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

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

OPPOSITION TO NOTICE OF APPARENT LIABILITY FOR FORFEITURE

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EXECUTIVE SUMMARY

The 2004 Super Bowl halftime show, in which Justin Timberlake ended his "Rock Your Body" duet with Janet Jackson by executing a surprise "reveal" of her right breast, instantly became a defining moment in the Commission's aggressive campaign to combat broadcast "indecency." The telecast was not the first nor perhaps even the most important catalyst for government action. *See Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 18 FCC Rcd. 19859 (Enf. Bur. 2003), *rev'd*, 19 FCC Rcd. 4975 (2004) ("*Golden Globe Awards Order*"). But it captured the imagination of pundits and policymakers to become the leading symbol for the sea change in the FCC's indecency enforcement efforts. It also added the unfortunate term "wardrobe malfunction" to the nation's lexicon, based on Justin Timberlake's inartful attempt to explain what had happened.

Although the "costume reveal" was as much a shock to Viacom as to everyone else, prompting its CBS network to issue an immediate public apology, the telecast had barely ended before baseless speculation emerged suggesting that CBS and MTV must have known it would happen – or worse – planned the event as a publicity stunt. The FCC launched an investigation less than 24 hours after the game ended, demanding a full accounting from Viacom Inc., CBS Broadcasting Inc., and MTV Networks (collectively "Viacom") regarding what happened at the Super Bowl and who at the networks, if anyone, had any role in the startling event. The apparent purpose was to determine if there was any substance to the initial speculation about whether any person at Viacom knew about the Jackson/Timberlake "costume reveal" in advance or in some way helped plan or execute the stunt.

Investigation Confirmed CBS's Explanation, But the FCC Proposed a Maximum Fine

Based on exhaustive interviews with all personnel who had a significant role with the Super Bowl or halftime show, review of tens of thousands of documents, and perusal of dozens

of videotapes, Viacom determined that no one at Viacom, CBS, or MTV had any foreknowledge of the surprise finale of the Jackson/Timberlake performance. In planning the event, the network selected proven, mainstream talent, the performances were carefully scripted, and full run-throughs were painstakingly reviewed to ensure adherence to broadcast standards. CBS also implemented a 5-second delay as an added precaution for the live broadcast. However, such measures ultimately did not prevent a long range camera shot in which Janet Jackson's breast was exposed for 9/16 of a second at the end of her performance with Justin Timberlake. Investigation found the "costume reveal" resulted from a stunt concocted by the performers themselves shortly before the show, and it confirmed that their last-minute scheme was never communicated to any network personnel. Viacom's response to the Commission included sworn statements from both Janet Jackson and Justin Timberlake explaining what happened.

Despite the fact that the investigation debunked all the post-game speculations about network involvement, the FCC issued a Notice of Apparent Liability ("NAL") proposing that a maximum fine of $550,000 be imposed on CBS and its owned and operated ("O&O") stations. The FCC did not directly dispute that no one at Viacom, CBS, or MTV knew about or helped plan the "costume reveal," but nevertheless held Viacom and its O&O's responsible for "willful indifference to the content and tone of what was ultimately broadcast." The Commission found the exposure of Ms. Jackson's breast during the performance, while unexpected and brief, was "clearly graphic" and was intended to "pander, titillate or shock." Accordingly, it concluded that the broadcast, in full context, was patently offensive as measured by contemporary community standards for the broadcast medium.

Nothing in the Record Supports an Indecency Finding

The Super Bowl NAL appears to assume what the facts did not show – that someone at Viacom knew, or reasonably should have anticipated, that Janet Jackson and Justin Timberlake would deviate from halftime show plans that had been in the works since the previous year. Lacking any evidence to support the initial speculations about network complicity, the Commission instead reached the illogical conclusion that the halftime show was *designed* to "pander to, titillate and shock the viewing audience" despite the fact that: Viacom (1) did not plan the sole part of the performance the FCC says made it indecent – the "costume reveal;" (2) did not know about it in advance; (3) did not sanction it (and would not have done so had it known); and (4) took steps to prevent anything at odds with broadcast standards. But as a matter of simple logic, something cannot be "designed" without advance knowledge.

The Commission nevertheless found CBS apparently liable based on its awareness of the "overall sexually provocative nature" of the Jackson/Timberlake segment. It claimed Viacom promoted the performance in advance as "'shocking' to attract potential viewers," based primarily on a quote from Janet Jackson's choreographer appearing on the MTV.com news site that the halftime show would include some "shocking moments." The NAL also suggested that Viacom should have known about the "costume reveal" because of a year-old news report that Justin Timberlake had grabbed what the FCC described as British singer Kylie Minogue's "famous bottom" during a televised performance in the UK. Based on these "facts," the Commission concluded that Viacom had exhibited an attitude of "willful indifference" to the content of the halftime show.

However, this tortured conclusion is not supported by the record. Nothing about the performance, as planned and scripted, comes close to anything the FCC has ever sanctioned as

"indecent." The song "Rock Your Body" has been broadcast hundreds of thousands of times on the radio and in videos, been featured on live TV at least twice, and performed live countless times, none of which involved any hint of nudity or any other potentially "indecent" behavior. Nor was there any reason to expect that the Super Bowl performance would be any different. The FCC's citation of a lone, obscure press account of a performance of a different Timberlake song, with a different female partner, in a different country (with different broadcast standards), involving a different action by Timberlake hardly suggests that Viacom should have anticipated that the performers might add their unscripted finale to their Super Bowl performance.

The Commission's conclusion that Viacom promoted the halftime show as "shocking" is a distortion of the record. An out-of-context quotation from Janet Jackson's choreographer that appeared in an online news story did not suggest that anything untoward might take place, nor did it put the network on notice that it should take precautions beyond those already in place. Viacom thoroughly explained all of the postings on the MTV.com website both before and after the Super Bowl, and made clear that none were based on knowledge – or provided any reason to anticipate – that the halftime show would have a surprise ending.

In short, nothing in the record before the Commission supports the claim that Viacom was "indifferent" about the content of the halftime show. Viacom screened the performers, developed the script with the help of the CBS Broadcast Standards Department, reviewed the rehearsals and costumes, and implemented an industry-standard five-second delay. The fact that such measures ultimately did not prevent an unprecedented and unplanned deviation from the script by the performers does not constitute "indifference."

The Test for "Indecency" Was Not Met

The Super Bowl broadcast, even as characterized in the NAL, did not violate the indecency standard as it has been articulated by the Commission. The brief flash of partial nudity that closed the halftime show was neither explicit nor graphic, did not "dwell on" or "repeat at length" sexual organs or activities, and was not used to titillate or shock. The NAL made no attempt to explain how a split-second exposure could simultaneously be "brief" and "repeated at length." Nothing in the record supports the conclusion that Viacom "pandered" the halftime show as if it were indecent. It is insufficient for the FCC to claim that the performance was designed to "shock and titillate" because Viacom was aware of the "overall sexual nature" of the Jackson/Timberlake segment, where the network scripted and planned a program that was well within broadcast standards.

The NAL's indecency findings also are inconsistent with previous decisions, both at the Commission and Bureau level. It is difficult to characterize the halftime show as "graphic" or "shocking," compared to other programs the Commission has labeled as indecent. Even more importantly, the Commission has dismissed complaints that were filed against programs that had far more sexual content than the Super Bowl halftime show. Examples include the FCC's recent dismissals of complaints against the programs *Will and Grace* and *Buffy the Vampire Slayer*.

The indecency finding is further undermined where the FCC claims it undertook what it calls the critically important task of reviewing the "full context" of the halftime show, because it is abundantly clear no such review occurred. Rather, the Commission focused on the final ten words of one song and a brief flash of partial nudity that lasted 9/16 of a second within a 12-minute halftime show, that was only a small portion of a nearly 9-hour telecast. Even within this

narrow focus, the NAL's conclusion ignored the important contextual factor that the final moment was unscripted and contrary to Viacom's plans for the telecast.

The NAL's faulty application of the indecency standard is capped by a complete absence of any discussion of how the contemporary community standard for the broadcast medium applies in this case. The Commission purported to find that the broadcast was "patently offensive" based on contemporary community standards for the broadcast medium, but it does little more than add up the complaints that were filed after the Super Bowl telecast. However, the number of complaints is no indication that a rule has been violated, as the FCC generally acknowledges, and it is not an adequate measure of the community standard, especially where, as here, a large proportion of the complaints were engineered by single-interest advocacy organizations. The FCC's assumptions about the community standard in this case are undermined by surveys showing that almost 80 percent of the public considered the Super Bowl investigation to be a waste of taxpayer dollars, and only 17 percent of parents were very concerned about the content of the halftime show.

The Proposed Forfeiture Violates the Communications Act

By proposing forfeitures for alleged indecency violations that were neither "repeated" nor "willful," the NAL violates Section 503(b)(1) of the Communications Act. Quite obviously, the fleeting exposure of a female breast for 9/16 of a second is not "repeated," and no reasonable construction of the term "willful" applies to an incident that is unknowing and accidental, as it was here. Additionally, the Commission's attempt to maximize the fine in this case by citing "recent indecent broadcasts by Viacom-owned radio stations," while acknowledging those cases are not final, flatly conflicts with Section 504(c) of the Act. That section provides that "where the Commission issues a notice of apparent liability looking toward the imposition of a

forfeiture …, that fact shall not be used, in any other proceeding … to the prejudice of the person to whom such notice was issued, unless (i) the forfeiture has been paid, or (ii) a court of competent jurisdiction has ordered … payment … and such order has become final." Additionally, the NAL's proposal to assess maximum forfeitures violates the FCC's own forfeiture guidelines given that Viacom did not intend the halftime telecast to include any indecent material and took all reasonable steps to avoid violating broadcast standards.

The Proposed Forfeiture Violates the First Amendment

Although the NAL acknowledges that "the First Amendment is a critical constitutional limitation that demands, in indecency determinations, that we proceed cautiously and with appropriate restraint," the Commission fails to heed its own words. This constitutional admonition has become nothing more than boilerplate in the Commission's recent indecency decisions. The indecency definition that was historically construed by the Commission and reviewed by the courts was far more narrow than the one applied here. In particular, the FCC formerly made clear that inadvertent, isolated or fleeting transmissions would not be subject to sanctions because it would be inequitable 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." Reviewing courts, including the Supreme Court in *FCC v. Pacifica Foundation*, approved the Commission's approach in the past only to the extent the agency pledged to exercise "caution" and "restraint" in its enforcement regime.

The Commission's decision in this case to propose a $550,000 forfeiture on CBS and its O&O stations for an unplanned, fleeting exposure of a woman's breast is anything but a "restrained" or "cautious" approach to enforcement. If it stands, the NAL will lead to the end of live broadcasting as we know it by placing broadcasters on notice that they risk massive liability

and perhaps license revocation if they fail to adopt technical measures to avoid the possibility of a spontaneous transgression. Such an approach will prevent broadcast stations from covering many live events (unless they have instituted elaborate delay mechanisms), such as events involving politicians, sports figures, or other newsmakers. The Commission's assumption that licensees "can easily ensure that they are not subject to an enforcement action" by implementing extended video delay mechanisms, uninformed by any fact-gathering process, fails to grasp the significant burdens associated with such technical measures or the overall impact on live broadcasting. Such measures are a disproportionate response to the risk of possible indecency in live telecasts, and the Commission's threat of huge fines (or worse) already is forcing licensees to choose whether to incur such expenses or forego live coverage altogether.

The FCC may have made a calculated decision to test the limits of its authority to enforce indecency rules, but it cannot pretend it is applying the same standard as articulated in *Pacifica*. Nor can it claim it is being cautious or restrained. The NAL is part of a radical transformation of FCC policy in this area that already is having a profound adverse effect. It violates the FCC's own pledge, upon which reviewing courts relied, to take no action which would inhibit live broadcasts. The NAL is an unconstitutional expansion of the FCC's power under existing law.

The Proposed Forfeiture Calls into Question *Pacifica*'s Continuing Validity

Not only does the NAL violate existing First Amendment doctrine as articulated in *Pacifica*, it calls into question the continuing validity of the entire FCC indecency regime. The power to regulate broadcast indecency is a limited constitutional exception to a general rule under which the Supreme Court has invalidated indecency restrictions in all other media. As the NAL acknowledges, *Pacifica* is now more than twenty-five years old, yet the Supreme Court has cautioned that "the broadcast industry is dynamic in terms of technological change [so that]

solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded ten years hence."

The law has changed significantly since the Supreme Court last considered FCC indecency rules. The Court has confirmed that indecent speech is fully protected by the First Amendment and not subject to diminished scrutiny, and it has invalidated indecency restrictions on cable despite finding it as accessible to children as broadcasting. More importantly, the Court for the first time subjected the indecency definition to rigorous scrutiny and found it deficient. Since the Supreme Court held in 1997 that the indecency standard was constitutionally deficient in *Reno v. ACLU*, virtually every court that has ruled on similar laws has held them unconstitutional.

In addition, none of the technological assumptions upon which the FCC's narrow indecency policies are predicated remain valid in 2004. In today's media-rich environment, it is implausible to justify broadcast indecency regulations on the "uniquely pervasive presence" of broadcasting, given the rise of other delivered video media like cable and satellite, of pre-recorded videotapes and DVDs, and of the Internet and digital video recorders. These marketplace developments empower individuals and parents to accept or reject programming of their choice. In addition to technical options provided by marketplace developments, certain other measures to promote viewer choice have emerged, such as V-chip technology that allows parents to block sexual, violent, and indecent material. The existence of less restrictive alternatives undermines the constitutional basis for the direct regulation of content.

The broadcast indecency rule's continuing constitutionality is weakened further by the FCC's failure to explain how it determines the contemporary community standard for the broadcast medium. The agency must do more than assert that it "knows" the national mind, for it

lacks any legitimate method for considering evidence of community standards. The Commission gives no indication it ever has considered any data on the issue, and has only said it will not credit the popularity of a program or consider survey results in measuring public tastes. Its avoidance of this issue flies in the face of recent Supreme Court decisions that affirm the importance and complexity of accurately determining the appropriate community standard.

The FCC's indecency standard also suffers from excessive vagueness, which is anathema to the First Amendment. The absence of clear guidelines impermissibly chills speech and gives the government far too much discretion to curb disfavored expression. Although the Commission generally notes that courts have rejected vagueness challenges in the past, the recent expansion of its indecency definition has rendered the standard all but incomprehensible. That, coupled with the fact that the agency has exhibited a chronic inability to interpret its own rules, strongly suggests that a reviewing court today would hold that the rules are void for vagueness. There is no body of judicial precedent interpreting or applying the standard in particular cases, and the FCC's rulings provide no real assistance in this regard. Indeed, the FCC struggled for more than six years in response to a court settlement to devise an *Indecency Policy Statement* in order to provide some guidance to the broadcast industry. That effort ultimately proved short-lived and unhelpful.

Review of the indecency standard on overbreadth grounds also is imperative in light of recent Commission decisions that have vastly expanded its scope. Not only has the agency loosened the definition for what may be considered "actionable" to include inadvertent or fleeting depictions as in the case of the Super Bowl NAL, it has re-energized the concept of "profanity" as a broad additional source of liability. Recently, the Commission, in a newly launched proceeding, has even suggested that the indecency standard *may not require any sexual*

content at all and may be applied to regulate televised violence. In sum, the Commission no longer recognizes any meaningful limits to its ability to regulate broadcast content under this standard, contrary to recent Supreme Court admonitions that "[t]he overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process."

The indecency policy is unconstitutional for the additional reason that it lacks procedural safeguards and vests the FCC with excessive discretion. Though the First Amendment compels strict procedural requirements for any administrative process having the effect of denying or delaying dissemination of speech to the public, the FCC's enforcement regime provides no such protections. The Commission allows anonymous complaints, has eliminated the requirement for a tape or transcript of the allegedly offending broadcast, and has shifted to broadcasters the burden of proving a broadcast did not occur and/or was not indecent. It also issues sweeping and onerous letters of inquiry without examining even whether the most basic details of a complaint are accurate. The combined impact of these constitutional defects is to impose a broad chilling effect on broadcasters.

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OPPOSITION TO NOTICE OF APPARENT LIABILITY FOR FORFEITURE

CBS Broadcasting Inc. ("CBS"), hereby submits its Opposition to the September 22, 2004, Notice of Apparent Liability in which the Commission concluded that Viacom Inc. ("Viacom") and its owned and operated ("O&O") stations affiliated with the CBS Television Network apparently violated the FCC rules governing broadcast indecency by the telecast of the 2004 Super Bowl halftime show, and proposed a forfeiture in the amount of $550,000.[1] For the reasons explained below, Viacom respectfully submits that the NAL is unsupported by the record before the agency, is inconsistent with the Commission's indecency standards, and cannot be reconciled with the Communications Act and FCC forfeiture policies. In addition, the NAL violates the First Amendment even under existing standards and places in doubt the constitutionality of the entire FCC indecency enforcement regime. Accordingly, the NAL should be rescinded.

[1] *Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, 19 FCC Rcd. 19230 (2004) ("NAL"). This response to the NAL, which originally was due within 30 days after the NAL's September 22, 2004, release date, *see id*. ¶ 31, is timely filed pursuant to an extension of time granted by the Commission's staff on October 18, 2004.

I. INTRODUCTION AND BACKGROUND

On February 1, 2004, at approximately 8:30 p.m. Eastern Standard Time, CBS aired as part of its coverage of the NFL Super Bowl XXXVIII, a halftime show featuring some of the biggest mainstream stars in the recording industry. Viacom's MTV Networks ("MTV") division produced the show, which included performances by Janet Jackson, P. Diddy, Nelly, Kid Rock, and surprise guest Justin Timberlake. The performance was the result of months of creative effort and careful planning involving dozens of people directed toward presenting a live music extravaganza with broad appeal. At the close of what otherwise was near-perfect execution of the program, Ms. Jackson and Mr. Timberlake performed an unscripted, unauthorized and unrehearsed show-closing "costume reveal" involving Ms. Jackson's bustier, that unfortunately resulted in her breast being exposed for approximately nine-sixteenths of a second.

By close-of-business the next day, February 2, 2004, the Commission sent a Letter of Inquiry ("LOI") to CBS to initiate a full investigation. The letter was addressed to CBS, but broadly sought information from any "parent company, wholly or partially owned subsidiary, other affiliated company or business (including, but not limited to Viacom Inc., CBS Television Network and MTV Networks)" as well as "all directors, officers, employees, or agents, including consultants and any other persons working for or on [its] behalf." The LOI required Viacom to answer a dozen detailed inquires about the halftime show telecast and to search tens of thousands of documents for relevant information. Viacom cooperated fully with the investigation.[2]

[2] Through counsel, Viacom immediately contacted the FCC staff to negotiate a process for responding to the LOI, and promptly supplied a tape of the halftime show. On February 10, 2004, Viacom provided an Interim Response to the LOI ("*Interim Response*"), signed by counsel. The official Response to the Letter of Inquiry ("*Final Response*"), was filed March 17, 2004, and was signed by Susanna Lowy, Vice President and Associate General Counsel of Viacom Inc. and CBS Broadcasting Inc. The response to the FCC was supported by thousands of documents, sworn declarations from Ms. Jackson and Mr. Timberlake, and dozens of videotapes.

A. Extensive Investigation Confirmed That No One at Viacom, CBS or MTV Involved in the Planning or Production of the Halftime Show Had Prior Knowledge

Viacom reported to the Commission in the *Interim Response* and in the *Final Response* that no officer, employee or agent of Viacom, CBS, or MTV had any advance notice or warning that the Super Bowl halftime performance involving Janet Jackson and Justin Timberlake would include exposure of Ms. Jackson's breast.[3] The LOI responses explained that the half-second at the end of the Super Bowl halftime show during which Ms. Jackson's breast was exposed was as unexpected to Viacom, CBS and MTV as it was to the broadcast audience. Throughout months of planning and effort all the way to final run-throughs of the show there had been no mention of or allusion to such a maneuver. The investigation found the "costume reveal" resulted from a poorly-executed stunt concocted by the performers at the last minute without any awareness on the part of Viacom, CBS or MTV, all of whom would have forbidden the stunt if there had been any inkling it was planned. CBS and MTV had immediately apologized for the incident, and the LOI response argued that the FCC should not impose any penalty but rather should acknowledge the incident was unplanned, unanticipated, and contrary to what was intended.

The Viacom responses described the exhaustive process though which Viacom, CBS and MTV interviewed more than 70 individuals who had any connection with or knowledge of the halftime show and reviewed tens of thousands of pages of documents and other materials. The investigation covered the year-long planning process for the Super Bowl, the development of the halftime show, the final days before the event, and the program itself. The *Interim Response* reported, and the *Final Response* later confirmed, that no officer, employee or agent of Viacom, CBS, or MTV had any advance notice or warning that Ms. Jackson's and Mr. Timberlake's

[3] *Final Response* at 1, 4-5, 8-10, 15. For present purposes this Opposition will cite relevant pages of the *Final Response* but will not separately identify supporting materials already on file.

performance would include any risk of exposure of Ms. Jackson's breast or any other nudity. *Final Response* at 1, 4-5, 8-10, 15.

Viacom explained that its investigation, including both its independent internal inquiries and the review conducted in response to the LOI, confirmed that the planning and preparation for the Super Bowl halftime show was directed toward ensuring the program met the expectations of Viacom and the NFL and conformed to broadcast standards. Measures employed included careful selection of proven, experienced talent. Janet Jackson and Justin Timberlake were chosen to headline the show not only for their talent and popular appeal, but also because those planning the program believed that those two artists would not be likely to participate in any unexpected or unscripted activities. Both artists had worked closely with MTV and CBS in the past and had provided no reason to anticipate any departures from script. *Id*. at 9. Each aspect of the halftime show was scripted in advance and was reviewed by the CBS Program Practices Department. The script contained no plans for any type of "costume reveal" at the end of the Janet Jackson and Justin Timberlake performance. *Id*. at 9-10, 15.

The Viacom responses showed that, before the Super Bowl, employees of CBS, MTV, and the NFL attended two full run-throughs of the halftime show to review the production, two days before the game. Viacom submitted videotapes of the rehearsal to the FCC that confirmed the lack of warning there would be any "costume reveal." The run-throughs provided no indication the Jackson/Timberlake duet would involve any kind of "tear away" of a costume or any nudity, as confirmed in videotapes provided to the Commission. In both run-throughs the musical number ended without any indication the performers might try such a maneuver. *Id*. at 10 & App. B. Producers from MTV individually reviewed tapes of the rehearsal performances with the performers to instruct them on any changes to be made to ensure conformance with broadcast standards during the performance on Super Bowl Sunday. *Id*. at 10, 15.

Based on this review, certain changes were made to the show. For example, the costume worn by one of the dancers during the run-throughs was considered too revealing, and she was instructed to change it before the final show. There was also concern about some of the language, and changes were suggested. *Id*. at 9-10 & n.26. After the run-throughs for the halftime show, both executive producers of the show were assured by Ms. Jackson's staff that there would not be any alterations in her performance as it was scripted. Because Janet Jackson was not in costume during the rehearsals, an executive producer subsequently checked to ensure her wardrobe would conform to broadcast standards during the actual performance. The executive producer stated that Ms. Jackson's staff indicated they briefly had considered using a "tear away" of the skirt that covered Ms. Jackson's pants, but determined not to pursue the idea and planned no "tear aways" for Ms. Jackson. In this discussion, no possible "tear away" of a part of Ms. Jackson's bustier was ever mentioned. *Id*. at 10, 15 & n. 27.

In addition to pre-game planning and review procedures, the CBS Broadcast Standards Department took additional precautions because the Super Bowl is a live event. The network implemented a five-second audio delay to avoid airing material inconsistent with network standards or practices, such as the possible broadcast of inappropriate language during the live entertainment portions of the broadcast. *Id*. at 9. Historically, a five-second delay has been adequate to preclude the broadcast of any spontaneous or unplanned audio material. With such an arrangement, an individual from the broadcast standards department monitors the transmission of a live event and manually "hits the button" to delete any objectionable material before it is broadcast. Although both the audio and video transmission is delayed, five seconds does not provide sufficient time to edit video images. Accordingly, the precaution of a five-second delay could not prevent the broadcast of the unexpected images at the end of the halftime show. *Id*. at 5 & n.13.

The Viacom response to the LOI also contained sworn statements of both Janet Jackson and Justin Timberlake confirming the lack of prior knowledge or involvement by anyone from Viacom, CBS, or MTV. *Id*. at 8-9, Exhs. 7-8. Janet Jackson's declaration stated in relevant part:

> I did not tell anyone who was a representative, employee, officer, director or agent of Viacom, CBS, MTV or the NFL of any possible costume reveal in my performance with Justin Timberlake for the Halftime Show. Further, there was no costume reveal during any rehearsal for the Halftime Show.

Justin Timberlake's declaration described his participation in the halftime show's finale, and the lack of warning to Viacom, CBS, or MTV:

> I attempted to perform a "costume reveal" by removing a portion of Ms. Jackson's costume and revealing the undergarment beneath. I had neither the intention or the knowledge that the reveal could expose her right breast.
>
> The decision to add the "costume reveal" to the finale was made by Ms. Jackson and her choreographer after final rehearsals for the Halftime Show. They informed me just before the performance begun [sic]. I did not communicate the plan to do the costume reveal to any officers, employees or representatives of Viacom, CBS, MTV or the NFL.

Both declarations were consistent with statements the two performers had made independently to the press following their Super Bowl performance.[4]

[4] Both Ms. Jackson and Mr. Timberlake stated publicly after the broadcast that the altered finale to their performance was devised by them after the formal run-throughs and without consulting anyone from Viacom, CBS, or MTV. Mr. Timberlake issued the following statement: "I am sorry if anyone was offended by the wardrobe malfunction during the halftime performance at the Super Bowl. It was not intentional and is regrettable." After the telecast, Ms. Jackson issued the following statement: "The decision to have a costume reveal at the end of my halftime show performance was made after final rehearsals. MTV was completely unaware of it. It was not my intention that it go as far as it did. I apologize to anyone offended – including the audience, MTV, CBS and the NFL." She subsequently issued a videotaped statement to the same effect: "My decision to change the Super Bowl performance was actually made after the final rehearsal. MTV, CBS, [and] the NFL had no knowledge of this whatsoever, and unfortunately the whole thing went wrong in the end. I am really sorry if I offended anyone – that was truly not my intention." *Id*. at 8 & App. F.

B. Pre-Show Publicity Did Not Suggest That the Halftime Show Would Include Anything in the Nature of a Costume Reveal

The Viacom responses to the Commission's inquiry explained the process by which press materials relating to the telecast were released, and made clear that the network did not issue any press releases suggesting Ms. Jackson's performance would be "shocking" or "outrageous." On December 18, 2003, a joint press release by the NFL, CBS, and MTV announced Ms. Jackson's engagement as the halftime show's featured performer. Though the press release said there would be "surprise collaborations," that reference was to the then-unannounced appearance of Justin Timberlake. *Id*. at 10-12 & App. D.

The Viacom response explained that the Commission's inquiry apparently referred to a news item that appeared on the MTV.com news website, and not a press release as some other media accounts had erroneously suggested. In that story, Ms. Jackson's choreographer was quoted as saying that Ms. Jackson's dance routine would be more "stylized" and "feminine" and that it would also include "some shocking moments." *Id*. The characterization did not come from anyone at CBS or MTV, but simply was quoted on the MTV News website, which serves a reporting function and operates independently of the promotional portions of the MTV website. The reporter's interview with Ms. Jackson's choreographer (a recording of which was submitted in response to the LOI) did not include discussion of any potential "tear away" or other stunt involving Ms. Jackson's wardrobe during her halftime performance. *Id*.

The MTV management personnel who reviewed the story at the MTV News website believed the "shocking moments" quote referred to Justin Timberlake's appearance, especially since other media outlets were playing up the "surprise guest" angle, and reporters had been asking about it repeatedly throughout the week. Viacom reported that, in any event, those who

reviewed the story said the quote did not stand out because such hyperbolic language is not uncommon in the music world.[5]

The "shocking moments" news item was posted to the MTV News website on January 28, 2004, at 1:15 p.m. and published (*i.e.*, became publicly accessible) at 3:20 p.m. that day. On Monday morning following the Super Bowl, MTV executives decided to remove the "shocking moments" article from the website because, in the wake of the halftime performance, it was being taken out of context in other media reports. However, because MTV News and its online complement are news outlets, the removal of newsworthy content generally is disfavored. Accordingly, MTV reposted the article later on February 2, 2004, with an editor's note designed to prevent readers from misinterpreting the article. As part of its responses, Viacom provided extensive background materials supporting the evolution of the "shocking moments" article, its appearance on the website, and its removal and later re-posting. *Id*. at 10-12 & App. D.

C. Post-Show Press Statements Did Not Promote the Halftime Show as Indecent

The Viacom responses answered the LOI's inquiry regarding post-broadcast press and Internet statements, and the import of an item on the MTV website under the title *Janet Gets Nasty*. The response explained the relevant editorial processes and demonstrated that such postings did not indicate advance awareness by Viacom, CBS, or MTV that Ms. Jackson and Mr. Timberlake would attempt a wardrobe reveal or any other maneuver that could result in

[5] The response to the LOI provided a number of examples of this. For example, on the MTV website alone, the word "shocking" or a variation has been used in headlines for movie reviews, such as "'Gigli' Flops, 'American Wedding' Shocks, 'Spy Kids' Drops" (Aug. 4, 2003), and music news items, such as "Shocking: GN'R Bassist Stinton Has Plenty of Time To Work on Solo Material" (Aug. 21, 2003), "Michael Jackson Shocks Al Sharpton By Calling Tommy Mottola A Racist" (July 8, 2002), "Dawn Robinson: Lucy Pearl Replacement 'A Big Shock'" (Nov. 9, 2000), and "Jewel Shocked by Grammy Nod" (Jan. 23, 1997). *Id*. at 11 n.29.

unplanned nudity. *Id*. at 12-15 & App. F. Viacom also showed that after the Super Bowl broadcast CBS and MTV posted apologies for the halftime show finale.

Viacom demonstrated that the item appearing under the heading *Janet Gets Nasty* was a general story written in advance of the game by staffers who did not know which specific songs Ms. Jackson would perform as part of a general effort to promote MTV-related events to take place at the Super Bowl. The staff members who produced this copy had no connection to the halftime show production.[6] The word "Nasty" in the headline was entirely unrelated to the halftime show and instead referred to one of Ms. Jackson's signature songs bearing the title "Nasty" from her 1986 album *Control*, which has become part of the pop vernacular associated with her. *Id*. On January 29, 2004, MTV.com Super Bowl promotional materials were rotated automatically to temporarily replace *Janet Gets Nasty* with a new promo entitled *Vote for Best Tackle of 2003*. The *Janet Gets Nasty* promo then rotated back onto the MTV.com homepage, in its original form, mid-day January 31, 2004. *Id*.

The Viacom responses showed that on the afternoon of February 1, 2004, several hours before Super Bowl kickoff, an MTV.com editorial producer rewrote the promotional copy about the halftime show and placed it in a "promo tool" to automatically publish to the website after halftime. The text was written in past tense in anticipation of the broadcast, with the intention of adding further minor revisions reflecting the actual performance, and new pictures inserted into pre-mapped spaces in the layout. This text, prepared in advance, including the *Janet Gets Nasty* headline, was posted to the website shortly after the halftime show. *Id*. at 13-14.

Approximately an hour after the halftime show, the text was changed to report on the incident that closed the show. Viacom explained that the New York-based editorial producer

[6] *Id*. at 13. The responses explained that the item appeared on the MTV.com website's Super Bowl homepage, which covered all the activities taking place at the Super Bowl. Notably, the webpage was not part of MTV's production responsibilities surrounding the halftime show.

changed the text to reflect the incident involving Mr. Timberlake and Ms. Jackson as a result of what he had seen while watching the broadcast in New York. The editorial changes were made to copy on the MTV.com website without consulting any person involved in the actual planning of the halftime show, and without any knowledge that MTV was at the same time preparing an apology regarding the broadcast. The online producer was merely fulfilling his duty to provide copy about the show. *Id*. at 13-14.

At the same time, pictures from the halftime show, comprising a "flip book" of images, were posted to the MTV.com website. The Viacom responses to the LOI reported that preparation of the new text and posting of the flip book were carried out as a routine matter by MTV employees who lacked any responsibility for or knowledge of the planning and approval of the halftime show, and who were not privy to reactions or decisions of the CBS, MTV and NFL executives at the game regarding the unscripted ending of the show. The only understanding those responsible for webpage content had was that they were to update MTV's online material associated with the Super Bowl halftime show to reflect that it had actually occurred. The original flip book remained on the website only nine minutes. The next morning, all copy and images referring to the incident (*e.g.*, the *Janet Gets Nasty* copy and flipbook) were removed from the site and later replaced with news featuring Ms. Jackson's and Mr. Timberlake's apologies and similar content, and a revised flip book that did not include any images of Ms. Jackson and Mr. Timberlake performing together. *Id*. at 14.

D. The Commission Issued the NAL Proposing to Levy Maximum Fines on CBS Notwithstanding the Lack of Prior Knowledge

The Commission issued the NAL on September 22, 2004, finding CBS apparently liable for violating the statutory prohibition on indecent broadcasts, 18 U.S.C. § 1464, and the FCC rule implementing it, 47 C.F.R. § 73.3999. It proposed a maximum forfeiture of $27,500 on each of the twenty Viacom O&O stations that broadcast the Super Bowl, for a total of $550,000.

The NAL concluded that the half-second glimpse of Ms. Jackson's exposed breast during the halftime performance violated the FCC indecency standard, because it constituted a depiction or description of sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium. NAL ¶ 10. The Commission found the exposure violated this standard based on what it characterized as a "critically important" analysis of "the *full context* in which the material appeared" based on: (1) the explicitness or graphic nature of offending broadcast, (2) whether it dwelt on or repeated at length any description(s) of sexual or excretory organs or activities, and (3) whether the material appeared to pander or was used to titillate or shock. *Id*. ¶ 12 (emphasis original).

Regarding the first criterion, the Commission concluded that the "joint performance by Ms. Jackson and Mr. Timberlake culminated in Mr. Timberlake pulling off part of Ms. Jackson's bustier and exposing her bare breast" and that while "the exposure … was unexpected and the duration of the exposure was … brief [19/32 of a second], it was clearly graphic."[7] The NAL did not provide reasoning for its characterization of the exposure as "clearly graphic," but simply asserted the exposure of a breast made it so. NAL ¶ 13. It rejected, however, Viacom's contention that the exposure was not graphic due to its context and brevity, holding that "[a]ssertions that the exposure was fleeting and unintentional are more appropriate to the analysis under the second and third factors." *Id*.

The Commission's entire analysis of the second criterion, whether the broadcast dwelt on or repeated the offending material (the exposure of Ms. Jackson's breast), and of the third criterion, whether it involved efforts to "pander, titillate or shock," was set forth in four sentences:

[7] NAL ¶ 13. There does not appear to be a basis in the record for the Commission's finding of a 19/32-second exposure. Viacom informed the Commission that the exposure "lasted only 18 frames (where 32 frames equals one second) or 9/16 of a second." *Final Response* at 5 n.12.

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

Id. ¶ 14 (footnotes omitted). Despite the prior determination that the brevity of the exposure of Ms. Jackson's breast was "more appropriate to the analysis" of, *inter alia*, whether the broadcast dwelt on or repeated at length descriptions of sexual or excretory organs or activities, the NAL never addressed whether the offending material was the sustained focus of the performance or otherwise was "repeated."

In establishing the proposed forfeiture amount, the Commission declined to impose the base forfeiture of $7,000 and instead stated that the statutory maximum penalty of $27,500 per station was appropriate. NAL ¶¶ 16, 24. In this regard, the NAL accepted Viacom's showing that "Ms. Jackson … did not advise Viacom, CBS or MTV of any possible costume reveal," and that Mr. Timberlake "did not communicate the plan to do the costume reveal to any officers, employees or representatives of Viacom, CBS, MTV or the NFL." *Id*. ¶ 17. The Commission nevertheless found CBS apparently liable based on the "overall sexually provocative nature" of the Jackson/Timberlake segment. *Id*. ¶¶ 17-18. It claimed CBS and MTV promoted the performance in advance as "'shocking' to attract potential viewers," and that its efforts toward "substantial review of the content of the halftime show before the broadcast … including the choreography, the songs and their lyrics" made CBS culpable, even though the NAL acknowledged the network's advance knowledge did not include "the exposure of Ms. Jackson's breast." *Id*. ¶ 18. All told, the FCC concluded Viacom should have known about the Jackson/Timberlake finale not in spite of, but *because of*, the precautions it took before the show.

Whereas the Commission devoted only a few sentences in its substantive analysis discussing whether the broadcast satisfied the legal standard for indecency, it dedicated four full paragraphs trying to build a case that the "shocking moments" and online *Janet Gets Nasty* items indicated that Viacom "portrayed an attitude of willful indifference to the content and tone of what was ultimately broadcast." *Id*. ¶¶ 19-22. At the same time, the Commission held that non-Viacom-owned affiliates were insulated from liability because they "could not have reasonably anticipated that the CBS Network production of a prestigious national event such as the Super Bowl would contain … exposure of Ms. Jackson's breast." *Id*. ¶ 25.

II. THE RECORD DOES NOT SUPPORT THE CONCLUSION THAT THE SUPER BOWL BROADCAST VIOLATED THE INDECENCY POLICY

A. The Commission's Analysis of the Factual Record is Flawed

The finding of apparent liability depends on an internally contradictory and illogical view of the facts, misapplies the statute, and fails to properly apply the FCC's own criteria for what constitutes an "indecent" broadcast. The FCC's own recitation of the facts does not support its conclusion that Viacom and its CBS stations should be held liable under the indecency rules. Such failure to follow "[f]undamental principles of administrative law [that] require … consideration of the relevant factors … and … reasoned decisionmaking" clearly "reflects a classic case of arbitrary and capricious agency action." *United States Telecoms. Ass'n v. FCC*, 227 F.3d 450, 461 (D.C. Cir. 2000). *See also Illinois Pub. Telecom's Ass'n v. FCC*, 117 F.3d 555, 564 (D.C. Cir. 1997) ("*ipse dixit* conclusion, coupled with … failure to respond to contrary arguments resting on solid data, epitomizes arbitrary and capricious decisionmaking").

The NAL states that "whether or not officials of these companies had advance knowledge of Ms. Jackson's breast-baring finale to the halftime program is not dispositive."[8] But the

[8] NAL ¶¶ 17-18. There are some indications that, contrary to the evidence and in conflict with the Commission's stated reason of its decision, some decisionmakers may have relied on

Commission also found that "the nudity here *was designed* to pander to, titillate and shock the viewing audience" despite the fact that Viacom did not know Janet Jackson's breast would be exposed. NAL ¶ 14 (emphasis added). In short, the Commission concluded that Viacom is responsible for what happened despite the fact that it: (1) did not plan the sole portion of the performance that the FCC says made it indecent; (2) did not know about it in advance; (3) did not sanction it (and would not have done so had it known); and (4) took steps to prevent airing anything inconsistent with broadcast standards. *Id*. ¶¶ 12-15, 17-18, 23, 25. But as a matter of simple logic, something cannot be "designed" without of advance knowledge.[9]

Not only is this conclusion illogical, it contradicts the Commission's finding that CBS affiliates should not be held liable for violating the indecency rules because "we have no evidence that the licensee of any of the non-Viacom-owned CBS Affiliates was involved in the selection, planning, or approval of the apparently indecent material." NAL ¶ 25. But the record is also quite clear that there is no evidence any Viacom-owned entity "was involved in the selection, planning, or approval of the apparently indecent material" either, since it was the unexpected flash of nudity that – in the Commission's analysis – transformed the halftime show into a violation. There is no relevant distinction between the Viacom-owned stations and the affiliates in this regard. The point here is that no broadcast licensee should be held liable – Viacom included – because they were not involved in the selection, planning, or approval of the only part of the performance that the Commission believes made it "indecent" – the costume reveal.

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uninformed speculations from outside the record and/or assumed Viacom had advance knowledge. If such assumptions affected the NAL, the Commission should reconsider it for that reason alone. *See Cinderella Career and Finishing Schs., Inc. v. FTC*, 425 F.2d 583, 590 (D.C. Cir. 1970).

[9] "Design" means "to contrive; to project with an end in view;" "to intend;" or "a thing planned for or outcome aimed at." *See, e.g.*, WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 493 (2d ed. 1979).

B. The "Costume Reveal" Was Not Foreseeable

Despite the absence of advance knowledge on the part of the network, the Commission nevertheless concluded Viacom should be held accountable for what ultimately occurred, on grounds that the surprise conclusion of the halftime show was reasonably foreseeable. It based this conclusion on assertions that Viacom: (a) approved "the overall sexual nature of the Jackson/Timberlake segment, and fully sanctioned it," and (b) "touted" the performance as "shocking" to attract potential viewers. *Id.* ¶¶ 17-23. These conclusions are a distortion of the facts, but even if they were factually supportable, they would not amount to a violation of the Commission's indecency policy.

There is nothing in the record to suggest the brief nudity at the conclusion of the halftime show was reasonably foreseeable or that "CBS failed to take adequate precautions to ensure that no actionably indecent material was broadcast." *Id.* ¶ 17. The Commission's erroneous conclusion is based entirely on claims that CBS and MTV were aware of the "overall sexual nature" of the performance because they were engaged in detailed planning of the show, and that news accounts of a British performance in which Justin Timberlake reportedly grabbed what was described as Kylie Minogue's "famous bottom" should have put the network on notice that something unscripted could happen. However, none of these factors even remotely support the Commission's ultimate conclusion.

The NAL's assumption that the "sexually provocative" nature of the song "Rock Your Body" made the surprise ending foreseeable, *id.* ¶ 18, is utterly baseless. Justin Timberlake's "Rock Your Body" has been broadcast hundreds of thousands of times on the radio,[10] and has

[10] MediaBase, a subscription company that monitors radio airplay, has counted 306,990 "spins" of "Rock Your Body" on the radio through October 7, 2004. In 2003, "Rock Your Body" was number 32 on Billboard's Hot 100 List, which measures the popularity of singles based on sales and airplay. *See* www.billboard.com/bb/yearend/2003/hot100_2.jsp.

also been performed on live television on at least two previous occasions.[11] No prior performance, including the song's music video[12] and Timberlake's concert tour,[13] involved any hint of nudity, or otherwise provided any indication that anything "indecent" might occur during this live performance. There is nothing in the record – or anything that the Commission has cited – to suggest that having Justin Timberlake perform "Rock Your Body" would be inconsistent with broadcast standards. The same is true of Janet Jackson.[14]

The Commission's bizarre logic that, even in the absence of any knowledge about the incident, the "wardrobe malfunction" nevertheless was reasonably foreseeable because in one U.K. television performance a year earlier Timberlake reportedly "grabbed" the bottom of a British performer, can only be characterized as unreasonable. *Id*. ¶ 17 n.54. As a threshold

[11] Timberlake performed "Rock Your Body" without incident at the Nickelodeon's Annual Kids' Choice Awards on April 12, 2003. *See* www.nickkcapress.com/2004KCA/content/fun_facts.php. Timberlake also performed a portion of the song when hosting *Saturday Night Live* on October 11, 2003. *See* www.saturday-night-live.com/snl/reviews/03-04/timberlake.html.

[12] A download of the music video of "Rock Your Body" is available at www.justintimberlake.com (viewed October 5, 2004).

[13] Timberlake toured with Christina Aguilera in 2003 to promote his *Justified* album. Reviews indicated he performed "Rock Your Body" as his opening number, and make no mention of nudity in that song or any other. *See, e.g.*, Michael D. Clark, *Pop star duo showing signs of growing up*, HOUS. CHRON., July 1, 2003 ("Opening with a 10-minute breakbeat jam on the album "Rock Your Body," Timberlake and his eight back-up dancers indulged in fast-paced, air-carving, body-popping tai chi."); Joshua Klein, *Justin, Christina: One Hot, One Not*, CHICAGO TRIBUNE, July 24, 2003, at C2 ("'Rock Your Body' recalled prime 'Off the Wall'-era Michael Jackson"); Leslie Gray Streeter, *Justifiably, Justin Steals the Show*, PALM BEACH POST, July 18, 2003, at 1E ("Timberlake capitalized on his good looks and some naughty lyrics … [he] swaggered suggestively but never smuttily."); Kevin C. Johnson, *Timberlake, Aguilera Deliver Pop Extravaganza*, ST. LOUIS POST-DISPATCH, July 7, 2003, at B4 ("Timberlake slid down a pole onto the main stage set … for his old school-flavored song 'Rock Your Body'").

[14] The Commission asserted only that a published quote attributed to Janet Jackson's choreographer should have led to added precautions. NAL ¶¶ 21-22. But it does not suggest what additional precautions CBS should have taken prior to the performance beyond what it had already done: controlled the script and staging, reviewed the wardrobe, and instituted an audio delay.

matter, the fact that the FCC could unearth an obscure press account about the performance of a different song, with a different female partner, in a different country (that has different broadcast standards) in a prior year is hardly persuasive that the network should have anticipated that the Super Bowl performers might add an unscripted surprise involving nudity. The Commission's reasoning is all the more dubious in light of the previous broadcast experience in *this* country with the song that was actually performed at the Super Bowl, particularly given the precautions Viacom took to select talent carefully and to maintain control over the halftime show.

The cases the Commission cites to bolster its claim that past performances or other types of danger signals may put a licensee "on notice" that a particular broadcast may present special problems do not support this NAL. *See id*. For example, in *Regent Licensee of Flagstaff, Inc. (KZGL(FM))*, 15 FCC Rcd. 17286, 17288 (2000), the FCC held that a broadcaster failed to take adequate precautions to prevent the transmission of indecent material where the program involved a live remote interview of an adult movie actress at an adult video store. That decision stressed that "some time passed between the time [the porn actress] started making explicit sexual references and the time [the station] finally cut her off," and the station did not use any delay mechanism.[15] In *WLLD(FM)*, 15 FCC Rcd. 23881 (Enf. Bur. 2000), the staff reasoned the licensee should have taken precautions when broadcasting a live hip hop concert because of "the lyrics *normally appearing in the artists' material*." *Id*. at 23883 (emphasis added). Finally, the NAL cites the March 18, 2004, *Golden Globe Awards Order*, which indicated the network in that

[15] The Commission in that case not only declined to impose the maximum fine, but instead adjusted the penalty downward.

case could have anticipated that a recipient at a live award ceremony might use profanity because similar mishaps had occurred in the past.[16]

Not only do these cases fail to support the NAL's conclusions, they suggest *exactly the opposite* inference – that the surprise ending of the halftime show was not foreseeable. Where the broadcast in *Regent Licensee of Flagstaff* was an interview of a porn actress in an adult video store, this case involves mainstream talent selected carefully by the network to minimize the possibility of the unexpected in a program the Commission describes as "a prestigious national event" in which no one could have "reasonably anticipated … the … exposure of Ms. Jackson's breast."[17] The licensee in *Flagstaff* had no delay mechanism and did not immediately cut off the transmission of supposedly indecent utterances, whereas here Viacom took the precaution of instituting a five-second delay, but had no opportunity to cut of the fleeting transmission when it occurred.[18] In *WLLD(FM*), the Commission assumed the licensee should have taken precautions because of "the lyrics normally appearing in the artists' material," 15 FCC Rcd. at 23883, where-as here, it concluded here that Viacom is liable (despite its precautions) because of an unscripted ending added by the artists that was never part of any previous performance and contrary to the

[16] NAL ¶ 17 n.54 (citing *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd. 4975, 4979 (2004) ("*Golden Globe Awards Order*")).

[17] *Id*. ¶ 25. The Commission has taken the position in an increasing number of cases that it can determine whether material is actionably indecent based on the general subject matter at issue "and the *identities of the participants* (a 'shock jock' and a porn star)." *Emmis Radio License Corp*., 19 FCC Rcd. 6452 (2004) ("*Emmis Radio*") (emphasis added). While this approach to enforcement is of doubtful legality, *e.g*., *Kolender v. Lawson*, 461 U.S. 352, 360 (1983), it is quite clear that that position is inapplicable to the facts of this case in view of the mainstream performers involved.

[18] The sexually-oriented dialogue in *Regent Licensee of Flagstaff* continued for about 30 seconds (out of a two-minute interview) before it was cut off. 15 FCC Rcd. at 17287. Here, the surprise "costume reveal" at the end of the 12-minute halftime show lasted 9/16 of one second. *Final Response* at 5 n.12.

network's plans.[19] Finally, the *Golden Globe Awards Order*, on which the Commission relies here, and which changed the FCC's standard for "fleeting" or "isolated" instances of indecency, was not decided until March 18, 2004, about seven weeks *after* the Super Bowl telecast. It provides no support for the Commission's inference that the "costume reveal" was foreseeable.[20]

Nor does the Commission's analysis of facts in *Young Broadcasting of San Francisco, Inc. (KRON-TV)*, 19 FCC Rcd. 1751 (2004), provide any basis for the conclusion that Viacom should have anticipated the Super Bowl halftime show performers would deviate from the script. That case involved a live interview with cast members of *Puppetry of the Penis* who appeared in the studio nude except for capes they wore during the segment. *Id*. at 1751. One of the performers asked the interviewer if they could demonstrate the "genital origami," and when told to proceed, "the penis of one [of the two performers] was fully exposed on-camera."[21] The Commission concluded that the transmission of indecent material was "clearly foreseeable" in these circumstances and the station failed to take adequate precautions because it knew "the interview involved performers who appear nude in order to manipulate and stretch their genitalia." *Id*. at 1756.

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[19] *Compare* NAL ¶ 14 *with Final Response* at 9-10. Viacom does not concede that *Regent Licensee of Flagstaff* or *WLLD(FM)* were decided correctly, but to whatever extent the assessments in those cases are correct as to the performers or the nature of their work, they have no application in the context of a halftime show for which artists were chosen in part based on a history of avoiding issues that might implicate broadcast standards.

[20] Not only was the discussion of foreseeability set forth in the *Golden Globe Awards Order* unavailable to Viacom at the time of the Super Bowl broadcast, and thus could provide no guidance on how Viacom should govern itself with respect to the halftime show, the Commission decided in that case it could not issue an NAL where "NBC and its affiliates did not have the requisite notice to justify a penalty," *Golden Globe Awards Order*, 19 FCC Rcd. at 4982, and the same result accordingly should apply here.

[21] *Id*. at 1751-52. The Commission further noted that "the segment, as broadcast, includes comments of station personnel who are off the set, and who urge the performers to demonstrate by stating 'let's see it.'" One of the show's hosts responded to the off-camera comments, saying, "they're tired of the talking." *Id*. at 1756.

Contrary to the conclusions in the NAL, literally nothing in the *Young Broadcasting* foreseeability analysis relates to what happened at the Super Bowl. Viacom did not invite the performers to appear in the nude or in costumes that risked such exposure, but instead checked the performers' wardrobe to ensure conformance with broadcast standards. *Final Response* at 10, 15. Network personnel did not ask the performers to do a demonstration involving nudity or anything remotely like it, but instead crafted a script that involved nothing indecent and held and reviewed run-throughs to make sure the script was followed. *Id*. at 9-10. No one at the network – on or off-camera – encouraged the performers to improvise, but instead instituted a delay mechanism as a backstop to catch any behavior that went contrary to plan. *Id* at 4.

C. The Super Bowl Broadcast Does Not Meet the Test for Indecency Articulated by the Commission

The Super Bowl broadcast does not violate the test for indecency as it is defined by the FCC. According to the Commission, a finding of indecency involves two fundamental determinations. The broadcast in question must (1) depict or describe sexual or excretory organs or activities, and (2) be patently offensive as measured by contemporary community standards for the broadcast medium.[22] Here, the Commission concluded without discussion that the first criterion was met, although that facile assertion is far from certain. However, the more important question is whether the Commission properly found that the Super Bowl broadcast violated the second criterion, which it says requires an assessment of "the *full context* in which the material appeared" to determine whether the broadcast violates contemporary community standards for the broadcast medium.[23] The Commission bases this latter determination on three factors:

[22] NAL ¶ 10. *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 (2001) ("*Indecency Policy Statement*").

[23] NAL ¶ 12 (quoting *Indecency Policy Statement*, 16 FCC Rcd. at 8002) (emphasis original).

(a) the explicitness or graphic nature of the depiction; (b) whether the material dwells on or repeats at length the depictions; and (c) whether the material appears to pander or is used to titillate or shock. *Id*. (quoting *Indecency Policy Statement*, 16 FCC Rcd. at 8002-15). None of those criteria are met here.

1. The Performance Was Neither Explicit Nor Graphic

There is no support in this record or Commission precedent to support the NAL's conclusion that the finale of the halftime show was explicit or graphic. It should not be over-looked that the unscripted moment that triggered the instant investigation involved a long shot of the stage that lasted just over half a second. Other than discounting the brevity of the shot, the NAL does not discuss the issue at all, and merely concludes that the "explicitness" criterion is met because the Jackson/Timberlake performance "culminated in on-camera partial nudity," Ms. Jackson's exposed breast.[24] It does not explain what is required for a broadcast to be considered "explicit," and states only that the fact that the offending image was fleeting should be considered as part of the "patent offensiveness" criterion. *Id*. ¶ 13. The NAL then proceeds from this mere assertion to determine whether the broadcast was patently offensive.

None of the Commission's prior indecency decisions support the NAL's conclusion. In this regard, it is worth noting that all of the examples put forward by the Commission in its *Indecency Policy Statement* describe explicit or graphic language on the radio and not a fleeting video image like that at issue here. *See* 16 FCC Rcd. at 8003-08. The NAL in a footnote cites two Bureau-level radio cases that address the issue of "explicitness," but they fail to shed any

[24] *Id*. ¶ 11. It is not clear that the broadcast of "Ms. Jackson's exposed breast." constitutes depiction of a "sexual organ" as the test requires. Additionally, the Commission did not explain how "the depiction of adult male frontal nudity," that it concluded "was graphic and explicit" in *Young Broadcasting*, sheds any light on why it considered brief exposure of a partially-covered female breast in a distant camera shot in this case to be "explicit."

light on what is meant by the term and only confuse matters further.[25] The only case involving a television broadcast that the Commission cites is *Young Broadcasting*, which involved the exposure of male genitalia under very different circumstances. The NAL does not discuss the issue or compare the two cases, but simply concludes without elaboration that the Jackson/Timberlake moment was "clearly graphic."[26]

Other Commission decisions issued since the Super Bowl broadcast cast significant doubt on the NAL's conclusion that the accidental "costume reveal" was explicit. In a recent notice of apparent liability issued for the Fox program *Married By America*, the Commission issued a base forfeiture – as opposed to the maximum fine proposed here – for programming considerably more explicit and clearly premeditated (at least as described by the Commission) than the halftime show at issue here.[27] This is not to suggest *Married by America* was correctly

[25] NAL ¶ 12 & n.39 (citing *Tempe Radio, Inc.*, 12 FCC Rcd. 21828 (1997), and *EZ New Orleans, Inc.*, 12 FCC Rcd. 4147 (1997)). Neither case discusses what it means to be graphic or explicit, and they are cited in *Indecency Policy Statement*, 16 FCC Rcd. at 8009, only to support the proposition that if material is sufficiently "graphic" it may outweigh the fact that its broadcast is brief or fleeting. In both cases, the cited material involved jokes about sex involving children, so the level of offensiveness counterbalanced the brevity of the broadcast. *See Entercom Sacramento Licensee, LLC*, FCC 04-224 ¶ 11 (rel. Oct. 15, 2004) (same). Nothing in these decisions supports the decision that a flash of partial nudity in the context at issue here should be considered "graphic." In this case, the broadcast in question was both non-explicit *and* fleeting.

[26] NAL ¶ 13 & n.42. Even if it were relevant here, *Young Broadcasting* is only an NAL that has neither ripened into a forfeiture order nor been subjected to judicial review. Viacom does not concede *Young Broadcasting* was correctly decided, but even if it was, that decision does not support the Commission's conclusory statement about the graphic nature of the halftime show given that "[t]he individual facts and the context are critical to separating protected speech from unlawful speech." NAL (Statement of Chairman Michael K. Powell).

[27] In *Complaints Against Various Licensees Regarding Their Broadcast of the Fox Network Program "Married by America" on April 7, 2003*, FCC 04-242 (rel. Oct. 12, 2004) ("*Married By America*"), the Commission imposed base forfeitures for programming that it described as involving "sexual situations," including: scenes of a "sexual nature" the import of which was "inescapable" notwithstanding "electronically obscure[d] nudity;" "a topless woman with her breasts pixilated, straddling a man in a sexually suggestive manner;" "a man on all fours in his underwear as two female strippers playfully spank him;" "two partially clothed female strippers kissing each other above a male;" "two partially clothed strippers rubbing a man's stomach;" "a

decided,[28] but the contrast reveals how the Commission's characterization of the Super Bowl halftime show as "explicit" is an exaggeration.

In making this point we acknowledge that the Commission has often stated that it is not barred from taking action merely because the material in question is less graphic than what has been evaluated in other cases.[29] However, a significant number of staff rulings that find programs "not actionably indecent" strongly suggest the Super Bowl telecast should not be considered sufficiently graphic to be considered indecent.[30] While it is true that many such rulings are difficult to find because they are not published, and that the Commission has

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male stripper about to put a woman's hand down the front of his pants;" and "bachelorettes straddling and touching a topless female stripper and then licking whipped cream off the stripper's stomach and bare chest while the stripper holds her own breasts." *Id*. ¶¶ 2, 8, 10.

[28] As with *Young Broadcasting*, the decision is only an NAL that has not ripened into a forfeiture order or been subjected to judicial review. The Commission's own discussion of the facts indicates that it failed to consider the fact that nudity in the program was electronically obscured. Moreover, *Married By America* fails to define or discuss whether the program depicted sexual organs or activities in a graphic or explicit manner as the Commission's standard requires, but only notes the programming was presented in "a sexually suggestive manner" and concludes "the sexual nature of the scenes is inescapable." *Id*. ¶ 8.

[29] *E.g*., *AMFM Radio Licenses, L.L.C.*, 19 FCC Rcd. 10751, 10755-56 (2004), *rescinded on other grounds*, 19 FCC Rcd. 10775 (2004); *Capstar TX Limited P'ship*, 15 FCC Rcd. 19615, 19616 (Enf. Bur. 2000).

[30] For cases in which the staff has found that material is not sufficiently "explicit" or "graphic" to warrant a finding of indecency, *see* Letter from William D. Freedman, File No. EB-03-IH-0644 (April 21, 2004) (dismissing complaint against telecast of network program *Hollywood Wives: The Next Generation* where complaint had focused on scene of simulated sexual intercourse); Letter from Charles W. Kelley, File No. EB-01-1H-0661/RBP (Mar. 21, 2002) (dismissing complaint against the *Victoria's Secret* lingerie special because complainant failed to demonstrate "the sexual aspects of the material was, in context, so graphic or explicit as to be patently offensive"); *Entercom Seattle License LLC*, 17 FCC Rcd. 1672, ¶ 6 n.9 (Enf. Bur. 2002) (dismissing complaint about "discussion of the use of sexual fantasy to reduce stress" including "references to masturbation and to fantasies about sexual encounters with celebrities and others" because the material was "not sufficiently explicit or graphic"); *Citadel Broad. Co.*, 17 FCC Rcd. 483, 486 (Enf. Bur. 2002) (finding sexual references in radio edit of "Real Slim Shady" are "oblique," and not "expressed in terms sufficiently explicit or graphic enough to be found patently offensive").

announced recently that it does not consider such rulings to be binding precedent,[31] these facts point to some of the deeper problems underlying the Commission's indecency enforcement policies. *See infra* Section V.

Whether or not Bureau rulings are dispositive, two recent decisions by the full Commission provide the most directly on-point indication of what the FCC means by the terms "graphic" or "explicit" depiction of sexual organs or activities on television. In both *KSAZ Licensee, Inc.*, 19 FCC Rcd. 15999 (2004), and *Complaint Against Various Broadcast Licensees Regarding Their Airing of the UPN Network Program "Buffy the Vampire Slayer" on November 20, 2001*, 19 FCC Rcd. 15995 (2004) ("*Complaint Against Various Broadcast Licensees*"), the full Commission denied indecency complaints directed at television programming.[32] In *KSAZ Licensee*, the broadcast of a scene from the NBC program *Will and Grace* "in which '[a] woman photographer passionately kissed [a] woman author and then humped her (what she called a "dry hump")'" was held "not sufficiently explicit or graphic to be indecent." Similarly, in *Complaint Against Various Broadcast Licensees*, the Commission rejected an indecency complaint against an episode of *Buffy the Vampire Slayer* in which the characters were alleged to have engaged in simulated sexual intercourse. In dismissing the complaint, the Commission said simply that "[b]ased on our review of the scene, we did not find that it is sufficiently graphic or explicit to be deemed indecent."[33]

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[31] *See Entercom Sacramento*, FCC 04-224, ¶ 11 n. 38 ("even to the extent Entercom was aware of these unpublished decisions, we do not believe any reliance on them was reasonable"). Though the Commission suggested licensees should rely on the *Indecency Policy Statement*, it provides no illumination on the issue presented in this case.

[32] The complaints against these network programs were frivolous, and the Commission correctly dismissed them.

[33] *Complaint Against Various Broadcast Licensees*, ¶ 6 (describing scene "depicting Buffy kissing and straddling Spike shortly after fighting with him").

Anyone acquainted with the facts of the instant case would be hard-pressed to describe the Jackson/Timberlake performance in Super Bowl halftime show telecast as "explicit," particularly in light of these recent dismissals. The NAL's characterization of the Jackson/Timberlake performance as including "'sexually explicit' dancing and song lyrics" and choreography that involved "grabbing and rubbing," NAL ¶¶ 2, 6, 14, is exaggerated, but in any event cannot be reasonably distinguished from the sexual situations described in *Will and Grace* and *Buffy the Vampire Slayer*.[34] It is even more difficult to characterize the Super Bowl broadcast as graphic or explicit when it is contrasted with the Commission's characterization of the programming in *Married By America*.[35] Given these decisions, it is not particularly meaningful for the FCC to state that CBS and MTV approved "the sexually provocative nature of the Jackson/Timberlake segment." NAL ¶ 23. To whatever extent that is accurate, it has no bearing on the only part of the performance the NAL cites as making it indecent. Viacom did *not* know of or authorize the brief display of nudity.

Ultimately, the Commission's review on this issue is entirely arbitrary. The FCC provides virtually no discussion of the "explicitness" criterion in its decisions, and there are no analytic tools whatsoever to guide its review. Where, as here, the Commission decides to find an indecency violation, it merely states as a bare conclusion that the material is "clearly graphic." NAL ¶ 13. On the other hand, when it chooses not to penalize a licensee, the Commission simply announces it has determined the material is non-explicit "[b]ased on our review of the

[34] The Commission provides no analysis by which anyone could understand the difference between its characterization of the halftime show performance and "dry humping" accompanied by "passionate kissing" in *Will and Grace*, and the kissing and "straddling" in *Buffy the Vampire Slayer*. *Compare* NAL ¶¶ 2, 6, with *KSAZ Licensee*, ¶ 1 and *Complaint Against Various Broadcast Licensees*, at ¶ 6. *See also* Bureau decisions cited at note 30.

[35] Nothing in the performance as planned and approved by Viacom could be considered "explicit" or "graphic." Even the one unplanned instant at the end of the Jackson/Timberlake performance cannot be considered explicit or graphic by the criteria the FCC previously has applied.

scene."[36] Such an arbitrary approach is wholly inadequate to support the issuance of a forfeiture in this case.

2. The Performance Did Not Dwell on Sexual Matters

The NAL asserted that the halftime performance "dwells on, or repeats at length descriptions of sexual or excretory organs or activities," but provides virtually no explanation to support this conclusion. NAL ¶¶ 12, 14. The Commission's entire analysis on this point was set forth in only two sentences:

> As to those factors [dwelling on sexual matters/pandering], throughout the Jackson/Timberlake segment, the performances, song lyrics and choreography discussed or simulated sexual activities, concluding with the exposure of Ms. Jackson's breast. In particular, we note that Mr. Timberlake pulled off part of Ms. Jackson's clothing to reveal her breast after he sang, "gonna have you naked by the end of this song."

Id. ¶ 14. Although the Commission purported to find that this constituted "dwelling on" or "repeating at length" a depiction of sexual organs or activities, it also acknowledged that "the exposure of Ms. Jackson's breast was brief." *Id*. It did not seek to explain how the split-second exposure could simultaneously be "brief" and "repeated at length."

The answer to this apparent paradox is that the NAL has tacitly eliminated the requirement that the material be "repeated" from the Commission's calculus of "patent offensiveness." Although it purported to analyze this factor, the decision avoided the matter altogether. In considering whether the display was "graphic," the FCC said that assertions "that the exposure was fleeting and unintentional are more appropriate to the analysis under the second and third factors," *id*. ¶ 13, yet four sentences later, after its complete consideration of the second and third factors, concluded that "[t]he fact that the exposure of Ms. Jackson's breast was brief is … not

[36] *KSAZ Licensee*, ¶ 1; *Complaint Against Various Broadcast Licensees*, ¶ 6. *See also* Letter from William D. Freedman, File No. EB-03-IH-0644 (April 21, 2004).

dispositive." *Id.* ¶ 14. In essence, the NAL's only two references to the "repetition" factor were: (1) we will decide this question later, and (2) this question has already been decided.[37] In fact, nothing in the Jackson/Timberlake performance "dwelled" on sexual activities.[38] The lyrics the Commission cites are oblique references at most, and do not constitute a repetition of, or consistent focus on, sexual or excretory material. The Commission has stressed that "where sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency."[39]

Ultimately, the NAL's faulty analysis constitutes a substantive change in the standard for measuring patent offensiveness. Yet if one thing is clear about the FCC's indecency policy – and this may be the only thing – it is that the Commission cannot legally penalize licensees for past broadcasts based on newly-devised criteria. In the *Golden Globes Awards Order* in which it altered the approach toward "fleeting" or "isolated" indecent utterances (among other things), the FCC specifically declined to initiate forfeiture proceedings because licensees "necessarily did not have the requisite notice to justify a penalty."[40] It is well-established that the agency will not

[37] The United States Court of Appeals for the D.C. Circuit has rejected such tactics, describing them as "the agency hat trick" by which the FCC seeks to "avoid defense of its policy at any stage." *United States Telecoms. Ass'n v. FCC*, 28 F.3d 1232, 1235 (D.C. Cir. 1994).

[38] The Commission's statement that "the [Jackson/Timberlake] performances, song lyrics and choreography discussed or simulated sexual activities," NAL ¶ 14, does not address the question of repetition. The fact that a dance number may evoke sexual tension does not satisfy this criterion where the sole rationale for the NAL hinges on the fleeting, isolated, unscripted, and unapproved half-second of nudity at the end.

[39] *Indecency Policy Statement*, 16 FCC Rcd. at 8008. *See, e.g., 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 (Mass Med. Bur. 1992); *Peter Branton*, 6 FCC Rcd. 610 (1991).

[40] 19 FCC Rcd. at 4982. In *Golden Globe Awards Order*, the Commission expressly overruled precedent and adopted a new standard under which a fleeting or isolated expletive may be considered actionably indecent. By its own terms, that new policy cannot be applied to the Super Bowl telecast, which occurred six weeks before the *Golden Globes Order* was issued. In any event, the *Golden Globes Awards Order* did not purport to eliminate "repetition" as a factor in

impose sanctions for newly announced interpretations of its indecency standard and associated rules and policies.[41] Accordingly, the NAL's conclusion on this issue is invalid.

3. The Performance Did Not Pander, Nor Was It Intended to Titillate or Shock

The Commission's statement that the companies "touted" the "shocking" nature of the Jackson/Timberlake performance is a distortion of the record. NAL ¶ 17. Contrary to the suggestion in the NAL, the "shocking moments" language was not part of a press release or other promotional material for the Super Bowl broadcast, but was merely a quote from a news item that appeared on the MTV.com news website.[42] The story quoted Gil Duldulao, Janet Jackson's choreographer, as saying the dance routine would include "some shocking moments," and no such characterization came from anyone at CBS or MTV. Nevertheless, the FCC conflated this statement with post-game website postings about the halftime show and reached the false conclusion that the network either knew ("they extensively promoted this aspect of the broadcast in a manner designed to pander, titillate and shock") or should have known (failure to "inquire further of Mr. Duldulao … portrayed an attitude of willful indifference to the content") what

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evaluating the patent offensiveness of a broadcast, and the Commission purported to apply that factor in this case. In reality, however, it neglected to do so.

[41] *See New Indecency Standards to be Applied to All Broadcast and Amateur Radio Licensees*, 2 FCC Rcd. 2726, 2727 (1987) ("*New Indecency Enforcement Standards*").

[42] *Final Response* at 11. The Supreme Court has defined "pandering" as "'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.'" *Ginzburg v. United States*, 383 U.S. 463, 467 (1966). Here, however, the Commission focuses on a quote from the MTV.com news site, not an advertisement. NAL ¶ 19 (citing quotation from Janet Jackson's choreographer). In this regard, the Commission has previously held that the *Ginzberg* definition applies only to "purely commercial advertising" and not news. *Applications of Chronicle Broad. Co.*, 40 F.C.C.2d 775 ¶ 47 (1973). In any event, the Supreme Court recently questioned how far the concept of "pandering" may extend, in light of First Amendment limits. *Ashcroft v. Free Speech Coalition*, 535 U.S 234, 272-273 (2002).

would happen. NAL ¶¶ 22-23. These statements flatly ignore the record and do not support a finding of "pandering."

The NAL provides no reason to question the explanation of the web postings in the *Final Response*. Although the NAL states that it "reasonably could be called into question" whether those who reviewed the website story actually believed the "shocking moments" quote referred to Justin Timberlake's surprise appearance at the halftime show, NAL ¶ 22, it provides neither plausible reasons for skepticism nor an explanation of what implications flow from it. It is undeniable that there was significant speculation in the press regarding the halftime show,[43] and the LOI response noted that reporters had been asking repeatedly about the "surprise guest" for a week prior to the game. *Final Response* at 11. The Commission's suggestion that the "surprising" nature of Justin Timberlake's appearance might be in doubt because he had an on-screen credit at the start of the halftime show lacks any foundation or reasoned explanation.[44]

[43] *CBS Adds Secret Performer for Halftime Show*, SPORTS ILLUSTRATED.COM, January 29, 2004 ("Another act is poised to join the MTV-produced extravaganza. Who that is will remain a mystery until the program, producers said Thursday."); Rick Harmon, *Timberlake Isn't Only Surprise Appearance*, Media General News Service, February 2, 2004 ("All week long, the cliffhanger for the halftime show was who would be the 'surprise guest?" Rumors were circulating that Janet Jackson's brother Michael would show up."); John McClaim, *Scenes from the Super Bowl*, HOUS. CHRON., January 31, 2004, at 2 ("entertainers talked about the possibility of some surprise guests joining them"); Gayle Fee and Laura Raposa, *Inside Track*, BOSTON HERALD, January 30, 2004, at 016 ("The music channel also promised a 'surprise guest.'"); John Branch, THE FRESNO BEE, January 30, 2004, at D2 ("MTV also said a surprise guest is likely."); Jeff Gluck, Cox News Serv., January 30, 2004 ("MTV executives also said that in addition to the listed performers, there will be a surprise guest.").

[44] NAL ¶ 22 n.64. That there was an on-screen credit at the beginning of the halftime show after a week of public speculation does not diminish the surprise element of Timberlake's guest appearance. The opening credits to the halftime show named Timberlake for several reasons, including holding the audience for the performance and giving Timberlake "superstar" status along with the other performers. Listing the credit does not detract from the fact that Timberlake was a "surprise" guest, and such listing is entirely consistent with standard industry practice. *See* Declaration of Salli Frattini, attached hereto.

The Commission's conclusion that the network had an obligation to inquire further into the quote about "shocking moments," and that failure to do so constitutes "willful indifference to the content" of the halftime show, NAL ¶ 22, has no support in the law.[45] Whether or not Viacom should have "inquire[d] further of Mr. Duldulao" does not convert the news reports prior to the Super Bowl halftime show into pandering an indecent performance. Moreover, the record does not support the Commission's suggestion of "indifference." *Final Response* at 8-10, 15-16.

The NAL's brief discussion regarding the extent to which the performance was designed to titillate or shock the audience focused on the fact that "Mr. Timberlake pulled off part of Ms. Jackson's clothing to reveal her breast after he sang, 'gonna have you naked by the end of this song.'" NAL ¶ 14. But its conclusion makes sense only if the assumption is made that Viacom had advance knowledge of the "costume reveal" and consciously promoted that aspect of the performance. However, a performance cannot be "*intended* to titillate or shock" where the shocking parts of the performance were never intended in the first place. One cannot pander by accident. It cannot be enough to tip the scales for the FCC to claim that Viacom was "well aware of the overall sexual nature of the Jackson/Timberlake segment." *Id*. ¶ 17. Promoting a perfor-

[45] The Commission cites no authority for its assumption that a quote from an employee of Ms. Jackson would trigger some heightened duty to investigate the content of the halftime show and to adopt added precautions. Few provisions of the Communications Act impose any such investigative obligations on licensees, and none apply in this case. *Cf.*, 47 U.S.C. § 317(c) (requiring broadcasters to exercise "reasonable diligence" in identifying actual sponsors of broadcasts in order to make sponsorship announcements.). Even where some obligation applies for a broadcaster to exercise "reasonable diligence," both the Commission and courts have interpreted the provisions narrowly so as not to create a duty to conduct an independent investigation. *Loveday v. FCC*, 707 F.2d 1443, 1449 (D.C. Cir. 1983) ("A duty to undertake an arduous investigation ought not be casually assigned to broadcasters. A variety of considerations, ranging from practical ones of administrative feasibility to legal ones involving constitutional difficulties, support that view.").

mance that was intended to be well within broadcast standards cannot be transformed into "pandering" by an unforeseeable event.[46]

4. The NAL Did Not Review the Super Bowl Broadcast in Its "Full Context"

The NAL purports to have reviewed the Super Bowl halftime show in its "*full context*" and represents that such an evaluation is "critically important." NAL ¶ 12 (emphasis in original). This aspect of the Commission's indecency policy comes from a discussion in *FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978), where the Supreme Court emphasized "the narrowness of our holding," that "context is all-important," and that "an occasional expletive" would not necessarily justify any sanction against a broadcast licensee. The Commission typically emphasizes the importance of "context" in its indecency determinations, although how this applies in a particular case is hard to define. As the FCC observed in its *Indecency Policy Statement*, "contextual determinations are necessarily highly fact-specific, making it difficult to catalog comprehensively all of the possible contextual factors that might exacerbate or mitigate the patent offensiveness of particular material." 16 FCC Rcd. at 8003. Here, however, the NAL studiously avoids consideration of the full context of the program, focusing instead on the last few moments of the halftime show and placing particular emphasis on the surprise ending.

The Commission's pledge to look at "context" is in tension with the "work as a whole" requirement in obscenity cases,[47] and the FCC has expressly rejected claims that it "is required

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[46] *Cf.* Frederick F. Schauer, THE LAW OF OBSCENITY 85 (BNA 1976) ("no amount of pandering can render a clearly nonobscene work obscene, and without some evidence of prurient appeal, patent offensiveness, and lack of value, the question of pandering is irrelevant").

[47] The Supreme Court has emphasized that it 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." *Ashcroft v. Free Speech Coalition*, 535 U.S. at 248. The First Amendment "requires that redeeming value be judged by considering there work as a whole" and a work does not become obscene "even though [a] scene in isolation might be offensive." *Id.* (citing *Miller v. California*, 413 U.S. 15 (1973); *Kois v. Wisconsin*, 408 U.S. 229 (1972) (*per curiam*)).

[to] take into account the work as a whole."[48] The agency claims to review "context" in order to minimize constitutional problems with the indecency standard, because "it is not sufficient … to know that explicit sexual terms or descriptions were used, just as it is not sufficient to know only that no such terms or descriptions were used." *Indecency Policy Statement*, 16 FCC Rcd. at 8002. Whether this analysis is still sufficient to support its indecency enforcement regime as the law has evolved remains to be seen.[49] But one thing is abundantly clear: the FCC is not free to abandon or truncate examination of the full context in which allegedly indecent material appears. *Pacifica*, 438 U.S. at 746-747, 750.

In this case, the Commission's investigation of the Super Bowl telecast was not limited to the Jackson/Timberlake performance or even the halftime show, but included the entire broadcast, beginning with the pre-game programming. The FCC staff demanded, and Viacom supplied, a videotape of the entire nearly 9-hour program, which began at 2 p.m. February 1, 2004, and ended at almost 11 p.m. NAL ¶ 3. Nevertheless, the NAL's indecency analysis focused only on the final song performed during the 12-minute halftime show and "[i]n particular," the fact that "Mr. Timberlake pulled off part of Ms. Jackson's clothing." *Id*. ¶ 14. In short, the FCC defined the "full context" of the program by the final 10 words of the Jackson/Timberlake song, accompanied by the unexpected nudity. *Id*. ¶¶ 14-15.

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[48] *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. 998, 1004 (1993), *aff'd, Alliance for Community Media v. FCC*, 56 F.3d 105 (D.C. Cir. 1995), *rev'd in part and aff'd in part sub nom. Denver Area Educ. Telecomms. Consortium*, 518 U.S. 717 (1996).

[49] *See infra* at 53-58, 64-77. In this regard, the Supreme Court has reasoned that the requirement of reviewing material "in context" does not provide sufficient clarity of how the indecency standard applies to the Internet. *Reno v. ACLU*, 521 U.S. 844, 870-871 (1997). *See also ACLU v. Ashcroft*, 322 F.3d 240, 252 (3d Cir. 2003) ("taken 'as a whole' language is crucial"), *aff'd*, 124 S. Ct. 2783.

Even with this narrow focus, the Commission ignored the fact that the final moment of the performance that triggered the investigation was contrary to the network's plans for the telecast. In this regard, the NAL did not seriously attempt to examine the full context of the broadcast. Instead, it emphasized the fact that that "Mr. Timberlake pulled off part of Ms. Jackson's clothing to reveal her breast after he sang, 'gonna have you naked by the end of this song,'" NAL ¶ 14, as if that event had been scripted and approved by Viacom. However, a balanced reading of the full record shows that this was not the case. The "*full context*" makes clear that the lyric and the action were not linked, that the choreography was not designed to include such a maneuver, and that the network sought to prevent such surprises.

5. The Super Bowl Broadcast Did Not Violate Contemporary Community Standards for the Broadcast Medium

Although the main thrust of the Commission's indecency test purports to find if a particular broadcast is "*patently offensive* as measured by contemporary community standards for the broadcast medium,"[50] the NAL curiously contains no direct discussion of how the community standard is determined or how it applies in this case. The FCC's "contextual analysis" and the various factors it employs as proxies for patent offensiveness, are never tied back to the central question – what the community believes. The closest the NAL comes to this essential issue is to simply list the number of complaints that were filed, a statistic that is echoed in the separate statements of Commissioners.[51] But this fact is not an adequate measure of the

[50] NAL ¶ 10 (quoting *Indecency Policy Statement*, 16 FCC Rcd. at 8002) (emphasis original).

[51] *Id*. ¶ 2 n.6. *See also* Statements of Chairman Michael K. Powell, Commissioner Michael J. Copps, Commissioner Kevin J. Martin, and Commissioner Jonathan S. Adelstein. In public statements, Chairman Powell has explained that "the increase in the Commission's enforcement efforts" is "a direct response to the increase of public complaints." Remarks of Chairman Michael K. Powell at the NAB Convention, April 20, 2004 ("[T]his year, up to this point, we have received 540,000 complaints" and [w]e're being responsive to public concern, which is the way that the indecency statute is written.").

community standard. The Consumer and Governmental Affairs Bureau regularly admonishes the public that "[t]he Commission receives many informal complaints that do not involve violations of the Communications Act, or a rule or order of the Commission. The existence of a complaint does not necessarily indicate wrongdoing by the company at issue."[52] Nor does the mere filing of complaints shed light on the community standard for the broadcast medium.[53]

Here, apart from repeated references to the large number of complaints generated in response to the Super Bowl telecast, the Commission offers nothing to support its conclusion that the broadcast was inconsistent with community standards. At the same time, national surveys indicate the public at large did not consider the halftime show all that shocking or offensive. One national poll conducted shortly after the Super Bowl found that most members of the broadcast audience disagreed that the broadcast was legally indecent, and nearly 80 percent of respondents described the FCC's investigation as a waste of tax dollars.[54] More recently, on the same day the Commission released the NAL in this case, the Kaiser Family Foundation issued a study that found that only 17 percent of parents were very concerned about the Super Bowl telecast.[55] This suggests there is no basis for the Commission's assumption that the telecast was patently offensive as measured by contemporary community standards.

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[52] CGB, Report on Informal Consumer Inquiries and Complaints, 4th Quarter Calendar Year 2003 (rel. June 10, 2004) ("*Fourth Quarterly 2003 Report*").

[53] Relying on the number of complaints filed in the indecency context is an even more dubious measure of community standards, since most are engineered through activist groups that sponsor complaint mills. *See* Comments of the Broadcasters' Coalition, MB Docket No. 04-232, filed Aug. 27, 2004, at 9-11 & Exhs. 2-5.

[54] *See* The Associated Press/Ipsos Poll: *Janet Jackson's Act Bad Taste, But Not a Federal Case*, February 24, 2004 (www.ipsos-na.com/news/pressrelease.cfm?id=2062&content=full).

[55] *Parents, Media and Public Policy: A Kaiser Family Foundation Survey* (Fall 2004) at 3.

III. THE NAL IS INCONSISTENT WITH THE COMMUNICATIONS ACT AND FCC FORFEITURE POLICIES

The NAL violates the Communications Act in two vital respects. It proposes to penalize CBS for alleged indecency violations that were neither "willful" nor "repeated," as required by Section 503(b)(1), and it assesses culpability and/or maximum forfeitures based on indecency allegations in other notices of apparent liability that have not led to final orders, in violation of Section 504(c). 47 U.S.C. §§ 503(b)(1), 504(c). In addition, the maximum forfeitures in the NAL are inconsistent with the FCC's forfeitures guidelines and its actions in other cases. Accordingly, the NAL's proposed forfeiture cannot lawfully be imposed.

A. The NAL Fails to Meet the Requirements of Section 503(b)(1)

Section 503(b)(1) empowers the FCC to impose forfeitures only for "willful" or "repeated" violations of the Act or agency rules. The alleged indecency violation in the Super Bowl halftime performance fails to meet either requirement, as it was neither willful nor repeated. This is evident from the fact that the only action the NAL found that made the broadcast sanctionable – the accidental exposure of Ms. Jackson's breast – was not done knowingly and was not repeated. As a threshold matter, it is obvious the 9/16 of a second at the end of the performance involving fleeting and accidental exposure of Ms. Jackson's breast was not "repeated," and the NAL does not suggest otherwise. Additionally, no reasonable construction of the term "willful" supports the conclusion of the NAL.

The record before the Commission confirms that Viacom took extensive steps to ensure the halftime show broadcast did not include content like the brief glimpse of nudity that ended the Jackson/Timberlake performance. *See supra* at 3-6. Although the NAL concludes that "whether or not officials of the[ ] companies had advance knowledge of Ms. Jackson's breast-baring finale … is not dispositive," NAL ¶ 17, it is not enough for the Commission to simply conclude the broadcast was "willful." The Act requires that the "violation" itself be intentional.

To be sure, the Commission has held that in order to satisfy the willfulness requirement, the purported offender need not intend to violate the Act or an FCC rule, or even be aware the action in question constitutes a violation.[56] Here, however, the question is not whether CBS intended to broadcast the halftime show, or even whether it intended the show to be "sexually provocative." Rather, the only question, and the one the NAL makes dispositive, is whether Viacom intended for Ms. Jackson to bare her breast as part of a broadcast that CBS aired. All evidence in the record indicates that Viacom not only formed no such intention, it did not even know the action would occur, as the Commission acknowledges. NAL ¶ 18.

The Commission recently has reiterated that "under Section 503(b) of the Act … the term 'willful' means the *conscious and deliberate* commission or omission of such act." *Butterfield Broad. Corp.*, DA 04-3157, ¶ 6 n.10 (rel. Oct. 4, 2004) (emphasis added) (internal quote and editing omitted). The evidence irrefutably shows that no one at Viacom was "conscious" that exposure of Ms. Jackson's breast or its inclusion in a broadcast would occur, and there was nothing "deliberate" in any actions related to the exposure or its broadcast during the halftime show.[57] It is notable in this regard the FCC must find "by a preponderance of the evidence," that

[56] *E.g.*, *Marshall D. Martin*, DA 04-3355, ¶ 8 (Enf. Bur. rel. Oct. 27, 2004).

[57] The Bureau recently canceled a notice of apparent liability for a forfeiture where it concluded a licensee "did not willfully violate" the rules because it, like Viacom here, took reasonable precautions as a matter of course, the violation was unexpected, and it occurred despite the routine precautions and before there was opportunity to discover or remedy the violation. In *Mega Communications of New Britain Licensee, L.L.C.*, 19 FCC Rcd. 11373 (Enf. Bur. 2004), the Enforcement Bureau rescinded its proposal to fine Mega for failure to close antenna structures within effective locked fences or other enclosures in violation of Section 73.49 of the rules. It found, "[b]ased on … review of Mega's response to the NAL and the overall record," that Mega regularly inspected the tower, and "the problem occurred shortly after an inspection by Mega." The thrust of the forfeiture cancellation was that because the enclosures were compliant when Mega inspected them last, and failed before it was time to inspect them again under Mega's routine procedures, the violation was not "willful." The same result should apply here, where Viacom took all reasonable precautions based on past experience – *including inspecting Ms. Jackson's costume* – but an unforeseeable violation nevertheless occurred.

the elements constituting a violation of the Act or of an FCC rule are present. NAL ¶ 8. The evidence here all points in the opposite direction.

Any other reading of Section 503(b)(1) does not comport with well-settled legal principles.[58] "[I]n order to establish a 'willful' violation of a statute, the Government must prove that the defendant acted with the knowledge that his conduct was unlawful." *Bryan v. United States*, 524 U.S. 184, 205 (1998) (internal quote omitted). *See also Ratzlaf v. United States*, 510 U.S. 135 (1994) ("'willfulness' requirement" for violation of bank reporting duty for cash transactions "mandates something more" than "purpose to circumvent [the] obligation," rather "the Government must prove … defendant acted with knowledge that his conduct was unlawful").

These requirements clearly apply to the Communications Act. For example, one court recently held that the relevant standard for willfulness was satisfied when a party "*chose* to circumvent" the "governing legal standard."[59] Moreover, when used in a criminal statute, such as 18 U.S.C. § 1464, under which the FCC exercises indecency enforcement authority, the term "willful" has been held to "generally mean[ ] an act done with a bad purpose … without justifiable excuse … stubbornly, obstinately, perversely." *United States v. Murdock*, 290 U.S. 389, 394 (1933) (citations omitted). Accordingly, "evil motive to do that which the statute condemns becomes a constituent element of the crime." *Screws v. United States*, 325 U.S. 91,

[58] The textbook definition of willfulness is that an action be "voluntary" or "intentional." *Kawaauhau v. Geiger*, 523 U.S. 57, 61 n.3 (1998) ("'willful' is defined in Black's Law Dictionary as "voluntary" or "intentional.").

[59] *CBS Inc. v. PrimeTime 24 Joint Venture*, 9 F.Supp.2d 1333, 1343-44 (S.D. Fla. 1998) (finding "willful" SHVIA violation by defendant) (emphasis added). *CBS v. PrimeTime 24* construed the standard in 47 U.S.C. § 312(f)(1), which also governs Section 503(b)(1). *See, e.g., ESI Companies, Inc.*, 19 FCC Rcd. 17744, 17746 n.9 (Enf. Bur. 2004). *See also AT&T v. New York City Human Res. Admin.*, 833 F.Supp. 962, 974 (S.D.N.Y. 1993) (defining "[w]illful misconduct, in interpreting tariff, as the intentional performance of an action with knowledge" that the "act will probably result in injury or damage," or "in such a manner as to imply reckless disregard of the probable circumstances").

101 (1945). Even to the extent "[t]he word 'willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears," it at minimum "denotes an act which is intentional, or knowing, or voluntary, *as distinguished from accidental*." *Bryan*, 524 U.S. at 191 & n.12 (emphasis added) (quoting *Spies v. United States*, 317 U.S. 492, 497 (1943)). At a minimum, the level of volition required for an act to be willful means the "accidental" exposure and broadcast of Ms. Jackson's breast does not qualify.

This interpretation is not only required by the Act, but is compelled as a constitutional matter in the context of sanctions that seek to punish expressive activity. The First Amendment requires statutory provisions imposing penalties on speech to be interpreted to include a scienter requirement.[60] And the government cannot, as a general proposition, impose a strict liability requirement on protected speech. *Cf., Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) ("[P]unishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally-guaranteed freedoms of speech and press. Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship."). The FCC accordingly may not impose a penalty where CBS did not know it would be transmitting "indecent" material.

Similarly, the claim in the NAL that Viacom was "willfully indifferent" to the content of the halftime show, NAL ¶ 22, is legally insufficient for imposing punishment for speech or other expressive conduct. *See*, e.g., *Saxe v. State College*, 240 F.3d 200, 206 (3d Cir. 2001). Not only is "willful indifference" too low a threshold for assigning liability for expressive conduct as a constitutional matter, any assertion that Viacom exhibited "willful indifference to the content and tone of what was ultimately broadcast" is not supported by the facts. *See supra* at 3-6.

[60] *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77-78 (1994); *United States v. Reilly*, 2002 WL 31307170 (S.D.N.Y. 2002). *See Smith v. California*, 361 U.S. 147 (1959).

B. The NAL Violates Section 504(c) of the Act

The NAL also violates the Act to the extent it assesses culpability, and/or maximum forfeitures for each owned-and-operated CBS television station, based on indecency allegations that are non-final orders.[61] Under Section 504(c) of the Act, "where the Commission issues a notice of apparent liability looking toward the imposition of a forfeiture …, that fact shall not be used, in any other proceeding … to the prejudice of the person to whom such notice was issued, unless (i) the forfeiture has been paid, or (ii) a court of competent jurisdiction has ordered … payment … and such order has become final."[62] Here, the NAL proposes forfeitures reflecting upward adjustment to the statutory maximum, NAL ¶ 24, based in part on what the Commission itself recognizes are only "notices of apparently liability looking toward imposition of a forfeiture," 47 U.S.C. § 504(c), in cases that are far from final in that, not only has no forfeiture been paid or ordered, there is still a "response pending" to the allegations in question. *See* NAL ¶ 24 n.68.

The Commission's reliance in the NAL on non-final, unadjudicated indecency allegations is unlike other cases in which it purportedly considered not the asserted violation of law, but the underlying facts upon which a notice of forfeiture liability is based.[63] Here, the NAL cites

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[61] NAL ¶ 24 (claiming to "tak[e] account all of the factors" as to "the particular culpability here of Viacom" including "the history of recent indecent broadcasts by Viacom-owned radio stations").

[62] 47 U.S.C. § 504(c). This requirement is not just a maxim of administrative fairness, but with respect to forfeitures involving speech, is a constitutional imperative. *Cf. Thomas v. Board of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1048 (2d Cir. 1979) (citing "fundamental axiom" that "speech may not be suppressed nor any speaker punished unless" there is a "final determination that [the] specific" speech presents a violation) (citing *Southeastern Promos., Ltd. v. Conrad*, 420 U.S. 546, 561 (1975); *Freedman v. Maryland*, 380 U.S. 51, 58 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1953)).

[63] *See, e.g., SBC Communications, Inc.*, 17 FCC Rcd. 4043, ¶ 21 (2002) (citing *Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 15 FCC Rcd. 303, ¶ 4 (1999) ("*Forfeiture Policy Recon.*")).

alleged "recent indecent broadcasts by Viacom-owned radio stations" when in fact the cases it relies upon do not involve *any* determination that the broadcasts in question were actionably indecent, and in most of the cases there has been only a finding of "apparent" violation of indecency rules. The Commission thus goes beyond simply "using the *underlying facts* of a prior violation" in those cases.[64] Instead, it relies on *legal determinations* about those facts – *i.e.*, not just that the materials in question aired, but that they were "indecent." This violates the prohibition of Section 504(c) and renders the proposed forfeiture and/or its amount unlawful.

Even were the NAL limited to the typical FCC stance that it may cite facts underlying allegations in a notice of apparent liability so long as it does not assume or conclude that an alleged violation occurred, that "distinction" cannot withstand scrutiny. Section 504(c) exists so that those subject to FCC enforcement are not penalized for actions the Commission claims "apparently" constitute Act or rules violations, but which subsequent administrative or judicial processes determine are in fact not violations at all. Here, the Commission has used the issuance of notices of apparent liability that have not been adjudicated to determine with finality that the broadcast of material that is indecent has occurred. This clearly is inconsistent with the purpose of Section 504(c).

C. The Proposed Forfeiture is Excessive

Even if the NAL's conclusion was correct with respect to indecency, the proposal to assess the maximum forfeiture clearly is excessive. The Commission recently has made plain its initiative to take "steps to sharpen [its] enforcement blade" for alleged indecency violations.[65]

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[64] *Forfeiture Policy Recon.*, 15 FCC Rcd. 303 ¶ 2 (quoting *Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd. 17087, ¶ 34 (1997) ("*Forfeiture Policy Statement*")) (emphasis in original).

[65] Testimony of Michael K. Powell, Chairman, Federal Communications Commission, before the United States Senate, Committee on Commerce, Science and Transportation, at 3 (Feb. 11, 2004).

This includes finding multiple indecent utterances in a single program to be separate violations, fining – or threatening to fine – all licensees who air network or syndicated programming that is held indecent, and starting calculations of forfeitures at the statutory maximum rather than with the base forfeiture. Such efforts to "target" or "get tough" on indecency not only are unconstitutional under the First Amendment (as explained more fully *infra*), they are inappropriately extended in this case.

The proposed maximum forfeiture violates the Commission's guidelines. The NAL acknowledges that any upward adjustment from the base forfeiture for an indecency violation, let alone imposition of maximum penalties, is appropriate only pursuant to the factors enumerated in 47 U.S.C. § 503(b)(2)(D). NAL ¶ 16. These include the nature, circumstances, extent and gravity of the violation, and a licensee's degree of culpability, history of prior offenses, and ability to pay. *Id*. (quoting *Forfeiture Policy Statement*, 12 FCC Rcd. at 17100-01). These factors, and notions of fundamental fairness, demonstrate that there is no justification for imposing the maximum forfeiture here.

The record shows overwhelmingly that Viacom did not intend the Super Bowl halftime performance to include any indecent material and that the network took all reasonable steps to avoid violating broadcast standards. Despite Viacom's reasonable efforts, two performers unforeseeably hijacked the halftime show for an unplanned, unauthorized, and unrehearsed finale that unfortunately went awry. These facts reflecting the nature and extent of the violation, and Viacom's culpability with respect to it, mitigate in favor of a lower forfeiture, and certainly do not support the maximum fine the NAL proposes. In addition, CBS has no history of prior offenses, and as shown in Section III.B, it is improper for the FCC to consider in setting the forfeiture amount here any notices of apparent liability.

Imposition of the maximum forfeiture in this case is inconsistent with precedent. As recently as this year, the Commission issued base forfeitures for indecency infractions even where "the complained-of material" included violations consisting of "numerous sexual references" that "were repeated and not isolated,"[66] yet the Commission proposes the maximum forfeiture here for a single, fleeting half-second of alleged indecency violation. The disproportionate nature of the forfeiture proposed here is further exacerbated by the fact that, unlike typical indecency cases where the speaker intends to utter the words that are ultimately deemed actionable, the sole "utterance" that the Commission identifies here was never intended to be displayed nor broadcast. *See Final Response* at 9 & Exh. 8.

Under the forfeiture guidelines, CBS's long record of compliance with broadcast standards dating back to the inception of television service should have been considered. Proper application of this factor should have produced a downward departure from the base forfeiture. *See, e.g., Entercom Seattle License, LLC*, 17 FCC Rcd. 18347, ¶¶ 13, 15 (Enf. Bur. 2002) (applying downward adjustment from the base forfeiture even where broadcast in question involved "graphic descriptions of the male genitalia"). Instead, it appears the Commission considered inappropriate issues that have no bearing on the substance of an alleged violation, such as the value of commercial time sold during the Super Bowl. *See* NAL (Statement of Commissioner Michael J. Copps).

Even assuming that the indecency finding is correct (and it emphatically is not), it would be more appropriate for the Commission to issue CBS at most an admonition. In the *Golden Globe Awards Order*, the Commission declined to impose a forfeiture because "NBC and its

[66] *Emmis Radio License Corp.*, 19 FCC Rcd. 2701 ¶ 12 (Enf. Bur. 2004) (forfeiture order for $7,000). *See also Married by America*, FCC 04-242; *Emmis Radio License Corp.*, 17 FCC Rcd. 21697 ¶ 9 (Enf. Bur. 2002) ("references to oral sex, genitalia, masturbation, ejaculation and excretory activities were not fleeting").

affiliates necessarily did not have the requisite notice to justify a penalty," and it stated that one way for licensees to avoid enforcement action after *Golden Globe Awards Order* was to use a delay/bleeping system for live broadcasts.[67] Just as the change in law and guidance in *Golden Globe Awards Order* came only after the broadcast in question aired, it postdated the Super Bowl as well.[68] By this reasoning, if NBC was not on notice before March 18 that "fleeting" and "isolated" utterance of a single offending word on a live event which failed to use a delay could lead to indecency enforcement action, Viacom was not on notice as of February 2 that the FCC had changed its interpretation of its rules such that enforcement action could ensue from an unscripted and fleeting "wardrobe malfunction" during the halftime show.[69] The Commission's decision in *Young Broadcasting*, issued a few days before the Super Bowl, is not to the contrary, for that case involved findings that the licensee consciously set up the situation where nudity might be displayed and actively encouraged events that produced that outcome.[70] Here, by contrast, the network took no similar risks with costumes, reviewed and rehearsed scripts with performers in advance, and implemented measures designed to avoid any violations.

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[67] *Golden Globe Awards Order*, 19 FCC Rcd. at 4981-82.

[68] *Compare id*. (issued Mar. 18, 2004), *with* NAL (citing Feb. 1, 2004, Broadcast of Super Bowl XXXVIII).

[69] Notably, unlike the Golden Globe Awards, CBS utilized a delay mechanism for the audio of the halftime performance. To the extent that, prior to the *Golden Globe Awards Order* and the halftime incident, CBS had no reason to take the unprecedented step of implementing a delay mechanism sufficient to edit unplanned and undesirable visuals, it was not on notice of any practical or regulatory need to employ such measures. *See AAT Communications Corp.*, DA 04-3305 ¶ 12 (Enf. Bur. Oct. 22, 2004) ("If the tower had been scheduled for repainting prior to the Commission's inspection, AAT would merit a reduction in the proposed forfeiture amount based on good faith efforts to correct the violation.").

[70] *Young Broad.*, 19 FCC Rcd. at 1751-52, 1756. As explained *supra* at note 19, Viacom does not believe *Young Broadcasting* was correctly decided. Even if it was, that case does not apply here.

IV. THE NAL VIOLATES THE FIRST AMENDMENT BECAUSE IT EXCEEDS THE COMMISSION'S CONSTITUTIONAL AUTHORITY AS ARTICULATED IN *FCC v. PACIFICA FOUNDATION*

Although the NAL acknowledges that "the First Amendment is a critical constitutional limitation that demands, in indecency determinations, that we proceed cautiously and with appropriate restraint," NAL ¶ 9, the Commission fails to heed its own words. This constitutional mandate has been diluted to nothing more than boilerplate in the Commission's recent indecency decisions, oft repeated but "more ritual than real."[71] Actions speak louder than words, however, and once "stripped of verbiage" about how "careful and thoughtful and measured and balanced" the agency has been, its claim of constitutional sensitivity, "like a Persian cat with its fur shaved, is alarmingly pale and thin." *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1050 (7th Cir. 1992). Here, the finding of apparent liability and proposal of a massive fine violates the "critical constitutional limitations" that circumscribe FCC enforcement authority under *Pacifica*.

A. The First Amendment Requires the Commission to Proceed Cautiously

The discussion of the First Amendment in the NAL fails to apply the constitutional limits inherent in the indecency enforcement regime. It is not sufficient to note, for example, that previous courts have upheld "the Commission's broadcast indecency definition," NAL ¶ 27, when this decision significantly expands what is encompassed within that definition. "Constitutional authority to impose some [regulation] is not authority to impose any [regulation] imaginable." *Time Warner Entmt. Co., L.P. v. FCC*, 240 F.3d 1126, 1129-30 (D.C. Cir. 2001). In this case, the NAL exceeds the limits set forth in the Commission's own history of indecency enforcement.

[71] *Action for Children's Television v. FCC*, 852 F.2d 1332, 1341 (D.C. Cir. 1988) ("*ACT I*"). The Commission repeats the language about "critical" constitutional limits in virtually all of its recent enforcement actions, even as it expands the indecency enforcement regime beyond previously recognized limits. *See, e.g., Entercom Sacramento*, FCC 04-224, ¶ 8; *Married by America*, FCC 04-242, ¶ 6; *Golden Globe Awards Order*, 19 FCC Rcd. at 4977; *Capstar TX Ltd. P'Ship*, 19 FCC Rcd. 4960, 4962 (2004).

The restrictions against "indecency" existed in some form since the Radio Act of 1927, but the Commission officially defined the term "indecent" for the first time in 1975 to clarify the concept in light of the Supreme Court's then-recent constitutional ruling regarding the obscenity standard in *Miller v. California*, 413 U.S. 15. Noting that "the term 'indecent' ha[d] never been authoritatively construed by the Courts in connection with Section 1464," it "reformulate[ed] the concept" of indecency as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of day when there is a reasonable risk that children may be in the audience." *A Citizen's Complaint Against Pacifica Found. Station WBAI(FM), New York, N.Y.*, 56 F.C.C.2d 94, 97-98 (1975) ("*Complaint Against Pacifica Foundation*").

Although the plain language of the statute would seem to impose a blanket ban on the broadcast of "indecent" or "profane" speech, the Commission recognized that its authority is constitutionally limited. Commissioner Glen O. Robinson explained that "[d]espite the fact that the statute (18 U.S.C. § 1464) on its face expresses no limit on our power to forbid 'indecent' language over the air, the First Amendment does not permit us to read the statute broadly." *Id*. at 103-104 (Concurring statement of Commissioners Robinson and Hooks). Accordingly, the FCC concluded that it could not prohibit such speech, notwithstanding the categorical statutory language, and limited its rules to "*channeling* behavior."[72] The Supreme Court and lower courts

[72] *Id*. at 98 (emphasis in original). *See also Petition for Clarification or Reconsideration of a Citizen's Complaint Against Pacifica Foundation, Station WBAI(FM), New York, N.Y.*, 59 F.C.C.2d 892 (1976) ("*Pacifica Reconsideration Order*") ("the Commission never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to the time of day when children most likely would not be exposed to it").

subsequently held that this more limited enforcement authority – as first articulated by the Commission – is compelled by the First Amendment.[73]

Such constitutional considerations control not just *when* the FCC may regulate, but *what* may fall within its indecency definition as well. The Commission explained that in order to "avoid the error of overbreadth" it was necessary "to make explicit whom we are protecting and from what." *Complaint Against Pacifica Foundation*, 56 F.C.C.2d at 98. It stressed that the indecency standard it articulated would not "force upon the general listening public debates and ideas which are 'only fit for children'" because "the number of words which fall within the definition of indecent is clearly limited." *Id*. at 99-100. In particular, it made clear that inadvertent, isolated or fleeting transmissions would not be actionable because it would be inequitable 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." *Pacifica Reconsideration Order*, 59 F.C.C.2d at 893 n.1. *See Pacifica*, 438 U.S. at 733 n.7 (quoting reconsideration order).

Judicial decisions reviewing the Commission's statutory construction confirm the narrow focus that the Constitution requires. The Supreme Court described its holding in *Pacifica* as "an emphatically narrow holding" and it did not approve any substantive penalty against the licensee.[74] Justices Powell and Blackmun, who supplied the crucial swing votes for *Pacifica's*

[73] *Pacifica*, 438 U.S. at 750 ("It is appropriate … to emphasize the narrowness of our holding …. The [indecency] concept requires consideration of a host of variables [and] time of day was emphasized by the Commission."); *ACT I*, 852 F.2d at 1343 n.18, 1344 ("[T]he FCC may regulate [indecent] material only with due respect for the high value our Constitution places on what the people say and hear," and such regulation cannot be accomplished constitutionally "unless the FCC adopts a reasonable safe harbor rule."); *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991) ("*ACT II*") (invalidating congressional directive for the FCC to enforce Section 1464's indecency ban 24 hours per day).

[74] *Pacifica*, 438 U.S. at 742 ("our review is limited to the question whether the Commission has the authority to proscribe this particular broadcast" in a "specific factual context"), 750 ("[i]t

slim 5-4 majority, explained 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," and they 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."[75] The Congressional Research Service recently agreed with this assessment, noting that "*Pacifica* did not hold that the First Amendment permits the ban either of an occasional expletive on broadcast media, or of programs that would not be likely to attract youthful audiences, even if such programs contain 'indecent' language."[76]

Because the FCC must "walk a 'tightrope'" to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act,"[77] the Commission is required "to proceed cautiously [with its indecency policy], as it has in the past." *Pacifica*, 438 U.S. at 761 (Powell, J., concurring). Lower courts that have reviewed the Commission's enforcement policies acknowledged that the Commission's definition of indecency may be

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is appropriate … to emphasize the narrowness of our holding"). *See also Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 127 (1989) (*Pacifica* was "an emphatically narrow holding"); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983) (emphasizing narrowness of *Pacifica*).

[75] *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]."). *See also Denver Area Educ. Telecomms. Consortium*, 518 U.S. at 752 (an "occasional expletive" is not "patently offensive" under *Pacifica*).

[76] CRS Report for Congress, *Regulation of Broadcast Indecency: Background and Legal Analysis* 15 (Updated May 27, 2004). *See id*. at 17 ("the Court did not hold that the FCC could prohibit an occasional expletive").

[77] *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 117 (1973). *See Turner Broad. Sys,, Inc. v. FCC*, 512 U.S. 622, 650 (1994) ("the Commission may not impose upon [broadcast licensees] its private notions of what the public ought to hear").

problematic, but that "the potential chilling effect of the FCC's generic definition … will be tempered by the Commission's restrained enforcement policy." *ACT I*, 852 F.2d at 1340 n.14 (reciting Justice Powell's "expectation that Commission will continue to proceed cautiously"). Unfortunately, the Commission abandoned any sense of restraint in the Super Bowl NAL.

B. The Super Bowl NAL Violates the FCC's Obligation to Use Restraint

The Commission's decision to propose a $550,000 forfeiture on Viacom and its owned and operated stations for an unplanned, fleeting exposure of a woman's breast is anything but a "restrained" or "cautious" approach to enforcement. In particular, the NAL violates the principle articulated in *Pacifica* limiting the FCC's authority to penalize isolated or momentary transmissions of indecent material that are beyond the licensee's control. *Pacifica*, 438 U.S. at 733 n.7, quoting *Pacifica Reconsideration Order*, 59 F.C.C.2d at 893 n.1 (limiting application of the rule where "public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing"). The Commission here makes no pretense about following this aspect of the *Pacifica* decision.[78]

If it stands, the NAL will lead to the end of live broadcasting as we know it by placing broadcasters on notice that they risk massive liability and perhaps license revocation if they fail to adopt technical measures to avoid the possibility of a spontaneous transgression. Even though the Commission declined to propose a forfeiture for CBS affiliates that carried the Super Bowl, it nevertheless "urge[d] each licensee to take reasonable precautions in the future, *such as employing delay technology to independently prescreen the network feed* to prevent the broadcast

[78] NAL ¶ 14 ("The fact that the exposure of Ms. Jackson's breast was brief is thus not dispositive."); *id*. ¶ 17 ("whether or not officials of these companies had advance knowledge of Ms. Jackson's breast-baring finale to the halftime program is not dispositive"). *See also Golden Globe Awards Order*, 19 FCC Rcd. at 4980 ("We now depart from this portion of the Commission's 1987 *Pacifica* decision ….").

of indecent programming over its licensed station." NAL ¶ 25 (emphasis added). It issued a similar warning to the industry generally in the *Golden Globe Awards Order*, saying that broadcasters "can easily ensure that they are not subject to an enforcement action" by "adopt[ing] and successfully implement[ing] a delay/bleeping system for live broadcasts." *Golden Globe Awards Order*. 19 FCC Rcd. at 4982. The consequences of failing to take such precautions are now quite evident, as the Commission recently proposed a forfeiture of nearly $1.2 million to Fox network affiliates for a network program, and reminded them that they could have employed "delay technology." *Married By America* ¶ 16 n. 33 (quoting NAL ¶ 25). Under the Commission's current approach, any live broadcast that unexpectedly results in an "indecent" display (that was not "caught" and kept off the air by delay technology) is potentially actionable, even when the licensee did not plan, control, or otherwise participate in the production.

The test of foreseeability articulated in the NAL will require broadcasters to adopt special precautions whenever news accounts suggest a person may do or say things that could cross the "indecency" line. NAL ¶ 17 n.54 (citing year-old news reports about a performance by Justin Timberlake). Such an approach will prevent broadcast stations from covering many live events (unless they have instituted elaborate delay mechanisms), such as events involving newsmakers whose "prior conduct" would give the stations "cause for caution." *Id.* Under the Commission's reasoning, broadcast stations should take special precautions whenever they cover such events as a national political convention,[79] California gubernatorial politics,[80] or presidential scandals.[81]

[79] Following Senator Kerry's speech on the last night of the Democratic National Convention, when balloons did not release on cue, director Don Mischer could be heard on CNN yelling "All balloons … where there hell … there's nothing falling! What the fuck are you guys doing up there?" *See* Eric Boehlert, *The pundits on Kerry: He nailed it*, SALON.COM, July 29, 2004, *available at* www.salon.com/news/feature/2004/07/29/pundits/index_np.html (viewed October 18, 2004).

[80] One major issue during the recent California Governor's race involved allegations that Arnold Schwarzenegger had engaged in past conduct of groping women. *See* Yvonne Abraham,

Under the new standard for indecency, many licensees already are informing the Commission that live news coverage is becoming untenable.[82]

The problem is not limited to news, of course. Almost any live coverage carries an inherent risk that a broadcaster may inadvertently violate the indecency standard if spontaneous, fleeting references are actionable and prior news stories make such utterances foreseeable.[83]

Schwarzenegger a Lure for Moderate Voters, BOSTON GLOBE, August 31, 2004, at A1. During that campaign, an earlier interview with Schwarzenegger resurfaced in which he freely used profanity, discussed his sex life including his participation in group sex, and acknowledged his use of recreational drugs. *See Schwarzenegger's Sex Talk*, (interview with OUI MAGAZINE) www.thesmokinggun.com/archive/arnoldinter1.html (viewed October 21, 2004).

[81] The last presidential impeachment, for example, included details that arguably should have alerted broadcast stations that such events are too hot to handle. *See, e.g.*, David Bauder, *Starr Report Too Steamy for TV*, ASSOCIATED PRESS, September 11, 1998.

[82] *See, e.g.*, Comments of the Radio-Television News Directors Association in Support of Petitions for Reconsideration of the Golden Globe Awards Decision, File No. EB-03-IH-0110 (April 29, 2004) ("*RTNDA Comments*") at 6-7 ("In the current regulatory environment, it is probable that, given the language contained in scenes from inside the World Trade Center, licensees would be hesitant if not unwilling to broadcast CBS's compelling documentary '9/11.' … Given the risk that certain 'offensive' language might be heard on the battlefield … it is questionable whether we would have seen the compelling live reports of journalists embedded with U.S. troops in Iraq. Broadcast journalists will be hesitant to cover those persons who, for whatever reason, may publicly use language that the Commission may consider to be indecent of now, 'profane.' And we may no longer hear live audio or see live coverage of an arraignment or trial, an emotionally charged demonstration, a locker room interview, or a scene of breaking news such as a disaster or terrorist attack."); Comments of the CBS Television Network Affiliates Association on Petition for Reconsideration of the Golden Globe Awards Decision, File No. EB-03-IH-0110 (April 29, 2004) at 2-3 ("[L]ive newsgathering outside the safe harbor will be a risk that many licensees cannot take. Creating disincentives to provide coverage of local events – such as demonstrations, disputes, live sports and other occasions when the language of subjects of news coverage may be unpredictable – diminishes the methods by which local broadcasters can serve their communities. And this particular method, live television broadcasting, is an important tool by which local broadcasters provide immediate and highly demanded coverage of events to their audiences.").

[83] *See* Mark Jurkowitz, *Curses! The Clampdown Fed Up With Indecency on Television*, BOSTON GLOBE, Feb. 12, 2004, at B13 (As Professor Robert Thompson, director of the Center for the Study of Popular Television at Syracuse, put it, "You hear these words standing in line to get tickets to the Ferris wheel."); Andrew Shain, *Curses! Stars caught in spotlight*, CHARLOTTE OBSERVER, October 6, 2004, at 1A (According to Professor Timothy Jay at the Massachusetts College of Liberal Arts, the average person uses expletives once every ten conversations). One

This is a frequent problem in the live coverage of sports, where players' comments, interactions between participants and officials, and the uncontrollable actions of fans create a significant risk that something the government considers indecent could slip through.[84] But it is not always possible to turn the cameras away from the things spectators or others may do at live events.

The Commission's assumption that licensees "can easily ensure that they are not subject to an enforcement action"[85] by using delay mechanisms, uninformed by any fact-gathering process, fails to grasp the significant burdens associated with such technical measures or the overall impact on live broadcasting. One week after the Super Bowl telecast, out of an abundance of caution, CBS used a *five-minute* delay in its telecast of the Grammy Awards, an unprecedented action that was both expensive and logistically difficult. Such measures are a disproportionate response to the risk of possible indecency in live telecasts, but the Commission's threat of huge

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commentator has suggested that almost all live sports coverage could be at risk. *E.g*., Clay Calvert, *Bono, the Culture Wars, and a Profane Decision: The FCC's Reversal of Course on Indecency Determinations and its New Path on Profanity*, 28 SEATTLE UNIV. L. REV. 61, 88-90 (Fall 2004) (providing numerous examples of news reports that would place broadcasters on notice of potential indecency violations).

[84] *See, e.g.*, Mark DeCotis, *Politics Forced NBC to Punish Earnhardt*, FLORIDA TODAY, Oct. 22, 2004, at 4; *NFL Could Never Be Like NASCAR; If League Took Away Points For Cursing, It Would Be Chaos*, THE STATE, Oct. 10, 2004, at 7; *Fine Costs Earnhardt $10,000, Points Lead; Driver Docked 25 Points by NASCAR*, AKRON BEACON, Oct. 6, 2004, at 2; *Shaq Gets No Slack for Talking Smack*, LANCASTER NEW ERA/INTELLIGENCER J, Apr. 13, 2004, at 16; Tom Hoffarth, *Courtside Cursing: Pass Blame*, LOS ANGELES DAILY NEWS, Mar. 26, 2004, at S2. It is worth noting in this regard that a streaker appeared at the 2004 Super Bowl as well, and CBS was able to prevent any images of that unexpected event from reaching the air. *E.g*., *Elaborate Security Cannot Stop Super Bowl Streaker*, CHINA DAILY, Feb. 3, 2004 (http://www.chinadaily.com.cn/english/doc/2004-02/03/content_302585.htm); *Winning Streak for a non-Super Bowl Ad*, MEDIA LIFE MAGAZINE, February 4, 2004 (http://www.medialifemagazine.com/news2004/feb04/feb09/2_tues/news4tuesday.html) (CBS "switched the cameras off the streaker as Super Bowl security and New England Patriots linebacker Matt Chatham brought him down.").

[85] *Id.* at 4982. *See id*. at 4980 ("The ease with which broadcasters today can block even fleeting words in a live broadcast is an element in our decision to act upon a single and gratuitous use of a vulgar expletive.").

fines (or even license revocation) forces licensees to choose whether to incur such expenses or forego "live" coverage altogether.[86] Among other things, requiring broadcasters to make such a choice "has the practical effect of altering the very nature of broadcast news, which relies heavily on live reporting."[87]

Concerns about the implications of the Commission's ruling cannot legitimately be dismissed as an exaggeration.[88] In this regard, the Commission cannot reasonably assert that stations do not need to worry about such unscripted references in "meritorious" programs, or in news and political coverage.[89] The FCC has never adopted a *per se* exclusion from its indecency rules for such programming,[90] and the Super Bowl NAL uses an indecency finding in a news

[86] In a Petition for Partial Reconsideration of the Super Bowl NAL, Saga Quad States Communications, LLC submitted evidence that installing the necessary equipment would cost approximately $129,600 per station and explained that the logistical problems of constantly monitoring network feeds would be "extremely burdensome." *See generally* Petition for Partial Reconsideration of Notice of Apparent Liability for Forfeiture of Saga Quad States Communications, LLC, and Saga Broadcasting, LLC, in File No. EB-04-IH-0011, filed October 22, 2004 (citing NAL ¶ 25).

[87] *RTNDA Comments* at 8 (Requiring a delay "threatens to dilute the first-hand, eyewitness images, sounds and accounts unique to broadcast journalism, and inevitably will result in the public receiving less information …. [T]he government's interest in protecting children from those relatively rare instances where language that may potentially be offensive to some makes its way into a story cannot justify eviscerating the live broadcast, long heralded as a hallmark of our free society.").

[88] *E.g.*, Remarks of Chairman Michael K. Powell at the NAB Convention, April 20, 2004 at 13 ("But one of the things I thought to myself is, 'Look, nobody has told you to take off half the stuff that's being recited in this statute.'").

[89] *Cf.* NAL ¶ 14 n.44 (explaining that, in context, the film *Schindler's List* is not actionably indecent).

[90] *E.g.*, *Golden Globe Awards Order*, 19 FCC Rcd. at 4979 n.25 ("This is not to suggest that the fact that a broadcast has social or political value would necessarily render use of the 'F-word' permissible."); *Pacifica Reconsideration Order*, 59 F.C.C.2d at 893 (denying *per se* indecency exemption for news or public affairs coverage).

interview context as a primary reference in support of its conclusions.[91] Regardless of the type of programming, if an isolated, unscripted, and fleeting transmission of supposedly indecent material can trigger massive liability, as it did here, it is impossible for broadcasters to take a chance on their ability to predict when such an occurrence might be in a context the FCC later agrees is acceptable for broadcast.

The FCC may have made a calculated decision to test the limits of its authority to enforce its indecency rules, but it cannot now pretend that it is applying the same standard that was articulated in *Pacifica*. Nor can it claim that it is being "cautious" or "restrained." The Super Bowl NAL is part of a radical transformation of Commission policy in this area that already is having a profound effect on broadcasting. It violates the Commission's own pledge, upon which reviewing courts relied, that it would "take no action which would inhibit broadcast journalism." *Pacifica Reconsideration Order*, 59 F.C.C.2d at 893. Accordingly, the Super Bowl NAL is an unconstitutional expansion of the FCC's asserted ability to regulate broadcast content under existing law.

V. THE NAL CALLS INTO QUESTION THE CONTINUING VALIDITY OF *FCC v. PACIFICA* FOUNDATION AND THE COMMISSION'S INDECENCY POLICIES

A. The NAL is Expressly Conditioned on *Pacifica*'s Continuing Validity

Not only does the Commission's expansive view of its indecency enforcement powers exceed the constitutional limits of current law, it calls into question the continuing validity of the indecency standard altogether. It is important to keep in mind that the ability to regulate so-called "indecent" speech is a limited constitutional exception, not the general rule. The Supreme

[91] NAL ¶¶ 13-14 (citing *Young Broadcasting*). *See also Golden Globe Awards Order*, 19 FCC Rcd. at 4980 & n.32 (overruling prior staff decision that un unscripted, fleeting expletive in a news program was not actionable).

Court has invalidated efforts to restrict indecency in print,[92] on film,[93] in the mails,[94] in the public forum,[95] on cable television,[96] and on the Internet.[97] The Commission devotes several paragraphs to the NAL reaffirming its constitutional authority, yet notes that *Pacifica* upheld the validity of the FCC's indecency rules "*over twenty-five years ago*." Similarly, circuit court rulings upon which the Commission relies are about a decade old. *See* NAL ¶¶ 26-29 (emphasis added). In this connection, it is not sufficient for the Commission simply to assume that the narrow, technology-specific *Pacifica* exception is still valid.

The Supreme Court has long held that "because the broadcast industry is dynamic in terms of technological change[,] solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded ten years hence."[98] As explained in more detail below, the technological and legal assumptions underlying *Pacifica* no longer reflect reality, and the Commission's experience in enforcing the rule has exposed its serious constitutional flaws. In the context of this significant enforcement action penalizing broadcast content, the

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[92] *Butler v. Michigan*, 352 U.S. 380, 383 (1957). *See also Hamling v. United States*, 418 U.S. 87, 113-114 (1974) (statutory prohibition on "indecent" or "obscene" speech may be constitutionally enforced only against obscenity).

[93] *United States v. 12 200-ft. Reels of Film*, 413 U.S. 123, 130 n.7 (1973).

[94] *Bolger*, 463 U.S. 60.

[95] *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

[96] *United States v. Playboy Entmt. Group, Inc.*, 529 U.S. 803 (2000).

[97] *Reno v. ACLU*, 521 U.S. 844 (1997).

[98] *CBS v. DNC*, 412 U.S. at 102. *See NBC v. United States*, 319 U.S. 190, 225 (1943) ("If time and changing circumstances reveal that the 'public interest' is not served by application of the regulations, it must be assumed that the Commission will act in accordance with its statutory obligations."). *See also Banzhaf v. FCC*, 405 F.2d 1082, 1100 (D.C. Cir. 1968) ("some venerable FCC policies cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets").

Commission cannot simply presume the constitutionality of its actions or defer to prior authority. It must respond to the merits of this First Amendment challenge, particularly since intervening decisions cast doubt on *Pacifica*'s continuing validity and the FCC has recognized the many technological changes that undermine the assumptions on which *Pacifica* is based.[99]

B. The Law Has Evolved Significantly Since *Pacifica*

The law has changed significantly in the 25 years since *Pacifica* was decided and in the ten years since circuit courts last considered the constitutionality of the FCC's broadcast indecency rules. The Court has since 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.[100] Rather, it stressed that "[t]he history of the law of free expression is one of vindication in cases involving speech that many citizens find shabby, offensive, or even ugly," and that the government cannot assume that it has greater latitude to regulate because of its belief that "the speech is not very important."[101] Additionally, since *Pacifica* the Court has invalidated government-imposed indecency restrictions on cable television channels despite its finding that "[c]able television broadcasting, including access channel broadcasting, is as 'accessible to children' as over-the-air broadcasting,

[99] *See Meredith Corp. v. FCC*, 809 F.2d 863, 873-74 (D.C. Cir. 1987) (FCC "may not simply ignore a constitutional challenge in an enforcement proceeding …. [W]e are aware of no precedent that permits a federal agency to ignore a constitutional challenge to the application of its own policy merely because the resolution would be politically awkward.").

[100] Only Justices Stevens, Rehnquist, and Chief Justice Burger joined that part of the opinion asserting that indecent speech lies "at the periphery of First Amendment concern." *Pacifica*, 438 U.S. at 743.

[101] *Playboy Entmt. Group*, 529 U.S. at 826.

if not more so."[102] Taken together, these decisions undermine the underlying logic of the indecency standard, regardless of the technological context.

Reno v. ACLU is the first case since *Pacifica* in which the Supreme Court subjected the indecency test to rigorous First Amendment review. In doing so, it found the standard to be seriously deficient. Writing for a near-unanimous Court, Justice Stevens concluded that the indecency restrictions of the Communications Decency Act ("CDA") were invalid because of vagueness and overbreadth. 512 U.S. at 875. This finding is especially meaningful since Justice Stevens also wrote the *Pacifica* decision, and he began his analysis by reaffirming the constitutional baseline: that the governmental interest in protecting children from harmful materials "does not justify an unnecessarily broad suppression of speech addressed to adults."[103]

Since then, virtually every court that has ruled on similar laws has held that they are unconstitutional.[104] Like *Reno v. ACLU*, these cases related primarily to state attempts to regulate "harmful to minors" material. But as the Third Circuit found in reviewing the Child Online Protection Act, successor to the CDA, the focus on minors (among other things) rendered the law ambiguous. "The chilling effect caused by this vagueness," the court concluded, "offends the Constitution." *ACLU v. Ashcroft*, 322 F.3d at 269 n.37. These cases struck down or enjoined laws that restricted online communications, not broadcasting, but the logic of the

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[102] *Denver Area Educ. Telecomms. Consortium*, 518 U.S. at 744. 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.

[103] *Id.* at 870-874, 881-882. Justice O'Connor, joined by Chief Justice Rehnquist, wrote an opinion concurring in part and dissenting in part on other grounds, but the Court was unanimous in holding that the CDA provisions requiring the screening of "indecent" displays from minors "cannot pass muster." *Id*. at 886.

[104] *PSI Net, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004); *American Booksellers Found. v. Dean*, 342 F.3d 96 (2d Cir. 2003); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *Cyberspace Communications, Inc. v. Engler*, 238 F.3d 420 (6th Cir. 2000) (table).

decisions is not affected by the medium of transmission. A vague standard does not become more precise – or more consistent with constitutional requirements – because the law is applied to one technology and not another.[105]

The question, then, is whether First Amendment protections for broadcasting are so attenuated to permit the government to apply a standard that the courts have now found to be patently defective.[106] The primary rationale for such different treatment, cited both by the Supreme Court and now touted by the Commission, is that more intensive content regulation has been permitted for broadcasting historically.[107] The Commission continues to point to "special justifications" for the different treatment, including "the history of extensive government regulation of the broadcast medium," spectrum scarcity, and the "invasive nature" of broadcasting. *See Indecency Policy Statement*, 16 FCC Rcd. at 8000 & n.9. Given the changes in the media landscape described below that recently have been catalogued by the FCC in various proceedings, the principal remaining "special justification" is the history of content regulation by the FCC. But this is a tenuous basis upon which to perpetuate a constitutionally deficient standard, and the history of FCC regulation of broadcasting is filled with examples of adaptation and change, much of it mandated by the courts.

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[105] *HBO, Inc. v. Wilkinson*, 531 F.Supp. 987, 993 n.9 (D. Utah 1982) (striking down indecency standard for cable television because it established "a standard that permitted a judge to get out of the formula any value judgment that he chose to put in"). *See also Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff'd mem*. 480 U.S. 926 (1987).

[106] *See Pacifica*, 438 U.S. at 759-760 (Powell, J., concurring) ("This is not to say … that the Commission has an 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.").

[107] *Pacifica*, 438 U.S. at 735-738; *Reno*, 521 U.S. at 867 (noting the FCC "had been regulating radio stations for decades").

Furthermore, for the FCC to argue it can regulate broadcasting content more restrictively now because it did so in the past does not distinguish broadcasting from other media. When the FCC was first chartered, for example, state and local governments subjected films to prior review and censorship.[108] In fact, speech of many kinds was subject to more intrusive government oversight during that period. But the law changed significantly in the intervening years, and the last cinema review board in the United States was finally dismantled over a decade ago.[109]

Accordingly, it is difficult for the Commission to argue that it may continue to rely on First Amendment law as it applied to broadcasting in 1927 or 1934 because Congress authorized it to regulate "indecent" or "profane" broadcasts in those years. Some may argue that the Commission's notion of what is "patently offensive" or "indecent" has been updated since the 1930s, but this does not answer the question presented by the indecency standard's emphasis on "contemporary" community standards. The standard was not frozen in 1978, when the Supreme Court decided *Pacifica*, and the Commission has a constitutional obligation to determine what type of programming current audiences have come to expect in 2004.

C. The Technological Assumptions on Which *Pacifica* is Based Are No Longer Valid

Given the many technological changes, it is far less plausible for the FCC to justify indecency regulations on the premise that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans." *Pacifica*, 438 U.S. at 748. As the Commission recently concluded, "the modern media marketplace is far different than just a decade ago." It found that traditional media "have greatly evolved," and "new modes of media

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[108] *See, e.g., Times Film Corp. v. City of Chicago*, 365 U.S. 43, 69-78 (1961) (Warren, C.J. dissenting) (providing detailed examples of film censorship and noting the "astonishing" extent "to which censorship has been used in this country").

[109] *Freedman*, 380 U.S. at 58-61; Elizabeth Kastor, *It's a Wrap: Dallas Kills Film Board*, WASHINGTON POST, Aug. 13, 1993 p. D1.

have transformed the landscape, providing more choice, greater flexibility, and more control than at any other time in history."[110]

In the current media environment, the FCC's conclusion in the NAL that broadcast indecency regulations are necessary (or sufficient) to shield children from indecent material is fanciful. In 2004, consumers not only have more programming options, but the available alternatives permit a far greater degree of control over programming than ever before. In addition to delivered video media (including broadcasting, cable and satellite), consumers may watch videotapes or DVDs of movies, technology that was only in its infancy two decades ago. Today, the vast majority of households have VCRs, and over half of American households have DVD players to view the more than 300,000 available titles.[111] Further, with the advent of digital video recorders, or DVRs, viewers have an increased ability to "time-shift," or watch programming at a later time than it is broadcast.[112] DVR penetration is projected to reach 24.7 million homes by 2007.[113] With a DVR, viewers can pause, rewind, or fast-forward programs as

[110] *2002 Biennial Regulatory Review*, 18 FCC Rcd. 13620, ¶¶ 86-87 (2003). Of particular relevance here, the Commission noted "[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 market-place." 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*. ¶ 88. Current research shows that teens and young adults spend considerably more time online than they do watching TV or listening to the radio (16.7 hours per week online versus 13.6 hours watching TV or 12 hours listening to the radio). COMMUNICATIONS DAILY, July 25, 2003, at 7 (reporting results of study by Harris Interactive and Teenage Research Unlimited).

[111] *DVD Disc Purchases in 2003 Exceeded $12 Billion*, January 26, 2004, MEDIA LINE NEWS, *available at* http://www.medialinenews.com/articles/publish/article_455.shtml.

[112] *See* Ken Belson, *TiVo, Cable or Satellite? Choose That Smart TV Wisely*, N.Y. TIMES, September 4, 2004.

[113] *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, 19 FCC Rcd. 1606, 1649 (2004). A Kagan Research study found that DVRs were in 2.9 million households at the end of 2003, and expected to be in 6.6 million households by the

they are being transmitted, changing the definition of "live TV." The NAL's quotation from *Pacifica* that households that want access to "indecent" materials can use subscription media and recording technologies, NAL ¶ 27, did not anticipate that myriad sources of video programming would become the norm in most households. Nor could it consider online media, which did not exist in 1978. In this environment, imposing special speech restrictions on the broadcast medium compared to other media seems futile.[114]

These technological developments empower individuals and parents to accept or reject programming of their choice.[115] In addition to technologies that evolved in the marketplace, other options that promote individual choice were stimulated by the Telecommunications Act of 1996. The Act requires that all televisions with a screen size of 13-inches or greater be equipped with V-chip technology which allows parents to block "sexual, violent, and other indecent material about which parents should be informed before it is displayed to children." 47 U.S.C. § 303(w)(1). In view of this "plausible, less restrictive alternative," it is difficult for the government to demonstrate that direct regulation of content is necessary or that it would be more effective. *Playboy Entmt.*, 529 U.S. at 816. The Supreme Court has confirmed that the government must satisfy a substantial burden of proof in order to demonstrate that less restrictive

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end of 2004. Kagan predicts that by 2014, DVR penetration will close in on cable's reach, at 62 million homes. Ann M. Mack, *Untitled*, ADWEEK, September 20, 2004.

[114] *See Bolger*, 463 U.S. at 72-73, striking down a restriction on unsolicited mailings of advertisements for contraceptives because the government could not demonstrate that the policy actually serves the stated interest. The Court noted that the policy could at best lend only "incremental support" because parents "must already cope with the multitude of external stimuli that color their children's perceptions of sensitive subjects." *See also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488-89 (1995) ("exemptions and inconsistencies" render a speech restriction irrational and undermine the government's ability to show that it serves its intended purpose).

[115] *See, e.g.*, http://customersupport.tivo.com/knowbase/root/public/tv1529.htm (TiVo parental controls); http://www.timewarnercable.com/corporate/products/digitalcable/dvr.html (guide to cable box DVR parental controls).

measures are ineffective, and that the government cannot discharge its constitutional obligation by showing that a proposed alternative "has some flaws." Rather, it must demonstrate the alternative measures are "less effective" than the law or regulation in question. *Ashcroft II*, 124 S.Ct. at 2793. The Court pointed out that "[t]he need for parental cooperation does not automatically disqualify a proposed less restrictive alternative." *Id*. *See Denver Area Educ. Telecomms. Consortium*, 518 U.S. at 758-759.

D. The Commission Has Never Articulated a Coherent Concept of Community Standards for the Broadcast Medium

The Commission has never explained its concept of contemporary community standards for the national broadcast medium, and lacks even a process for addressing the issue. The *Indecency Policy Statement* says only that the relevant standard "is not a local one" tied to "any particular geographical area" but instead "is that of an average broadcast viewer or listener and not the sensibilities of any individual complainant." 16 FCC Rcd. at 8002. The Commission has concluded in various NALs and forfeiture orders over the years that particular broadcasts were patently offensive, but has never once tried to determine what the average viewer or listener would tolerate. Only recently has it even tried to articulate how it "knows" the mind of the average person. It claims to rely on its "collective experience and knowledge, developed through *constant interaction* with lawmakers, courts, broadcasters, public interest groups and ordinary citizens, to keep abreast of contemporary community standards for the broadcast medium."[116]

It is difficult to know what to make of this statement. The essential claim is that the Commission *just knows* what offends the average viewer or listener because of its experience and special contacts. But to state the proposition is to undermine it, for there is nothing whatsoever to support it. There has been no "constant interaction" by the Commission with the courts on the

[116] *WLLD(FM)*, 19 FCC Rcd. at 5026 (emphasis added).

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) ("*ACT IV*"). Such interactions generally 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 resulted in a settlement that produced (almost seven years later, in 2001) the Commission's *Indecency Policy Statement* – a document that now appears to be of limited utility. Nor does the agency explain what interactions it has had with lawmakers, broadcasters, or members of the public, or how such contacts have defined a coherent national community standard. The Commission has conducted no rulemakings on these issues since the early 1990s, and did not explore the issue even then.

There is no legal analysis to support the FCC's assertion of a national standard for indecency. The Supreme Court struggled for sixteen years to fashion a definition of community standards in obscenity cases, and finally reached an uneasy accommodation with local community standards in *Miller v. California*.[117] The Court held that the Constitution does not require a national standard, finding that "[p]eople in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." It found there cannot be "fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.'" Describing a search for a national standard as "an exercise in futility," Chief Justice Burger's opinion for the Court emphasized that "our nation is

[117] 413 U.S. 15. *See Roth v. United States*, 354 U.S. 476, 505-506 (1957) (Harlan, J., dissenting) (arguing local standards should govern state obscenity prosecutions, while national standards should apply in federal cases). *But see Jacobellis v. Ohio*, 378 U.S. 184, 200-203 (1964) (Warren, C.J., dissenting) (arguing that "there is no provable 'national standard' and perhaps there should be none").

simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 states in a single formulation, assuming the prerequisite consensus exists." *Miller*, 413 U.S. at 20, 30-33.

This is not to suggest that the FCC should be bound by a local standard either. The point is that the issue of community standards is a complex question that goes to the heart of the indecency standard, and the issue deserves far more thoughtful treatment than has heretofore been given by the Commission. The Supreme Court recently confirmed the complexity of the community standards question and expressed reservations about what type of evidence would be relevant in the online context, where the medium transcends political boundaries. *See generally Ashcroft v. ACLU*, 535 U.S. 564. Many of the same considerations apply to a national system of broadcasting.

No court has ever approved the FCC's assertion of a national broadcast standard, and the agency has managed to keep the matter from being litigated through enforcement policies that have successfully avoided judicial review.[118] But even if a national standard were deemed constitutionally acceptable or feasible, the Commission must do more than assert that it "knows" the national mind. Every obscenity prosecution requires proof of the community standard as an essential element of the offense, and courts examine a range of evidence on this issue, including expert testimony, surveys, local statutes, and the existence of comparable materials in the relevant community.[119] It cannot be the case that indecency enforcement, which (unlike obscenity) involves constitutionally-protected speech, permits the government simply to assume the key

[118] No broadcaster has "held out long enough" through the administrative process to have a particular enforcement order tested in court. *ACT IV*, 59 F.3d at 1254. *See also id*. at 1264 (Tatel, J., dissenting) ("of the thirty-six FCC indecency forfeiture orders issued since 1987, not one has been reviewed by a court").

[119] Schauer, *supra* note 46 at 131-135.

standard has been met. Here, however, the Commission lacks any method for considering evidence of community standards, and it provides no indication it has ever considered *any* data on the issue. Quite to the contrary, the Commission has said repeatedly that it will not credit the popularity of a program as any indication of community acceptance,[120] and it has refused to consider the results of surveys.[121] It is well-established that survey data can be probative of what a community may or may not find to be patently offensive.[122]

E. FCC Experience with the Indecency Standard Increasingly Shows its Constitutional Flaws

The courts previously gave the FCC some latitude to enforce its indecency policy so long as the Commission exercised restraint. However, as the Commission has gained greater experience with the indecency standard, its definitions have become less understandable. After a decade in which the FCC applied its policy only to the seven specific words in the George Carlin monologue (the so-called "seven dirty words"), it switched to enforcing a "generic" indecency policy. *New Indecency Enforcement Standards*, *supra* note 41. In 1994, the Commission settled

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[120] *See, e.g., Entercom Sacramento*, FCC 04-224, ¶ 13 ("We reject Entercom's claim that because this proceeding was precipitated by complaints from a lone individual, and Station KRXQ(FM) generally enjoys high ratings, the community standards of the Sacramento, California, listening community must, as a consequence, embrace the station's programming."); *The KBOO Found.*, 16 FCC Rcd. 10731, 10732-33 (Enf. Bur. 2001) ("we have previously ruled that neither the statute nor our case law permits a broadcaster to air indecent material because it is popular"); *Telemundo of Puerto Rico License Corp.*, 16 FCC Rcd. 7157, 7159 n.1 (Enf. Bur. 2001) ("The fact that the material appeals to Puerto Rican viewers … is irrelevant to … whether the material is indecent.") (internal quotation omitted); *Michael J. Faherty*, 6 FCC Rcd. 3704, 3705 (Med. Bur. 1989) ("indecency is a violation of federal law and its popularity in a particular community does not change that fact") (cites and footnotes omitted).

[121] *E.g.*, *Independent Group Ltd. P'ship*, 6 FCC Rcd. 3711 (Mass Med. Bur. 1990).

[122] *E.g.*, *Miller*, 413 U.S. at 31 n.12 (discussing with approval reliance on "an extensive statewide survey" with respect to community standards); *United States v. Pryba*, 678 F.Supp. 1225, 1229 (E.D. Va. 1988) ("Courts have recognized that properly conducted public opinion surveys may be useful in gauging community standards for the purposes of determining whether the materials at issue are obscene.").

an enforcement action (in part to avoid having to respond to a First Amendment defense in court) and committed to providing "industry guidance" as to the meaning of the indecency standard within six months of the settlement agreement. *Evergreen Media, Inc. v. FCC*, Civil No. 92 C 5600 (N.D. Ill. Feb. 22, 1994). It took another six and one-half years for the Commission to fulfill this condition by issuing a policy statement in 2001 purporting to offer interpretive guidance on the indecency standard. *Indecency Policy Statement*, 16 FCC Rcd. 7999. Yet despite this belated attempt at clarification, the Commission itself has been unable to interpret its own standard.

1. The Indecency Standard is Vague

It is basic First Amendment doctrine that the government cannot use a vague standard for the sensitive task of regulating constitutionally protected speech. *Reno v. ACLU*, 521 U.S. at 874. Imprecise speech restrictions are invalid for a number of reasons. First, without clear guidelines, those subject to a restriction cannot understand what is forbidden and what is not.[123] Second, a vague standard impermissibly chills speech, causing speakers to "steer far wider of the unlawful zone"[124] and to restrict their expression "to that which is unquestionably safe."[125] Third, restrictions on speech that lack clear limits give government officials far too much discretion to curb disfavored expression.[126] These concerns are not lessened by the fact that the government may seek to regulate in the interest of protecting children. As the Supreme Court

[123] *See, e.g.*, *Reno*, 521 U.S. at 871; *Kolender*, 461 U.S. at 357-358; *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (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").

[124] *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

[125] *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964).

[126] *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988); *City of Houston v. Hill*, 482 U.S. 451, 468-469 n.18 (1987); *Kolender*, 461 U.S. at 358, 360; *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

made clear in *Interstate Circuit, Inc. v. City of Dallas*, "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."[127]

In light of developments in the law, it is not sufficient now for the Commission to point out that courts in the past have rejected vagueness challenges to the FCC's indecency rules. The Supreme Court in *Reno* explained why the indecency standard lacks the necessary rigor to withstand review, concluding, "[t]he vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech."[128] Since *Reno*, the Commission has done nothing to clarify its indecency rules, and its recent decisions have only loosened the standard immeasurably.

The Super Bowl NAL acknowledges that there is no precise indecency standard. It notes that "[e]ach indecency case presents its own particular mix of [criteria for determining patent offensiveness], and possibly other, factors." NAL ¶ 12 (quoting *Indecency Policy Statement*, 16 FCC Rcd. at 8003). The *Indecency Policy Statement* emphasizes that "contextual determinations are necessarily highly fact-specific, making it difficult to catalog comprehensively all the possible contextual factors that might exacerbate or mitigate the patent offensiveness of particular material." 16 FCC Rcd. at 8003. In other words, because each case is decided based on its individual facts, the Commission cannot articulate specifically what factors will distinguish one case from another. The many subjective factors involved make it doubtful the

[127] 390 U.S. 676, 689 (1968). *See also Bantam Books*, 372 U.S. at 59 (condemning a commission charged with reviewing material "manifestly tending to the corruption of the youth").

[128] 521 U.S. at 871-72. The Court explained that "[g]iven the vague contours of the coverage of the statute, it unquestionably silences some speakers whose messages would be entitled to constitutional protection. That danger provides further reason for insisting that the statute not be overly broad …. We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech." *Id.* at 874.

Commission can create an intelligible standard that can be understood by those who must adhere to the law and consistently applied by those who must enforce it. The root problem, as the *Reno* Court recognized, is with the lack of judicial rigor in the definitions of "indecency" and "patent offensiveness." The indecency standard gives the FCC excessive discretion because it is not limited by requirements that the affected speech be specifically defined by law, or lack serious merit, or be considered as a whole. *Reno*, 521 U.S. at 872-876.

Unfortunately, FCC decisions under the indecency standard fail to provide meaningful guidance. Since there is no body of court decisions interpreting or applying the indecency standard in particular cases, licensees must look to the Commission's interpretation of the law. But the FCC's rulings provide no real assistance, because most are unavailable, thus constituting a body of secret law.[129] The vast majority of indecency decisions are unpublished, informal letter rulings that are stored in individual complaint files at the FCC. In this regard, the dismissals would be most helpful to understanding the Commission's application of the standard, but these decisions, with a few exceptions, are not made public, and the agency has recently said that unpublished decisions are not binding precedent. Even where the Commission reaches the merits of an indecency complaint, its decision typically consists of conclusory statements regarding its determination that a particular broadcast is indecent.[130]

[129] As Commissioner Copps has noted, of the nearly 500 complaints received by the Enforcement Bureau in 2002, "83% were either dismissed or denied, one company paid a fine, and the rest are pending or otherwise in regulatory limbo." Remarks of Commissioner Michael J. Copps to the NATPE 2003 Family Programming Forum (January 22, 2003).

[130] After a comprehensive analysis of the FCC's indecency rulings, Professor Lili Levy concluded that "the Commission applies its policy conclusorily, acontextually, and even inconsistently, in an ambivalent practice suggesting that it simply knows indecency 'when it sees it.'" *See* Lili Levy, *The Hard Case of Broadcast Indecency*, NYU REV. L. & SOC. CHANGE 49, 175 (1992-93). *See generally id*. at 101-112 (discussing cases).

The Commission sought to address this problem by issuing in April 2001 its *Industry Policy Statement* purporting to clarify its criteria governing enforcement of the indecency standard. 16 FCC Rcd. at 7999. Unfortunately, the ink had not yet dried on the document when the Commission found that it was inadequate to provide any realistic guidance regarding what material is or is not indecent. The Enforcement Bureau issued a $7,000 notice of apparent liability to noncommercial radio station KBOO-FM for the broadcast of a rap song entitled "Your Revolution," *KBOO Found.*, 16 FCC Rcd. 10731, only to rescind the decision eighteen months later.[131] The Bureau initially concluded that "Your Revolution" was indecent because it contains "unmistakably patently offensive sexual references." On review, however, the Bureau found that "on balance and in context, the sexual descriptions in the song are not sufficiently graphic to warrant sanction." It did not seek to explain the basis for its shifting characterization of the factual basis for its ruling. Similarly, the Bureau initially found the Eminem song "The Real Slim Shady" to be indecent because the edited version "contains unmistakable offensive sexual references." *Citadel Broad. Co.*, 16 FCC Rcd. 11839 (Enf. Bur. 2001). On review, however, the Bureau found that it had been mistaken about its previous "unmistakable" conclusions. It characterized the sexual references in the radio edit of "The Real Slim Shady" as "oblique," and not "expressed in terms sufficiently explicit or graphic enough to be found patently offensive." As to the context of the song, the Bureau concluded that the edited version did "not appear to pander to, or to be used to titillate or shock its audience." *Citadel Broad*, 17 FCC Rcd. 483.

Similarly, the *Indecency Policy Statement* proved to be inadequate for providing guidance in the *Golden Globe Awards Order*. Although the Commission staff followed the guidance set forth in the *Policy Statement* in finding that an isolated and fleeting expletive was not actionably

[131] *The KBOO Found.*, 18 FCC Rcd. 2472 (Enf. Bur. 2003). The song, written and performed by award-winning poet and performance artist Sarah Jones, is a loose reworking of Gil Scott-Heron's classic poem, "The Revolution Will Not Be Televised."

indecent, the Commission disagreed, reversed the Bureau decision, and overruled the previous policy on which the staff ruling was based. *Golden Globe Awards Order*, 19 FCC Rcd. at 4980. Since then, it has made clear that broadcasters cannot rely on staff rulings for guidance as to the meaning of the indecency standard.[132] The Commission has thus expanded the scope of the indecency definition (including the resuscitation of the "profanity" concept) and has extended the reach of its policy to include accidental and fleeting references as "actionable indecency," while simultaneously eliminating the interpretive value of what meager "case law" that exists. As a consequence, the *Indecency Policy Statement* and the FCC's interpretations of the statement offer no guidance to licensees (and their lawyers) as to what material is indecent.

Moreover, the Commission has no available administrative procedures to mitigate the inherent uncertainty of the indecency standard. The FCC in the past has asserted that, if individual rulings fail to "remove uncertainty" in this "complicated area of law," it could use its power to issue declaratory rulings to clarify the indecency standard.[133] In practice, however, no such relief is available.[134] When Pacifica Radio sought to broadcast its annual Bloomsday reading from James Joyce's *Ulysses*, the Commission declined to issue a declaratory ruling that the material was not indecent despite a 60-year-old judicial precedent supporting the literary

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[132] *E.g.*, *Entercom Sacramento*, FCC 04-224, ¶ 11 n. 38 (reliance on unpublished staff rulings was not reasonable); *AMFM Radio Licenses*, 19 FCC Rcd. at 10756. *Cf. Infinity Broad. Operations, Inc.*, FCC 04-226, ¶ 3 n.10 (rel. Oct. 18, 2004) (rejecting as "not relevant" argument that the Commission's determination that unpublished staff decisions are not binding … under-mines the guidance set forth" in *Indecency Policy Statement*).

[133] *See New Indecency Enforcement Standards*, 2 FCC Rcd. at 2727.

[134] This is not to suggest that it would be good policy for the government "pre-approve" programming for broadcast or that any such process would survive First Amendment scrutiny. However, the government in the past has sought to assure reviewing courts that its policy is not vague because it may issue declaratory rulings when the need arises, but then refuses to do so in particular cases when petitioners seeks guidance. The FCC cannot have it both ways.

value of the book.[135] The FCC also has refused to clarify its indecency standard even in the face of judicial requests for guidance. In *Playboy*, for example, the district court asked whether there are "any FCC letter or advisory opinions that are available to assist this Court, the plaintiff, or other channels … in construing the permissible scope of regulation."[136] Notwithstanding the district court's prompting, the FCC rejected Playboy's request for a declaratory ruling to clarify the status of a safe sex documentary that was to premiere on World AIDS Day in December 1997, along with several other programs.[137] Just as the declaratory ruling process was no help to Playboy, it also failed to provide any specific relief for Sarah Jones, whose work was banned from the air for eighteen months by the initial Bureau's forfeiture order.[138]

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[135] *William J. Byrnes, Esq.*, 63 R.R.2d 216 (Mass Media Bur. 1987). *See United States v. One Book Entitled Ulysses*, 72 F.2d 705 (2d Cir. 1934). The FCC's refusal to issue a declaratory ruling on *Ulysses* (in the same year it promised to "remove uncertainty" through declaratory rulings) is particularly telling. As Judge Sloviter observed in holding that the CDA's indecency standard was invalid, the government's promise that it will enforce the indecency standard "in a reasonable fashion … would require a broad trust indeed from a generation of judges not far removed from the attacks on James Joyce's *Ulysses* as obscene." *ACLU v. Reno*, 929 F.Supp. 824, 857 (E.D. Pa. 1996).

[136] *Playboy Entmt. Group, Inc. v. United States*, Civil Action No. 96-94-JJF (D. Del. Oct. 31, 1997), slip op. at n.6.

[137] In a one-page letter denying the request, issued long after World AIDS Day came and went, the Chief of the Cable Services Bureau wrote that "declaratory rulings related to programming issues must be dealt with cautiously" and "have the potential to be viewed as prior restraints." *Letter from Meredith J. Jones, Chief, Cable Services Bureau to Robert Corn-Revere, Counsel for Playboy Entertainment Group, Inc.* (January 30, 1998).

[138] Jones initially filed a declaratory judgment action in federal district court seeking a determination that the work is not indecent and that the FCC's decision violated her rights under the First and Fifth Amendments. However, the court dismissed the action, finding that the Bureau decision was not "final agency action" and that any appeal from a final action must be brought in the court of appeals. The court suggested that Jones should ask the FCC to issue a declaratory ruling if she was concerned about delay in obtaining a final order. *Jones v. FCC*, 30 Media L. Rep. 2534 (S.D.N.Y. Sept. 4, 2002), *vacated as moot*, Docket No. 02-6248 (S.D.N.Y. March 12, 2003)(not reported in F.Supp.2d). On October 2, 2002, Jones filed a declaratory ruling request, but it was dismissed as moot when the Bureau reversed its initial order in February 2003.

Ultimately, the indecency standard lacks any principled formulation for defining what speech is actionable, and there is no reliable body of case law for refining its broad concepts into an intelligible standard. Contrary to the usual course of events, where experience with a law and interpretive decisions bring greater clarity, the FCC's actions regarding the indecency standard have only generated greater confusion, so that even the Commission's own staff cannot make sense of the policy. Its *Indecency Policy Statement*, over six years in the making, was rendered obsolete almost as soon as it was published, and now provides no meaningful guidance at all. This experience has not led to a narrowing of restrictions on protected speech but has greatly expanded the reach of the Commission's enforcement policies. Review of the vagueness of the Commission's indecency policy is vitally important.

2. The Indecency Standard is Overly Broad

The Supreme Court has instructed that, even for expression that is entirely *unprotected* by the First Amendment, "[t]he overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." *Ashcroft v. Free Speech Coalition*, 535 U.S. at 255. It has emphasized the importance of keeping the "starch in our constitutional standards" because content-based prohibitions "have the constant potential to be a repressive force in the lives and thoughts of a free people." *Ashcroft II*, 124 S. Ct. at 2788, 2794. Even the governmental interest in protecting children from viewing material perceived to be harmful "does not justify an unnecessarily broad suppression of speech addressed to adults."[139]

[139] *Reno*, 521 U.S. at 875. Put differently, "[t]he Government cannot ban speech fit for adults simply because it may fall into the hands of children." *Ashcroft v. Free Speech Coalition*, 535 U.S. at 252. Thus, the First Amendment precludes regulation that in effect reduces the content of adult discourse only "to that which is suitable for children to hear." *Sable*, 492 U.S. at 131. *See also, e.g., Bolger*, 463 U.S. at 74 ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.").

The indecency standard, however, is not merely "susceptible of regular application to protected expression,"[140] but rather on its face regulates an entire category of speech that is undeniably protected by the First Amendment. The FCC has stated that the merit of a work is not a complete defense to an indecency complaint, but is "simply one of many variables that make up a work's context." *Liability of Evergreen Media Corp. of Chicago*, 6 FCC Rcd. 502 ¶12 (Mass Med. Bur. 1991) (internal quote omitted). The FCC has even acknowledged that, because serious merit does not save material from an indecency finding, there is a "broad range of sexually-oriented material that has been or could be considered indecent" that does "not [include] obscene speech."[141] Thus, the Commission has expressly declined to hold that "if a work has merit it is *per se* not indecent," and that material may be found indecent for broadcast even where the information is presented "in the news" and is presented "in a serious, newsworthy manner."[142]

In striking down the CDA's indecency standard as applied to the Internet, the *Reno* Court found the absence of a "societal value" requirement "particularly important." 521 U.S. at 873. It noted that requiring inclusion of a work's merit "allows appellate courts to impose some limitations and regularity on the definition by setting, as a matter of law, a national floor for socially

[140] *Houston v. Hill*, 482 U.S. at 467.

[141] *Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 5 FCC Rcd. 5297, 5300 (1990), *rev'd on other grounds sub nom. ACT II*, 932 F.2d 1504.

[142] *Letter to Merrill Hansen*, 6 FCC Rcd. 3689, 3689 (1990) (citation omitted). *See also KLOL (FM)*, 8 FCC Rcd. 3228 (1993); *WVIC-FM*, 6 FCC Rcd. 7484 (1991). In this regard, it is sobering to realize that in *Gillett Communications* v. *Becker*, a federal district court held that the videotape *Abortion in America: The Real Story*, transmitted as part of a political advertisement by a bona fide candidate for public office, was indecent. *Gillett Communications* v. *Becker*, 807 F.Supp. 757 (N.D. Ga. 1992), *appeal dismissed mem.*, 5 F.3d 1500 (11th Cir. 1993).

redeeming value." *Id*. No such requirement is contained in the indecency standard.[143] As a result, the Court concluded that application of the indecency standard threatened to restrict "discussions of prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalogue of the Carnegie Library." *Id*. at 878. The district court in *Reno* similarly had expressed concern the indecency standard restricts "a broad range of material" including "contemporary films" such as "*Leaving Las Vegas*." *ACLU v. Reno*, 929 F.Supp. at 855 (Sloviter, J.). As a result, application of the overbreadth doctrine in this context is appropriately more exacting because the regulation at issue "'simply has no core' of constitutionally unprotected expression to which it might be limited." *Houston v. Hill*, 482 U.S. at 468 (quoting *Smith v. Goguen*, 415 U.S. 566, 578 (1974)).

Review of the indecency standard on overbreadth grounds has become even more imperative in light of recent Commission decisions that have vastly expanded its scope. Not only has the agency expanded the scope of what may be "actionable" to include inadvertent or fleeting depictions (even in the context of works with substantial merit), it has re-energized the concept of profanity to include: (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." *Golden Globe Awards Order*, 19 FCC Rcd. at 4981. Recently, the Commission has even suggested that the indecency standard may not require any sexual

[143] *E.g.*, *Pacifica Found. Inc.*, 2 FCC Rcd. 2698 (1987) (case involving serious drama regarding homosexual relations in the post-AIDS era). Significantly, in that case, the FCC disregarded the artistic merit of the play, saying that its indecency finding was not affected by the fact that the material presented "was excerpted from a dramatic performance that dealt with homosexual relations and Acquired Immune Deficiency Syndrome (AIDS)" or that the excerpts came from a "critically acclaimed and long-running [play] in Los Angeles area theatres." *Infinity Broad.*, 3 FCC Rcd. 930, 932 (1987); *cf. ACLU v. Reno*, 929 F.Supp. at 852-853 (Sloviter, J.) (discussing the chilling effect of indecency standard to serious dramas such as the gay-themed play "*Angels in America*").

content at all and may be applied to regulate televised violence.[144] In sum, the Commission no longer recognizes any meaningful – let alone constitutionally acceptable – limits to its ability to regulate broadcast content under this standard.

3. The FCC's Indecency Policy Lacks Procedural Safeguards and Vests the Agency With Excessive Discretion

As a general matter, the First Amendment requires the government to use "sensitive tools" to "separate legitimate from illegitimate speech." *Speiser*, 357, U.S. at 525. Strict procedural requirements govern any administrative procedure that has the effect of denying or delaying the dissemination of speech to the public. *Freedman*, 380 U.S. at 58-61. In particular, the First Amendment commands that any delay be minimal, and that the speaker have access to prompt judicial review. *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971). Where ongoing government regulation of speech is involved, the government's obligation to provide due process is heightened.[145] In every case where the government seeks to limit speech, the constitutional presumption runs against the government, which must justify the restriction.[146]

The FCC's regime of enforcing the indecency rules is inconsistent with these basic principles. For example, the Commission issues letters of inquiry that indicate "a complaint has been filed" and demand detailed responses from licensees but do not indicate the identity of the

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[144] *See Violent Television Programming and its Impact on Children*, 19 FCC Rcd. 14394 ¶ 25 (2004) (asking if the Commission "could expand its definition of indecency to include violent programming" and asserting that "the Supreme Court has concluded that the term indecent 'merely refers to nonconformance with accepted standards of morality' and that 'neither our prior decisions nor the language or history of § 1464 supports the conclusion that prurient appeal is an essential component of indecent language.'") (quoting *Pacifica*, 438 U.S. at 740-741).

[145] *City of Lakewood*, 486 U.S. at 757; *Houston v. Hill*, 482 U.S. 451 (1987).

[146] *Playboy Entmt. Group*, 529 U.S. at 816 ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 959 (8th Cir. 2003).

complainants.[147] This problem is exacerbated by the erosion of the Commission's requirement that complainants provide a tape or transcript of the offending broadcast. The Commission once required complainants to furnish a tape or transcript, or a significant excerpt of a program alleged to be indecent before taking any action.[148] As recently as early 2002, Commissioner Martin observed that "[g]enerally, unless a consumer has a tape or transcript of the program in question, the Commission takes no further action on [an indecency] complaint."[149] Not long thereafter, however, the Commission began backing away from the requirement, recharacterizing it as a "general practice" of requiring a tape or transcript, the absence of which is not fatal to an indecency complaint. *Emmis License Corp. of Chicago*, 17 FCC Rcd. 493, 496 (Enf. Bur. 2002). As time went on the Commission's "general practice" was reduced to "not a requirement" and finally became merely something "used by the Commission to assist in the evaluation of indecency complaints." *Id*.

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[147] The Commission's decision to act on anonymous complaints is puzzling since current rules provide that informal complaints should be routinely available to the public. *See* 47 C.F.R. §§ 0.453(a)(2)(ii)(F), 0.453(a)(2)(ii)(H). In a similar vein, in the context of the instant LOI and NAL, it is puzzling that the Commission used the occasion of undefined complaints about "certain commercials" during the Super Bowl as an occasion to review "all" the commercials in the telecast, under the aegis of investigating the halftime show, especially given that the Commission, predictably, was forced to pronounce all the commercials not indecent. NAL ¶ 2 n.7.

[148] *See, e.g., WMCQ Licensing, Inc.*, 15 FCC Rcd. 8111, 8113 n.8 (Enf. Bur. 2000); *L.M. Communications of S.C., Inc.*, DA 98-1157, ¶ 4 n.2 (Mass Med. Bur. 1998); *Mr. Steve Bridges, Vice Pres.*, 9 FCC Rcd. 1681, (Mass Med. Bur. 1994); *Nationwide Communications, Inc.*, 6 FCC Rcd. 3695 (Mass Med. Bur. 1990) (noting that "[n]ormally, in evaluating indecency complaints, it is our policy to insist upon supporting evidence taken directly from the offending broadcast" to "increase[ ] the reliability of the complaint as a basis for possible … inquiry or action," but accepting a substitute recording in the case at bar). *See also Press Statement of Comm'r Gloria Tristani; Enforcement Letter Ruling Regarding Indecency Complaints Against WDCG(FM)*, 2001 WL 740587 (rel. July 2, 2001); *Press Statement of Comm'r Gloria Tristani; Enforcement Letter Ruling Regarding Indecency Complaints Against WTFX-TV*, 2001 WL 721678 (rel. June 27, 2001) (both citing dismissals of indecency complaints due to lack of tape or transcript).

[149] *Establishment of Rules Governing Procedures to be Followed When Informal Complaints are Filed by Consumers Against Entities Regulated by the Commission*, 17 FCC Rcd. 3919, 3954 (2002) (Statement of Comm'r Martin).

By the end of last year, the Commission had begun shifting the burden from requiring complainants to provide a tape or transcript or a significant portion of the program complained of to requiring that licensees provide such evidence to defend against indecency charges.[150] This shift of the burden was completed earlier this year as part of the above-described indecency "crackdown."[151] The transformation of the procedural requirement has resulted in a presumption that a complaint is valid unless the licensee can disprove it, effectively reversing the burden of proof in indecency cases, as the Commission acknowledges.[152] But such an approach "raises serious constitutional difficulties" when the government seeks "to impose on [a speaker] the burden of proving his speech is not unlawful."[153]

Finally, once the Commission, in its sole discretion, decides that a particular broadcast is indecent, the process to review that decision is anything but prompt. For the licensee, challenging an indecency determination generally requires refusing to pay a proposed forfeiture

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[150] *See, e.g.*, *Entercom Portland License, LLC*, 18 FCC Rcd. 25,484, 25,487 n.21 (2003) ("We find that once a complainant makes a *prima facie* case alleging the broadcast of indecent material, it is appropriate for the Bureau to seek *from the licensee* a tape or transcript not only of the material relevant to the complaint, but also of a reasonable amount of preceding and subsequent material ….") (emphasis added).

[151] *See Capstar*, 19 FCC Rcd. at 4961; *id.* at 4973 (Statement of Comm'r Martin) (supporting action in part on grounds it would mean "[c]omplaints should *no longer* be denied because of a lack of tape, transcript or significant excerpt") (emphasis added). *See also Emmis Radio*, 19 FCC Rcd. 6452.

[152] *See Retention By Broadcasters of Program Recordings*, 19 FCC Rcd, 12626, 12628 n.9 (2004) ("We have held that in cases in which a licensee can neither confirm nor deny the allegations of indecent broadcasts in a complaint, we have held that the broadcasts occurred.") (citing *Clear Channel*, 19 FCC Rcd. 1768). As the Chief of the FCC's Enforcement Bureau has explained the process, "[i]f the station can't refute information in the complaint, we'll assume the complainant got it right." Bill McConnell, *New Rules for Risqué Business*, BROADCASTING & CABLE, March 4, 2002.

[153] *Ashcroft v. Free Speech Coalition*, 535 U.S. at 255; *ACLU v. Ashcroft*, 322 F.3d at 260. *See also Freedman*, 380 U.S. at 58-61; *Speiser*, 357 U.S. at 525. *Cf., Playboy Entmt. Group*, 529 U.S. at 816 (2000); *Interactive Digital Software Ass'n*, 329 F.3dat 959.

and enduring an enforcement proceeding before it may raise a defense in court, assuming the government initiates a collection action.[154] During this time, the Commission may withhold its approval of other matters the licensee has pending before the agency. For this reason, no licensee has been able to hold out long enough to test the validity of an FCC indecency determination. *ACT IV*, 59 F.3d at 1254. From the perspective of the artist whose work may be effectively banned from the air by an FCC decision (including a decision made on delegated authority by a lower level official), the government's position is that there is no right to seek judicial review at all. *See Jones v. FCC*, *supra* note 138.

VI. CONCLUSION

The NAL reads as if no investigation into the Super Bowl incident took place. Although the Commission does not directly question the fact that no one from Viacom, CBS or MTV knew that Janet Jackson and Justin Timberlake would alter the ending of the halftime show with an unplanned stunt, the only way the decision can be understood is to assume such knowledge contrary to all the evidence. It fails to acknowledge the exhaustive fact-gathering effort that led to the finding, backed by sworn declarations of the performers, that no one at the network knew, or had reason to suspect, that the halftime show would end with a glimpse of nudity. As a result, the Commission's finding of apparent liability and its intention to impose a $550,000 forfeiture on Viacom and its O&O stations is entirely illogical. It is based on the premise that Viacom "planned" and "touted" what it did not know would happen.

Not only is the factual basis of the NAL flawed, its legal conclusions are erroneous as well. The Commission's test for indecency was not met even as it is articulated by the agency,

[154] *See Indecency Policy Statement*, 16 FCC Rcd. at 8016. On the other hand, a licensee may pay the proposed forfeiture and proceed to the court of appeals. *See AT&T v. FCC*, 323 F.3d 1081 (D.C. Cir. 2003). However, making such payment subjects the licensee to potentially greater penalties pursuant to Section 504(c), and possible license revocation proceedings pursuant to the FCC's heightened enforcement policies.

and the proposed forfeiture is inconsistent with the Communications Act and FCC policy. The Commission's expansive interpretation of its enforcement authority in this case exceeds the constitutional boundaries set forth in *FCC v. Pacifica Foundation*, and its lack of sensitivity to First Amendment values calls into question the entire indecency enforcement regime. Accordingly, the proposed forfeiture should be cancelled, and this proceeding terminated.

Respectfully submitted,

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Its Attorneys

November 5, 2004

Declaration of Salli Frattini

I, Salli Frattini, do hereby declare as follows:

1. I am Senior Vice President and Executive in Charge of MTV.

2. In my capacity as Senior Vice President I also am a Senior Producer at MTV and served as Executive Producer for the Super Bowl XXXVIII halftime show. Accordingly, I was directly involved in the approval of talent for the show, as well the script, and I actively participated all aspects of the show, from its conception to its presentation. In addition, as Executive Producer for the halftime performance, with the MTV Music Department, I coordinated with the talent and talent's management on all details for the halftime show.

3. Justin Timberlake was the last performer chosen to perform at the halftime show. Together with Mr. Timberlake's representatives we decided that his role in the halftime show would be that of "surprise guest."

4. Though CBS and MTV received repeated inquiries as to the identity of the surprise guest for the halftime show in the days leading up to the Super Bowl, Mr. Timberlake's participation was not disclosed prior to the commencement of the performance. However, the Thursday prior to game day when MTV held dress rehearsal at the Reliant stadium Mr. Timberlake was present in front of thousands of casted fans. His name was part of several rumored surprise guests that the press spoke about days before.

5. Justin Timberlake's name was included in the opening credits of the halftime show to announce his participation for several purposes. First, it was an attempt to hold viewers for the halftime performance. By adding his name to the opening credits, we were able to confirm that Mr. Timberlake would be the "surprise guest" (and dispel rumors as to other possible performers, including Michael Jackson) in a manner that would encourage fans of Mr. Timberlake to remain tuned in throughout the performance. Second, including Justin Timberlake's name in the opening credits afforded him the same "superstar" treatment as the other performers on the halftime show. Furthermore, Mr. Timberlake's management specifically requested that he be included at this time so that he would be as recognizable as the other artists when he performed.

6. Based on my experience over the last 25 years of having produced and/or otherwise been involved in producing television programming such as the Super Bowl halftime show, it is not atypical that a performer's name will appear in the opening credits, or that the performer otherwise is identified, before he or she appears on a program even where the performer's appearance is a "surprise." The practice commonly is used for purposes of persuading fans of the performer to remain tuned in for his or her appearance. Indeed, this approach is used even where a performer only might appear on a program. One such example is nominees on awards shows who, to the extent they are present but would appear onstage only if they win an award, nevertheless are included in the opening credits (and other announcements) during the program, before the performer appears (if at all) on

the program.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 04 day of November, 2004.

Salli Frattini