excitement.<sup>8</sup>

Despite the well-publicized nature of the incident, the public did not demonstrate concern regarding the clearly unintentional slip. According to Nielsen data, approximately 13.3 million persons tuned into all or part of NBC Network's coverage of the Game.<sup>9</sup>

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<sup>7</sup> <http://sports.yahoo.com/ncaaf/recap?gid=200411130104> (viewed Jan. 18, 2005).

<sup>8</sup> See Exhibit A.

<sup>9</sup> See Declaration of Alan Wurtzel (attached as part of Exhibit B).

Of these more than thirteen million persons, only two individuals apparently complained to the Commission. The two Complaints received by the FCC state, respectively:

Network: NBC  
Program Name: College Football  
Broadcast Date: 11/13/04  
Broadcast Time: 2:30 pm EST  
My Affiliate: WRC

Description of Indecency:

A profanity came from the quarterback of the Pitt Panthers after the game. I want him fined and every NBC affiliate. Be consistent [sic] or stop the fines all together.

\* \* \*

Network: NBC  
Program Name: College Football: Pitt vs. Notre Dame  
Broadcast Date: Saturday, November 13  
Broadcast Time: 8:00 pm EST  
My Affiliate: WDTN

Description of Indecency:

The Word 'fuck' was used during a live interview after the game!

\* \* \*

Neither of these Complaints explained the context of Palko's remarks. Neither even correctly identified the specific word uttered by Palko. The first Complaint expressed as much irritation with the Commission's enforcement practices as with Palko's utterance, and favored no penalties over purportedly inconsistent application of the rules. The second Complaint misstated both the time of the broadcast as "8:00 pm EST" and the word actually spoken by Palko. These two errors in this already vague Complaint indicate that the writer did not even view the broadcast. This Complaint,

therefore, is insufficient to justify further Commission investigation and should be dismissed; otherwise, any complaint can trigger a government-launched investigation into broadcast program content. These Complaints also specifically addressed programming on only two of the 200-plus stations affiliated with the NBC Network.

Moreover, this incident was unprecedented. Since 2000, the NBC Network has aired approximately 110 hours of Notre Dame football coverage, an average of more than 20 hours per year.<sup>10</sup> NBC is not aware of any other instance during all this coverage in which a variant of the “f-word” was uttered audibly on air. Nor is NBC aware of any other indecency complaints ever made about its football coverage.

Notwithstanding the unique nature of this incident, NBC Sports is taking measures to preclude a recurrence. NBC does not want such language in its sports broadcasts. NBC Sports will work with the University of Notre Dame and its opponents to re-emphasize the importance of adhering to all NBC Network’s broadcast standards during any NBC televised game. Similarly, NBC Sports, which airs Arena Football League games, has worked with that League to reduce the risks of inappropriate speech during broadcast events. NBC is not aware of any incident during these AFL games where a player’s arguably indecent or profane speech has been broadcast.<sup>11</sup>

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<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

I. **Golden Globes *Should Be Reversed***

A. Golden Globes

*Golden Globes* addressed complaints against petitioner NBC Universal's live broadcast of an annual "Golden Globe Awards" program during which the performer Bono, who received an award, stated: "This is really, really fucking brilliant. Really, really great."<sup>12</sup> The *Order* expressly abandoned aspects of the Commission's established policy governing enforcement of Section 1464 and established a new enforcement policy. Long-standing Commission precedent consistently held that isolated and fleeting uses of the "f-word" in broadcasts were not indecent and that the context in which the word was used must be taken into account.<sup>13</sup> Under the new policy, an isolated, fleeting use of the "f-word" or "any of its variants" and "in any context" – even when used as an intensifier, without any intention on the part of the licensee, and potentially without regard to the social value of the speech at issue – is

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<sup>12</sup> *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globes Awards" Program*, 18 FCC Rcd 19859 (Enf. Bur. 2003), *rev'd*, Memorandum Opinion and Order, FCC 04-43 (¶ 15) (March 18, 2004), *recon. pending* (the "*Golden Globes Order*" or "*Golden Globes*").

<sup>13</sup> See *Industry Guidance On the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999, 8002, 8009, (2001) ("*Indecency Policy Statement*"), and cases cited therein; See, e.g., *Peter Branton*, 6 FCC Rcd 610 (1991) (refusing to find indecent repeated use of the "f-word" in a broadcast of an interview with organized crime figure John Gotti); *cf. WUHY-FM*, 24 F.C.C.2d 408 (1970) (distinguishing coverage of bona fide news events from expletive-laced interview with Grateful Dead lead guitarist Jerry Garcia), *on recon.*, 59 F.C.C.2d 892, 893 (1976) ("...RTNDA's Petition calls to our attention the fact that 'in some cases, public events likely to produce offensive speech are covered live, and there is not opportunity for journalistic editing.' Under these circumstances we believe that it would be inequitable for us to hold a licensee responsible for indecent language").

both “indecent” and “profane” for purposes of Section 1464 and the subsequent imposition of forfeiture liability under 47 U.S.C. § 503(b). *Golden Globes* appeared to have adopted an unprecedented *per se* rule that disregards each and every aspect of the broadcast, including even its impact on the viewers, and myopically focuses solely on a single word.

*Golden Globes* effectively eliminated the two separate determinations that had been necessary to any indecency analysis, as it concluded that certain words would be deemed inherently sexual *and* inherently patently offensive. It ignored the judicial axiom that “indecent” and “profane” must have separate meanings, and so expanded the definition of profane -- to include all highly offensive speech -- as to make any indecent utterance profane as well.

NBC Universal, Inc., as well as Fox Entertainment Group, Viacom and other parties, urged the Commission to reconsider the *Golden Globes* Order, arguing that the ruling was unconstitutional, violated the Commission’s statutory mandate and was poor policy. Those petitions have been pending since April 2004. In June 2004, NBC Universal, Fox Entertainment Group and Viacom jointly petitioned the Commission for a stay of the *Golden Globes* Order. The Commission has not ruled on that request.

B. Supreme Court Precedent Prohibits A Flat Ban Against Fleeting or Isolated Use of A Word Without Considering Context of Circumstances

In *FCC v. Pacifica Foundation*,<sup>14</sup> the Supreme Court stressed the importance of context when it upheld the authority of the FCC to regulate the broadcast of “patently offensive words dealing with sex and excretion.” In the agency ruling on appeal, the

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<sup>14</sup> 438 U.S. 726 (1978).

FCC had concluded that the broadcast of George Carlin's "Filthy Words" monologue included several words that referred to excretory or sexual activities or organs; that the repetitive, deliberate use of those words in an afternoon broadcast when children were in the audience was patently offensive and therefore indecent within the meaning of 18 U.S.C. § 1464. The Court agreed that the broadcast was indecent. The Court also recognized, however, that "[a]lthough these words ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment. Some uses of even the most offensive words are unquestionably protected....Indeed, we may assume *arguendo* that this monologue would be protected in other contexts." The Court emphasized "the narrowness of our holding" and made clear it was not addressing whether "an occasional expletive" would justify a sanction.<sup>15</sup>

Justice Powell, who provided the crucial fifth vote for *Pacifica's* slim majority, buttressed this limitation on the Commission's authority:<sup>16</sup>

The Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast . . . .

Since *Pacifica*, the Supreme Court has further narrowed what might constitute constitutional restrictions on media speech. Less than a decade ago, the Court struck down indecency regulation of cable television leased and public access channels, although these channels were found to be as "'accessible to children' as over the air

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<sup>15</sup> See *id.* at 750.

<sup>16</sup> *Id.* at 760-61 (Powell and Blackmun, JJ., concurring in part, and concurring in judgment).

broadcasting, if not more so.”<sup>17</sup> Other Supreme Court decisions, including those relating to the regulation of indecent content on the Internet, likewise have questioned the logic underlying any indecency standard.<sup>18</sup>

C. Section 1464 Does Not Authorize A Flat Ban Against Fleeting or Isolated Use of a Word Without Considering Context or Circumstances

In addition to constitutional constraints, the Commission cannot exceed its statutory mandate and authority. As construed by the Commission, and as approved by the courts, Section 1464 requires at least two separate “fundamental determinations to support a finding of indecency:”<sup>19</sup>

- the material alleged to be indecent “must describe or depict sexual or excretory organs or activities”; and
- the material “must be *patently offensive* as measured by contemporary community standards for the broadcast medium.”

The Commission recently reiterated that speech will not be deemed indecent unless it meets each of these independent and separate criteria.<sup>20</sup> Only that material which satisfies both prongs of the Commission’s own tests qualifies as indecent.<sup>21</sup>

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<sup>17</sup> *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 717, 744 (1996). The Court concluded that the ability of parents to block particular channels on a household by household basis – even though more difficult to do than the V-chip now required on all television sets thirteen inches or larger that were manufactured since January 1, 2000, and which applies to all rated broadcast programming on a program by program basis -- was a more narrowly tailored alternative than government censorship.

<sup>18</sup> See, e.g., *Reno v. ACLU*, 521 U.S. 844, 871-81 (1997).

<sup>19</sup> See *Indecency Policy Statement*, 16 FCC Rcd at 8002 (2001) (emphasis in original).

<sup>20</sup> See *Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, Memorandum Opinion and Order, FCC 04-279 (released January 24, 2005) (“*January 25 Denial Order I*”)

In determining whether speech is “patently offensive,” the Commission also just reiterated that the “full context in which the material appeared is critically important.”<sup>22</sup> Three “principal factors” are to be considered (1) the explicitness or graphic nature of the description of sexual or excretory organs or activities; (2) whether descriptions of sexual or excretory organs or activities are dwelled upon or repeated at length; and (3) whether the material is used to pander, titillate or for shock value.

*Golden Globes* misapplied the Commission’s own standards. The Commission “recognize[d] NBC’s argument that the “f-word” here was used ‘as an intensifier’” and that the dictionary definition of the word includes an independent meaning of “really” or “very,” but the Commission nonetheless concluded that “given the core meaning of the “F-word,” *any use* of that word or a variation, in any context, inherently has a sexual connotation.”<sup>23</sup>

This construction is plainly wrong. Once the Commission recognized, as it must, that certain meanings of the word are intensifiers and *distinct* from meanings that describe sexual activities, it has removed any basis for its conclusion that “any” use of the word or its variants inevitably depicts or describes sexual activity. It simply defies

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(denying complaints against 21 programs); *Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, Memorandum Opinion and Order, FCC 04-280 (released January 24, 2005) (“*January 25 Denial Order II*”) (denying complaints against 15 programs).

<sup>21</sup> See *Indecency Policy Statement*, 16 FCC Rcd at 8002 (2001) (emphasis in original).

<sup>22</sup> See *January 25 Indecency Denial Order I* at ¶ 5.

<sup>23</sup> *Order* ¶ 8 & n.23 (emphasis added).

credulity to conclude that Bono's reference to "fucking brilliant" or Palko stating "I'm so proud of our fucking football team" denoted or connoted any sexual meaning.

*Golden Globes* also improperly construed the statutory term "profane," reasoning that "'profanity' is commonly defined as 'vulgar, irreverent, or coarse language'" and that the "F-word" word is clearly the "vulgar and coarse" language that falls with Section 1464's term.<sup>24</sup> Even though the Commission acknowledged that its prior precedent has focused on "blasphemy," the agency nevertheless found as an "independent ground" for its ruling that Bono's expletive constituted "profane" language under 14 U.S.C § 1464. Prior to the Commission ruling, no party, including the Media Bureau, even suggested, that the language in question was profane. Nor has the Commission ever suggested, in the many cases in which the Commission found similar language not indecent, that such incidents were separately actionable as profane.<sup>25</sup> Nevertheless, citing the Seventh Circuit's "most recent" decision, which was rendered over three decades ago in a case dealing with a criminal conviction for obscenity,<sup>26</sup> and several years prior to the Supreme Court's order in *Pacifica* that made no mention of any

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<sup>24</sup> The *Order* does not explain why it substituted a definition for "profanity" in lieu of a definition of "profane," which is the actual statutory term, but this substitution may have underlay the *Order's* incorrect reasoning. Just as an obscenity is not necessarily legally obscene, a profanity may not be assumed to be legally profane.

<sup>25</sup> See, e.g., *Lincoln Deller, Renewal of License for Stations KPRL(AM) and KDDB(FM)*, 8 FCC Rcd 2582, 2585 (MMB 1993) (holding that news announcer's live statement that he "fucked that one up" was not indecent). See also *Golden Globes* at n. 32 (listing several cases in which the "fleeting or isolated use of the 'f-word'" or a variation thereof" had been deemed not indecent without mention that they also, implicitly or otherwise, did not find the word to be profane).

<sup>26</sup> *Tallman v. United States*, 465 F.2d 282 (7<sup>th</sup> Cir. 1972).

“profane” utterance in the entire “Filthy Words” monologue that featured the “f-word” repeatedly, the Commission ruled that, in addition to blasphemy or divine imprecation, “profane” will now encompass the “f-word” and its variants.

The Commission also impermissibly collapsed the distinct meanings of “obscene, indecent, or profane” in Section 1464, thereby exacerbating the vagueness of the new standard for profane material. The Supreme Court in *Pacifica* stated that “the words” ‘obscene, indecent, or profane’ are written in the disjunctive, implying that each has a separate meaning.”<sup>27</sup> The Commission’s new definition of profane contravenes the Supreme Court’s ruling and creates an open-ended and standardless prohibition under which any word may be deemed sanctionable.

*Golden Globes* violates the limitations imposed by both the Constitution and Section 1464 on the Commission’s authority to regulate indecent and profane speech. The Order should be reversed or modified on reconsideration. In any event, the Order should not be extended beyond its facts or applied to the even more benign facts present in this case: an unintentional and completely unexpected slip by an emotional and excited college football player during a live sports event, which has never before been marred by offensive language, and that was followed by an immediate on-air and other apologies and that provoked only two Complaints to the Commission.

## II. ***The Golden Globes Per Se Rule Should Not Be Applied Here***

Golden Globes was premised on several erroneous assumptions and assertions, including that the “f-word” is always patently or highly offensive, that the “f-word” always

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<sup>27</sup> 483 U.S. at 739-40.

has a sexual connotation, that broadcasters should know that any live programming might include offensive language and that offensive language is easily avoided through use of technology to delay the broadcast and bleep the word.

A. An Inadvertent Slip During Live Programming Is Not Always Patently or Highly Offensive

The Commission's test for indecent or profane language is whether material is "patently offensive as measured by contemporary community standards" (indecent) or "highly offensive" (profane).<sup>28</sup> With the advent of email and other communication advances, as well as campaigns launched by single interest groups, people now can and do easily complain to the Commission. In 2004, more than one million complaints about purportedly indecent or profane broadcast programming were submitted to the Commission, as compared to fewer than 400 in 2001.<sup>29</sup>

Out of the 13.3 million total viewers who watched Pitt defeat Notre Dame, only two people complained to the Commission. Speech simply cannot be deemed patently offensive as measured by contemporary community standards, or highly offensive, when only two of more than thirteen million viewers complain. The sheer numbers refute that determination. If "patently offensive" and "contemporary community

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<sup>28</sup> See *Golden Globes Order* at ¶¶ 9, 14. The *Golden Globes Order* based what is a new (for the Commission) definition of profane on a 1972 Seventh Circuit decision, which predated the Supreme Court's decision in *Pacifica*, the Indecency Policy Statement and many other Commission decisions to the contrary. See *Tallman v. United States*, 465 F.2d 282 (7<sup>th</sup> Cir. 1972). According to the Seventh Circuit in 1972, profanity is "construable 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." *Id.* at 286.

<sup>29</sup> See <http://www.fcc.gov/eb/broadcast/ichart.pdf>.

standards" have any legitimate meaning at all, they cannot mean speech that provokes a complaint from two individuals out of more than 13.3 million total viewers.

The lack of any public reaction -- much less outrage -- to this event establishes that under the *Golden Globes* standards for an indecent utterance -- "patently offensive" -- or a profane utterance -- "highly offensive" -- the Palko interview was neither indecent nor profane. Contrary to the assumption of *Golden Globes*, every use of a variant of the "f-word" is not *per se* offensive in a manner that justifies Commission sanction.

Moreover, NBC's immediate response undoubtedly limited any initial concern and made clear that NBC disapproved of Palko's language. As noted above, NBC issued immediate on-air statements of regret for Palko's language, including Tom Hammonds' apology and clear disapproval of the language used and Lewis Johnson's audible admonition to Palko during the interview itself. Palko himself regretted the mistake instantaneously, immediately issuing a public apology and sending a further apology to NBC. NBC now is voluntarily taking further steps to reinforce broadcast decorum with Notre Dame and its opponents.

In these circumstances, a finding that a single word, uttered inadvertently and followed by immediate statements of regret and rebuke, still justifies Commission action would be completely contrary not only to Constitutional and statutory limitations, but to the Commission's own criteria for determining indecency.

Indeed, the Commission has just recently and correctly reaffirmed that many words some viewers may find offensive, and which clearly do connote sexual activity, do not meet the "patently offensive" factor of the indecency analysis. In two Orders issued on January 24, 2005, in response to a total of thirty-six complaints filed by the Parents

Television Council against a host of television broadcast licensees, the Commission found that the “fleeting uses” of the words dick, hell, damn, ass, bastard, bitch, pissed, crap, penis, testicle, vaginal, orgasm, breast or nipples were not patently offensive.<sup>30</sup> The descriptions in the *Denial Orders* make clear that some of these words were used to connote sexual activity, although the *Orders* concluded that the Commission “need not address whether any of the complaints fail to depict or describe sexual or excretory organs or activities” as none of the words were patently offensive.<sup>31</sup> Nevertheless, Palko’s inadvertent use of “fucking” as an emphatic adjective, even if deemed to be sexual in nature despite clearly referring solely to a football team and its victory, cannot conceivably be considered more patently offensive than other phrases which the Commission has correctly determined do not satisfy that standard.

B. The “F-word” and Its Variations Do Not Always Have A Sexual Connotation.

NBC Network’s own standards restrict any use of the “f-word” (or its variants) during NBC Network broadcasts, even within the mandated safe harbor period from 10 p.m. to 6 a.m. Accordingly, even under pre-Golden Globes Commission precedent, when isolated utterances did not automatically violate the Commission’s standards on indecent or profane utterances, NBC restricted any audible f-word on NBC or its television stations. Regardless of the outcome of this matter, NBC does not intend to relax these standards in this respect.

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<sup>30</sup> See *January 25 Indecency Denial Order I & II*. See also *Entrecom Buffalo License, LLC (WGR(AM))*, 17 FCC Rcd 11997, 11999-12000 (EB 2002) (“*WGR*”) (finding use of term “pissed on” to mean something other than excretory activity in context of relevant material).

<sup>31</sup> See *id.* at nn. 12 & 13.

However, NBC objects to *Golden Globes'* blanket refusal to follow the Commission's own established standards as to what constitutes indecent speech. Under the Commission's own standards, as approved by the Supreme Court, no word can be judged indecent unless it "describes or depicts" sexual or excretory activities or organs. *Golden Globes* jettisons this requirement with respect to the "f-word," stating that "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."

*Golden Globes'* *per se* rule that any variant of the "f-word" describes sexual activity contravenes both *Pacifica* and the Commission's obligation to achieve its objectives through "narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms."<sup>32</sup> The *Pacifica* Court expressly rejected a blanket ban on a particular word. The Court characterized its 5-4 vote decision as "an emphatically narrow holding." As Justice Powell explained in his concurring opinion, the Court approved "only the Commission's holding that Carlin's monologue was indecent 'as broadcast' at two o'clock in the afternoon, and not the broad sweep of the Commission's opinion."<sup>33</sup> Justices Powell and Blackmun noted "[t]he Commission's holding, and certainly the Court's holding today, does not speak to

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<sup>32</sup> *Action for Children's Television v. FCC*, 58 F.3d 654, 663-64 (D.C. Cir. 1995) (en banc) ("ACT III") (quoting *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989)).

<sup>33</sup> *Pacifica*, 438 U.S. at 755-56 (Powell, J., concurring).

cases involving the isolated use of a potentially offensive word.”<sup>34</sup> They stressed that the Commission does not have “unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from momentary exposure to it in their homes.”<sup>35</sup>

To determine whether Palko’s single word constituted indecency, the Commission must make a determination that the word was both patently offensive and depicted sexual or excretory activities or organs, based upon the facts and the context, and not upon a flat ban against a single word. This case demonstrates that variants of the word are used in many contexts that are clearly do not intend *any* sexual connotation. Tyler Palko, Pitt’s quarterback said: “I’m so proud of our fucking football team.” *Golden Globes* presumes that Palko’s word choice inescapably would cause any listener to apply a sexual connotation to Pitt’s football team. In fact, it is plainly obvious that the word did not have any sexual connotation. The word was again used as an intensifier – Palko’s visceral choice to convey the overwhelming emotion over his team’s just-concluded thrilling victory.

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<sup>34</sup> The concurring opinion expressly distinguished “the isolated use of a potentially offensive word” from “the verbal shock treatment administered by respondent,” and explained that the order under review “was limited to the facts of this case.” *Pacifica*, 438 U.S. at 760-761 (Powell, J., joined by Blackmun, J., concurring).

<sup>35</sup> *Id.* See also *id.* at 772 (Brennan J., dissenting) (“I believe that the FCC is estopped from using either this decision or its own orders in this case...as a basis for imposing sanctions on any public radio broadcast other than one aired during the daytime or early evening and containing the relentless repetition, for longer than a brief interval, of [offensive language].”).

C. Broadcasters Should Not Be Required to Anticipate Indecent or Profane Material During Live Programming.

*Golden Globes* asserted that NBC was “on notice that an award presenter or recipient might use offensive language during the live broadcast” because of two prior instances in which a presenter or recipient, including Bono, had used such language during other entertainment awards programming.<sup>36</sup> The Commission noted that NBC could have imposed a tape delay on its live broadcast to ensure that no offensive language was aired. Indeed, based upon this meager record, the Commission broadly asserted that “we encourage networks and broadcasters to undertake such technological measures.”<sup>37</sup>

The Commission’s logic transforms a criminal statute, that should have *scienter* as an essential element, into a strict liability standard that is not appropriate for an enforcement action related to speech. NBC had never experienced a similar incident in its years of airing the *Golden Globes* and other award ceremonies. No law or reasonable policy justified the wholesale technological delay mechanism on live award or entertainment shows based on an isolated incident.

Such a requirement would be truly absurd in this case. Every year, broadcasters air thousands of local high school and college football games. In the past five years alone, NBC has aired approximately 110 hours of college football coverage involving the

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<sup>36</sup> See *Golden Globes Order* at ¶ 10.

<sup>37</sup> See *id.*

University of Notre Dame.<sup>38</sup> During all of that coverage, NBC is not aware of any prior instances in which there were any audible utterances of language similar to Palko's. NBC is not aware of any live amateur football coverage on any other television broadcast network or station in which there was an audible vulgarity, or in which an NCAA athlete used an audible vulgarity during a live broadcast interview. To NBC's knowledge, of the millions of words uttered in the past several years during college football coverage, exactly one – Palko's slip -- has been alleged to be indecent. Based on this record, NBC had no reason to alter years of programming practice and risk the live, on the spot programming that viewers want and expect.

D. A Delay System Should Not Be Imposed For Live, On-the-Spot Coverage

*Golden Globes* blithely assumes that "broadcasters can easily ensure that they are not subject to enforcement action under our decision today" if they "adopt and successfully implement a delay/bleeping system for live broadcasts."<sup>39</sup> Even if such a system can be effective in the relatively controlled environment of an entertainment awards program, the same assumption does not apply to on-the-spot sports or news coverage.

First, the effectiveness of any delay/bleeping system depends on trained personnel being able to catch the questionable word, sometimes amid a sea of ambient noise, and being able to time the "bleep" to obscure a questionable word without affecting other

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<sup>38</sup> See *id.*

<sup>39</sup> *Golden Globes Order* at ¶ 17.

speech. Human error, or judgment calls, will not be uncommon. A delay system is likely to block protected speech and may result in fewer live broadcasts.

This case highlights the problems. The setting was an on-the-spot interview in a chaotic end zone a few moments after a thrilling Pitt victory. It would have been a real challenge to pre-screen any inappropriate language within a short delay even if a screening mechanism would have been in place. An audio review would have but a few seconds to determine, among all the ambient noise, whether there was a vulgarity that might be contrary to the Commission's current standards.

The video of the event would have further complicated any effort to censor the audio. The camera did not remain focused on the interview itself. Instead, the video attempted to capture the excitement of the Pitt players and the disappointment of Notre Dame. Accordingly, the video would not assist and would likely have distracted any personnel seeking to censor the ongoing audio. Because of these challenges inherent in an uncontrolled environment that is common to on-the-spot sports or news coverage, a 5 or 10-second delay is often likely to be insufficient to censor all questionable language.

Second, a compelled time delay of all live on-the-spot coverage is likely to preclude many live reports in their entirety. Often, for example, a reporter in the field is responding to questions heard over the live broadcast feed; the reporter is not hearing the questions from a news or sports anchor through a separate line. As a result, a five-second delay on the over-the-air feed would mean a news anchor or sports announcer would ask a question and the on-the-spot reporter would not hear it until five or 10

seconds later. In other words, any sort of short delay would effectively deny such further questioning of an on-site reporter.

Third, multiple venues pose further issues for delay mechanisms. In multiple venue or game coverage, it would be nearly impossible to synchronize the delays between one site and another site. Events like the Olympics, which involve coverage at multiple sites, are meticulously planned months in advance in an effort to maximize coverage. The synchronization of swimming's 10-second delay with that of the javelin would introduce an additional degree of difficulty that could result in missed highlights, dead air and frustrated viewers during the coverage.

Fourth, the cost of delay systems would risk much existing live sports and news coverage, especially on the local level. Local television and radio stations would have to implement costly tape-delay mechanisms or abandon the live broadcasts of sports, news and other local events. Each local television and radio station would have to choose between running the risk of strict liability for a single vulgar word (and the possible threat to a station's licenses) or run every aspect of its on-the-spot coverage – whether it is a local “man on the street” interview or national coverage of a hurricane – through the appropriate and expensive “bleeping” equipment and trained personnel before it can go on air. The ultimate result will be less live programming, both local and national, on free, over the air broadcast television, all because of the threat of a rare slip of the tongue or uncontrollable audio during a live event.

E. Live Broadcasts, Without Delays, Serve The Public Interest

The public interest will not be served by a flat ban against certain words and a policy that penalizes broadcasters who do not implement a delay system. *Golden*

*Globes* wrongly ignored that the true value of the speech lost is not just the value of the already extraordinarily rare expletive, but all speech that will be deleted, chilled or altered if the Commission can impose sanctions because of a single word in any live programming. Any Commission sanction in this case may allow one or two complaints to dictate the extent to which millions of Americans can enjoy free, unfettered over-the-air broadcast coverage of many live sporting events.

Viewers value witnessing sports, or other breaking news, as events unfold in a live broadcast. Indeed, what made the Game so compelling was that its outcome was in doubt until literally the final second – a thrill that would have been lost if the broadcast had been subject to a delay and fans had already heard the final score on a local radio station or saw it on one of thousands of unregulated Internet sites.<sup>40</sup> The importance of live sports broadcasts to viewers is illustrated by the sheer number of such broadcasts, sometimes in unusual time slots.<sup>41</sup> Many nationally televised games and events frequently start at 9 p.m. in order to facilitate live viewing for the entire continental United States. NBC even airs certain international events in the morning in the Eastern time zone, including its annual Wimbledon coverage or coverage of other international events like the Olympics, in order to air the programming live. Sanctioning a

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<sup>40</sup> A delayed broadcast presents a competitive issue as well: even a short delay between the end of the game and its broadcast can cause passionate viewers to look to other media – such as 24-hour sports cable networks – for truly up-to-the-second game coverage. In an environment where much sports programming already has fled from free and universally available over-the-air broadcasts to national pay television because of the exploding costs of that programming, broadcasters and sports fans want to avoid other reasons for their sports programming to move elsewhere.

<sup>41</sup> Indeed, certain Commission policies treat sports programming differently from other programming because of its extreme sensitivity. See, e.g., 47 C.F.R. § 76.95.

broadcaster based on the absence of a delay/bleeping mechanism will have ramifications for hundreds of televised events, both local and national, every year.

Furthermore the Commission's action may have ramifications far beyond sports and extend to live and on-the-spot news coverage. The Commission should not endanger live news coverage as part of a quixotic effort to purge the extraordinarily rare instances of accidental vulgarities from such broadcasts. The principle of live, uncensored coverage of breaking events is fundamental to a free society and protected by the Constitution. That this case involved an on-the-spot interview with a college football player, rather than an interview with another newsmaker, political figure or witness to a newsworthy event does not alter the underlying risk: any live interview can result in Commission sanction for a single word. The obvious result will be a chilling effect on actual live broadcasts, and the loss of much spontaneous speech.

### **III. *The Commission Should Not Extend Golden Globes to Live Event Coverage of Sports and News At Issue Here***

Even if the Commission declines to modify or reverse *Golden Globes* upon reconsideration, *Golden Globes* should not be extended to live coverage of sports and news, and should not lead to a finding of indecency in this case. In *Golden Globes*, the Commission justified its abrupt break from longstanding precedent stretching back to *Pacifica* by focusing on the extent of public outcry regarding the word uttered, the nature of the event, the asserted ease and effectiveness of a delay system in the relevant environment, and the past improprieties of Bono, the speaker of the word at issue.<sup>42</sup> It

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<sup>42</sup> See *Golden Globes Order* at n. 6, ¶¶ 10, 11 (noting, respectively, the thousands of public communications to the Commission, the claim that at least two prior entertainment awards programs had instances of vulgar language, the asserted, without

also altered its past definition of profane to include the "f-word" and its variants based on a claim that, in the *Golden Globes* context, the word amounted to a nuisance. Each of these four factors is inapplicable in this case:

- Here, only two of the more than thirteen million viewers who tuned into the broadcast complained about the challenged language.
- Here, the live nature of the programming was even more important to viewers. Unlike the *Golden Globes* awards ceremony, which was scheduled to air on a delayed basis in the Mountain and Pacific time zones, the Game was aired live across the country.
- Here, a delay/bleeping system is less likely to be effective and more likely to filter out non-offensive speech. On-the-spot programming in crowded, unregulated environments, such as Palko's postgame interview, must deal not only with the pressures inherent in split-second screening common to any live programming, but also the challenges of a live event, ambient noise, verbal exchanges with remote or offsite reporters and crowd noise. The resulting cacophony makes it difficult to review and, if necessary, delete words during the seconds afforded by a typical delay.
- Here, Palko's slip was unprecedented: the NBC Network alone has aired more than 100 hours of Notre Dame football coverage since 2000 without a similar incident and Palko had no prior history of using offending language in public.

These circumstances also present even less reason to find the challenged language patently offensive under the Commission's traditional three-pronged test:

- Palko's language was neither a graphic nor explicit description of sex; the context of the phrase "our fucking football team," makes clear that it had no sexual component.
- The challenged word was even more fleeting and isolated than in *Golden Globes*. The word was buried toward the end of a long and impassioned response, and a review of the relevant recording shows that Palko stumbled a bit in the word's pronunciation, which further diminished the impact of the word.
- The immediate warning and prompt apology and rebuke by NBC on-air further served to isolate and limit the word's impact.

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proof, "ease with which broadcasters today can block even fleeting words in a live broadcast," and past statements of Bono, the speaker in question).

- Palko's language was clearly not intended to titillate or pander. Palko was weary and extremely excited. His response was visceral, not calculated. NBC on-air talent apologized for Palko's language immediately following the interview.

The facts of this case compel the conclusion that Palko's utterance was neither indecent nor profane. A contrary ruling simply cannot be reconciled with Supreme Court precedent, the Commission's prior ruling or sound policy.

#### **IV. *The Complaints Do Not Justify Further Investigation***

Neither of the two Complaints filed against the relevant programming includes specific allegations of fact sufficient to justify further Commission investigation. The Commission should refuse to pursue any complaint unless that complaint includes specific allegations of fact that, if true, would substantiate a violation of the Commission's Rules.<sup>43</sup>

A decision by the Commission to investigate viewer complaints, even when no description sufficient to substantiate an alleged violation is included in the complaint, compounds the challenge to free speech posed by the Commission's admittedly case-by-case indecency policies. If parties' complaints are not required to meet some factual

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<sup>43</sup> Much precedent suggests that the actual threshold should require far more reliable evidence. See *Emmis License Corporation*, Memorandum Opinion and Order, 17 FCC Rcd 18343 (Enf. Bur. 2002) (implying that "significant excerpts" were needed for Commission to commence indecency investigation). However, no Commission policy suggests that less than a *prima facie* complaint can trigger a Commission request for additional information regarding a claim of indecent or profane broadcasts. Cf. *Infinity Broadcasting Operations, Inc.*, Notice of Apparent Liability for Forfeiture, FCC 03-234, n. 38 (Oct. 2, 2003) (determining that "once a complainant makes a *prima facie* case, it is appropriate for the staff to seek from the licensee a tape or transcript not only of the relevant material, but also of a reasonable amount of preceding and subsequent material.") In this case, the Complaint failed even to allege sufficient facts, unsupported or otherwise, to establish a *prima facie* case of indecency.

minimum before the Commission launches an inquiry, the Commission is well on its way down the slippery slope of government oversight of all programming. In addition, stations have no safeguard against the costs involved in defending against even pretextual complaints, other than neutering their content to suit even the most sensitive viewers at the expense of what many others in the audience would prefer to be able to watch on free, over the air television.

Furthermore, a low factual bar for Commission investigation will encourage motivated parties to send unsubstantiated "nuisance" complaints, even when those parties have not viewed the programming in question. This is not mere speculation. The two errors contained in one of the two complaints investigated here indicate that this individual did not actually view the Game. *Golden Globes* noted a flood of complaints about Bono's language airing on dozens of stations that never actually aired that word because NBC deleted it for broadcasts in later time zones.<sup>44</sup> These complaints are a waste of Commission and licensee resources to resolve, as they do not truly reflect legitimate concerns of a station's viewers.

The marked increase in Commission complaints since 2000 is directly tied to organized campaigns conducted by advocacy groups to generate a high volume of electronic complaints against programming which is demonstrably popular with the vast majority of viewers. According to the Commission, over 99 percent of the indecency complaints submitted to the Commission in 2003 were generated by the Parents

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<sup>44</sup> See, e.g., *Golden Globes Order* at ¶ 19 & n. 46 (acknowledging that "many of the stations were not proper subjects of the complaint because they aired the program . . . after NBC had deleted the offending material").

Television Council.<sup>45</sup> Through October 1, 2004, the Commission reported that over 99 percent of indecency complaints – other than those related to the Super Bowl half-time show – were generated by the same group.<sup>46</sup> Another group, the American Family Association, provides emails alerting members to programs it deems objectionable and prepares model complaint letters to be sent to the Commission. These singular campaigns generate a large number of complaints that require careful scrutiny.

Lax application of indecency pleading requirements creates a vague standard that cannot be applied fairly and in an even-handed fashion. The Commission should not have discretion to target particular stations based on certain “fact-less” indecency complaints.<sup>47</sup> The ambiguity inherent in the Commission’s current treatment as to what constitutes indecency<sup>48</sup> should not be compounded by investigating complaints that do not meet a reasonable evidentiary standard for detail and reliability.

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<sup>45</sup> Todd Shields, “Activists Dominate Content Complaints,” *MediaWeek* (Dec. 6, 2004) (available at [www.mediaweek.com/mediaweek/headlines/article\\_display.jsp?vnu\\_content\\_id=1000731656](http://www.mediaweek.com/mediaweek/headlines/article_display.jsp?vnu_content_id=1000731656)) (last viewed January 31, 2005).

<sup>46</sup> *See id.*

<sup>47</sup> *Cf. Melody Music v. FCC*, 345 F.2d 730 (D.C. Cir. 1965) (requiring that similarly situated parties be treated similarly.)

<sup>48</sup> *See, e.g., American Civil Liberties Union, et al., Petition for Reconsideration of Golden Globes Order*, File No. EB-03-IH-0110, at 6-19 (filed April 19, 2004). Several comments to this and other reconsideration petitions raised similar points. Comments of NBC Affiliates at 2; Comments of Radio-Television News Directors Association at 4.

These Complaints should be dismissed as insufficient on their face.<sup>49</sup> Neither Complaint correctly identified what Palko said. One complaint claimed Palko as having uttered a “profanity” without any description of which profanity or the context, and appeared as upset by the Commission’s enforcement policies as by Palko’s utterance. The other claimed Palko said “fuck,” when the actual quote involved a variant of the term, and noted a time of the event that was off by many hours, which indicates that the complainant had not viewed the post-game interview. On these grounds alone, the Complaints should be dismissed.

### **GENERAL RESPONSES AND OBJECTIONS**

1. NBC objects to any aspect of the Request to the extent it seeks the discovery of information protected by attorney-client privilege, that constitutes attorney work product, or that is otherwise privileged or protected from disclosure.
2. NBC objects to any aspect of the Request to the extent it exceeds a scope reasonably pertinent to the issues raised by the Investigation.
3. NBC objects to any aspect of the Request to the extent it seeks discovery of information outside NBC's possession, custody or control.
4. In providing answers to any aspect of the Request, NBC does not waive, and expressly reserves, all objections as to competency, relevancy, materiality and admissibility of the Responds or the subject matter thereof, as well as all objections to any other discovery request.

Each of the General Objections is hereby incorporated by reference into each and every Response as set forth below.

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<sup>49</sup> As the Commission’s own *Indecency Policy Statement* underscored, even an allegation that certain explicit words or descriptions were used “is not sufficient” to justify a finding of indecency. See *Indecency Policy Statement*, 16 FCC Rcd at 8002 (¶ 9).

## **SPECIFIC RESPONSES AND OBJECTIONS**

### **Query No. 1**

**With regard to each segment of material described in the Complaints, state whether NBC broadcast the segment over Station WRC-TV . . . on the date and time for segment indicated in the Complaints and/or any other date between 6:00 a.m. and 10:00 p.m. local time.**

Subject to the General Objections, NBC responds that WRC-TV aired a live broadcast of the Game, including the post-game interview with University of Pittsburgh quarterback Tyler Palko during the afternoon and evening of November 13, 2004, as delivered by the NBC Network.

### **Query No. 2**

**With regard to each broadcast referred to in the response to Inquiry 1 above, if the programming described in the Complaints does not accurately reflect the material broadcast over Station WRC-TV . . . describe any inaccuracies.**

Subject to the General Objections and other matters as discussed at length elsewhere in this submission, NBC responds that the Complaints do not accurately reflect the material broadcast and the applicable legal standards. Neither Complaint accurately described the word spoken by Palko and neither described the context of his remark. One complaint misstated both the actual word spoken and the time of the event. Neither complaint referenced the on-air apologies for this inadvertent slip by Palko.

### **Query No. 3**

**With regard to each segment of material described in the Complaint, state whether NBC and/or any of its affiliates broadcast all or any portion of the segment over other stations than the referenced stations.**

Subject to the General Objections, other NBC-owned stations beyond WRC-TV also broadcast the relevant program segment live.

**Query No. 4**

**If the answer to Inquiry 4 above is "yes," provide, for each broadcast referred to in the response to Inquiry 4, above:**

- a. the call sign, community of license and licensee;**
- b. the date(s) and time(s) of the broadcast(s);**
- c. if only a portion of the material was broadcast, describe the material so broadcast;**
- d. if the Complaint does not accurately reflect the material broadcast, describe any inaccuracies.**

Subject to the General Objections and those noted in response to Query 4, NBC hereby submits Exhibit C, which responds to this query (inclusive of WRC-TV), with the exception of subpart d. With respect to subpart d, each of the Stations listed on Exhibit C concur with the inaccuracies in the Complaint as addressed in response to Query No. 2 and elsewhere in this response.

**Query No. 5**

**With regard to each segment of material described in the Complaint, identify each station licensed to an entity or individual other than NBC that had the contractual right with Licensee to air the material in question and, for each such station, state whether NBC has reason to believe that the station did not air the material in question and the basis for that belief.**

In addition and subject to the General Objections, NBC raises two specific objections to this query. First, this question is irrelevant, as the Commission never has sanctioned a station not commonly controlled with the relevant programming network for a single

word in live programming.<sup>50</sup> The Commission has reasoned that non-owned affiliates should not be held liable for a spontaneous, isolated utterance during live programming unless there was prior reason for concern. Indeed, the Commission should be ready to apply a similar policy with respect to all stations, including owned and operated stations, as there is no evidence that the NBC Network, had reason to think that an unprecedented event would occur in the challenged postgame interview.<sup>51</sup> Regardless, any change in the Commission's policy with respect to network affiliates' liability for a live broadcast cannot be applied retroactively without violating both constitutional and statutory due process protections.<sup>52</sup>

Second, subject to the specific objection that NBC does not have actual knowledge as to whether any of its non-owned affiliates aired the lone challenged word, NBC

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<sup>50</sup> See *Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, Notice of Apparent Liability for Forfeiture, FCC 04-209 (rel. September 22, 2004) (limiting indecency action in cases involving live programming to network owned and operated stations).

<sup>51</sup> Also, as the Commission is aware, the NBC Stations do not have identical ownership with the NBC Network, although GE ultimately exercises control of both the NBC Stations and the NBC Network. See, e.g., FCC File No. BALCT-20031106AJY.

<sup>52</sup> See *Golden Globes* at ¶ 15 (citing *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618 (D.C. Cir. 2000), which reversed Commission decision that denied a renewal application for abuse of process in connection with the Commission's minority ownership rules because the court found the Commission had not provided sufficiently clear notice of what those rules required). *Golden Globes* added that "given that existing precedent would have permitted this broadcast, we will not require any of the stations that broadcast the program to report our finding here to us as part of its renewal application and we will not consider the broadcast of this program adversely to such licensees as part of the renewal process." *Id.* See, e.g., *Infinity Broadcasting Corp.*, 3 FCC Rcd 930, *aff'd in part, vacated in part, remanded sub nom ACT I*, 852 F.2d 1332 (D.C. Cir. 1988) (subsequent history omitted) (refusing to sanction broadcasters because indecency finding resulted from changed Commission policy).

hereby submits Exhibit D, which identifies all stations that had a contractual right to air such programming. At this time, NBC does not have reason to conclude that the stations included on this matrix did not air the material in question.

\* \* \* \* \*

Please direct any further communications regarding this matter to  
the undersigned.

Respectfully Submitted,



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F. William LeBeau

Senior Regulatory Counsel & Ass't Secretary  
NBC Telemundo License Co.  
1299 Pennsylvania Avenue, NW  
Washington, DC 20004  
202-637-4535

February 2, 2005

**EXHIBIT A**

**(Palko Letter of Apology)**

-----Original Message-----

**From:** Tyler Palko [mailto:born2qb3@yahoo.com]

**Sent:** Monday, November 15, 2004 4:42 PM

**To:** Ebersol, Dick (NBC Universal)

**Subject:** Please Read...From Tyler Palko

Mr. Ebersol

I want to sincerely apologize for my language slip-up on your television station on Saturday after the Notre Dame game. I want to let you know that it was a huge honor to play on NBC against Notre Dame in a game like that. I am very embarrassed about my choice of words, I just got caught up in the moment and lost my composure. That was totally out of character of myself, I am not that type of person, my emotions just got the best of me. I know I caused you some headaches, but I hope you can accept my apology with my deepest regrets and hope we can move on from here.

Sincerely

Tyler Palko

**EXHIBIT B**  
**(Declaration of Alan Wurtzel)**

## DECLARATION

I, Alan Wurtzel, President, NBC Research and Development, under penalty of perjury, hereby declare that the following statements are true and accurate to the best of my personal knowledge and belief:

1. According to Nielsen data available to NBC, approximately 13.27 million persons saw all or part of the NBC Network's coverage of the game between the University of Notre Dame and the University of Pittsburgh on November 13, 2004, as aired by the NBC Network beginning at 2:30 p.m. Eastern Standard Time.
2. Since 2000, NBC had aired approximately 110 hours of Notre Dame college football coverage.



Alan Wurtzel

February 1, 2005

**EXHIBIT C**

**(List Of NBC Network Affiliated Stations Owned Or Controlled By NBC)**

**EXHIBIT C**

<b>Call Sign</b>	<b>Community of License</b>	<b>Time Aired *</b>	<b>Licensee</b>
KNBC(TV)	Los Angeles, CA	11:30 AM to 3 PM	NBC Telemundo License Co.
KNSD(TV)	San Diego, CA	11:30 AM to 3 PM	Station Venture Operations, LP
KNTV(TV)	San Jose, CA	11:30 AM to 3 PM	NBC Telemundo License Co.
KXAS-TV	Fort Worth, TX	1:30 PM to 5 PM	Station Venture Operations, LP
WCAU(TV)	Philadelphia, PA	2:30 PM to 6 PM	NBC Telemundo License Co.
WCMH-TV	Columbus, OH	2:30 PM to 6 PM	NBC Telemundo License Co.
WJAR(TV)	Providence, RI	2:30 PM to 6 PM	NBC Telemundo License Co.
WMAQ-TV	Chicago, IL	1:30 PM to 5 PM	NBC Telemundo License Co.
WNBC(TV)	New York, NY	2:30 PM to 6 PM	NBC Telemundo License Co.
WNCN(TV)	Goldsboro, NC	2:30 PM to 6 PM	NBC Telemundo License Co.
WRC-TV	Washington, DC	2:30 PM to 6 PM	NBC Telemundo License Co.
WTVJ(TV)	Miami, FL	2:30 PM to 6 PM	NBC Telemundo License Co.
WVIT(TV)	New Britain, CT	2:30 PM to 6 PM	NBC Telemundo License Co.
WVTM-TV	Birmingham, AL	1:30 PM to 5 PM	NBC Telemundo License Co.

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\* In all cases, date aired is November 13, 2004. All times expressed are local time.

**EXHIBIT D**

**(Affiliate List)**

**ND/PITTSBG****Primary\_Affiliate****CALL\_LETTERS**

KALB  
KAMR  
KARE  
KARK  
KBJR  
KBTB  
KBZ  
KCBD  
KCEN  
KCFW  
KCHY  
KCRA  
KCWY  
KDK  
KDLT  
KDLV  
KECI  
KENV  
KETK  
KFDX  
KFOR  
KFTA  
KFYR  
KGET  
KGNS  
KGW  
KHAS  
KHBC  
KHNL  
KHQ  
KIEM  
KING  
KJRH  
KJWY  
KKCO  
KLK  
KLSB  
KMAY  
KMCC  
KMIR  
KMOT  
KMTR  
KMTX  
KMTZ  
KNAZ  
KNBC  
KNBN  
KNDO  
KNDU

**NBC\_MARKET\_NAME**

ALEXANDRIA LA  
AMARILLO TX  
MINNEAPOLIS MN  
LITTLE ROCK AR  
DULUTH MN  
BEAUMONT TX  
BOZEMAN MT  
LUBBOCK TX  
TEMPLE TX  
KALISPELL MT  
CHEYENNE WY  
SACRAMENTO CA  
CASPER WY  
LEAD SD  
SIOUX FALLS SD  
MITCHELL SD  
MISSOULA MT  
ELKO NV  
JACKSONVILLE TX  
WICHITA FALLS TX  
OKLAHOMA CITY OK  
FORT SMITH AR  
BISMARCK ND  
BAKERSFIELD CA  
LAREDO TX  
PORTLAND OR  
HASTINGS NE  
HILO HI  
HONOLULU HI  
SPOKANE WA  
EUREKA CA  
SEATTLE WA  
TULSA OK  
JACKSON, WY  
GRAND JUNCTION CO  
LARAMIE WY  
TYLER TX  
BRYAN TX  
LAUGHLIN NV  
PALM SPRINGS CA  
MINOT ND  
EUGENE OR  
ROSEBURG OR  
COOS BAY OR  
FLAGSTAFF AZ  
LOS ANGELES CA  
RAPID CITY SD  
YAKIMA WA  
RICHLAND WA

**DMA\_MARKET\_NAME**

ALEXANDRIA LA  
AMARILLO TX  
MINNEAPOLIS-ST. PAUL MN  
LITTLE ROCK-PINE BLUFF AR  
DULUTH-SUPERIOR MN  
BEAUMONT-PORT ARTHUR TX  
BOZEMAN MT  
LUBBOCK TX  
WACO-TEMPLE TX  
MISSOULA MT  
CHEYENNE-SCOTTSBLUFF-STERLING  
SACRAMENTO-STOCKTON CA  
CASPER-RIVERTON WY  
RAPID CITY SD  
SIOUX FALLS SD  
SIOUX FALLS SD  
MISSOULA MT  
RENO NV  
TYLER TX  
WICHITA FALLS-LAWTON TX/OK  
OKLAHOMA CITY OK  
FT. SMITH AR  
MINOT-BISMARCK-DICKINSON ND  
BAKERSFIELD CA  
LAREDO TX  
PORTLAND OR  
LINCOLN-HASTINGS-KEARNEY NE  
HONOLULU HI  
HONOLULU HI  
SPOKANE WA  
EUREKA CA  
SEATTLE-TACOMA WA  
TULSA OK  
IDAHO FALLS-POCATELLO ID  
GRAND JUNCTION-MONTROSE CO  
DENVER CO  
TYLER TX  
WACO-TEMPLE TX  
LAS VEGAS NV  
PALM SPRINGS CA  
MINOT-BISMARCK-DICKINSON ND  
EUGENE OR  
EUGENE OR  
COOS BAY OR  
PHOENIX AZ  
LOS ANGELES CA  
RAPID CITY SD  
YAKIMA WA  
YAKIMA WA



KUMV	WILLISTON ND	MINOT-BISMARCK-DICKINSON ND
KUSA	DENVER CO	DENVER CO
KVBC	LAS VEGAS NV	LAS VEGAS NV
KVEO	BROWNSVILLE TX	HARLINGEN-BROWNSVILLE TX
KVLY	FARGO ND	FARGO-VALLEY CITY ND
KVOA	TUCSON AZ	TUCSON AZ
KWAB	BIG SPRINGS TX	ODESSA-MIDLAND TX
KWES	MIDLAND TX	ODESSA-MIDLAND TX
KWNV	WINNEMUCCA NV	RENO NV
KWQC	DAVENPORT IA	DAVENPORT-ROCK IS.-MOLINE IL
KWWL	WATERLOO IA	CEDER RAPIDS-WATERLOO DUBUQUE
KXAM	LLANO TX	AUSTIN TX
KXAN	AUSTIN TX	AUSTIN TX
KXAS	FORT WORTH-DALLAS TX	DALLAS-FT WORTH TX
KXTS	VICTORIA TX	VICTORIA TX
KYMA	YUMA AZ	YUMA-EL CENTRO AZ/CA
KYTV	SPRINGFIELD MO	SPRINGFIELD MO
KYUS	MILES CITY MT	BILLINGS MT
WAFF	HUNTSVILLE AL	HUNTSVILLE-DECATUR AL
WAGT	AUGUSTA GA	AUGUSTA GA
WALB	ALBANY GA	ALBANY GA
WAVE	LOUISVILLE KY	LOUISVILLE KY
WAVY	NORFOLK VA	NORFOLK-PORTSMOUTH VA
WBAL	BALTIMORE MD	BALTIMORE MD
WBBH	FORT MYERS FL	FT. MYERS-NAPLES FL
WBGH	BINGHAMTON NY	BINGHAMTON NY
WBIR	KNOXVILLE TN	KNOXVILLE TN
WBOY	CLARKSBURG WV	CLARKSBURG-WESTON WV
WBRE	WILKES-BARRE PA	WILKES BARRE-SCRANTON PA
WCAU	PHILADELPHIA PA	PHILADELPHIA PA
WCBD	CHARLESTON SC	CHARLESTON SC
WCMH	COLUMBUS OH	COLUMBUS OH
WCNC	CHARLOTTE NC	CHARLOTTE NC
WCSH	PORTLAND ME	PORTLAND-AUBURN ME
WCYB	BRISTOL VA	TRI-CITIES TN/VA
WDAM	HATTIESBURG MS	HATTIESBURG-LAUREL MS
WDIV	DETROIT MI	DETROIT MI
WDSU	NEW ORLEANS LA	NEW ORLEANS LA
WDTN	DAYTON OH	DAYTON OH
WEAU	EAU CLAIRE WI	LA CROSSES-EAU CLAIRE WI
WECT	WILMINGTON NC	WILMINGTON NC
WEEK	PEORIA IL	PEORIA-BLOOMINGTON IL
WESH	DAYTONA BEACH FL	ORLANDO-DAYTONA BEACH FL
WETM	ELMIRA NY	ELMIRA NY
WEYI	SAGINAW-BAY CITY MI	FLINT-SAGINAW-BAY CITY MI
WFIE	EVANSVILLE IN	EVANSVILLE IN
WFLA	TAMPA FL	TAMPA-ST. PETERSBURG FL
WFMJ	YOUNGSTOWN OH	YOUNGSTOWN OH
WGAL	LANCASTER PA	HARRISBURG-LANCASTER-YORK PA
WGBA	GREEN BAY WI	GREEN BAY-APPLETON WI
WGBC	MERIDIAN MS	MERIDIAN MS
WGEM	QUINCY IL	QUINCY-HANNIBAL IA/MO

WGRZ	BUFFALO NY	BUFFALO NY
WHAG	HAGERSTOWN MD	WASHINGTON DC
WHDH	BOSTON MA	BOSTON MA
WHEC	ROCHESTER NY	ROCHESTER NY
WHIZ	ZANESVILLE OH	ZANESVILLE OH
WHO	DES MOINES IA	DES MOINES-AMES IA
WICD	CHAMPAIGN IL	CHAMPAIGN SPRINGFIELD-DECATUR
WICS	SPRINGFIELD IL	CHAMPAIGN SPRINGFIELD-DECATUR
WICU	ERIE PA	ERIE PA
WILX	LANSING MI	LANSING MI
WIS	COLUMBIA SC	COLUMBIA SC
WISE	FORT WAYNE IN	FT. WAYNE IN
WITN	WASHINGTON NC	GREENVILLE-WASHINGTON NC
WJAC	JOHNSTOWN PA	JOHNSTOWN-ALTOONA PA
WJAR	PROVIDENCE RI	PROVIDENCE-NEW BEDFORD RI/MA
WJFW	RHINELANDER WI	WAUSAU-RHINELANDER WI
WJHG	PANAMA CITY FL	PANAMA CITY FL
WKTV	UTICA NY	UTICA NY
WKYC	CLEVELAND OH	CLEVELAND OH
WLBT	JACKSON MS	JACKSON MS
WLBZ	BANGOR ME	BANGOR
WLEX	LEXINGTON KY	LEXINGTON KY
WLIO	LIMA OH	LIMA OH
WLTZ	COLUMBUS GA	COLUMBUS GA
WLUC	MARQUETTE MI	MARQUETTE MI
WLWT	CINCINNATI OH	CINCINNATI OH
WMAQ	CHICAGO IL	CHICAGO IL
WMC	MEMPHIS TN	MEMPHIS TN
WMGM	WILDWOOD NJ	PHILADELPHIA PA
WMGT	MACON GA	MACON GA
WMTV	MADISON WI	MADISON WI
WNBC	NEW YORK NY	NEW YORK NY
WNCN	RALEIGH-DURHAM NC	RALEIGH-DURHAM NC
WNDU	SOUTH BEND IN	SOUTH BEND-ELKHART
WNKY	BOWLING GREEN	BOWLING GREEN KY
WNNE	HANOVER NH	BURLINGTON-PLATTSBURGH NY
WNWO	TOLEDO OH	TOLEDO OH
WNYT	ALBANY-SCHENECTADY NY	ALBANY-SCHENECTADY-TROY NY
WOAI	SAN ANTONIO TX	SAN ANTONIO TX
WOOD	GRAND RAPIDS MI	GRAND RAPIDS-KALAMAZOO MI
WOWT	OMAHA NE	OMAHA NE
WPBN	TRAVERSE CITY MI	TRAVERSE CITY-CADILLAC MI
WPMI	MOBILE AL	MOBILE-PENSACOLA FL
WPSD	PADUCAH KY	PADUCAH-HARRISBURG IL
WPTV	PALM BEACH FL	WEST PALM BEACH-FT. PIERCE FL
WPTZ	PLATTSBURGH NY	BURLINGTON-PLATTSBURGH NY
WPXI	PITTSBURGH PA	PITTSBURGH PA
WRC	WASHINGTON DC	WASHINGTON DC
WRCB	CHATTANOOGA TN	CHATTANOOGA TN
WREX	ROCKFORD IL	ROCKFORD IL
WSAV	SAVANNAH GA	SAVANNAH GA
WSAZ	HUNTINGTON WV	CHARLESTON-HUNTINGTON WV

WSFA  
WSLS  
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WTAP  
WTHR  
WTLV  
WTMJ  
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WTOV  
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WTWC  
WTWO  
WVIR  
WVIT  
WVLA  
WVTM  
WVVA  
WWBT  
WWLP  
WXIA  
WXII  
WYFF

MONTGOMERY AL  
ROANOKE VA  
NASHVILLE TN  
SYRACUSE NY  
PARKERSBURG WV  
INDIANAPOLIS IN  
JACKSONVILLE FL  
MILWAUKEE WI  
CHEBOYGAN MI  
WHEELING WV  
TUPELO MS  
MIAMI FL  
TALLAHASSEE FL  
TERRE-HAUTE IN  
CHARLOTTESVILLE VA  
HARTFORD CT  
BATON ROUGE LA  
BIRMINGHAM AL  
BLUEFIELD WV  
RICHMOND VA  
SPRINGFIELD MA  
ATLANTA GA  
WINSTON-SALEM NC  
GREENVILLE SC

MONTGOMERY AL  
ROANOKE-LYNCHBURG VA  
NASHVILLE TN  
SYRACUSE NY  
PARKERSBURG WV  
INDIANAPOLIS IN  
JACKSONVILLE FL  
MILWAUKEE WI  
TRAVERSE CITY-CADILLAC MI  
WHEELING-STEUBENVILLE WV/OH  
COLUMBUS-TUPELO-WEST POINT MS  
MIAMI-FT. LAUDERDALE FL  
TALLAHASSEE-THOMASVILLE FL  
TERRE HAUTE IN  
CHARLOTTESVILLE VA  
HARTFORD-NEW HAVEN CT  
BATON ROUGE LA  
BIRMINGHAM AL  
BECKLEY-BLUEFIELD-OAK HILL WV  
RICHMOND-PETERBURG VA  
SPRINGFIELD-HOLYOKE MA  
ATLANTA GA  
GREENSBORO-WINSTON SALEM NC  
GREENVILLE-SPARTANBURG SC

**APPENDIX VI**

**LETTER FROM F. WILLIAM LEBEAU TO WILLIAM H. DAVENPORT RE: FCC  
FILE NO. EB-04-IH-0570 (FEB. 14, 2005)**



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Tel: (202) 637-4535  
Fax: (202) 637-4530

February 14, 2005

William H. Davenport  
Chief, Investigations and Hearings Division  
Enforcement Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 4-A462  
Washington, DC 20554

**Attn: Tom Hutton, Esq., Room 4A336, Enforcement Bureau**

**Re: NBC Telemundo License Co.  
File No. EB-04-IH-0570**

Dear Chief Davenport:

NBC Telemundo License Co. ("NBC"), the licensee or corporate parent of 14 NBC affiliated Stations (the "NBC Stations"), hereby responds to the Commission's correspondence dated December 22, 2004 (the "Request").<sup>1</sup> The Request seeks NBC's response to the Bureau's "preliminary investigation" that the broadcast of Olympic indoor woman's volleyball match between the United States and China on August 14, 2004 (the "Match"), "may have contained the word "fuck.""<sup>2</sup> The Request does not reference any public complaint about this particular broadcast, and none of the nine Olympics-related complaints received by the Commission specifically referred to this incident.

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<sup>1</sup> This response is timely filed pursuant to Commission Staff grant of an extension of time – until February 14, 2005 – for NBC to submit responses to the Request. NBC is commonly controlled with the NBC broadcast television network (the "NBC Network") and NBC Olympics, which produced the challenged programming.

<sup>2</sup> See Request at 1.

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## INTRODUCTION AND SUMMARY

Prior to a single instance last year, the Commission, heeding Supreme Court precedent, its own 2001 Policy Statement and sound judgment, had never asserted that a single word, and any of its variations in any context, is invariably indecent and profane under federal law, or that a broadcaster would be sanctioned for airing a live event based upon a single utterance. The "one word" standard for indecent and profane speech announced in *Golden Globes* was a sudden break from Commission precedent, ignored express constitutional warnings from the Supreme Court, and overrode the essential role of context in any regulation of objectionable speech.

Now, the Enforcement Bureau is investigating whether the "f-word" was uttered during an indoor women's Olympic volleyball match, even though not a single viewer complained to the Commission about such an incident. More than 41 million people viewed Olympic programming during the afternoon that this match was broadcast. Not one viewer complained about an expletive uttered during that day's indoor women's volleyball game. This self-initiated investigation takes the Commission even farther down the path of governmental monitoring of free, over-the-air television broadcasts and is a radical departure from its long-standing policy of conducting investigations only in response to specific complaints.

The Supreme Court's decision in *FCC v. Pacifica Foundation* expressly rejected a flat ban against "the isolated use of a potentially offensive word" or a prohibition which ignored the context in which a word was spoken. Subsequent court decisions, and indeed most of the Commission's rulings, reaffirm that a case-by-case determination

considering all the circumstances surrounding a broadcast and the manner in which the language is used is necessary to survive constitutional scrutiny and to ensure reasonable enforcement.

Contrary to the *Golden Globes*' assertion that variants of the "f-word" will always satisfy the statutory standard of "indecent" or "profane" because the word is "patently" or "highly offensive" as defined by the FCC's Policy Statement, only four out of the 41 million viewers complained, inaccurately, to the Commission about allegedly indecent language at any point during the Games, and none of these complaints was directed at the incident now under investigation by the Commission. Furthermore, while *Golden Globes* implied that networks should know that live event broadcasts may involve offensive language, the facts here prove otherwise. Any alleged incident during an Olympic competition was unprecedented: NBCU properties have transmitted more than 1200 hours of Olympic coverage in 2004 (and more than 1600 hours since 2002), but NBCU is not aware of any slip similar to that alleged.

NBC does not condone any use of the "f-word" by any person on broadcast television. Rather, NBC strives to avoid the use of this language on any NBC program through both its own broadcast standards personnel and by working with other participants in live programming to ensure compliance with these standards. NBC is certainly not seeking permission or the right to air any variant of the "f-word" on its programs. In NBC's view, the important issue raised here is not whether the "f-word" should be broadcast, but whether the Commission must consider the context and circumstances in determining whether programming is indecent, as required by

Supreme Court precedent and as the Commission itself has acknowledged is sound policy.

Even if the Commission does not reverse *Golden Globes* in response to the pending petitions for reconsideration, that ruling -- concerning a seasoned entertainer on an annual entertainment awards show -- should not be extended to live sports programming, to words uttered by athletes during a competition, or to other on-the-spot broadcasts of live events, including local and national news. The chilling and boundless ramifications for live, breaking broadcast coverage of sports and news that will result from any extension of *Golden Globes* to this case compel dismissal.

### **BACKGROUND**

The 2004 Summer Olympic Games was a historic and unprecedented event. The Olympics' first return to Greece since the original modern Games in 1896, the 2004 Olympics included 202 separate competing nations and more than 11,000 competitors.<sup>3</sup> Across the globe, four billion viewers watched the Games. The Olympics were more than sports; they were international news.

The Olympics are like no other programming. The Games involve dozens of different venues and hundreds of separate competitions, any of which could result in the next breaking news story. This complexity is compounded by the international nature and popularity of the Games, and it compels individual networks to modify their coverage and typical practices. For example, unlike a typical competition, NBCU is not able to rely solely on its own video. Instead, NBCU relies, in part or in all, on the "world"

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<sup>3</sup> See <http://www.athens2004.com/en/> (viewed on February 1, 2005).

video feed for visual imagery of many events. Because Greece is seven hours ahead of the Eastern Time Zone, NBCU also was unable to air all of the competitions live, contrary to its preferred practice. When feasible, however, NBCU was delighted to expend the extra effort to air key events live, especially on the weekend, where events in the late evening in Greece could be shown live in the morning or early afternoon to significant parts of the United States, whether on the NBC Network or other NBCU platforms.

On the second day of the 2004 Olympics, the NBC Network was able to air live to its Eastern and Central time zone affiliates a woman's indoor volleyball match between the United States and China. It had been 12 years since the U.S. women's volleyball team received an Olympic medal and the pressure to do so was intense. China took a significant lead in the initial set, but the United States had battled back. Trailing 21-20, the United States lost a critical point. As the world feed camera focused on a U.S. volleyball player, the disappointed athlete, while rotating to her set position and with absolutely no apparent knowledge that she was the focus of the camera, appears to have uttered the "f-word." Given the nature of the utterance and the audio environment, viewers may not even have heard the word. The NBC announcers, who were not necessarily viewing the world feed at that moment and may not have heard the athlete's utterance, did not mention or confirm the nature of the fleeting word.

The NBC announcers were not the only ones who did not note any incident. According to Nielsen data, approximately 41.34 million persons viewed all or part of that

afternoon's Olympic coverage on NBC Network.<sup>4</sup> However, no viewer actually complained about this incident to the Commission.<sup>5</sup>

Specifically, the Commission received nine complaints regarding NBC's coverage of the 2004 Olympics. Only four of these complaints focused on allegedly offensive language.<sup>6</sup> One contended that the viewer "had heard some obscenities [sic] aired on the Olympics that I found to be deeply offensive." Another, which was submitted August 14, 2004, noted that "In today's coverage of the women's *beach* volley ball event one of the women clearly says the F word (uck)." (Emphasis added.) A third, submitted August 16, 2004, said that: "My children saw an exposed breast during the opening ceremonies. The words "fuck you" were also heard twice *after* the American volleyball match." (Emphasis added.) A fourth complained about the "f-word" being uttered during the Opening Ceremony.

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<sup>4</sup> See Declaration of Alan Wurtzel (attached as part of Exhibit B).

<sup>5</sup> See <http://www.fcc.gov/eb/broadcast/Pleadings/EB-04-IH-0570.pdf>.

<sup>6</sup> Of the five remaining complaints, two focused on different commercials aired during the Olympics, two complained about allegedly "sexual" content (including male genitalia) during the Opening Ceremony, and one objected to an NBC story on Olympics' gold medal swimmer Amanda Beard. None of these complaints merited further Commission investigation. Those that refer to particular events either are not accurate or do not refer to anything even arguably indecent or profane. Indeed, the complaints regarding a video presentation symbolizing Greek contributions to the world ultimately prompted a very public response from the President of the Athens 2004 Organizing Committee, which underscores why any government action in this area must be limited. See Gianna Angelopoulos-Daskalaki, "Since When is Greece's Culture Obscene?," LOS ANGELES TIMES (Jan. 16, 2005) ("If NBC is punished for airing our opening ceremonies – which in reality depicted Greek contributions to civilization – it would, in effect, label a presentation of our culture on your airwaves as "indecent." . . . [I]t is astonishingly unwise for an agency of the U.S. government to engage in an investigation that could label a presentation of the Greek origins of civilization as unfit for television viewing.")

The Request correctly mentioned none of these complaints. The first lacked the specific allegations necessary for a complaint, and the remainder are simply inaccurate.<sup>7</sup> However, these unsubstantiated and inaccurate complaints caused the Commission to conduct its own review of NBCU Olympic programming, which then resulted in this Commission investigation of an alleged violation of federal law.

This incident was unanticipated and unprecedented. For the 2004 Olympics, NBCU transmitted 1210 total hours of the Olympics across all of its media platforms, including the NBC Network and the Telemundo Network. That is more than three times as much as the 376 hours of coverage transmitted for the 2002 Salt Lake Olympics. Collectively with the 2004 Olympic Trials, NBCU had transmitted 1626 hours of Olympic-related programming in the last three years – most of which was during a five week period. NBC is not aware of any other instance during all this coverage in which a variant of the “f-word” was uttered audibly on air. Nor is NBC aware of any other indecency complaints ever made about its Olympic coverage, other than the unwarranted complaints filed last year.

NBCU's coverage of the 2004 Summer Olympics was widely recognized as high quality family programming. The Sixth Family Television Awards awarded the Olympics its 2004 award for special programming.<sup>8</sup> Of course, this award would not be bestowed on programming that was patently or highly offensive.

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<sup>7</sup> See <http://www.fcc.gov/eb/broadcast/Pleadings/EB-04-IH-0570.pdf>.

<sup>8</sup> See <http://www.ana.net/family> (2004 Awards).

I. **Golden Globes *Should Be Reversed***

A. *Golden Globes Wrongly Abandoned Established Commission Policy*

*Golden Globes* addressed complaints against petitioner NBC Universal's live broadcast of an annual "Golden Globe Awards" program during which the performer Bono, who received an award, stated: "This is really, really fucking brilliant. Really, really great."<sup>9</sup> The *Order* expressly abandoned aspects of the Commission's established policy governing enforcement of Section 1464 and established a new enforcement policy. Long-standing Commission precedent consistently held that isolated and fleeting uses of the "f-word" in broadcasts were not indecent and that the context in which the word was used must be taken into account.<sup>10</sup> Under the new policy, an isolated, fleeting use of the "f-word" or "any of its variants" and "in any context" – even when used as an intensifier, without any intention on the part of the licensee, and potentially without regard to the social value of the speech at issue – is

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<sup>9</sup> *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globes Awards" Program*, 18 FCC Rcd 19859 (Enf. Bur. 2003), *rev'd*, Memorandum Opinion and Order, FCC 04-43 (¶ 15) (March 18, 2004), *recon. pending* (the "*Golden Globes Order*" or "*Golden Globes*").

<sup>10</sup> See *Industry Guidance On the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999, 8002, 8009, (2001) ("*Indecency Policy Statement*"), and cases cited therein; See, e.g., *Peter Branton*, 6 FCC Rcd 610 (1991) (refusing to find indecent repeated use of the "f-word" in a broadcast of an interview with organized crime figure John Gotti); *cf. WUHY-FM*, 24 F.C.C.2d 408 (1970) (distinguishing coverage of bona fide news events from expletive-laced interview with Grateful Dead lead guitarist Jerry Garcia), *on recon.*, 59 F.C.C.2d 892, 893 (1976) ("...RTNDA's Petition calls to our attention the fact that 'in some cases, public events likely to produce offensive speech are covered live, and there is not opportunity for journalistic editing.' Under these circumstances we believe that it would be inequitable for us to hold a licensee responsible for indecent language").

both “indecent” and “profane” for purposes of Section 1464 and the subsequent imposition of forfeiture liability under 47 U.S.C. § 503(b). *Golden Globes* appeared to have adopted an unprecedented *per se* rule that disregards each and every aspect of the broadcast, including even its impact on the viewers, and myopically focuses solely on a single word.

*Golden Globes* effectively eliminated the two separate determinations that had been necessary to any indecency analysis, as it concluded that certain words would be deemed inherently sexual *and* inherently patently offensive. It ignored the judicial axiom that “indecent” and “profane” must have separate meanings, and so expanded the definition of profane -- to include all highly offensive speech -- as to make any indecent utterance profane as well.

NBCU, as well as Fox Entertainment Group, Viacom and other parties, urged the Commission to reconsider the *Golden Globes* Order, arguing that the ruling was unconstitutional, violated the Commission’s statutory mandate and was poor policy. Those petitions have been pending since April 2004. In June 2004, NBCU, Fox Entertainment Group and Viacom jointly petitioned the Commission for a stay of the *Golden Globes* Order. The Commission has not ruled on that request.

B. Supreme Court Precedent Prohibits A Flat Ban Against Fleeting or Isolated Use of A Word Without Considering Context or Circumstances

In *FCC v. Pacifica Foundation*,<sup>11</sup> the Supreme Court stressed the importance of context when it upheld the authority of the FCC to regulate the broadcast of “patently offensive words dealing with sex and excretion.” In the agency ruling on appeal, the

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<sup>11</sup> 438 U.S. 726 (1978).

FCC had concluded that the broadcast of George Carlin's "Filthy Words" monologue included several words that referred to excretory or sexual activities or organs; that the repetitive, deliberate use of those words in an afternoon broadcast when children were in the audience was patently offensive and therefore indecent within the meaning of 18 U.S.C. § 1464. The Court agreed that the broadcast was indecent. The Court also recognized, however, that "[a]lthough these words ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment. Some uses of even the most offensive words are unquestionably protected....Indeed, we may assume *arguendo* that this monologue would be protected in other contexts." The Court emphasized "the narrowness of our holding" and made clear it was not addressing whether "an occasional expletive" would justify a sanction.<sup>12</sup>

Justice Powell, who provided the crucial fifth vote for *Pacifica's* slim majority, buttressed this limitation on the Commission's authority:<sup>13</sup>

The Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast . . . .

Since *Pacifica*, the Supreme Court has further narrowed what might constitute constitutional restrictions on media speech. Less than a decade ago, the Court struck down indecency regulation of cable television leased and public access channels, although these channels were found to be as "'accessible to children' as over the air

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<sup>12</sup> See *id.* at 750.

<sup>13</sup> *Id.* at 760-61 (Powell and Blackmun, JJ., concurring in part, and concurring in judgment).

broadcasting, if not more so.”<sup>14</sup> Other Supreme Court decisions, including those relating to the regulation of indecent content on the Internet, likewise have questioned the logic underlying any indecency standard.<sup>15</sup>

C. Section 1464 Does Not Authorize A Flat Ban Against Fleeting or Isolated Use of a Word Without Considering Context or Circumstances

In addition to constitutional constraints, the Commission cannot exceed its statutory mandate and authority. As construed by the Commission, and as approved by the courts, Section 1464 requires at least two separate “fundamental determinations to support a finding of indecency.”<sup>16</sup>

- the material alleged to be indecent “must describe or depict sexual or excretory organs or activities”; and
- the material “must be *patently offensive* as measured by contemporary community standards for the broadcast medium.”

The Commission recently reiterated that material will not be deemed indecent unless it meets each of these independent and separate criteria.<sup>17</sup> Only that material which satisfies both prongs of the Commission’s own tests qualifies as indecent.<sup>18</sup>

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<sup>14</sup> *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 717, 744 (1996). The Court concluded that the ability of parents to block particular channels on a household by household basis – even though more difficult to do than the V-chip now required on all television sets 13 inches or larger that were manufactured since January 1, 2000, and which applies to all rated broadcast programming on a program by program basis -- was a more narrowly tailored alternative than government censorship.

<sup>15</sup> See, e.g., *Reno v. ACLU*, 521 U.S. 844, 871-81 (1997).

<sup>16</sup> See *Indecency Policy Statement*, 16 FCC Rcd at 8002 (2001) (emphasis in original).

<sup>17</sup> See *Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, Memorandum Opinion and Order, FCC 04-279 (released January 24, 2005) (“*January 25 Denial Order I*”) (denying complaints against 21 programs); *Complaints by Parents Television Council*

In determining whether programming is “patently offensive,” the Commission also just reiterated that the “full context in which the material appeared is critically important.”<sup>19</sup> Three “principal factors” are to be considered (1) the explicitness or graphic nature of the description of sexual or excretory organs or activities; (2) whether descriptions of sexual or excretory organs or activities are dwelled upon or repeated at length; and (3) whether the material is used to pander, titillate or for shock value.

*Golden Globes* misapplied the Commission’s own standards. The Commission “recognize[d] NBC’s argument that the “f-word” here was used ‘as an intensifier’” and that the dictionary definition of the word includes an independent meaning of “really” or “very,” but the Commission nonetheless concluded that “given the core meaning of the “F-word,” any use of that word or a variation, in any context, inherently has a sexual connotation.”<sup>20</sup>

This construction is plainly wrong. Once the Commission recognized, as it must, that certain meanings of the word are intensifiers and *distinct* from meanings that describe sexual activities, it has removed any basis for its conclusion that “any” use of the word or its variants inevitably depicts or describes sexual activity. It simply defies logic to suggest that sexual activity was referenced by Bono saying “fucking brilliant” or

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*Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, Memorandum Opinion and Order, FCC 04-280 (released January 24, 2005) (“*January 25 Denial Order II*”) (denying complaints against 15 programs).

<sup>18</sup> See *Indecency Policy Statement*, 16 FCC Rcd at 8002 (2001) (emphasis in original).

<sup>19</sup> See *January 25 Indecency Denial Order I* at ¶ 5.

<sup>20</sup> *Order* ¶ 8 & n.23 (emphasis added).

by an exasperated Olympic athlete uttering a four-letter word in the heat of competition. Here, it is not even clear that any viewers actually heard the “f-word” spoken by this athlete.<sup>21</sup>

*Golden Globes* also improperly construed the statutory term “profane,” reasoning that “‘profanity’ is commonly defined as ‘vulgar, irreverent, or coarse language’” and that the “F-word” word is clearly the “vulgar and coarse” language that falls with Section 1464’s term.<sup>22</sup> Even though the Commission acknowledged that its prior precedent has focused on “blasphemy,” the agency nevertheless found as an “independent ground” for its ruling that Bono’s expletive constituted “profane” language under 14 U.S.C § 1464. Prior to the Commission ruling, no party, including the Media Bureau, even suggested, that the language in question was profane. Nor has the Commission ever suggested, in the many cases in which the Commission found similar language not indecent, that such incidents were separately actionable as profane.<sup>23</sup> Nevertheless, citing the Seventh Circuit’s “most recent” decision, which was rendered over three

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<sup>21</sup> Cf. *January 25 Indecency Denial Order II* at e (rejecting indecency claim because alleged indecent phrase was not sufficiently clear to warrant sanction).

<sup>22</sup> The *Order* does not explain why it substituted a definition for “profanity” in lieu of a definition of “profane,” which is the actual statutory term, but this substitution may have underlay the *Order*’s incorrect reasoning. Just as an obscenity is not necessarily legally obscene, a profanity may not be assumed to be legally profane.

<sup>23</sup> See, e.g., *Lincoln Deller, Renewal of License for Stations KPRL(AM) and KDDDB(FM)*, 8 FCC Rcd 2582, 2585 (MMB 1993) (holding that news announcer’s live statement that he “fucked that one up” was not indecent). See also *Golden Globes* at n. 32 (listing several cases in which the “fleeting or isolated use of the “f-word” or a variation thereof” had been deemed not indecent without mention that they also, implicitly or otherwise, did not find the word to be profane).

decades ago in a case dealing with a criminal conviction for obscenity,<sup>24</sup> and several years prior to the Supreme Court's order in *Pacifica* that made no mention of any "profane" utterance in the entire "Filthy Words" monologue that featured the "f-word" repeatedly, the Commission ruled that, in addition to blasphemy or divine imprecation, "profane" will now encompass the "f-word" and its variants.

The Commission also impermissibly collapsed the distinct meanings of "obscene, indecent, or profane" in Section 1464, thereby exacerbating the vagueness of the new standard for profane material. The Supreme Court in *Pacifica* stated that "the words" 'obscene, indecent, or profane' are written in the disjunctive, implying that each has a separate meaning.<sup>25</sup> The Commission's new definition of profane contravenes the Supreme Court's ruling and creates an open-ended and standardless prohibition under which any word may be deemed sanctionable.

*Golden Globes* violates the limitations imposed by both the Constitution and Section 1464 on the Commission's authority to regulate indecent and profane speech. The Order should be reversed or modified on reconsideration. In any event, the Order should not be extended beyond its facts or applied to the even more benign facts present in this case: a slip by an emotional and excited Olympic athlete following a missed point during a live sports event, which has never before been knowingly marred by offensive language, and which did not provoke any specific and accurate complaints to the Commission from any one of the more than 41 million viewers.

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<sup>24</sup> *Tallman v. United States*, 465 F.2d 282 (7<sup>th</sup> Cir. 1972).

<sup>25</sup> 483 U.S. at 739-40.

II. ***The Golden Globes Per Se Violation Rule Should Not Be Applied Here***

Golden Globes was premised on several erroneous assumptions and assertions, including that the “f-word” is always patently or highly offensive, that the “f-word” always has a sexual connotation, that broadcasters should know that any live programming might include offensive language and that offensive language is easily avoided through use of technology to delay the broadcast and bleep the word. In this case, even assuming *arguendo*, that U.S. athlete uttered the “f-word” rather than some other word, the Commission should not sanction the NBC Stations.

A. *An Unintended Slip During Live Programming Is Not Always Patently or Highly Offensive*

To determine whether material is indecent or profane, the Commission evaluates whether the material is “patently offensive as measured by contemporary community standards” (indecent) or “highly offensive” (profane).<sup>26</sup> With the advent of email and other communication advances, as well as campaigns launched by single interest groups, people now can and do easily complain to the Commission. In 2004, more than one million complaints about purportedly indecent or profane broadcast programming were submitted to the Commission, as compared to fewer than 400 in 2001.<sup>27</sup>

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<sup>26</sup> See *Golden Globes Order* at ¶¶ 9, 14. The *Golden Globes Order* based what is a new (for the Commission) definition of profane on a 1972 Seventh Circuit decision, which predated the Supreme Court’s decision in *Pacifica*, the Indecency Policy Statement and many other Commission decisions to the contrary. See *Tallman v. United States*, 465 F.2d 282 (7<sup>th</sup> Cir. 1972). According to the Seventh Circuit in 1972, profanity is “construable 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.” *Id.* at 286.

<sup>27</sup> See <http://www.fcc.gov/eb/broadcast/ichart.pdf>.

Out of the more than 41 million total viewers who watched that afternoon's Olympic telecast, none specifically complained about an athlete uttering the "f-word" during the first set of an indoor women's volleyball match. Four viewers complained about allegedly indecent utterances in NBC's Olympic coverage, but did not specify that these alleged words were spoken during the indoor volleyball match.

Programming simply cannot be deemed "patently offensive" as measured by contemporary community standards, or "highly offensive", within the meaning of the statute and the definitions set forth in the Commission's Policy Statement, when four out of 41 million viewers complained to the Commission and none complained to NBC. If "patently offensive" and "contemporary community standards" have any legitimate meaning at all as statutory standards on which to impose sanctions under federal law, they cannot refer to material that provokes a response from one in ten million viewers

The complete lack of any demonstrable public reaction to this event establishes that under the *Golden Globes* standards for an indecent utterance -- "patently offensive" -- or a profane utterance -- "highly offensive" -- the alleged incident was neither indecent nor profane within the meaning of the statute. "Contemporary community standards" means that the most highly sensitive viewer does not set the standard for the nation's viewers. Contrary to the assumption of *Golden Globes*, every use of a variant of the "f-word" does not make a broadcast *per se* indecent in a manner that justifies Commission sanction. In these circumstances, a finding that a single word, uttered in a manner that was not intended to be audible to any broadcast audience, still justifies Commission action would be completely contrary not only to constitutional and statutory limitations, but to the Commission's own criteria for determining indecency.

Indeed, the Commission has just recently and correctly reaffirmed that many words some viewers may find offensive, and which clearly do connote sexual activity, do not meet the "patently offensive" factor of the indecency analysis. In two Orders issued on January 24, 2005, in response to a total of thirty-six complaints filed by the Parents Television Council against a host of television broadcast licensees, the Commission found that the "fleeting uses" of the words dick, hell, damn, ass, bastard, bitch, pissed, crap, penis, testicle, vaginal, orgasm, breast or nipples were not patently offensive.<sup>28</sup> The descriptions in the *Denial Orders* make clear that some of these words were used to connote sexual activity, although the *Orders* concluded that the Commission "need not address whether any of the complaints fail to depict or describe sexual or excretory organs or activities" as none of the words were patently offensive.<sup>29</sup> Nevertheless, an athlete's alleged utterance of the "f-word" as an expression of dismay cannot conceivably be considered more patently offensive than other phrases which the Commission has correctly determined do not satisfy that standard.

B. The "F-word" and Its Variations Do Not Always Have A Sexual Connotation

NBC Network's own standards restrict any use of the "f-word" (or its variants) at any time, including from 10 p.m. to 6 a.m. Accordingly, even under pre-Golden Globes Commission precedent, when isolated utterances did not violate the Commission's standards on indecent or profane utterances, instances of any audible "f-word" on NBC

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<sup>28</sup> See *January 25 Indecency Denial Order I & II*. See also *Entrecom Buffalo License, LLC (WGR(AM))*, 17 FCC Rcd 11997, 11999-12000 (EB 2002) ("WGR") (finding use of term "pissed on" to mean something other than excretory activity in context of relevant material).

<sup>29</sup> See *id.* at nn. 12 & 13.

(or NBC television stations) were extraordinarily rare. Regardless of the outcome of this matter, NBC does not intend to relax these standards in this respect.

Under the Commission's own standards, as approved by the Supreme Court, programming cannot be judged indecent unless it "describes or depicts" sexual or excretory activities or organs. *Golden Globes* just overrides this requirement with respect to the "f-word," stating that "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."

*Golden Globes' per se* rule that any variant of the "f-word" describes sexual activity contravenes both *Pacifica* and the Commission's obligation to achieve its objectives through "narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms."<sup>30</sup> The *Pacifica* Court expressly rejected a blanket ban on a particular word. The Court characterized its 5-4 vote decision as "an emphatically narrow holding." As Justice Powell explained in his concurring opinion, the Court approved "only the Commission's holding that Carlin's monologue was indecent 'as broadcast' at two o'clock in the afternoon, and not the broad sweep of the Commission's opinion."<sup>31</sup> Justices Powell and Blackmun noted "[t]he Commission's holding, and certainly the Court's holding today, does not speak to

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<sup>30</sup> *Action for Children's Television v. FCC*, 58 F.3d 654, 663-64 (D.C. Cir. 1995) (en banc) ("ACT III") (quoting *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989)).

<sup>31</sup> *Pacifica*, 438 U.S. at 755-56 (Powell, J., concurring).

cases involving the isolated use of a potentially offensive word.”<sup>32</sup> They stressed that the Commission does not have “unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from momentary exposure to it in their homes.”<sup>33</sup>

To determine whether the alleged utterance constitutes indecency, the Commission must make a determination that the word was both patently offensive and depicted sexual or excretory activities or organs, based upon the facts and the context, and not upon a flat ban against a single word. This case demonstrates that variants of the word are used in many contexts that clearly do not intend *any* sexual connotation. An Olympic volleyballer, in the heat of competition, may have uttered the “f-word” after losing a tough point without even knowing that her word may be audible to the public. *Golden Globes* presumes that such alleged word choice inescapably would cause any listener to apply a sexual connotation. In fact, it is obvious that the word lacked any sexual connotation and, if uttered, was simply a visceral reaction to missing a point in a close match.

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<sup>32</sup> The concurring opinion expressly distinguished “the isolated use of a potentially offensive word” from “the verbal shock treatment administered by respondent,” and explained that the order under review “was limited to the facts of this case.” *Pacifica*, 438 U.S. at 760-761 (Powell, J., joined by Blackmun, J., concurring).

<sup>33</sup> *Id.* See also *id.* at 772 (Brennan J., dissenting) (“I believe that the FCC is estopped from using either this decision or its own orders in this case...as a basis for imposing sanctions on any public radio broadcast other than one aired during the daytime or early evening and containing the relentless repetition, for longer than a brief interval, of [offensive language].”).

C. Broadcasters Should Not Be Required to Anticipate Indecent or Profane Material During Live Programming

*Golden Globes* asserted that NBC was “on notice that an award presenter or recipient might use offensive language during the live broadcast” because of two prior instances in which a presenter or recipient, including Bono, had used such language during other entertainment awards programming.<sup>34</sup> The Commission noted that NBC could have imposed a tape delay on its live broadcast to ensure that no offensive language was aired. Indeed, based upon this meager record, the Commission broadly asserted that “we encourage networks and broadcasters to undertake such technological measures.”<sup>35</sup>

The Commission’s logic transforms a criminal statute that should have *scienter* as an essential element into a strict liability standard that is not appropriate for an enforcement action related to speech. NBC had never experienced a similar incident in its years of airing the *Golden Globes* and other award ceremonies. No law or reasonable policy justified requiring a technological delay mechanism on live award or entertainment shows based on an isolated incident.

Such a requirement would have even less justification in this case. In the past three years alone, NBCU has transmitted more than 1600 hours of Olympic coverage.<sup>36</sup> During all of that coverage, NBCU is not aware of any prior instances in which there were any audible utterances of language similar to that alleged here. To NBC’s

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<sup>34</sup> See *Golden Globes Order* at ¶ 10.

<sup>35</sup> See *id.*

<sup>36</sup> See *id.*

knowledge, the complaints received by the Commission last year are the only complaints ever made by viewers about allegedly indecent Olympics material. Based on this record, NBC has no reason to alter years of programming practice and risk the on-the-spot programming that viewers want and expect.

D. A Delay System Should Not Be Imposed For Live, On-the-Spot Coverage

*Golden Globes* blithely assumes that “broadcasters can easily ensure that they are not subject to enforcement action under our decision today” if they “adopt and successfully implement a delay/bleeping system for live broadcasts.”<sup>37</sup> Even if such a system can be effective in the relatively controlled environment of an entertainment awards program, the same assumption does not apply to on-the-spot sports or news coverage, especially Olympic coverage.

First, the effectiveness of any delay/bleeping system depends on trained personnel being able to catch the questionable word, sometimes amid a sea of ambient noise, and being able to time the “bleep” to obscure a questionable word without affecting other speech. Human error, or judgment calls, will not be uncommon. A delay system is likely to block protected speech and may result in fewer live broadcasts.

This case highlights the problems. The setting for the alleged expletive was an Olympic volleyball match with thousands of noisy fans and more than a dozen competitors, coaches and referees constantly audible. It would have been an impossible challenge to pre-screen any inappropriate language within a short delay even if a screening mechanism could have been in place. An audio review would have

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<sup>37</sup> *Golden Globes Order* at ¶ 17.

but a few seconds to determine, among all the ambient noise, whether there was a vulgarity that might be contrary to the Commission's current standards.

And that would be just for one match. To do the same exercise for every Olympic event – for literally thousands of hours of Olympic coverage – would be an impossible task given the time and equipment available. Second, multiple venues, especially in regionalized sports broadcasts, pose further issues for delay mechanisms. In multiple venue or game coverage, it would be nearly impossible to synchronize the delays between one site and another site. Events like the Olympics, which involve coverage at multiple sites, are meticulously planned months in advance in an effort to maximize coverage. The synchronization of swimming's ten-second delay with that of the javelin would introduce an additional degree of difficulty that could result in missed highlights, dead air and frustrated viewers during the coverage.

Third, a compelled time delay of all live on-the-spot coverage is likely to preclude many live reports in their entirety. Often, for example, a reporter in the field is responding to questions heard over the live broadcast feed; the reporter is not hearing the questions from a news or sports anchor through a separate line. As a result, a five-second delay on the over-the-air feed would mean a news anchor or sports announcer would ask a question and the on-the-spot reporter would not hear it until five or ten seconds later. In other words, any sort of short delay would effectively deny such further questioning of an on-site reporter.

Fourth, the cost of delay systems would risk much existing live sports and news coverage, especially on the local level. Local television and radio stations would have to implement costly tape-delay mechanisms or abandon the live broadcasts of sports,

news and other local events. Each local television and radio station would have to choose between running the risk of strict liability for a single vulgar word (and the possible threat to a station's licenses) or run every aspect of its on-the-spot coverage – whether it is a local “man on the street” interview or national coverage of a hurricane – through the appropriate and expensive “bleeping” equipment and trained personnel before it can go on air. The ultimate result will be less live programming, both local and national, on free, over the air broadcast television, all because of the threat of a rare slip of the tongue or uncontrollable audio during a live event.

E. Live Broadcasts, Without Delays, Serve The Public Interest

The public interest will not be served by a flat ban against certain words and a policy that penalizes broadcasters who do not implement a delay system. *Golden Globes* wrongly ignored that the true value of the speech lost is not just the value of the already extraordinarily rare expletive, but all speech that will be deleted, chilled or altered if the Commission can impose sanctions because of a single word in any live programming. Any Commission sanction in this case may allow one or two complaints to dictate the extent to which millions of Americans can enjoy free, unfettered over-the-air broadcast coverage of many live sporting events and reduce Olympic coverage.

The importance of live sports broadcasts to viewers is illustrated by the sheer number of such broadcasts, sometimes in unusual time slots.<sup>38</sup> The Olympics demonstrates this point: U.S. telecasts often begin in the late morning in order to maximize live coverage for all or some of the United States. Similarly, many nationally

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<sup>38</sup> Indeed, certain Commission policies treat sports programming differently from other programming because of its extreme sensitivity. See, e.g., 47 C.F.R. § 76.95.

televised games and events frequently start at 9 p.m. in order to facilitate live viewing for the entire continental United States. NBC even airs certain international events in the morning in the Eastern time zone, including its annual Wimbledon coverage or coverage of other international events like the Olympics, in order to air the programming live. Sanctioning a broadcaster based on the absence of a delay/bleeping mechanism will have ramifications for hundreds of televised events, both local and national, every year. Indeed, such local sports coverage, which entails similar risks as any other live event coverage, may now become simply too risky – both in monetary terms and with respect to a station's license -- to air.

A delay requirement also could reduce Olympic coverage. The Olympics involve dozens of venues, many separate video and audio feeds and thousands of hours of coverage in a few weeks time. Requiring "bleeping" personnel to review each of the relevant feeds for all of this coverage would add a substantial burden to Olympics coverage.

Furthermore, the Commission's action may have ramifications far beyond sports and extend to live and on-the-spot news coverage. The Commission should not endanger live news coverage as part of a quixotic effort to purge the extraordinarily rare instances of accidental vulgarities from such broadcasts. The principle of live, uncensored coverage of breaking events is fundamental to a free society and protected by the Constitution. That this case involved an on-the-spot coverage of a volleyball match, rather than an interview with a political figure or witness to a newsworthy event, does not alter the underlying risk that any live coverage can result in Commission sanction for

a single word. The obvious result will be a chilling effect on actual live broadcasts, and the loss of much spontaneous speech.

### **III. *The Commission Should Not Extend Golden Globes to Live Event Coverage of Sports and News At Issue Here***

Even if the Commission declines to modify or reverse *Golden Globes* upon reconsideration, *Golden Globes* should not be extended to the live coverage of sports and news, and should not lead to a finding of indecency in this case. In *Golden Globes*, the Commission justified its abrupt break from longstanding precedent stretching back to *Pacifica* by focusing on the extent of public outcry regarding the word uttered, the nature of the event, the asserted ease and effectiveness of a delay system in the relevant environment, and the past improprieties of Bono, the speaker of the word at issue.<sup>39</sup> It also altered its past definition of profane to include the “f-word” and its variants based on a claim that, in the *Golden Globes* context, the word amounted to a nuisance. Each of these four factors is inapplicable in this case:

- Here, none of the more than 41 million viewers who tuned into that afternoon’s Olympic programming specifically complained about the language that may have been used during the Match. Only four complaints to the Commission addressed language concerns and these were far too vague or inaccurate to be thought reliable or worthy of investigation by the Commission.
- Here, the live nature of the programming was even more important to viewers. The Match was aired live in both the Eastern and Central Time Zones, as well as Hawaii, and delayed (with the rest of that afternoon’s Olympic programming) by only one or two hours in the Mountain, Pacific and Alaska time zones.

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<sup>39</sup> See *Golden Globes Order* at n. 6, ¶¶ 10, 11 (noting, respectively, the thousands of public communications to the Commission, the claim that at least two prior entertainment awards programs had instances of vulgar language, the asserted, without proof, “ease with which broadcasters today can block even fleeting words in a live broadcast,” and past statements of Bono, the speaker in question).

- Here, a delay/bleeping system is less likely to be effective and more likely to filter out non-offensive speech. On-the-spot programming in crowded, unregulated environments, such as during an Olympic competition with thousands of attendees present, must deal not only with the pressures inherent in split-second screening common to any live programming, but also the challenges of a live event, including on-field noise, verbal exchanges with remote or offsite reporters and crowd noise. The resulting cacophony makes it difficult to review and, if necessary, delete words during the seconds afforded by a typical delay.
- Here, any alleged vulgarity was unprecedented: NBCU has transmitted more than 1600 hours of Olympics-related programming since the 2002 Winter Games without being aware of any similar incident.

These circumstances also present even less reason to find the challenged language patently offensive under the Commission's traditional three-pronged test:

- It is not certain that the "f-word" word was heard by viewers as the nature of the broadcast made the audio not completely clear. When a potential expletive has not been clearly uttered, the Commission has sensibly refused to apply sanctions, even after *Golden Globes*.<sup>40</sup>
- The challenged word was even more fleeting and isolated than in *Golden Globes*. The word was uttered at a random point in the Match, without any surrounding communication from the athlete, who had no reason to know that the international video and audio feed was focusing momentarily on her
- The word was clearly not intended to titillate or pander. The athlete was trying to win an Olympics competition and had just missed a point. Any possible expletive was clearly visceral, not calculating.

The facts of this case compel the conclusion that the material broadcast was neither indecent nor profane within the meaning of the statute. A contrary ruling simply cannot be reconciled with Supreme Court precedent, the Commission's prior ruling or sound policy.

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<sup>40</sup> Cf. *Indecency Denial Order II* at e (rejecting complaint against "The Next Joe Millionaire" because no character "appears to utter" the specific expletive at issue).

#### **IV. Further Investigation Is Not Justified**

None of the handful of Complaints relating to accusations of verbal indecency merit any further Commission investigation. Indeed, the Request declines to reference any of these complaints, none of which specifically identify any apparent instance of the details of any possible profane or indecent utterance. This lack of an underlying specific complaint raises two fundamental procedural issues.

First, the Commission should limit any investigation of programming to the issues specifically raised by complaints from the public. Otherwise, the Commission could use any complaint as a basis for a completely unrelated inquiry, which would have a frightening chilling effect on broadcast speech. The Commission also would violate its own long-established policy intended to limit the potential arbitrariness of Commission enforcement in this already gray area.<sup>41</sup> Here, no complaint from the public alleges that an athlete possibly used a variant of the “f-word” during a women’s indoor volleyball match on August 14, 2004. The only arguably relevant complaints refer to a beach volleyball match, to statements uttered after the women’s volleyball match, and to a completely vague allegation of “obsenities” [sic] during Olympic programming.

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<sup>41</sup> See, e.g., [www.fcc.gov/eb/broadcast/opi.html](http://www.fcc.gov/eb/broadcast/opi.html) (last viewed Feb. 1, 2005) (“Enforcement actions in this area are based on documented complaints of indecent, profane or obscene broadcasting received from the public. The Commission’s staff reviews each complaint to determine whether it alleges information sufficient to suggest that a violation of the obscenity, profanity or indecency prohibition has occurred.”); *Action for Children’s Television v. FCC*, 59 F.3d 1249 (D.C. Cir. 1995) (“The Commission initiates the forfeiture process only after receiving a complaint from a listener or viewer. The agency staff reviews each complaint to determine whether it suggests that there has been a violation of the ban on indecent broadcasting.”)

Second, the Commission should refuse to pursue any complaint unless that complaint includes specific allegations of fact that, if true, would substantiate a violation of the Commission's Rules.<sup>42</sup> A decision by the Commission to investigate viewer complaints, even when no description sufficient to substantiate an alleged violation is included in the complaint, compounds the challenge to free speech posed by the Commission's admittedly case-by-case indecency policies. If parties' complaints are not required to meet some factual minimum before the Commission launches an inquiry, the Commission is well on its way down the slippery slope of government oversight of all programming. In addition, stations have no safeguard against the costs involved in defending against even pretextual complaints, other than neutering their content to suit even the most sensitive viewers at the expense of what many others in the audience would prefer to be able to watch on free, over the air television.

Furthermore, a low factual bar for Commission investigation will encourage motivated parties to send unsubstantiated "nuisance" complaints, even when those parties have not viewed the programming in question, and especially when the

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<sup>42</sup> Much precedent suggests that the actual threshold should require far more reliable evidence. See *Emmis License Corporation*, Memorandum Opinion and Order, 17 FCC Rcd 18343 (Enf. Bur. 2002) (implying that "significant excerpts" were needed for Commission to commence indecency investigation). However, no Commission policy suggests that less than a *prima facie* complaint can trigger a Commission request for additional information regarding a claim of indecent or profane broadcasts. Cf. *Infinity Broadcasting Operations, Inc.*, Notice of Apparent Liability for Forfeiture, FCC 03-234, n. 38 (Oct. 2, 2003) (determining that "once a complainant makes a *prima facie* case, it is appropriate for the staff to seek from the licensee a tape or transcript not only of the relevant material, but also of a reasonable amount of preceding and subsequent material.") In this case, the Complaint failed even to allege sufficient facts, unsupported or otherwise, to establish a *prima facie* case of indecency.

Commission has demonstrated a willingness to pursue matters possibly discovered through these allegations, even when they are unrelated to the initial complaint.

This is not mere speculation. The many errors contained in certain of the Olympics-related complaints -- including false allegations of naked breasts, vulgar language or male genitalia during the NBC telecast of the Opening Ceremony -- indicate that some viewers make mistakes or are predisposed to find problems with what are clearly decent broadcasts. Indeed, *Golden Globes* noted a flood of complaints about Bono's language airing on dozens of stations that never actually aired that word because NBC deleted it for broadcasts in later time zones.<sup>43</sup> These complaints are a waste of Commission and licensee resources to resolve, as they do not truly reflect legitimate concerns of a station's viewers.

The marked increase in Commission complaints since 2000 is directly tied to organized campaigns conducted by advocacy groups to generate a high volume of electronic complaints against programming which is demonstrably popular with the vast majority of viewers. According to the Commission, over 99 percent of the indecency complaints submitted to the Commission in 2003 were generated by the Parents Television Council.<sup>44</sup> Through October 1, 2004, the Commission reported that over 99 percent of indecency complaints -- other than those related to the Super Bowl half-time

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<sup>43</sup> See, e.g., *Golden Globes Order* at ¶ 19 & n. 46 (acknowledging that "many of the stations were not proper subjects of the complaint because they aired the program . . . after NBC had deleted the offending material").

<sup>44</sup> Todd Shields, "Activists Dominate Content Complaints," *MediaWeek* (Dec. 6, 2004) (available at [www.mediaweek.com/mediaweek/headlines/article\\_display.jsp?vnu\\_content\\_id=1000731656](http://www.mediaweek.com/mediaweek/headlines/article_display.jsp?vnu_content_id=1000731656)) (last viewed January 31, 2005).

show – were generated by the same group.<sup>45</sup> Another group, the American Family Association, provides emails alerting members to programs it deems objectionable and prepares model complaint letters to be sent to the Commission. These singular campaigns generate a large number of complaints that require careful scrutiny.

Lax application of indecency pleading requirements creates a vague standard that cannot be applied fairly and in an even-handed fashion. The Commission should not have discretion to target particular stations based on certain “fact-less” indecency complaints.<sup>46</sup> The ambiguity inherent as to what constitutes indecency should not be compounded by investigating complaints that do not meet a reasonable evidentiary standard for detail and reliability.

Accordingly, the four complaints suggesting indecent or profane language during the Games should be denied or dismissed for lack of specific detail or unreliability. The Bureau’s own inquiry should be terminated because of a lack of basis in any demonstrable public concern.

### **GENERAL RESPONSES AND OBJECTIONS**

1. NBC objects to any aspect of the Request to the extent it seeks the discovery of information protected by attorney-client privilege, that constitutes attorney work product, or that is otherwise privileged or protected from disclosure.
2. NBC objects to any aspect of the Request to the extent it exceeds a scope reasonably pertinent to the issues raised by the Investigation.
3. NBC objects to any aspect of the Request to the extent it seeks discovery of information outside NBC’s possession, custody or control.

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<sup>45</sup> *See id.*

<sup>46</sup> *Cf. Melody Music v. FCC*, 345 F.2d 730 (D.C. Cir. 1965) (requiring that similarly situated parties be treated similarly.)

4. In providing answers to any aspect of the Request, NBC does not waive, and expressly reserves, all objections as to competency, relevancy, materiality and admissibility of the Response or the subject matter thereof, as well as all objections to any other discovery request.

Each of the General Objections is hereby incorporated by reference into each and every Response as set forth below.

### **SPECIFIC RESPONSES AND OBJECTIONS**

#### **Query No. 1**

**State whether the Licensee broadcast the Expletive (in any form) over any or all of the Stations in the Volleyball Broadcast (or on any rebroadcast(s) of any portion of the Volleyball Broadcast) between 6:00 a.m. and 10:00 p.m.**

Subject to the General Objections, and to the legal and factual context detailed elsewhere in this response, NBC Network broadcast a women's volleyball match between the United States v. China as part of live Olympic coverage from approximately 2:54 p.m. to 4:30 p.m. EDT on August 14, 2004 (the "Match"), in which one of the U.S. athletes, following a lost point, appears to have uttered the word "fuck," although the audio environment suggests that what was heard by viewers was not completely clear, especially given the lack of any specific complaints on this point. When a potential expletive has not been clearly uttered, the Commission has sensibly refused to apply sanctions, even after *Golden Globes*.<sup>47</sup> The "f-word" was neither a graphic nor explicit description of sex and could not possibly denote or connote any sexual meaning.

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<sup>47</sup> Cf. *Indecency Denial Order II* at e (rejecting complaint against "The Next Joe Millionaire" because no character "appears to utter" the specific expletive at issue).

The NBC telecast of the Match aired once on all NBC Stations, as listed in Exhibit C, and did not air on any other broadcast station or broadcast network owned or controlled by NBC or a corporate entity affiliated with NBC, including Telemundo Stations.

**Query No. 2**

**With regard to each broadcast referred to in the response to Inquiry 1 above, state the exact date(s) and time(s) the Expletive was broadcast on each Station and state whether the broadcast consisted of live or taped coverage.**

Subject to the General Objections, the NBC telecast of the Match commenced at 2:54 p.m. EDT on August 14, 2004, and the alleged incident occurred between 2:54 p.m. and 3:15 p.m. EDT (The Bureau has a copy of the Match as broadcast on NBC. The alleged incident occurred during the first set of the match, between China's 21<sup>st</sup> and 22<sup>nd</sup> points. Coverage of the Match was aired live on all Eastern and Central time zone NBC Stations. (Eastern Time Zone stations commenced that day's Olympic coverage at 12 p.m. EDT, while Central Time Zone stations commenced their coverage at 11 a.m. CDT, so these stations aired the Match simultaneously.) NBC Stations in the Mountain and Pacific time zones also aired the programming as part of that day's Olympic coverage. However, in these time zones, NBC Stations' Olympic broadcast programming did not commence until 11 a.m. local time, so the Match itself was not aired live but was delayed by only one or two hours.

**Query No. 3**

**With regard to each broadcast referred to in the response to Inquiry 1 above, identify each United States broadcast station licensed to an entity or individual other than the Licensee that had the contractual right to air the material in question and, for each such station, state whether the Licensee has reason to believe that the station either did not air the material in question or edited the Expletive from the broadcast, and the basis for that belief.**

In addition and subject to the General Objections, NBC raises two specific objections to this query. First, this question is irrelevant, as the Commission never has sanctioned a station not commonly controlled with the relevant programming network for a single word during same-day coverage of a live event.<sup>48</sup> The Commission has reasoned that non-owned affiliates should not be held liable for a spontaneous, isolated utterance during same-day coverage of a live event unless there was prior reason for concern. Indeed, the Commission should be ready to apply a similar policy with respect to all stations, including owned and operated stations, as there is no evidence that the NBC Network had reason to think that the alleged event would occur in the challenged Match.<sup>49</sup> Regardless, any change in the Commission's policy with respect to network affiliates' liability for the same-day broadcast of a live event cannot be applied retroactively without violating both constitutional and statutory due process protections,

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<sup>48</sup> See *Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, Notice of Apparent Liability for Forfeiture, FCC 04-209 (rel. September 22, 2004) (limiting indecency action in cases involving live programming to network owned and operated stations).

<sup>49</sup> Also, as the Commission is aware, the NBC Stations do not have identical ownership with the NBC Network, although GE ultimately exercises control of both the NBC Stations and the NBC Network. See, e.g., FCC File No. BALCT-20031106AJY.

especially as, at the time the program aired, no affiliate had been sanctioned for airing network programming.<sup>50</sup>

Second, subject to the specific objection that NBC does not have actual knowledge as to whether any of its non-owned affiliates aired the lone challenged word, NBC hereby submits Exhibit D, which identifies all stations that had a contractual right to air such programming.<sup>51</sup> None of these stations would likely have had the opportunity to preview this programming. At this time, NBC does not have reason to conclude that the stations included on this matrix did not air the material in question.

#### **Query No. 4**

**Provide copies of all Documents that provide the basis for or otherwise support the responses to Inquiries 1-4 above.**

Subject to the General Objections, NBC notes that, prior to the Request, NBC had provided the Enforcement Bureau a copy of the telecast of the Match as broadcast in

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<sup>50</sup> See *Golden Globes* at ¶ 15 (citing *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618 (D.C. Cir. 2000), which reversed Commission decision that denied a renewal application for abuse of process in connection with the Commission's minority ownership rules because the court found the Commission had not provided sufficiently clear notice of what those rules required). *Golden Globes* added that "given that existing precedent would have permitted this broadcast, we will not require any of the stations that broadcast the program to report our finding here to us as part of its renewal application and we will not consider the broadcast of this program adversely to such licensees as part of the renewal process." *Id.* See, e.g., *Infinity Broadcasting Corp.*, 3 FCC Rcd 930, *aff'd in part, vacated in part, remanded sub nom ACT I*, 852 F.2d 1332 (D.C. Cir. 1988) (subsequent history omitted) (refusing to sanction broadcasters because indecency finding resulted from changed Commission policy).

<sup>51</sup> In addition to the scheduling issues discussed in response to Query 2, NBC affiliates in Hawaii aired coverage of the Match live, as they commenced that day's Olympic coverage at 6 a.m. NBC affiliates in Alaska commenced that day's Olympic coverage at 10 a.m., and so briefly delayed broadcast of the Match in a manner similar to the Mountain and Pacific time zones.

response to an informal request.. Other documents relating to the broadcast that were prepared in connection with or in preparing a response to the Commission's requests are subject to privilege and have not been provided. Subject to any appropriate objections, NBC expects to continue to cooperate with further Commission requests for information relevant to this matter.

\* \* \* \* \*

Please direct any further communications regarding this matter to the undersigned.

Respectfully Submitted,



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F. William LeBeau

Senior Regulatory Counsel & Ass't Secretary  
NBC Telemundo License Co.  
1299 Pennsylvania Avenue, NW  
Washington, DC 20004  
202-637-4535

February 14, 2005

**EXHIBIT A**

**(Declarations of Alan Wurtzel and Peter Diamond)**

## DECLARATION

I, Alan Wurtzel, President, NBC Research and Development, under penalty of perjury, hereby declare that the information contained herein is true and accurate to the best of my personal knowledge and belief.

1. According to Nielsen data available to NBC, approximately 41.34 million persons saw all or part of the NBC Network's coverage of the Olympics during the late morning or afternoon of August 14, 2004, as aired by the NBC Network beginning at 12 p.m. Eastern Daylight Time.
2. Since and including 2002, NBC Universal, Inc., has transmitted approximately 1626 hours of Olympic coverage.



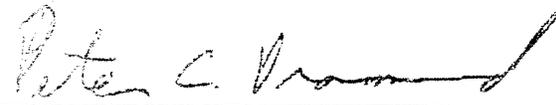
Alan Wurtzel

February 10, 2005

## DECLARATION

I, Peter Diamond, Senior Vice President, Programs, NBC Olympics, under penalty of perjury, hereby declare that the following statements are true and accurate to the best of my personal knowledge and belief:

1. Since and including 2002, NBC Universal, Inc., has transmitted approximately 1626 hours of Olympics coverage, including the 2002 Olympics, the 2004 Olympic Trials, and the 2004 Olympics.
2. The audio and video feed of the alleged incident transmitted by NBC was from the "world" feed of the indoor women's volleyball match between the United States and China on August 14, 2004 (the "Match").
3. The Match was broadcast on NBC affiliated stations in the Eastern and Central time zones and Hawaii. Based on the information available to NBC Network, the broadcast of the Match was delayed one hour by Mountain Time Zone NBC affiliated stations that aired the programming and two hours by Pacific and Alaska Time Zone NBC affiliated stations that aired the programming.



Peter Diamond

February 14, 2005

**EXHIBIT B**

**(List Of NBC-Affiliated Stations Owned Or Controlled By NBC)**

**EXHIBIT B**

<b>Call Sign</b>	<b>Community of License</b>	<b>Time Aired *</b>	<b>Licensee</b>
KNBC(TV)	Los Angeles, CA	1:54 PM to 3:30 PM	NBC Telemundo License Co.
KNSD(TV)	San Diego, CA	1:54 PM to 3:30 PM	Station Venture Operations, LP
KNTV(TV)	San Jose, CA	1:54 PM to 3:30 PM	NBC Telemundo License Co.
KXAS-TV	Fort Worth, TX	1:54 PM to 3:30 PM	Station Venture Operations, LP
WCAU(TV)	Philadelphia, PA	2:54 PM to 4:30 PM	NBC Telemundo License Co.
WCMH-TV	Columbus, OH	2:54 PM to 4:30 PM	NBC Telemundo License Co.
WJAR(TV)	Providence, RI	2:54 PM to 4:30 PM	NBC Telemundo License Co.
WMAQ-TV	Chicago, IL	1:54 PM to 3:30 PM	NBC Telemundo License Co.
WNBC(TV)	New York, NY	2:54 PM to 4:30 PM	NBC Telemundo License Co.
WNCN(TV)	Goldsboro, NC	2:54 PM to 4:30 PM	NBC Telemundo License Co.
WRC-TV	Washington, DC	2:54 PM to 4:30 PM	NBC Telemundo License Co.
WTVJ(TV)	Miami, FL	2:54 PM to 4:30 PM	NBC Telemundo License Co.
WVIT(TV)	New Britain, CT	2:54 PM to 4:30 PM	NBC Telemundo License Co.
WVTM-TV	Birmingham, AL	1:54 PM to 3:30 PM	NBC Telemundo License Co.

\* In all cases, date aired is August 14, 2004. All times expressed are local time.

**EXHIBIT C**

**(Affiliate List)**

**Sum Olym Sat PM****Primary\_Affiliate****CALL\_LETTERS**

KALB  
KAMR  
KARE  
KARK  
KBJR  
KBTB  
KBZ  
KCBD  
KCEN  
KCFW  
KCRA  
KCWY  
KDK  
KDLT  
KECI  
KENV  
KETK  
KFDX  
KFOR  
KFTA  
KFYR  
KGET  
KGNS  
KGW  
KHAS  
KHBC  
KHNL  
KHQ  
KIEM  
KING  
KJRH  
KJWY  
KKCO  
KMAV  
KMCC  
KMIR  
KMOH  
KMOT  
KMTR  
KMTX  
KMTZ  
KNAZ  
KNBC  
KNBN  
KNDO  
KNDU  
KNOP  
KNSD  
KNTV

**NBC\_MARKET\_NAME**

ALEXANDRIA LA  
AMARILLO TX  
MINNEAPOLIS MN  
LITTLE ROCK AR  
DULUTH MN  
BEAUMONT TX  
BOZEMAN MT  
LUBBOCK TX  
TEMPLE TX  
KALISPELL MT  
SACRAMENTO CA  
CASPER WY  
LEAD SD  
SIOUX FALLS SD  
MISSOULA MT  
ELKO NV  
JACKSONVILLE TX  
WICHITA FALLS TX  
OKLAHOMA CITY OK  
FORT SMITH AR  
BISMARCK ND  
BAKERSFIELD CA  
LAREDO TX  
PORTLAND OR  
HASTINGS NE  
HILO HI  
HONOLULU HI  
SPOKANE WA  
EUREKA CA  
SEATTLE WA  
TULSA OK  
JACKSON, WY  
GRAND JUNCTION CO  
BRYAN TX  
LAUGHLIN NV  
PALM SPRINGS CA  
KINGMAN AZ  
MINOT ND  
EUGENE OR  
ROSEBURG OR  
COOS BAY OR  
FLAGSTAFF AZ  
LOS ANGELES CA  
RAPID CITY SD  
YAKIMA WA  
RICHLAND WA  
NORTH PLATTE NE  
SAN DIEGO CA  
SAN FRANCISCO CA

**DMA\_MARKET\_NAME**

ALEXANDRIA LA  
AMARILLO TX  
MINNEAPOLIS-ST. PAUL MN  
LITTLE ROCK-PINE BLUFF AR  
DULUTH-SUPERIOR MN  
BEAUMONT-PORT ARTHUR TX  
BOZEMAN MT  
LUBBOCK TX  
WACO-TEMPLE TX  
MISSOULA MT  
SACRAMENTO-STOCKTON CA  
CASPER-RIVERTON WY  
RAPID CITY SD  
SIOUX FALLS SD  
MISSOULA MT  
RENO NV  
TYLER TX  
WICHITA FALLS-LAWTON TX/OK  
OKLAHOMA CITY OK  
FT. SMITH AR  
MINOT-BISMARCK-DICKINSON ND  
BAKERSFIELD CA  
LAREDO TX  
PORTLAND OR  
LINCOLN-HASTINGS-KEARNEY NE  
HONOLULU HI  
HONOLULU HI  
SPOKANE WA  
EUREKA CA  
SEATTLE-TACOMA WA  
TULSA OK  
IDAHO FALLS-POCATELLO ID  
GRAND JUNCTION-MONTROSE CO  
WACO-TEMPLE TX  
LAS VEGAS NV  
PALM SPRINGS CA  
PHOENIX AZ  
MINOT-BISMARCK-DICKINSON ND  
EUGENE OR  
EUGENE OR  
COOS BAY OR  
PHOENIX AZ  
LOS ANGELES CA  
RAPID CITY SD  
YAKIMA WA  
YAKIMA WA  
NORTH PLATTE-HAYES-MC COOK NE  
SAN DIEGO CA  
SAN FRANCISCO-OAKLAND CA

KNVN	CHICO CA	CHICO-REDDING CA
KNWA	FAYETTEVILLE AR	FT. SMITH AR
KOAA	COLORADO SPRINGS CO	COLORADO SPRINGS-PUEBLO CO
KOB	ALBUQUERQUE NM	ALBUQUERQUE-SANTE FE NM
KOBF	FARMINGTON NM	ALBUQUERQUE-SANTE FE NM
KOBG	SILVER CITY NM	ALBUQUERQUE-SANTE FE NM
KOBI	MEDFORD OR	MEDFORD-KLAMATH FALLS OR
KOBR	ROSWELL NM	ROSWELL NM
KOGG	WAILUKU HI	HONOLULU HI
KOMU	COLUMBIA MO	COLUMBIA-JEFFERSON CITY MO
KOTI	KLAMATH FALLS OR	MEDFORD-KLAMATH FALLS OR
KPLC	LAKE CHARLES LA	LAKE CHARLES LA
KPNX	PHOENIX AZ	PHOENIX AZ
KPRC	HOUSTON TX	HOUSTON TX
KPVI	IDAHO FALLS ID	IDAHO FALLS-POCATELLO ID
KQCD	DICKINSON ND	MINOT-BISMARCK-DICKINSON ND
KRBC	ABILENE TX	ABILENE-SWEETWATER TX
KRIS	CORPUS CHRISTI TX	CORPUS CHRISTI TX
KRNV	RENO NV	RENO NV
KSAN	SAN ANGELO TX	SAN ANGELO TX
KSBW	SALINAS CA	MONTEREY-SALINAS CA
KSBY	SAN LUIS OBISPO CA	SANTA BARBARA-SAN LUIS OBISPO
KSCT	SITKA, AK	JUNEAU AK
KSDK	ST. LOUIS MO	ST. LOUIS MO
KSEE	FRESNO CA	FRESNO-VISALIA CA
KSHB	KANSAS CITY MO	KANSAS CITY MO
KSL	SALT LAKE CITY UT	SALT LAKE CITY UT
KSNC	GREAT BEND KS	GREAT BEND KS
KSNE	PITTSBURG KS	JOPLIN-PITTSBURG MO/KS
KSNG	GARDEN CITY KS	ENSIGN-GARDEN CITY KS
KSNE	MCCOOK NE	NORTH PLATTE-HAYES-MC COOK NE
KSNT	TOPEKA KS	TOPEKA KS
KSNE	WICHITA KS	WICHITA-HUTCHINSON KS
KSWY	SHERIDAN WY	RAPID CITY SD
KTAL	SHREVEPORT LA	SHREVEPORT LA
KTEN	ARDMORE OK	ADA-ARDMORE OK
KTFT	TWIN FALLS ID	TWIN FALLS ID
KTGF	GREAT FALLS MT	GREAT FALLS MT
KTIV	SIOUX CITY IA	SIOUX CITY IA
KTSM	EL PASO TX	EL PASO TX
KTTC	ROCHESTER MN	MASON CITY-AUSTIN ROCHESTER
KTUU	ANCHORAGE AK	ANCHORAGE AK
KTVB	BOISE ID	BOISE ID
KTVE	ELDORADO AR	MONROE-EL DORADO AR
KTVF	FAIRBANKS AK	FAIRBANKS AK
KTVH	HELENA MT	HELENA MT
KTVM	BUTTE MT	BUTTE MT
KTVZ	BEND OR	BEND OR
KULR	BILLINGS MT	BILLINGS MT
KUMV	WILLISTON ND	MINOT-BISMARCK-DICKINSON ND
KUSA	DENVER CO	DENVER CO
KVBC	LAS VEGAS NV	LAS VEGAS NV

KVEO	BROWNSVILLE TX	HARLINGEN-BROWNSVILLE TX
KVLY	FARGO ND	FARGO-VALLEY CITY ND
KVOA	TUCSON AZ	TUCSON AZ
KWAB	BIG SPRINGS TX	ODESSA-MIDLAND TX
KWES	MIDLAND TX	ODESSA-MIDLAND TX
KWNV	WINNEMUCCA NV	RENO NV
KWQC	DAVENPORT IA	DAVENPORT-ROCK IS.-MOLINE IL
KWWL	WATERLOO IA	CEDER RAPIDS-WATERLOO DUBUQUE
KXAM	LLANO TX	AUSTIN TX
KXAN	AUSTIN TX	AUSTIN TX
KXAS	FORT WORTH-DALLAS TX	DALLAS-FT WORTH TX
KXTS	VICTORIA TX	VICTORIA TX
KYMA	YUMA AZ	YUMA-EL CENTRO AZ/CA
KYTV	SPRINGFIELD MO	SPRINGFIELD MO
KYUS	MILES CITY MT	BILLINGS MT
WAFF	HUNTSVILLE AL	HUNTSVILLE-DECATUR AL
WAGT	AUGUSTA GA	AUGUSTA GA
WALB	ALBANY GA	ALBANY GA
WAVE	LOUISVILLE KY	LOUISVILLE KY
WAVY	NORFOLK VA	NORFOLK-PORTSMOUTH VA
WBAL	BALTIMORE MD	BALTIMORE MD
WBBH	FORT MYERS FL	FT. MYERS-NAPLES FL
WBGH	BINGHAMTON NY	BINGHAMTON NY
WBIR	KNOXVILLE TN	KNOXVILLE TN
WBOY	CLARKSBURG WV	CLARKSBURG-WESTON WV
WBRE	WILKES-BARRE PA	WILKES BARRE-SCRANTON PA
WCAU	PHILADELPHIA PA	PHILADELPHIA PA
WCBD	CHARLESTON SC	CHARLESTON SC
WCMH	COLUMBUS OH	COLUMBUS OH
WCNC	CHARLOTTE NC	CHARLOTTE NC
WCSH	PORTLAND ME	PORTLAND-AUBURN ME
WCYB	BRISTOL VA	TRI-CITIES TN/VA
WDAM	HATTIESBURG MS	HATTIESBURG-LAUREL MS
WDIV	DETROIT MI	DETROIT MI
WDSU	NEW ORLEANS LA	NEW ORLEANS LA
WEAU	EAU CLAIRE WI	LA CROSSES-EAU CLAIRE WI
WECT	WILMINGTON NC	WILMINGTON NC
WEEK	PEORIA IL	PEORIA-BLOOMNIGTON IL
WESH	DAYTONA BEACH FL	ORLANDO-DAYTONA BEACH FL
WETM	ELMIRA NY	ELMIRA NY
WEYI	SAGINAW-BAY CITY MI	FLINT-SAGINAW-BAY CITY MI
WFIE	EVANSVILLE IN	EVANSVILLE IN
WFLA	TAMPA FL	TAMPA-ST. PETERSBURG FL
WFMJ	YOUNGSTOWN OH	YOUNGSTOWN OH
WGAL	LANCASTER PA	HARRISBURG-LANCASTER-YORK PA
WGBA	GREEN BAY WI	GREEN BAY-APPLETON WI
WGBC	MERIDIAN MS	MERIDIAN MS
WGEM	QUINCY IL	QUINCY-HANNIBAL IA/MO
WGRZ	BUFFALO NY	BUFFALO NY
WHAG	HAGERSTOWN MD	WASHINGTON DC
WHDH	BOSTON MA	BOSTON MA
WHEC	ROCHESTER NY	ROCHESTER NY

WHIZ  
WHO  
WICD  
WICS  
WICU  
WILX  
WIS  
WISE  
WITN  
WJAC  
WJAR  
WJFW  
WJHG  
WKTV  
WKYC  
WLBT  
WLBZ  
WLEX  
WLIO  
WLTZ  
WLUC  
WLWT  
WMAQ  
WMC  
WMGM  
WMGT  
WMTV  
WNBC  
WNCN  
WNDU  
WNKY  
WNNE  
WNWO  
WNYT  
WOAI  
WOOD  
WOWT  
WPBN  
WPMI  
WPSD  
WPTV  
WPTZ  
WPXI  
WRC  
WRCB  
WREX  
WSAV  
WSAZ  
WSFA  
WSLS  
WSMV  
WSTM

ZANESVILLE OH  
DES MOINES IA  
CHAMPAIGN IL  
SPRINGFIELD IL  
ERIE PA  
LANSING MI  
COLUMBIA SC  
FORT WAYNE IN  
WASHINGTON NC  
JOHNSTOWN PA  
PROVIDENCE RI  
RHINELANDER WI  
PANAMA CITY FL  
UTICA NY  
CLEVELAND OH  
JACKSON MS  
BANGOR ME  
LEXINGTON KY  
LIMA OH  
COLUMBUS GA  
MARQUETTE MI  
CINCINNATI OH  
CHICAGO IL  
MEMPHIS TN  
WILDWOOD NJ  
MACON GA  
MADISON WI  
NEW YORK NY  
RALEIGH-DURHAM NC  
SOUTH BEND IN  
BOWLING GREEN  
HANOVER NH  
TOLEDO OH  
ALBANY-SCHENECTADY NY  
SAN ANTONIO TX  
GRAND RAPIDS MI  
OMAHA NE  
TRAVERSE CITY MI  
MOBILE AL  
PADUCAH KY  
PALM BEACH FL  
PLATTSBURGH NY  
PITTSBURGH PA  
WASHINGTON DC  
CHATTANOOGA TN  
ROCKFORD IL  
SAVANNAH GA  
HUNTINGTON WV  
MONTGOMERY AL  
ROANOKE VA  
NASHVILLE TN  
SYRACUSE NY

ZANESVILLE OH  
DES MOINES-AMES IA  
CHAMPAIGN SPRINGFIELD-DECATUR  
CHAMPAIGN SPRINGFIELD-DECATUR  
ERIE PA  
LANSING MI  
COLUMBIA SC  
FT. WAYNE IN  
GREENVILLE-WASHINGTON NC  
JOHNSTOWN-ALTOONA PA  
PROVIDENCE-NEW BEDFORD RI/MA  
WAUSAU-RHINELANDER WI  
PANAMA CITY FL  
UTICA NY  
CLEVELAND OH  
JACKSON MS  
BANGOR  
LEXINGTON KY  
LIMA OH  
COLUMBUS GA  
MARQUETTE MI  
CINCINNATI OH  
CHICAGO IL  
MEMPHIS TN  
PHILADELPHIA PA  
MACON GA  
MADISON WI  
NEW YORK NY  
RALEIGH-DURHAM NC  
SOUTH BEND-ELKHART  
BOWLING GREEN KY  
BURLINGTON-PLATTSBURGH NY  
TOLEDO OH  
ALBANY-SCHENECTADY-TROY NY  
SAN ANTONIO TX  
GRAND RAPIDS-KALAMAZOO MI  
OMAHA NE  
TRAVERSE CITY-CADILLAC MI  
MOBILE-PENSACOLA FL  
PADUCAH-HARRISBURG IL  
WEST PALM BEACH-FT. PIERCE FL  
BURLINGTON-PLATTSBURGH NY  
PITTSBURGH PA  
WASHINGTON DC  
CHATTANOOGA TN  
ROCKFORD IL  
SAVANNAH GA  
CHARLESTON-HUNTINGTON WV  
MONTGOMERY AL  
ROANOKE-LYNCHBURG VA  
NASHVILLE TN  
SYRACUSE NY

WTAP  
WTHR  
WTLV  
WTMJ  
WTOM  
WTOV  
WTVA  
WTVJ  
WTWC  
WTWO  
WVIR  
WVIT  
WVLA  
WVTM  
WVVA  
WWBT  
WWLP  
WXIA  
WXII  
WYFF

PARKERSBURG WV  
INDIANAPOLIS IN  
JACKSONVILLE FL  
MILWAUKEE WI  
CHEBOYGAN MI  
WHEELING WV  
TUPELO MS  
MIAMI FL  
TALLAHASSEE FL  
TERRE-HAUTE IN  
CHARLOTTESVILLE VA  
HARTFORD CT  
BATON ROUGE LA  
BIRMINGHAM AL  
BLUEFIELD WV  
RICHMOND VA  
SPRINGFIELD MA  
ATLANTA GA  
WINSTON-SALEM NC  
GREENVILLE SC

PARKERSBURG WV  
INDIANAPOLIS IN  
JACKSONVILLE FL  
MILWAUKEE WI  
TRAVERSE CITY-CADILLAC MI  
WHEELING-STEUBENVILLE WV/OH  
COLUMBUS-TUPELO-WEST POINT MS  
MIAMI-FT. LAUDERDALE FL  
TALLAHASSEE-THOMASVILLE FL  
TERRE HAUTE IN  
CHARLOTTESVILLE VA  
HARTFORD-NEW HAVEN CT  
BATON ROUGH LA  
BIRMINGHAM AL  
BECKLEY-BLUEFIELD-OAK HILL WV  
RICHMOND-PETERBURG VA  
SPRINGFIELD-HOLYOKE MA  
ATLANTA GA  
GREENSBORO-WINSTON SALEM NC  
GREENVILLE-SPARTANBURG SC

**APPENDIX VII**

**DECLARATION OF NICOLE A. BERNARD**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of )  
 )  
Remand of Section III.B of the Commission's ) DA 06-1739  
March 15, 2006 *Omnibus Order* Resolving )  
Numerous Broadcast Television Indecency )  
Complaints )

**DECLARATION OF NICOLE A. BERNARD  
ON BEHALF OF FOX TELEVISION STATIONS, INC.**

1. I am Senior Vice President of Broadcast Standards and Practices for the Fox Broadcasting Company, a position that I have held since April 2004. I currently oversee all day-to-day standards and practices operations for Fox Broadcasting Company, including all content approval and compliance processes for the network's entertainment programming and paid advertising content.

2. I am responsible for coordinating the submission of tapes to the Federal Communications Commission that are requested as part of its investigatory process. I also assist outside legal counsel in preparing Fox's formal responses to any Commission indecency inquiries. I am therefore familiar with the FCC's procedures for investigating, prosecuting, and dismissing complaints against the network.

3. It is my understanding that the FCC is actively investigating complaints against at least 75 Fox network programs or content broadcast by Fox's owned and operated television stations, and that these unresolved indecency complaints often lead to significant delays in the license renewal process for the affected stations.

4. I am increasingly concerned about the FCC's lack of transparency with respect to the indecency complaint process. The Commission has only recently (*i.e.*, within the last

6 to 9 months) agreed to provide Fox with the titles and broadcast dates of programs that it is investigating, and the FCC only does so if Fox makes a specific request. The Commission now provides copies of complaints, but redacts all of the complainant's contact information, including the community of residence. This redaction makes it impossible to verify that the complaint has identified the appropriate station. In addition, Fox is not apprised of indecency complaint dismissals without a direct inquiry, and even then, the FCC refuses to provide copies of dismissal letters. The Enforcement Bureau has advised the network that it must file a request under the Freedom of Information Act if it wants to obtain these dismissals. This convoluted process and the associated delays significantly undermine the network's ability to more fully understand the agency's indecency case law and to determine what is and is not acceptable for broadcast.

5. The Commission's dramatically expanded indecency enforcement, which began with its 2004 Golden Globe's decision, together with the ongoing investigation of over 75 complaints against shows aired on Fox or Fox-owned stations, are having a dramatic chilling effect on writers, performers and producers of Fox network programming. With management at Fox increasingly nervous about stepped-up indecency enforcement in the context of a tenfold increase in fines, the network has become ever more cautious in editing out content that this FCC may find objectionable under its vague standards. Without question, content that previously was aired, or would have aired, on Fox, is left out of programs in this chilly environment. Following are some specific examples:

- FOX was forced to shelve an episode of "That 70s Show" that dealt with masturbation after a single airing. The episode, which neither depicted the act nor discussed it in specific terms, won a prestigious award from the Kaiser Family Foundation for an honest and accurate depiction of a sexual health issue.

- Hours before a live broadcast of “American Idol,” Broadcast Standards and Practices forced producers to delete a clip from a Brittany Spears video that had aired numerous times on MTV, VH1 and other broadcast programs.
- The resources of no less than eight Standards and Practices executives were utilized to cover live broadcasts of the family-friendly “American Idol” (three on site, five covering the delay button and phone) out of concern that even the slightest unintended vulgarity or innuendo might generate a response from pressure groups or the FCC.
- For the 2004 and 2005 “Billboard Music Awards,” FOX committed no less than seven Broadcast Standards and Practices executives to cover this live show. Two executives were on-site in Las Vegas for several days, while four executives were directly on separate delay buttons (backed up by another executive on the telephone).
- Ten previously delivered episodes of “Cops” had to be re-edited so that, in addition to bleeping, mouths speaking profanities were blurred.
- For the rebroadcast of the “Family Guy” episode “Road to Europe,” a shot of the nude buttocks of an animated couple at a rock concert was blurred.
- For the rebroadcast of the “Family Guy” episode “A Very Special Family Guy Freakin’ Christmas”, a shot of an animated baby’s bare buttocks reflected on a Christmas tree ornament was removed.
- Although the highly acclaimed drama “House” is unanimously praised for dealing with numerous medical conditions in an honest and accurate fashion, Standards and Practices forced producers to completely re-write an episode that dealt with a patient struggling with psychiatric issues related to sexuality and animals. Although the topic contained no depiction or specific discussion of sexual activity, there was concern about the subject matter.
- “Prison Break” producers were forced to hire a Spanish language consultant after it was learned that Spanish words that were completely acceptable when spoken by a Puerto Rican character might mean something different in another Hispanic culture.
- A scene in a final cut of “Prison Break” featuring a fully-clothed woman sitting on top of a fully clothed man was removed. Although sex was neither explicit nor implied, the scene was edited to ensure it would not generate an FCC inquiry.
- Furious producers for “So You Think You Can Dance” were forced to blur a female dancer’s birthmark on her cleavage out of fear that the birthmark might be mistaken for an areola/nipple.

- At unprecedented expense, no less than eight Standards and Practices executives were involved in covering Super Bowl XXXIX. Two executives were flown to Jacksonville to be on-location, four executives were on separate delay buttons, another executive was backing up on the telephone, and an eighth executive reviewed taped sports material in the days leading up to the game.

6. In general, Fox has had to increase staffing in my department between Fiscal 2004 and Fiscal 2007 by 70%, at a cost of \$1,026,000, to respond to the FCC's stepped-up indecency enforcement regime.

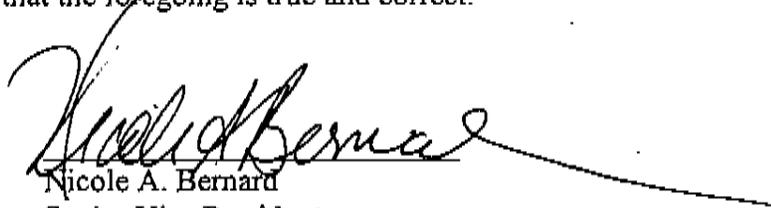
7. All Broadcast Standards and Practices executives undergo rigorous training to ensure that objectionable content is caught prior to air. However, even despite this extensive preparation and training, perfect compliance with the network's broadcast standards and practices is not possible.

8. The network now utilizes four individuals on the "button" to censor potentially indecent live content. Despite this investment in additional full-time personnel, because this is an inherently human endeavor, it is impossible to ensure that content violative of the FCC's vague indecency standard will never air on live television.

9. The current indecency regime is also upsetting the creative community due to the lack of certainty. Programs that once cleared the department must now be reevaluated as the FCC issues new indecency decisions. Furthermore, these changes often must be implemented rapidly which heightens the opportunity for error.

**VERIFICATION**

I declare under penalty of perjury that the foregoing is true and correct.

A handwritten signature in black ink, appearing to read "Nicole A. Bernard", with a long horizontal flourish extending to the right.

Nicole A. Bernard  
Senior Vice President  
Broadcast Standards and Practices  
Fox Broadcasting Company  
10201 West Pico Boulevard  
Los Angeles, CA 90035  
(310) 369-0092

September 20, 2006

**APPENDIX VIII**

**DECLARATION OF DENNIS SWANSON**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Remand of Section III.B of the Commission's	)	DA 06-1739
March 15, 2006 <i>Omnibus Order</i> Resolving	)	
Numerous Broadcast Television Indecency	)	
Complaints	)	

**DECLARATION OF DENNIS SWANSON  
ON BEHALF OF FOX TELEVISION STATIONS, INC.**

1. My name is Dennis Swanson. I am President of Station Operations for the Fox Television Stations Group, a position that I have held since October 2005. I am currently responsible for managing the operations of the 35 television stations owned and operated by Fox, including the stations' local news operations. I previously served as Executive Vice President and Chief Operating Officer of the Viacom Television Stations Group, where I oversaw operations for the 40 television stations owned and operated by Viacom. I also have served in executive positions with the ABC and NBC networks and with local television stations in New York and Chicago.
2. The ability to present live news coverage is of critical importance to the Fox stations and to the viewing public. Particularly during emergency situations and breaking news events, it is essential that viewers learn of vital news as it happens (*e.g.*, the great unifier in the community after the events of 9-11 was television and the information that it imparted). Presenting news on a live basis ensures that our stations' viewers receive the most authentic presentation of information in real-time, without censorship. While live news coverage provides extraordinary benefits to the public, it also carries certain risks due to its often unscripted and volatile nature. For example, stories about severe weather

or military conflict can lead to very emotional reporting, but it is this extemporized coverage that makes live news so compelling and valuable to the public.

3. Due to recent FCC indecency enforcement action, however, the network is now faced with having to consider a delay even during news coverage because of the possibility that an on-air report may run afoul of the FCC's vague indecency standard. The FCC's content restrictions inappropriately infringe on journalistic freedom by forcing stations to choose between censoring broadcasts (and depriving the public of critical information) and risking severe penalties from a government enforcement action.

4. Even with a delay, moreover, in many cases it would be impossible for stations to review content to ensure compliance with overly-broad indecency restrictions.

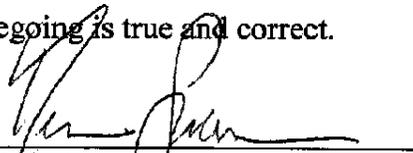
Employees enforcing broadcast standards would have to make difficult, split-second decisions about whether to censor news reporting in an effort to comply with the FCC's indecency regulations. Broadcast standards employees are not journalists and their efforts would necessarily interfere with both the right and the obligation of journalists to present the news as accurately as possible. Further, decisions about what news to censor would have to be made based on an inherently vague indecency standard that relies on context to an extraordinary degree. Any effort to censor the news would always be subject to human error – both in terms of failing to edit potentially objectionable material and in accidentally editing out clearly legal content. This potential for error means that non-journalists could unnecessarily restrict the flow of news to the audience.

5. Finally, for competitive reasons, Fox's ability to present the news live and unadulterated is more important than ever. The Fox stations are competing with other media that are not subject to the Commission's stringent and uncertain indecency

regulations. The near ubiquitous availability of cable and the Internet means that consumers easily can migrate to other platforms where they can get the most current and complete news without fear that it might be censored or edited for reasons unrelated to news judgment. Such migration would not be entirely without cost, however; live, local news coverage is a distinctive feature of the broadcast offerings of local stations. If FCC regulation of live broadcasts threatens local news coverage, an important public service performed by local stations may be lost.

### VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct.



---

Dennis Swanson  
President of Station Operations  
Fox Television Stations Group  
1211 Avenue of the Americas  
New York, New York 10036  
(212) 556-2400

September 20, 2006

**APPENDIX IX**

**DECLARATION OF ED GOREN**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of )  
 )  
Remand of Section III.B of the Commission's ) DA 06-1739  
March 15, 2006 *Omnibus Order* Resolving )  
Numerous Broadcast Television Indecency )  
Complaints )

**DECLARATION OF ED GOREN  
ON BEHALF OF FOX TELEVISION STATIONS, INC.**

1. My name is Ed Goren. I am President, Fox Sports, a position that I have held since April 2000. I am currently responsible for the look, sound, editorial content and superior quality of Fox Sports' studio and game broadcasts and I also serve as Executive Producer of all Fox Sports productions. I previously served as Senior Producer for CBS Sports, where I produced sports telecasts for every sport broadcast by the network.
2. The ability to present live sports programming to the Fox Sports audience is of critical importance. Viewers demand the most authentic and realistic presentation of sporting events in real time and without censorship. In addition to live broadcasts of the events themselves (with their accompanying play-by-play commentary), at times the network also provides live audio from the field of play and live interviews with athletes before, during and after games. This coverage, which our viewers have come to expect, provides the audience a complete experience and helps fans feel like they are part of the action.
3. Due to recent FCC indecency enforcement action, however, Fox Sports is now faced with having to consider a delay even during live sports coverage because of the possibility that an on-air event may run afoul of the FCC's vague indecency standard.

This is an unwarranted infringement on the sports production process that also thwarts the expectations of sports fans who desire to watch games live.

4. Even with a delay, moreover, in many cases it would be impossible for Fox Sports to review content to ensure compliance with overly-broad indecency restrictions.

Broadcast standards employees would be forced to make split-second decisions about whether to censor content in an effort to comply with the FCC's indecency regulations. And they would have to make these decisions based on an inherently vague indecency standard that relies on context to an extraordinary degree. This very human endeavor would always be subject to error – both in terms of failing to edit potentially objectionable material and in accidentally editing out clearly legal content. This potential for error easily could lead to distorted coverage if perfectly legitimate content is inadvertently edited out.

5. Finally, for competitive reasons, Fox Sports' ability to present programming live and unadulterated is more important than ever. In an era of time-shifting made possible by digital video recorders, sports programs are one of the few remaining examples of “appointment television.” Fans demand that sports be shown live and will favor media that are able to provide such programming. Fox Sports' over-the-air broadcasts compete with other media that are not subject to the Commission’s stringent and uncertain indecency regulations. The near ubiquitous availability of cable and the Internet means that consumers easily can migrate to other platforms where they can experience sports coverage live and without fear that it might be censored or edited solely because of fear of government enforcement. Thus, the Commission's indecency enforcement threatens

the viability of live sports programming on over-the-air broadcast television and puts Fox Sports at a competitive disadvantage with other media.

**VERIFICATION**

I declare under penalty of perjury that the foregoing is true and correct.



Ed Goren  
President, Fox Sports  
Fox Broadcasting Company  
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Los Angeles, CA 90035  
(310) 369-1000

September 20, 2006

**APPENDIX X**

**DECLARATION OF PETER LIGUORI**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of )  
 )  
Remand of Section III.B of the Commission's ) DA 06-1739  
March 15, 2006 *Omnibus Order* Resolving )  
Numerous Broadcast Television Indecency )  
Complaints )

**DECLARATION OF PETER LIGUORI  
ON BEHALF OF FOX TELEVISION STATIONS, INC.**

1. My name is Peter Liguori. I am President, Entertainment for the Fox Broadcasting Company, a position that I have held since March 24, 2005. I am currently responsible for all FOX network program development and scheduling, as well as marketing, business affairs and promotions. I previously served as President and Chief Executive Officer of News Corporation's FX Networks for seven years, where I oversaw business and programming operations for FX and the Fox Movie Channel.
2. The ability to present awards shows and other entertainment programming live to our audience is of critical importance to the network. Viewers demand the most authentic presentation of awards shows and other public events in a way that is realistic and uncensored. The live presentation of awards shows and other popular entertainment programming (such as *American Idol*) is what makes this content so compelling.
3. Due to recent FCC indecency enforcement action, however, the network is forced to delay these broadcasts so that censors may attempt to bleep out or discard material that may run afoul of the FCC's vague indecency standard. This is a harmful infringement on the creative process that interferes with the desire of the viewing public to watch these events as they unfold.

4. Even with a delay, moreover, in many cases it is impossible for the network's broadcast standards group to effectively monitor live broadcasts. These dedicated employees must make split second decisions about whether to censor content in an effort to comply with the FCC's indecency regulations. And they have to make these decisions based on an inherently vague indecency standard that relies on context to an extraordinary degree. This very human endeavor is subject to error – both in terms of failing to edit potentially objectionable material and in accidentally editing out clearly legal content. As a result, unnecessary censorship is inevitable under the vague indecency standard. Such censorship inappropriately invades the creative process, leads to harmful distortions of broadcasts and threatens the future of live programming.

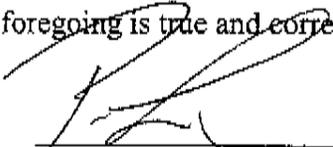
5. The threat is not merely theoretical. The network recently broadcast a program containing a live performance by a musician. Broadcast standards employees reviewed the song lyrics in advance and watched multiple dress rehearsals, all of which indicated that the performance would fully comply with the indecency rules. During the time-delayed live broadcast, however, a vigilant standards employee bleeped a portion of the song's audio out of fear that an expletive had been used. A review of the material following the broadcast revealed that no expletive in fact was ever uttered, but by then the television audience had already been subjected to an unwarranted interruption of its enjoyment of the program.

6. Finally, for competitive reasons, FOX's ability to present entertainment programming live and unadulterated is more important than ever. In an era of time-shifting made possible by digital video recorders, awards shows and similar broadcasts of public events are one of the few remaining examples of "appointment television." The

viewing public demands that such programs be shown live and will favor media that is able to provide such programming. The network is competing with other media that are not subject to the Commission's stringent and uncertain indecency regulations. The near ubiquitous availability of cable and the Internet means that consumers easily can migrate to the platform where they can get the most current and complete programming without fear that it might be censored or edited for reasons unrelated to creative judgment. Thus, the Commission's indecency enforcement threatens the viability of live programming on over-the-air broadcast television and puts FOX at a competitive disadvantage with other media.

#### VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct.



---

Peter Liguori  
President, Entertainment  
Fox Broadcasting Company  
10201 West Pico Boulevard  
Los Angeles, CA 90035  
(310) 369-1000

September 20, 2006

**APPENDIX XI**

**DECLARATION OF ANDREW G. SETOS**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Remand of Section III.B of the Commission's	)	DA 06-1739
March 15, 2006 <i>Omnibus Order</i> Resolving	)	
Numerous Broadcast Television Indecency	)	
Complaints	)	

**DECLARATION OF ANDREW G. SETOS  
ON BEHALF OF FOX TELEVISION STATIONS, INC.  
AND FOX BROADCASTING COMPANY**

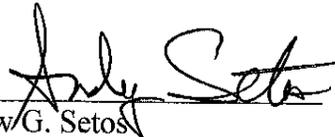
1. My name is Andrew G. Setos. I am the President of Engineering for the Fox Group, a position that I have held since February 2002. In this role, I serve as the senior technology strategist for the company with oversight of engineering for all Fox divisions, including all film and television units. I have been with the engineering division of Fox since 1988.
2. Shortly after Congress increased the maximum potential fine for a violation of broadcast indecency regulations tenfold, I was asked by Fox executives to prepare an estimate of the economic costs of operating time delay systems for all live programming (including news and sports) broadcast over the Fox Broadcasting Company's FOX network and over all of the owned-and-operated local broadcast stations. The FOX network currently owns and operates time delay equipment used during all live entertainment programs, at an installed cost of approximately \$100,000. This equipment would be expected to require replacement every 5 years. But the network does not own sufficient equipment, nor does it employ sufficient personnel, to operate time delay systems for all sports and news programming.

3. For sports and news programming broadcast by the FOX network, it would cost approximately \$1 million to purchase and install the necessary delay equipment (with an estimated useful life of five years), plus an additional \$440,000 (approximately) per year for the personnel required to maintain and operate this equipment and for certain other support costs.

4. For the 35 owned-and-operated Fox local television stations, the cost to purchase and install the necessary delay equipment would be approximately \$100,000 for each station, or \$3.5 million in total. The equipment would be expected to require replacement every 5 years. Assuming two operating positions, the cost per year for the personnel necessary to operate and maintain this equipment for live local news, sports and entertainment originally produced by such stations would be approximately \$16 million in total for all stations. If, however, the stations were to utilize four operating systems as the network does, the approximate personnel cost per year would increase to \$32 million in total for all stations.

#### VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct.



Andrew G. Setos  
President of Engineering  
Fox Group  
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September 20, 2006