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

In the Matter of	)	
	)	
Complaints Against Various Television Licensees	)	File Nos. EB-03-IH-0122 and
Concerning Their February 25, 2003,	)	EB-03-IH-0353
Broadcast of the Program "NYPD Blue"	)	

OPPOSITION TO NOTICE OF APPARENT LIABILITY FOR FORFEITURE OF 50 TELEVISION BROADCAST STATIONS AFFILIATED WITH THE ABC TELEVISION NETWORK AND OF THE ABC TELEVISION AFFILIATES ASSOCIATION

February 11, 2008

VOLUME 1 OF 2

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The undersigned licensees or former licensees, together with the ABC Television Affiliates Association, (collectively, the "ABC Affiliates") hereby oppose the *Notice of Apparent Liability for Forfeiture* ("*Notice*"), FCC 08-25, adopted and released on January 25, 2008, and as corrected by an *Erratum* released on January 31, 2008, in the above-captioned matter.

Preliminary Statement and Summary

The *Notice* finds the ABC Affiliates apparently liable for the maximum forfeiture amount for broadcasting a depiction of buttocks, for fewer than 7 seconds, during the tenth season of one of the most lauded shows in television history. This *Notice*, which was released 59 months after the episode of *NYPD Blue* in question was broadcast, is rife with procedural infirmities; is predicated on form complaints that do not satisfy the Commission's own policies; proscribes material outside the scope of the Commission's indecency enforcement authority; misapplies the Commission's own multifactor test for patent offensiveness; is inconsistent with the Commission's governing precedent at the time of broadcast; and reaches a result that is plainly unconstitutional under *Pacifica*. For a host of reasons, the *Notice* should be rescinded in its entirety.

To begin with, the *Notice* fails to acknowledge the true brevity and context of the depiction in issue. During a 57-second scene that explores the awkwardness and discomfiture that can result from a single parent with his child sharing living quarters with the parent's new romantic partner—a scene that is part of a broader multi-episode story arc—a female character prepares to shower in her bathroom when an eight-year-old boy accidentally walks in on her and both express their embarrassment and surprise. While the scene itself is less than one minute, the depiction of bare buttocks for which the ABC Affiliates are being cited occurs for fewer than 7 seconds, which is less than 0.25% of the hour-long drama. The *Notice* also wholly fails to acknowledge that this depiction of brief nudity is entirely non-sexual and non-excretory. A woman prepares to shower, as millions of women do every day, by simply disrobing. There is no hint or innuendo of sexual or excretory activity anywhere in the entire scene.

Unfortunately, the *Notice*'s factual and contextual lacunae are symptomatic of deeper flaws. For instance, the belated *Notice* raises a host of due process concerns apparently precipitated by a rush to judgment to avoid the running of a statute of limitations. *First*, the Commission inexplicably and inexcusably delayed nearly five years after the broadcast of the *NYPD Blue* episode to issue the *Notice*—despite its preparation, according to press reports, of a draft nearly two years earlier and despite its issuance of a letter of inquiry to the ABC Network (but not to any of the ABC Affiliates) in 2004, less than a year after the broadcast. *Second*, the Commission only produced the "complaints" on which the *Notice* relies beginning on February 4, 2008—10 days *after* the issuance of the *Notice* and just a week before this response was due but, again, nearly five years after the broadcast in issue and roughly four years after the letter of inquiry sent to the Network. And, *third*, if the lengthy delay between the broadcast and *Notice* were not troublesome enough, the Commission demanded a response from the ABC Affiliates just 17 days after the *Notice* was issued—a period far shorter than the 30 days that the

Commission's own rules and its settled practice treat as presumptively reasonable. The extraordinary delay in the issuance of the *Notice*, the Commission's belated production of the underlying complaints, and the unusually and unfairly truncated period allowed for the ABC Affiliates' response all combine to deprive the Affiliates of the most fundamental guarantees of due process: reasonable notice of the prospective deprivation and a reasonable and fair opportunity to respond to the Commission's charges before the deprivation determination is made.

The lack of due process afforded the ABC Affiliates is mere prelude to the multitude of independent substantive errors that render the *Notice* fatally defective. The very complaints upon which the *Notice* relies lack all indicia of genuineness. For reasons akin to standing, Commission policy requires indecency enforcement to proceed from complaints of viewers who actually viewed the complained-of material on the station being cited. But the complaints in this proceeding, which were not attached to or summarized with particularity by the *Notice*, and which were not produced to most of the ABC Affiliates until ferreted out by FOIA requests, fail to satisfy this policy: These complaints are nothing but generic, mass-generated emails orchestrated by a special interest advocacy group. None of them alleges that the complainant actually watched the *NYPD Blue* episode. None of them alleges that the complainant saw the allegedly offending material on the station that the Commission associates with the complaint. None of them was submitted proximate to the broadcast on February 25, 2003; instead, the earliest was submitted 4 1/2 months later while the last one was submitted more than two full years after the episode aired! And, remarkably, none of them actually complains about the televised depiction of buttocks, all of them focusing instead on a purported concern that the child actor saw a naked lady, a matter that pertains to labor practices beyond the Commission's purview. No "restrained" approach to indecency enforcement, which the First Amendment

requires, could rationally find any of these complaints credible, let alone actionable.

When it comes to the merits, the *Notice* is particularly breezy, with one conclusory assertion after another. As a preliminary matter, the *Notice* finds that buttocks are within the scope of the Commission's indecency enforcement authority because they are both sexual and excretory organs. But that is just wrong as a matter of biology and anatomy. The buttocks are part of the muscular system and have no sexual or excretory function. The Commission's reliance on "common sense" cannot trump science. And the two cases the *Notice* cites in support (as well as many others) actually refute the *Notice*'s finding in this regard.

Even assuming, *arguendo*, that buttocks are within the Commission's regulatory grasp, the *Notice* repeatedly misapplies its own multifactor test for patent offensiveness. The depiction of buttocks was neither explicit or graphic, dwelled upon or repeated, nor titillating or shocking. The *Notice*'s reliance on the Super Bowl/Janet Jackson and Young Broadcasting/Puppetry of the Penis cases is inapposite at best. Those cases involved the depiction of a nipple and areola and of a penis, respectively, not the depiction of buttocks. And those cases were decided *after* the *NYPD Blue* episode in question here was broadcast. Instead, when viewed through the lens of relevant Commission precedent, as shown in detail below, the depiction at issue here fails to satisfy *each* factor. Of course, since mere nudity itself is not indecent *per se*, it is impossible to see how the depiction of buttocks for fewer than 7 seconds in an utterly non-sexual manner could ever be patently offensive as measured by contemporary community standards. But the capricious nature of the *Notice*'s blindered view in this regard is heightened by the blatant willingness of the Commission to substitute its own artistic judgment for that of *NYPD Blue*'s creative team—a substitution that is itself patently offensive to the First Amendment.

The *Notice*'s ultimate conclusion that the brief depiction of nude buttocks is indecent is really tantamount to a new rule that nudity *is* indecent *per se*. Of course, no Commission

precedent supports that position. What's more, at the time of broadcast, neither the Commission nor staff had *ever* released a decision finding the depiction of televised nudity to be indecent at all. *Schindler's List* and a host of other cases had all found substantially longer depictions of nudity—including numerous instances of sexualized nudity—to be nonactionable. The *Notice* is not only inconsistent with the Commission's own precedent, but it is impossible to square with elementary principles of administrative law, let alone the First Amendment.

And so, finally, it is inconceivable that the *Notice*'s result could be constitutional under the First Amendment and *Pacifica.* In that case a narrow majority barely upheld the Commission's authority to proscribe as indecent a 12-minute monologue riddled, over and over again, with seven expletives and their variants. In that case the critical opinion focused on the repetitive nature and "verbal shock treatment" of the material. In that case the radio licensee conceded the complained-of material was indecent. In that case the radio licensee broadcast the material at 2:00 in the afternoon when children were likely to be in the audience. And in that case the Court specifically did not countenance the proscription of fleeting material, such as an occasional expletive in an Elizabethan comedy, or of Chaucer's ribald *Miller's Tale.* This case is wholly different from that case and obviously falls outside its narrow confines. This case is about the fleeting depiction of buttocks which are neither sexual nor excretory organs. This case is about a fleeting depiction of nudity that was wholly non-sexualized. This case is about fewer than 7 seconds—less than 0.25%—of a critically-acclaimed, award-winning hour-long drama. This case involves a television show, appropriately rated and with a parental advisory, that was broadcast in the last hour of prime time when children were unlikely to be in the audience. And this case proceeds from the trumped-up complaints of a political advocacy group with no evidence that a single *bona fide* viewer of the program actually complained. No, this case is not like *Pacifica*, and a finding by the Commission that the scene in question is actionably indecent

would be unconstitutional under *Pacifica* and the First Amendment.

For these, and the many reasons set forth below, each of the ABC Affiliates asks that the proposed forfeiture be cancelled and that the *Notice* be rescinded.

Argument

I. Background and Factual Context

NYPD Blue ran for 12 television seasons—261 individual episodes—on the ABC Television Network at 10:00 p.m. Eastern/Pacific Time, 9:00 p.m. Central/Mountain Time from September 1993 through March 2005. Although controversial from the very beginning,[1] *NYPD Blue* was one of the most lauded shows in television history: Among other accolades, the gritty police drama garnered 84 Emmy nominations and 20 Emmy awards, including Outstanding Drama Series and Outstanding Writing for a Drama Series.[2] *NYPD Blue* won two Peabody Awards, three Humanitas Awards for Best Writing, a National Board of Review award for Best Television Series, awards from Viewers for Quality Television for Best Drama and acting, and many Golden Globe awards. Despite its realistic portrayal of adult situations, including nudity, the show was never found to have crossed the legal line during its long television broadcast run.

The *Notice* alleges that one brief scene containing adult female nudity in an episode airing five years ago on February 25, 2003, during the show's tenth season, constituted indecent material that was patently offensive. The *Notice* also alleges that the Commission received

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[1] The pilot episode itself ended with a dimly-lit lovemaking scene containing partial male and female nudity. *See* NYPD Blue, Wikipedia, *available at* http://en.wikipedia.org/wiki/Nypd_blue; NYPD Blue, Museum of Broadcast Communications, *available at* http://www.museum.tv/archives/etv/N/htmlN/nypdblue/nypdblue.htm.

[2] *See* Advanced Primetime Awards Search, Academy of Television Arts & Sciences, *available at* http://www.emmys.tv/awards/awardsearch.php.

"numerous" complaints that the ABC Affiliates, all located in the Central and Mountain time zones, aired the program between 9:00 p.m. and 10:00 p.m., which is outside the "safe harbor" and during a time period when the Commission can constitutionally regulate indecent programming. *See* 47 C.F.R. §73.3999(b).

The scene in question was part of a broader story arc, developing over many months, involving the relationship between lead character Andy Sipowicz and fellow detective Connie McDowell. Sipowicz, a widower, is struggling to raise his 8-year-old son, Theo, at the same time that his relationship with McDowell is becoming serious. Eventually, Sipowicz and McDowell decide to move in together which leads to the scene in question.

In the scene, which lasts a total of 57 seconds, McDowell enters the bathroom and prepares to take a shower when Theo, just getting out of bed and not knowing she is in the bathroom, opens the door and sees McDowell. Both are surprised and embarrassed. McDowell covers herself with her hands and arms, Theo exits with a "sorry," and McDowell, still covering herself, says through the now-closed door, "It's okay, no problem."

No sexual or excretory activities take place during the scene, nor does the *Notice* contend otherwise. The *Notice*, in paragraphs 9 and 10, fairly accurately describes the scene, but it fails to contextualize it. For example, the *Notice* fails to note that a later scene shows McDowell worrying about the incident, reading a book about raising children, and expressing her embarrassment to a colleague. She also asks Sipowicz whether Theo was all right when Sipowicz dropped him off at school, and he attempts to put her at ease. Other story lines in the episode also deal with family and relationships: A man learns that his wife, the mother of his two children, is having an affair and plotting to have him murdered. A detective learns of his father's suicide after they quarreled. McDowell and another detective learn to sympathize with the victim of a petty theft after discovering the victim's only child had been recently killed by a

drunk driver. Moreover, subsequent episodes continue the story arc dealing with Theo's adjustment to a new parental figure.

The scene, then, placed in context, is integral to storytelling about the awkwardness and discomfiture accompanying the introduction of a new romantic partner into the life of a single parent and his only child, specifically, and about revealing the multifaceted aspects of humanity through interrelationships, more generally. Drama requires conflict and resolution, and it was appropriate for the *NYPD Blue* storytellers to illustrate these lessons in the fashion they chose.

Moreover, the nudity in question was very brief. During the scene, McDowell, standing in front of a mirror, removes her robe as she prepares for her shower, and McDowell's full buttocks are visible for approximately 2 2/3 seconds. McDowell then walks toward the shower and is seen in profile with her buttocks visible from one side for approximately 1.9 seconds. The scene shifts to Theo getting out of bed and going to the bathroom, and then the camera cuts back to McDowell getting ready to step into the shower. McDowell's full buttocks are visible again for approximately 2 1/4 seconds. Thereafter, Theo and McDowell are both surprised and embarrassed, and McDowell's nudity is subsequently covered in the remainder of the scene. In sum, McDowell's full buttocks are visible for less than 5 seconds, and her buttocks are visible from the side for less than 2 seconds, which, together, constitute approximately 12% of the entire 57-second scene and less than 0.25% of the entire hour-long episode.

ABC applied a voluntary self-rating of TV-14-DLV to this *NYPD Blue* episode. The TV-14 rating means

> Parents Strongly Cautioned—This program contains some material that many parents would find unsuitable for children under 14 years of age. Parents are strongly urged to exercise greater care in monitoring this program and are cautioned against letting children

under the age of 14 watch unattended.[3]

The "D" designation means "intensely suggestive language." The "L" designation means "strong coarse language." The "V" designation means "intense violence." In addition, the episode was preceded by a visual and audio warning that stated, "THIS POLICE DRAMA CONTAINS ADULT LANGUAGE AND PARTIAL NUDITY. VIEWER DISCRETION IS ADVISED."

In addition to the V-chip rating and the audiovisual warning, *NYPD Blue* was in its tenth television season when the episode aired. The show's realistic portrayal of adult situations, occasionally containing partial nudity, was well-known to its nationwide television viewing audience. With 212 episodes preceding this one, *NYPD Blue* had established a "brand," and viewers knew what *NYPD Blue* was about and the type of material it was likely to contain. Any complaint by an actual viewer about this episode would ring hollow. Such a complaint is akin to eating Big Macs once a week for ten years and then suddenly complaining that they contain saturated fats!

II. The Delay in Issuance of the *Notice* and the Inadequate Response Period Provided for the ABC Affiliates Constitute a Deprivation of Due Process

The fundamental requirements of procedural due process are well settled:

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[3] The TV Parental Guidelines, Federal Communications Commission, *available at* http://www.fcc.gov/parents/parent_guide.html. The purpose of program ratings is two-fold. *First*, program ratings alert parents to the type of material that a program contains so that they can exercise their own independent, contemporaneous judgment about whether that type of material is appropriate for their children to watch. *Second*, program ratings enable parents with a V-chip equipped television set to block the type of programs that they have determined in advance to be unsuitable for their unsupervised children.

pre-deprivation notice and an opportunity to be heard.[4] The requisite notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections,"[5] and the pre-deprivation hearing must take place "at a meaningful time and in a meaningful manner."[6] These protections are fully applicable in administrative proceedings.[7]

The timing of the *Notice*, the Commission's belated (and incomplete) production of the underlying complaints, and the truncated schedule for response established by the Commission fall well short of the fundamental constitutional requirements. The remarkable delay between the February 25, 2003, broadcast of the challenged *NYPD Blue* episode and the Commission's

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[4] *See, e.g.*, *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) ("For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" (citations omitted)); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

[5] *Mullane*, 339 U.S. at 314 (citation omitted); *see also Fuentes*, 407 U.S. at 80 ("the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner'" (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965))).

[6] *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation omitted); *see also Bell v. Burson*, 402 U.S. 535, 541-42 (1971) (hearing "must be 'meaningful' . . . and 'appropriate to the nature of the case'" (citations omitted)).

[7] *See, e.g.*, *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Mathews*, 424 U.S. at 332. Whether the procedures available in the administrative context adequately provide the requisite notice and opportunity to be heard turns on the balance of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335; *see also Jifry v. FAA*, 370 F.3d 1174, 1183 (D.C. Cir. 2004) (quoting *Mathews*).

issuance of the *Notice* nearly five full years later on January 25, 2008 (and its subsequent production of the underlying complaints not beginning until February 4, 2008), together with the unusually truncated period allowed for the ABC Affiliates to respond, combine to deprive the ABC Affiliates of a fair and reasonable opportunity to respond to the Commission's charges.[8]

A. The Commission Failed to Provide the ABC Affiliates with Timely Notice

The program at issue aired on February 25, 2003, but the Commission waited nearly *five years* after the episode was broadcast to notify the ABC Affiliates of its intent to challenge the episode as indecent. The *Notice* offers no explanation for the Commission's long delay in proposing forfeitures, and none is obvious on its face. Indeed, the delay does not appear to have been inadvertent, as a draft of the *Notice* was reportedly prepared nearly two years ago but languished until the Commission finally was prompted to act by the looming deadline imposed by the applicable statute of limitations.[9] That the Commission waited nearly five years after the broadcast and almost two years after the preparation of a draft *Notice* to provide notice to the

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[8] The Commission's rush to judgment appears to be driven by a looming statute of limitations. Under 28 U.S.C. § 2462, the Commission must institute an action to enforce any "civil fine, penalty, or forfeiture" within five years "from the date when the claim first accrued." Because the program was broadcast on February 25, 2003, the Commission must review this Opposition and any other responses filed, enter an order imposing any forfeiture, and file complaints in federal district courts throughout the Central and Mountain time zones if it is to enforce any such forfeiture order—all by February 25, 2008. But the Commission's statute of limitations problem is of its own making. It had five years to give the ABC Affiliates ample notice of the alleged violation, an opportunity to conduct an investigation of the facts, and a reasonable period of time to present a meaningful response. Having failed to do so, the Commission should not be permitted to "solve" its statute of limitations problem by imposing a truncated notice and response process that violates the due process rights of the ABC Affiliates.

[9] *See* Jonathan Make, "Indecency Fine Against ABC Sat at FCC Nearly Two Years," COMM. DAILY 1 (Jan. 29, 2008) (describing the nearly two-year delay between draft *Notice* and issuance as "a departure from regular practice").

ABC Affiliates is both inexplicable and inexcusable.

The extraordinary delay in providing notice to the ABC Affiliates is all the more disturbing in light of the timely notice provided to other interested parties. On February 3, 2004—less than one year after the broadcast—the Commission sent the ABC Network (but none—not a single one—of the Affiliate stations) a letter of inquiry alerting ABC that complaints had been filed regarding the *NYPD Blue* episode. ABC submitted a detailed response to the Commission on February 17, 2004, demonstrating that the episode did not constitute indecent programming.

Because two of the 52 stations cited in the *Notice* are owned and operated by ABC, those two stations received (via ABC) notice in February 2004 that the *NYPD Blue* episode was under investigation. The ABC Affiliate stations, however, were not given similar notice or an opportunity to respond until nearly four years later. Indeed, the ABC Affiliates were not advised by the Commission, before the issuance of the January 25, 2008, *Notice*, that even a single complaint had been filed with the Commission against any Affiliate regarding the February 25, 2003, episode of *NYPD Blue*, much less that the Commission would suddenly spring on them the *Notice* finding them apparently liable for actionable indecency. The 50 ABC Affiliates, then, did not have the same opportunity as did ABC and its two O&O stations to conduct a contemporaneous investigation of the facts. The resulting inequality of treatment is evident, and that inequality amplifies the significant additional burdens on the ABC Affiliates who were not put on notice in 2004.

Indeed, the lengthy delay in providing notice of any kind to the ABC Affiliates is far from harmless. After nearly five years, pertinent records of the broadcast may be non-existent or difficult to locate, and knowledgeable witnesses may no longer be readily available. Each individual station may be unable easily to determine whether it even aired the *NYPD Blue*

episode, whether it delayed the episode and aired it within the "safe harbor," or whether it received any complaints from viewers following the broadcast.[10] Given the nearly five years that have passed since the episode aired on the ABC Network, it is unsurprising that the records and witnesses that could provide answers to those questions are no longer readily accessible. And such answers are critical because, if a station preempted the episode or broadcast it during the "safe harbor," those are absolute defenses to liability.

The long delay between the broadcast and the *Notice* deprived the ABC Affiliates of the sort of notice that the Due Process Clause demands. Notice that reached the ABC Affiliates nearly five years after the challenged broadcast cannot be described as "reasonably calculated, under all the circumstances, to apprise [the ABC Affiliates] of the pendency of the action and afford them an opportunity to present their objections."[11] Quite the contrary: the Commission's untimely notice inevitably imposes unfair and unnecessary burdens on the ABC Affiliates in responding to the *Notice*. Those burdens, occasioned by the Commission's unnecessary delay in issuing the *Notice*, constitute a deprivation of due process.[12]

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[10] Several of the ABC Affiliates who have begun to search for pertinent records in response to the *Notice* have found that records that may have been relevant are no longer available. *See, e.g.*, Exhibit 3, Declaration of Stephen J. Wheeler; Exhibit 4, Declaration of Lawrence Delia; Exhibit 5, Declaration of Jan Wade. Indeed, stations are required to retain complaints from viewers for only three years. *See* 47 C.F.R. § 73.3526(e)(9). In addition, there is no longer any requirement that stations maintain program logs at all; consequently, few stations retain such logs for five years. *See Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 F.C.C. 2d 1076 (1984), ¶¶ 68-79 (eliminating requirement for commercial television stations to maintain and retain program logs for two-year period).

[11] *Mullane*, 339 U.S. at 314 (citation omitted).

[12] *See, e.g., Lane Hollow Coal Co. v. Director, Office of Workers' Compensation Programs*, 137 F.3d 799, 801, 808 (4th Cir. 1998) (where Department of Labor's "extraordinary delay in notifying [employer] of its potential liability deprived it of a meaningful opportunity to contest that liability" because of intervening unavailability of witnesses, employer "was denied (continued . . .)

B. The Commission's Delay in Providing the Underlying Complaints Compounds the Due Process Violations

The *Notice* refers to "numerous complaints," *Notice*, ¶ 8, received by the Commission in response to the *NYPD Blue* episode, but it neither attaches the complaints nor provides any particularized summary of their content. Because that content is critical to the ABC Affiliates' response to the *Notice*, affected stations repeatedly requested that the Commission produce the underlying complaints.[13] The Commission finally responded to those requests by beginning to produce copies of the complaints late in the evening of February 4, 2008—just one week before the ABC Affiliates were required to respond to the *Notice*—and by continuing to provide copies of additional complaints through February 7, 2008, just days before this response to the *Notice* is due. In fact, as of this writing, the Commission has yet to respond to all of the ABC Affiliates' requests for the complaints (whether informal oral or letter or formal FOIA requests), and the ABC Affiliates have only been provided with the complaints associated with 42 of the 50 ABC Affiliate stations cited in the *Notice*.

The belated (and still incomplete) production of the underlying "complaints" underscores that delay has characterized the Commission's actions from the very outset in this matter. None of the form complaints affirmatively declares that the complainant actually viewed the *NYPD Blue* episode, identifies the station on which they supposedly viewed it, or indicates the market in which they reside (or then resided). The Commission apparently recognized—quite

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(. . . continued)
due process of law").

[13] *See, e.g.*, Letter from Wade H. Hargrove to Matthew Berry, General Counsel (Jan. 30, 2008). When the Commission did not timely respond to many of the informal requests for the complaints, a number of the affected stations formally requested copies of the complaints under the Freedom of Information Act, 5 U.S.C. § 552.

belatedly—that this was a significant deficiency in the form complaints, and it corresponded with each of the complainants by email in late December 2005 to plug the obvious holes—34 months after the *NYPD Blue* episode aired. However, this delay was so long that, as shown below, some of the complainants could not even remember the circumstances of their complaint. The Commission has provided no explanation for why this email correspondence was delayed for nearly three years after the episode aired and nearly two years after ABC had already responded to the Commission's letter of inquiry.

The Commission's pattern of delay has continued through the belated production of the specific complaints to the ABC Affiliates in this case. That production imposes additional difficulties on the ABC Affiliates, who have been required to analyze and evaluate the numerous complaints in less than one week's time to determine whether they provide an adequate predicate for the Commission's enforcement action or who, with respect to 8 stations, have yet to see any complaints at all. Yet the specific complaints are essential to a determination of each ABC Affiliate's liability for forfeiture, because it is now settled that the Commission will not prosecute a complaint that does not allege that the complainant actually viewed the program at issue on the station charged.[14] Until the underlying complaints are received, no individual licensee can determine whether the complaints against it satisfy this rule. But even for those (belatedly) produced by the Commission, the complaints have done nothing to assure the ABC Affiliates that the rule has been satisfied in this case. Quite the contrary: The complaints indicate on their face that the *Notice* is predicated almost entirely on computer-generated "form"

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[14] *See Complaints Regarding Various Television Broadcasts Between February 2, 2002, and March 8, 2005*, 21 FCC Rcd 2664 (2006) ("*Omnibus Order*"), ¶¶ 32, 42, 86; *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 13299 (2006) ("*Omnibus Remand Order*"), ¶¶ 75-76.

complaints that do not establish (and nowhere indicate) that the complainant viewed the subject program on the individual station[15]—a standing-like prerequisite to the exercise of the Commission's enforcement authority, as explained below.

In any event, the belated and incomplete production of the individual complaints cannot cure the many due process defects in the Commission's enforcement action. The Commission continues to ignore the established requirement that an NAL itself summarize the factual underpinnings of the predicate complaints (a task the Commission has left—improperly—to the ABC Affiliates to undertake in this case, on one week's notice or less). Section 1.80(f)(1)(ii) requires that any NAL "will" "[s]et forth the nature of the act or omission charged against the respondent and the *facts* upon which such charge is based." 47 C.F.R. § 1.80(f)(1)(ii) (emphasis added). The Commission's eleventh-hour production of the complaints was not coupled with

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[15] The typical complaint contains the following generalized screed against television programming:

> Why do you continue to disregard your obligation to protect our families from the constant barrage of indecency on television?
>
> Like many families, we are tired of the constant sex, violence, and profanity coming into our homes through the public airwaves.
>
> On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity. It is shameless that this kind of broadcast is going unchallenged by the FCC.
>
> As a member of OneMillionDads.com, I implore you to vigorously enforce broadcast indecency laws to insure this type of incident does not occur again.

Exhibit 1 at 000001. As is self-evident, the form complaint does not state that the individual watched the program at all, let alone that the individual watched it on a specific station that has been cited in the *Notice*.

any amendment to the *Notice* to include the required factual summary of the complaints.[16] That omission further compounds the due process injury to the ABC Affiliates: Not only has the Commission's delay unnecessarily hindered the ABC Affiliates' ability to respond to the *Notice*, but the Commission has also violated its own rules in a way that makes it all the more difficult for the ABC Affiliates to respond.

C. The *Notice* Fails to Provide the ABC Affiliates with an Adequate Opportunity to Respond

To provide constitutionally adequate process, pre-deprivation notice "must afford a reasonable time for those interested to make their appearance." *Mullane*, 339 U.S. at 314. The truncated time for response to the *Notice* imposed by the Commission in this case fails to satisfy this constitutional minimum.

Because the Commission is apparently concerned that the statute of limitations may foreclose its ability to obtain judicial enforcement of an order of forfeiture, it has provided the ABC Affiliates with an unusually shortened period of time in which to submit a response: The

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[16] The Commission did produce an *Erratum* to the *Notice* which corrected certain identifying information related to several of the Affiliates named in the original *Notice*. This eleventh-hour amendment, however, did not cure the defect in the original *Notice* since the *Erratum*, too, lacked the factual summary of the underlying complaints required by Section 1.80(f)(1)(ii).

The need for an erratum further underscores the haste with which the Commission has undertaken this enforcement action. Among other things, the original *Notice* named the licensees of at least two stations (KFBB-TV, Great Falls, Montana, and KTKA-TV, Topeka, Kansas) whose current license terms began after the February 25, 2003, *NYPD Blue* episode aired, and the statute of limitations contained in 47 U.S.C. § 503 provides an absolute defense in such a case. Both licensees have filed separate responses to the *Notice* on this point. The original *Notice* also included incorrect identifying information for several licensees, errors that prompted the *Erratum*.

Commission demands a response just *17 days* after the date of the *Notice*.[17] The Commission's own rules indicate that this abbreviated period for response is inappropriately short. Section 1.80, referenced in the *Notice*, provides for a "reasonable" period of time in which to respond to a notice, presumptively 30 days:

> (f) *Notice of apparent liability.* Before imposing a forfeiture penalty under the provisions of this paragraph, the Commission or its designee will issue a written notice of apparent liability.
>
> [. . .]
>
> (3) *Response.* The respondent will be afforded a reasonable period of time (usually 30 days from the date of the notice) to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. . . .

47 C.F.R. § 1.80(f)(3).

Here, the ABC Affiliates effectively were given just two weeks to respond to the *Notice*.[18] That truncated period is unreasonable on its face and deprives the ABC Affiliates of a full and fair opportunity to respond to the *Notice*, particularly in light of the significant factual

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[17] *See Notice*, ¶ 22 (ordering, "pursuant to Section 1.80 of the Commission's rules, that no later than February 11, 2008, each licensee . . . SHALL PAY the full amount of its proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of their proposed forfeiture").

Affected stations have requested that the Commission grant an extension of time to respond to the *Notice*, at least through and including February 25, 2008—the full thirty days that the Commission's own rule suggests is proper. *See, e.g.*, Letter from Wade H. Hargrove to Matthew Berry, General Counsel (Jan. 30, 2008); Motion by ABC Television Affiliates Association and Named Licensees for Extension of Time to Respond to Notice of Apparent Liability for Forfeiture (filed Feb. 1, 2008). The Commission has not responded to these requests.

[18] The 17 days between the issuance of the *Notice* (late on a Friday) and the date for the ABC Affiliates' response (a Monday) includes three weekends, leaving just 11 business days for the ABC Affiliates to request the complaints (and the Commission to produce them), investigate the circumstances surrounding the *NYPD Blue* episode in issue, and prepare this response.

investigation that the Affiliates must undertake in response to the *Notice*—an investigation made all the more difficult given the long passage of time since the broadcast.

The abbreviated period for response allowed by the Commission in this case not only runs contrary to the Commission's own rule, but it also contradicts what is apparently the Commission's settled practice. With the exception of the instant *Notice*, every single one of the other 39 Notices of Apparent Liability for Forfeiture for indecency listed on the Commission's website (www.fcc.gov/eb/broadcast/NAL.html) allowed for a response "within 30 days" or instructed the recipients to respond within "a period of 30 days." In other words, not a single NAL for indecency issued since 2000 demanded a response within less than the 30 days provided for by Section 1.80—much less, as here, within little more than two weeks.

In short, the truncated period allowed for the ABC Affiliates to respond to the belated *Notice* fails to afford them a *reasonable* opportunity to present their objections—the bare minimum required by the Due Process Clause. The ABC Affiliates should, at minimum, have been allowed the 30 days prescribed by the Commission's own rule for response, and, given the belated production of documents from the Commission after issuance of the *Notice*, that 30 days should not begin to run until after the Commission's complete production of the underlying complaints.

D. The Deficiencies in the *Notice* Deprive the ABC Affiliates of Due Process

"[W]hen notice is a person's due, process which is a mere gesture is not due process."[19] The belated "notice" and the unusually truncated period for response given the ABC Affiliates, however, combine to provide "process" that is little more than a mere gesture as the Commission

[19] *Mullane*, 339 U.S. at 315.

hurries toward the issuance of an order of forfeiture that will not be rendered unenforceable by the statute of limitations. The *Notice* requires the ABC Affiliates to respond to charges arising from a broadcast that occurred nearly five years ago, with less than a week to analyze the "numerous" complaints that supposedly prompted the *Notice*, and in a period of time remarkably shorter than that uniformly allowed to other licensees and described as presumptively reasonable by the Commission's own rules.

The timing of the *Notice* and the required response is plainly infirm in light of the three-factor test set out in *Mathews v. Eldridge*. *First*, the private interests that stand to be affected by the Commission's actions are undeniably significant: Because the Commission seeks the statutory maximum penalty against each of the named Affiliates and the two O&Os, the total monetary forfeiture at issue exceeds $1.4 million. *Second*, the risk of an erroneous deprivation is significant in light of the truncated period of time allowed for the ABC Affiliates to investigate the facts, review the underlying complaints, and construct a full response. Additional procedural safeguards would have obvious value: At minimum, allowing the ABC Affiliates the full 30 days for response prescribed by the Commission's own rules would at least begin to ameliorate the serious harms occasioned by the Commission's truncated notice-and-response period. *Third*, and finally, the Commission can hardly claim that additional procedural safeguards would be burdensome, as this appears to be the *only* case in which the Commission has coupled a foreshortened period for response with a remarkably delayed *Notice*. The only "burden" the Commission could fairly claim is a burden of its own creation: the prospect that an order of forfeiture issued after February 25, 2008, will be judicially unenforceable in light of 28 U.S.C. § 2462. But that "burden" only serves to highlight the lack of due process afforded here.

What the ABC Affiliates request is nothing more than the full "process" allowed to every other licensee under the Commission's own rules and practice. Anything less is a deprivation of

the Affiliates' fundamental rights to due process.

III. Because the Complaints Are Not from *Bona Fide* Viewers, the *Notice* Should Be Rescinded

The *Notice* asserts that "we propose forfeitures against only those licensees whose broadcasts of the material between 6 a.m. and 10 p.m. were actually the subject of viewer complaints to the Commission." *Notice*, ¶ 19. However, the *Notice* failed to contain copies (or even summaries) of any of the complaints allegedly filed against any of the ABC Affiliates. Accordingly, the *Notice* fails to comply with Section 1.80(f)(1)(ii) of the Commission's rules which requires that any NAL "will" "[s]et forth the nature of the act or omission charged against the respondent and the *facts* upon which such charge is based." 47 C.F.R. § 1.80(f)(1)(ii) (emphasis added). Moreover, the *Notice*'s conclusory statement is inconsistent with the "restrained" approach to indecency enforcement mandated by both the Constitution and the Commission's own established policy.[20]

In the *Omnibus Remand Order*, the Commission established a policy of only processing indecency complaints from *bona fide* in-market or over-the-air viewers of the complained-of material. Thus, the Commission required that there be something

> in the record either to tie the complaints to [the station's] local viewing area (or the local viewing area of any station where the material was aired outside of the safe harbor), or to suggest that the broadcast programming at issue was the subject of complaints from anyone who viewed the programming on any station that aired the material outside of the safe harbor.

Omnibus Remand Order, ¶ 75.

As the Commission also correctly held in the *Omnibus Remand Order*, determining "the

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[20] *See Omnibus Order*, ¶¶ 32, 42, 86; *Omnibus Remand Order*, ¶¶ 74-77.

sufficiency of a complaint is the *first* step rather than the *last* step in the Commission's analysis." *Omnibus Remand Order*, ¶ 77 (emphases added). Yet the Commission has effectively made this critical "first step" the "last step" in this case. Counsel for the ABC Television Affiliates Association, on the next business day following the Friday afternoon release of the *Notice* on January 25, 2008, asked the Commission's General Counsel for copies of all of the complaints on which the *Notice* relies. When copies of such complaints were not forthcoming, counsel for many ABC Affiliates submitted that same request in writing to the Commission's General Counsel.[21] And when that request, too, appeared to be ignored, counsel for various ABC Affiliates submitted individual Freedom of Information Act requests, *see* 5 U.S.C. § 552, on a station-by-station basis, for copies of the complaints.

It was not until the evening of February 4, 2008, 10 days after the *Notice* was released and just 7 days before responses to the *Notice* were due, that copies of complaints began to trickle out to ABC Affiliates pursuant to their FOIA requests or, in a few instances, informal letter requests. As of this writing, not all of the FOIA requests have been acted upon by the Commission, and the ABC Affiliates have not received the alleged complaints with respect to 8 of the 50 ABC Affiliate stations (KFBB-TV, Great Falls, Montana; KODE-TV, Joplin, Missouri; KQTV(TV), St. Joseph, Missouri; KSPR(TV), Springfield, Missouri; KTKA-TV, Topeka, Kansas; WAAY-TV, Huntsville, Alabama; WDHN(TV), Dothan, Alabama; and WKDH(TV), Houston, Mississippi). With respect to these 8 stations, then, there still remains no evidence whatsoever that any complaint, of whatever nature, was ever filed against these stations pertaining to the *NYPD Blue* episode in question. Each of these stations reserves the right to

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[21] *See, e.g.*, Letter from Wade H. Hargrove to Matthew Berry, General Counsel (Jan. 30, 2008).

object further, or to otherwise supplement this Opposition, if and when the Commission should ever produce the complaints against those stations on which the *Notice* purports to rely.

As to the complaints the Commission did produce, however, those complaints, with one questionable exception, are not *bona fide* complaints from actual viewers of the *NYPD Blue* episode on the stations in question.

Instead, the complaints are form complaints all generated by a project of the advocacy group American Family Association ("AFA"), variously called OneMillionDads.com, OneMillionMoms.com, and OneMillionYouth.com. Each of the complaints contains these two identical sentences: "On February 25, ABC affiliate stations aired NYPD BLUE. In the program, a young boy was exposed to full adult female nudity." Not a single one of these form complaints states that the complainant actually watched the episode in question. Not a single one of these form complaints states that the complainant watched the episode on the ABC Affiliate being cited. Not a single one of these form complaints provides a physical address to match the complainant with a television market and an ABC Affiliate. With respect to the first batch of complaints produced in response to the ABC Affiliates' requests, not a single one of the form complaints was dated, but with respect to the second batch of complaints produced in response to the ABC Affiliates' requests, which were dated, [22] not a single one of the form complaints was

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[22] The Commission explained to various ABC Affiliates' counsel in emails that the first batch was produced from a database (Access) while the second batch was taken directly from the email program in which they were received (Outlook). Although the two batches are purported to match up, there are several discrepancies. The complaints from the first batch are attached hereto in Exhibit 1; the complaints from the second batch are attached hereto in Exhibit 2. The Bates-stamped numbers of the two exhibits correspond except the suffix "a" is appended to the complaints in Exhibit 2. There is one complaint in Exhibit 1 against Station KMGH-TV, Denver, Colorado, for which no corresponding complaint in Exhibit 2 was produced. *See* Exhibit 1 at 000126. With respect to Station KATV-TV, Little Rock, Arkansas, the Commission produced an alleged response to an email from the Commission, but there is no corresponding original complaint nor is there a corresponding dated complaint. *See* Exhibit 1 at 000023. In (continued . . .)

proximate in time to the actual broadcast.

Particularly interesting is that not a single one of these complaints actually complains about the televised nudity, let alone about the depiction of buttocks in the episode. Instead, the form complaints complain that the boy in the scene was exposed to "full adult female nudity." The thrust of the complaints, then, goes to the *studio* exposure of a child actor to adult nudity. That issue was, however, fully rebutted by ABC in its response to the Commission's letter of inquiry where it explained that, during the filming of the episode, the actress's nipples, areolas, and pubic areas were covered by opaque material so that potentially offensive body parts were obscured from the child actor's view.[23] In any event, the labor practices of television studios are subject to state labor laws and are beyond the purview of the Commission.[24]

(. . . continued)
addition, with respect to the one complaint the Commission provided against Station KVIA-TV, El Paso, Texas, the subject lines do not match up, so these are not the same complaints. *Compare* Exhibit 1 at 000086 *with* Exhibit 2 at 000086a. With respect to Station KOTA-TV, Rapid City, South Dakota, the Commission provided two identical complaints in its first batch, *compare* Exhibit 1 at 000114-000115 *with* Exhibit 1 at 000116-000117, but in its second batch the Commission provided two different complaints, *compare* Exhibit 2 at 000114a *with* Exhibit 2 at 000116a, only the first of which apparently corresponds with the complaint from the first batch, *compare* Exhibit 1 at 000114 *with* Exhibit 2 at 000114a. These various discrepancies suggest that the Commission has been unable to associate a particular complaint with a particular station, which, of course, calls into the question the *bona fides* of the complaints.

[23] *See* Letter from John W. Zucker and Susan L. Fox to William D. Freedman (Feb. 17, 2004), at 6.

[24] The one complaint that varies from the other form complaints was filed against Station KMGH-TV, Denver, Colorado. However, that complaint, too, objects to "a full nude display of a woman being viewed by a 6 year-old boy." It does not complain about the televised depiction of buttocks in the program. Exhibit 1 at 000126. Moreover, that complaint is undated and the Commission failed to produce a dated version—the only one for which it failed to do so—so there is no evidence that this particular complaint was filed in proximity to the broadcast of the program and was not simply prompted by the AFA campaign. Furthermore, the complainant never states whether he or she actually viewed the episode at all or viewed the episode on KMGH. For the same reasons the more obviously form complaints fail, this complaint likewise is ultimately defective.

That the form complaints themselves provide no evidence of their *bona fides* is hardly surprising. The OneMillionDads.com and OneMillionMoms.com websites explain their *modus operandi* as follows:

> Here's how the One Million Dads [Moms] Campaign works. It is free to join and does not require a large investment of time.
>
> - We contact you, via e-mail, with information about a particular target (TV network, sponsor, or station), giving you a link to a "take action" page on the website.
>
> - Following instructions on the page, you e-mail the responsible party voicing your concern. . . .
>
> That's all there is to it![25]

The websites' FAQs provide this additional information:

> Basically, the campaign works like this:
>
> 1. A concerned parent registers to join OMD [OMM]. They will begin receiving an average of one e-mail per week alerting them to an action that needs to be taken.
>
> 2. The "e-activist" clicks on a link in the e-mail which takes them to an action page where they either use a default letter provided, edit the letter to their taste, or write a letter that more personally reflects their views. They fill-in their name and e-mail address, and submit the letter.
>
> 3. The letter is sent via e-mail to a list of relevant decision-makers.[26]

In other words, the AFA tells the purported complainants what to complain about, drafts the

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[25] OneMillionDads.com, How the Campaign Works, *available at* <http://onemilliondads.com/works.asp>; OneMillionMoms.com, How the Campaign Works, *available at* <http://onemillionmoms.com/works.asp>.

[26] OneMillionDads.com, Frequently Asked Questions, *available at* <http://onemilliondads.com/faq.asp>; OneMillionMoms.com, Frequently Asked Questions, *available at* <http://onemillionmoms.com/faq.asp>.

complaint for them, and sends it to the Commission on their behalf. There is no requirement that the purported complainant actually have watched the show on any particular station. The only "investment of time" is filling in a name and email address and pressing "send." Why actually bother watching television and being "offended" when someone else will watch for you and be "offended" on your behalf?

Apparently recognizing the utter insufficiency of every one of these form complaints, the Commission sent every one of these form complainants an email seeking additional information. This email was not sent until December 29, 2005, 34 months after the *NYPD Blue* episode aired (and 22 months after ABC had already responded to the Commission's letter of inquiry). Although not a single complainant stated that he or she had actually watched the program on a particular station, the Commission's email stated that "we would like to obtain information concerning the station on which you saw this program" and asked for the call letters or city or town "in which the station you watched is located." This is a leading question, and an objection would be lodged and sustained in any evidentiary proceeding—certainly the ABC Affiliates object here. Notably, the Commission did *not* ask "Did you watch the *NYPD Blue* episode? If so, which station did you watch it on?" Consequently, not a single one of these form complaints should be admissible in this proceeding.

In marked contrast to the Commission's communications with the purported complainants, at no point prior to the *Notice* did the Commission communicate with the affected ABC Affiliates or provide them copies of the complaints. Indeed, it was not until the *Notice* itself that the Commission ever informed the ABC Affiliates that it was considering any action against them or even that a complaint had been filed against them.

This matter is not trivial. Indeed, the nature of the complaints and of the Commission's leading email seeking to cure their deficiencies is critical. For reasons analogous to standing

requirements, the Commission may proceed only with an indecency complaint that alleges a sufficient *prima facie* case, namely, that the complainant resides in the station's market and actually viewed the program material in issue on the subject station. Stations, in turn, must be given the opportunity to evaluate the *bona fides* of any complaint in order to determine its sufficiency, as a matter of law, to trigger the enforcement process. Indeed, hornbook law in the Article III standing context, *see Sierra Club v. EPA*, 292 F.3d 895, 898-901 (D.C. Cir. 2002), requires parties to provide affirmative evidence of standing prior to reaching the merits. Failure to provide such evidence as early in the process as possible, even if facts sufficient ultimately to demonstrate standing exist, prevents the parties from reaching the merits. *See id.*[27] Here, of course, the Commission found the ABC Affiliates apparently liable for broadcasting indecent material without ever providing *bona fide* complaints, let alone providing them sufficiently early in the process.

The need to apply similar threshold limitations in the indecency enforcement context, particularly given the significant First Amendment implications of substantive indecency regulation, is manifest. Just as the necessary limitations on standing are "a means of protecting the integrity of the federal judiciary, our tripartite system of coequal branches, and the interests

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[27] Limitations on standing require a party to demonstrate: (1) the existence of an injury in fact that is (2) fairly traceable to the challenged action and (3) likely to be redressed by the requested relief. *See KERM, Inc. v. FCC*, 353 F.3d 57, 58 (D.C. Cir. 2004) (holding that a petitioner who failed to allege a particularized injury lacked standing). These limitations are based, in part, on the principle that courts should not become "an open forum for the resolution of political or ideological disputes." *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring). Standing limitations are also based, in part, upon the notion that courts should not resolve controversies "on the basis of the rights of third persons not parties to the litigation . . . [because] it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not." *Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976).

of individuals,"[28] the Commission's own limitations on indecency enforcement are a necessary means of protecting the integrity of the Constitution, the Commission's indecency regime, the good faith programming judgments of broadcast licensees, and the interests of viewers. The important limitations on the Commission's indecency enforcement authority require first and foremost that enforcement follows only upon a showing by the Commission of a complaint that sets forth the requisite *prima facie* case. Such a showing necessarily includes the opportunity—an opportunity that has been woefully inadequate here—for a station threatened with forfeiture to evaluate the sufficiency of the complaints against it.

That opportunity has proven critical in prior enforcement actions. Significantly, the Commission's decision with respect to Station KMBC-TV in the *Omnibus Remand Order* was premised on the Commission's having provided the station with copies of the complaints against the station as part of a letter of inquiry that was issued after the issuance of the initial notice of apparent liability in the *Omnibus Order* (and after a Commission-requested remand from the Second Circuit). When the station had the opportunity, for the first time, to review the sufficiency of those complaints and to address their obvious deficiencies, it was able to argue successfully the threshold issue of viewer "standing" and the insufficiency of the complaints. Those complaints, like the form complaints here, were the result of an advocacy group and contained no allegation that the complainant had actually watched the complained-of programs (also episodes of *NYPD Blue* from the same television season) on KMBC-TV.

The result with respect to Station KMBC-TV in the *Omnibus Remand Order* was compelled by prudential considerations with standing-like characteristics. It follows from these standing-like requirements that the Commission can enforce its indecency restrictions only after

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[28] *American Legal Found. v. FCC*, 808 F.2d 84, 88 (D.C. Cir. 1987).

a station is provided *evidence* that (and an adequate opportunity to evaluate whether) a complaint meeting the *Omnibus Remand Order* standard has been filed with the Commission. Such a complaint must contain evidence of "sufficient detail and context"[29] to corroborate that the station broadcast the material and, of dispositive significance here, that *the complainant actually viewed the material on that station.* Absent such a showing, the Commission should decline to process the complaint.[30] Since the Commission has failed to produce any such evidence in this matter, the *Notice* should be rescinded.[31]

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[29] *See Infinity Broadcasting Corp. of Los Angeles, Licensee of Station KROQ-FM*, 17 FCC Rcd 9892 (2002) ("*KROQ-FM*"), Separate Statement of Commissioner Martin.

[30] *See Omnibus Remand Order*, ¶ 76 ("In addition to demonstrating appropriate restraint in light of First Amendment values, this enforcement policy preserves limited Commission resources, while still vindicating the interests of local residents who are directly affected by a station's airing of indecent and profane material."). As the *Omnibus Remand Order* acknowledges, restraint in enforcement is particularly important in the indecency context where the Commission's regulatory authority is cabined by constitutional limitations. Critical to *Pacifica* is the unique and pervasive nature of the broadcast medium that may "confront the citizen . . . in the privacy of the home," *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978). Consequently, the indecency regime fails as a *constitutional* matter if the Commission uses complaints generated by out-of-market advocacy groups to trigger enforcement action. Distant complainants are not "confronted" by a distant station's programming "in the privacy of the home," but rather out-of-market complainants must take active and deliberate steps to reach out beyond their own home and market *to expose themselves* to allegedly indecent material. In dismissing the indecency complaint against Station KMBC-TV in November 2006, the Commission recognized this principle in the *Omnibus Remand Order.*

[31] To be clear, the ABC Affiliates are not asserting that there are specific Article III standing limitations on the Commission's indecency enforcement authority. Rather, because the Constitution requires a restrained approach to indecency enforcement, as acknowledged in *Pacifica*—a restraint that, in part, serves and is built upon principles similar to standing—the "more limited approach" announced in the *Omnibus Order*, and reaffirmed in the *Omnibus Remand Order*, serves as the functional equivalent of standing in indecency complaint cases. This restrained approach is also consistent with the fact that the Commission has never asserted that its indecency regime should be enforced by individual members of the agency *sua sponte.* Consequently, the Commission may not issue an NAL, which represents the penultimate step of the indecency enforcement process, without first demonstrating that the complaints upon which the NAL relies were made by a *bona fide* in-market or over-the-air viewer of the complained-of material on the station in question. In this case, there is no evidence that the form complaints

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Even when the form complaints are considered with the "answers" provided to the Commission's leading follow-up email, the deficiencies under the standard set forth in the *Omnibus Remand Order* are manifest. The vast majority of the "answers" simply provide the call sign of the complainant's local ABC affiliate. They do not assert that the complainant actually watched the *NYPD Blue* episode on that station. A number of the "answers" make clear that they are doing nothing but naming the local ABC affiliate or observing that the local ABC affiliate "carries" *NYPD Blue*.[32] Still others make it clear that the Commission's delay in its "investigation" has led the complainants to forget and to *guess* at the station in question.[33] In

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(. . . continued)
filed against any of the ABC Affiliates make out such a *prima facie* case.

[32] *See, e.g.*, Exhibit 1 at 000010 ("The ABC Affiliate in Tulsa, OK is KTUL-TV."); 000012 ("The local ABC channel is KATV Channel 7 in Little Rock, Arkansas."); 000016 ("The ABC TV station here in Little Rock is 7/KATV."); 000031 ("The call letters of the ABC station in Jackson, MS are WAPT."); 000043 ("Our ABC affiliate is WKOW-TV in Madison, WI."); 000045 ("KOCO-TV carries the program."); 000057 ("The call letters for my local station are WKRN located in Nashville, TN."); 000061 ("Our ABC affiliate is WKRN, Nashville TN."); 000067 ("The Local ABC affiliate is WSIL tv Harrisburg, Il."); 000083 ("I live in Savannah, TN, so the station that I would have watched it on would have been WBBJ-TV 7, Jackson, TN. It came on ABC, and this is our ABC channel."); 000113 ("NYPD Blue is televised on KETV here in Omaha, Nebraska."); 000123 ("The call letters of the ABC station are KATC – i live in Lafayette, La."); 000125 ("My ABC station is KATC Lafayette, La."); 000136 ("The local ABC affiliate is: KXXV-TV."); 000140 ("The local ABC affiliate is KXXV-TV . . . ."); 000142 ("KXXV TV 25, Waco, TX is an affiliate of the ABC television network."); 000183 ("The call letters of the local ABC is KAKE TV and is located in Wichita, KS."); 000187 ("Our local ABC station is KAKE-TV in Wichita, KS."); 000189 ("This episode of NYPD Blue was on February 25, 2005 [sic] on the ABC network. The call letters of my local ABC affiliate are: KAKE-TV, Wichita, Kansas."); 000221 ("WGNO is our local ABC station in the New Orleans area."); 000231 ("The ABC affiliate in my area is KLAX 31 in Alexandria, LA."); 000235 ("Our local ABC affiliate is KBMT – TV 12.").

[33] *See, e.g.*, Exhibit 1 at 000041 ("I'm sorry but I don't have the information you are asking about. I believe it was on ABC which is WKOW tv in Madison Wisconsin."); 000059 ("I believe it was on WKRN TV – Nashville, TN If I was not here at that time, I cannot tell you which station. The wheels of your division move slowly it seems."); 000063 ("I believe the call letters of the Station are WKRN."); 000077 ("I believe the call letters of the station that the NYPD Blue episode was on is WSIL-TV."); 000091 ("I do not recall specifically, from two
(continued . . .)

other cases, the complainants state that they may not have or cannot remember having watched the show.[34] And, since none of the form complaints contains physical addresses (even just the towns, so there is no danger of jeopardizing the complainant's personal privacy) or such addresses were redacted by the Commission, there is no evidence that these complainants even could have viewed the *NYPD Blue* episode on the station they name—just as the complainant in the *Omnibus Remand Order* named a station (KMBC-TV) that she could not physically have viewed.

(. . . continued)
years ago, regarding the channel I saw it on. The local ABC affiliate is KATC in Lafayette, LA. The only other ABC station that covers this market is WBRZ out of Baton Rouge, LA. It would have been one of the two stations."); 000093 ("Well whoop-dee-doo, The FCC is chasing dead horses. After nearly 3 years you are asking for information that if needed now should have also been needed in March 2003. To the best of my knowledge ABC was the broadcaster, and local stations WBRZ, Baton Rouge, LA and KATC, Lafayette, LA are ABC's affiliates[.]"); 000095 ("I'm sorry but I cannot rembert [sic] the call station, I think possibly wxow tv?"); 000101 ("I think that it was aired on KTBS Channel 3 in Shreveport, Louisiana."); 000105 ("To the best of my knowledge it was KMBZ-ABC."); 000128 ("In regard to your question about which station we watched the NYPD Blue incident, I'll have to admit I am having a difficult time with which channel it was. I believe it could have been on channel 7, in Denver. Call letters for that station would be KMGH-TV the ABC affiliate."); 000138 ("I think it was kxxv channel 25, waco texas."); 000166 ("Wow, it's been so long I can hardly remember the complaint. But to answer your question, it would have been KVUE-TV Channel 24 in Austin, Texas."); 000178 ("I believe it was KCRG – TV 9, our ABC affiliate."); 000191 ("I believe this episode was broadcasted on KAKE-TV."); 000218 ("This complaint must have been so long ago & so much has happened in this world since this apparently that i have really forgot even making the complaint though i do often try to use my voice to make a difference in this world & to be helpful when & where i can. Was this done thru your website or an email? I am wondering if i see a copy of the complaint, it will jog my memory. I do believe the call letters for the station this show plays on here is 'KNXV-TV' which would be Channel 15/ABC."); 000237 ("Though it has been some time ago, the station would have been the ABC affiliate in Pensacola, FL. I believe the call letters are WEAR-TV.").

[34] *See, e.g.*, Exhibit 1 at 000109 ("We do not generally watch this program, so I am not quite sure of the actual station it was on. Our local ABC station is KHOG."); 000174 ("This was quite some time ago and if I was watching the show it would have been on: WDAY-TV Fargo, ND."); 000195 ("Although I don't remember the particular program. My ABC affiliate is KAKE-TV in Wichita, KS.").

Even were the Commission to accept the *bona fides* of the complaints/"answers" that name particular stations, in several cases the complainants could not definitively name the station, and, in several such cases, those were the *only* complaints. Surely that "evidence" must be insufficient to satisfy the *Omnibus Remand Order* standard, and the *Notice* should be rescinded on that ground alone with respect to those licensees.

Thus, for example, with respect to Station WBRZ-TV, Baton Rouge, Louisiana, the Commission produced two complaints against the Station, but neither of them state definitively that the complainant saw the *NYPD Blue* episode on that Station rather than on a different station, and, in fact, one of the complainant's address is in Lafayette, Louisiana, which is in a different DMA. *See* Exhibit 1 at 000091 ("I do not recall specifically, from two years ago, regarding the channel I saw it on. The local ABC affiliate is KATC in Lafayette, LA. The only other ABC station that covers this market is WBRZ out of Baton Rouge, LA. It would have been one of the two stations."); 000093 ("Well whoop-dee-doo, The FCC is chasing dead horses. After nearly 3 years you are asking for information that if needed now should have also been needed in March 2003. To the best of my knowledge ABC was the broadcaster, and local stations WBRZ, Baton Rouge, LA and KATC, Lafayette, LA are ABC's affiliates[.]"). Therefore, there is no basis whatsoever for proceeding against WBRZ-TV.[35]

With respect to Station WXOW-TV, La Crosse, Wisconsin, the Commission produced just one complaint against the Station, but that complainant could not remember the station and wondered whether it was "possibly" WXOW. *See* Exhibit 1 at 000095 ("I'm sorry but I cannot rembert [sic] the call station, I think possibly wxow tv?"). Therefore, there is no basis

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[35] Given these complainants' confusion, these complaints cannot be deemed to lie against KATC(TV), Lafayette, Louisiana, either.

whatsoever for proceeding against WXOW-TV.

With respect to Station KMBC-TV, Kansas City, Missouri, the Commission produced just one complaint against the Station, but that complainant identified the station as KMBZ, with no community of license and which may or may not be KMBC. *See* Exhibit 1 at 000105 ("To the best of my knowledge it was KMBZ-ABC."). Therefore, there is no basis whatsoever for proceeding against KMBC-TV.

With respect to Station KHOG-TV, Fayetteville, Arkansas, the Commission produced just one complaint against the Station, but that complainant really did not watch *NYPD Blue*, let alone the episode in question, and only fingered KHOG because it is the local ABC affiliate. *See* Exhibit 1 at 000109 ("We do not generally watch this program, so I am not quite sure of the actual station it was on. Our local ABC station is KHOG."). Therefore, there is no basis whatsoever for proceeding against KHOG-TV.

With respect to Station WDAY-TV, Fargo, North Dakota, the Commission produced just one complaint against the Station, but that complainant could not state that he had viewed the episode and named WDAY because it is the local ABC affiliate. *See* Exhibit 1 at 000174 ("This was quite some time ago and if I was watching the show it would have been on: WDAY-TV Fargo, ND."). Therefore, there is no basis whatsoever for proceeding against WDAY-TV.

With respect to all of the stations there is another, particularly compelling reason to reject the *bona fides* of any of the complaints: Each of the form complaints, on its face, demonstrates that it is not a genuine complaint about the broadcast of the *NYPD Blue* episode. Not a single one of them is dated in any proximity to the actual broadcast date (February 25, 2003). In fact, the earliest complaint is dated July 8, 2003,[36] nearly 4 1/2 months after the broadcast date, and

[36] *See* Exhibit 2 at 000005a.

the latest complaint is dated April 22, 2005,[37] more than two full years after the broadcast date.[38] This lack of contemporaneity is damning evidence that none of these complainants actually viewed the *NYPD Blue* episode on the cited stations, were offended, and filed a *bona fide* complaint with the Commission. Instead, these form complaints are nothing but ginned-up diatribes initiated by a special interest advocacy group long after the broadcast of the program and submitted by individuals who were willing to speak the words that others put in their mouths. What's next? Will ABC Affiliates be forced to oppose an NAL issued with respect to their broadcast of the nudity depicted in *Roots* in 1977?[39]

It could hardly be plainer that the "sufficient detail and context"[40] necessary to corroborate that the station broadcast the material and that the complainant actually viewed the material on that station are simply absent here. The Commission cannot satisfy its own threshold requirement pursuant to the *Omnibus Remand Order*. Because the Commission has ignored its own policy and has trampled upon the restrained approach to indecency enforcement that is mandated by the First Amendment, the *Notice* should be rescinded.

IV. The Fleeting Depiction of Buttocks in *NYPD Blue* Is Not Indecent Under the Commission's Standards

A. Buttocks Are Not Sexual or Excretory Organs

The Commission has defined indecency as "language or material that, in context, depicts

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[37] *See* Exhibit 2 at 000143a.

[38] The majority of the form complaints appear to be dated in the Fall of 2003 (September through November) and Winter of 2004 (December through February). *See generally* Exhibit 2.

[39] Incidentally, it bears observing that *Roots* was in the consciousness of America when the Supreme Court issued its decision in *Pacifica*.

[40] *See KROQ-FM*, Separate Statement of Commissioner Martin.

or describes in terms patently offensive, as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999 (2001) ("*Policy Statement*"), ¶ 4. To be considered indecent, broadcast material must meet two requirements: (1) the material must depict or describe *sexual or excretory activities or organs*, and (2) the material must be *patently offensive* as measured by contemporary community standards for broadcasting. *See id.*, ¶¶ 7-8.

The *Notice* states that the *NYPD Blue* episode satisfies the first requirement "because it depicts sexual organs and excretory organs—specifically an adult woman's buttocks." *Notice*, ¶ 11.[41] However, buttocks are neither sexual organs nor excretory organs. The first prong of the Commission's indecency inquiry cannot be satisfied, and the matter should end there.

The buttocks, by common definition, are

> Either of the two rounded prominences on the human torso that are posterior to the hips and formed by the gluteal muscles and underlying structures.

AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 262 (3d ed. 1996). Anatomically, the buttocks are muscular and are classified as part of the muscular system. Standard anatomy texts describe the region as follows:

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[41] In finding the ABC Affiliates apparently liable for broadcasting indecent material, the *Notice* does not rely on any alleged depiction of sexual activities or excretory activities. The scene, of course, does not depict any sexual activities or excretory activities or even any innuendo concerning any such activities. Nor does the *Notice* rely on the very brief depiction of "[o]nly a small portion of the side of one of her breasts." *Notice*, ¶ 9. Previously, the Commission has found that the depiction of the side of a breast, while a female was undressing, but without a nipple being exposed, is not patently offensive. *See Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, 20 FCC Rcd 1920 (2005), ¶ 6. As the *NYPD Blue* scene contains no view of a female nipple or areola, and there is no suggestion of sexual or excretory activities, it cannot be patently offensive.

> The gluteal region of the body is an area of morphological transition over the posterior surface of the hip bone, between the posterolateral aspect of the trunk and the back of the thigh. It is given the characteristic rounded form, termed the *buttock(s)*, because of a mass of muscles which course laterally and downward over the posterior aspect of the hip joint to attachments on the upper part of the femur.

W.D. Gardner & W.A. Osburn, ANATOMY OF THE HUMAN BODY 223-25 (3d ed. 1978) (emphasis in original). The gluteus maximus muscle, which superficially forms the buttock, permits the extension of the thigh at the hip joint; if the leg is fixed, it extends the pelvis and trunk in trunk movements; and it acts as a lateral rotator of the thigh at the hip joint. *Id.* at 224. As explained in another standard anatomy text:

> Gluteus Maximus is an extensor of the hip joint but it is used only when the joint has to be extended with power, e.g., against the weight of the body (gravity). It is used, therefore, in rising from a sitting or stooped position, climbing a hill, or going upstairs; it is used in running but not in walking on the level. The muscle is also a powerful lateral rotator of the extended thigh though it loses this power if the thigh is flexed.

J.V. Basmajian, PRIMARY ANATOMY 183 (6th ed. 1970). It is clear that the buttocks have no sexual or excretory function.

In contrast, the sexual organs are biologically defined as follows:

> **sex (sexual) organs** The genitalia or reproductive organs that make possible the union of ovum and sperm. In the female, the external female sex organs are the vulva, major and minor labia, clitoris, and vagina. The internal female sex organs are the two ovaries, the uterus, and the paired fallopian tubes. The external male sex organs are the penis and the scrotum containing two testes. The internal male sex organs are the paired *vasa deferentia*, seminal vesicles, ejaculatory ducts, spermatic cords, prostate gland, Cowper's glands, and urethra.

R.T. Francouer, COMPLETE DICTIONARY OF SEXOLOGY 588 (2d ed. 1995). *See also* S.A. Sanders, *Human Sexuality*, ENCARTA ENCYCLOPEDIA, *available at* <http://encarta.msn.com/text_761580700___0/Human_Sexuality.html> (external genitalia of

women, the vulva, includes the *mons pubis*, *labia majora*, and *labia minora*; "external sex organs of men are the penis and scrotum"); W.D. Gardner & W.A. Osburn, ANATOMY OF THE HUMAN BODY 502 (external female genital organs and structures are *mons pubis*, *labia majora*, pudendal cleft, *labia minora*, vestibule of the vagina, and clitoris); W.H. Mason & N.L. Marshall, HUMAN SIDE OF BIOLOGY 564-65 (2d ed. 1987) (female external genitalia, usually referred to as the vulva, collectively comprise the *labia majora*, *labia minora*, and clitoris). It is obvious that buttocks are not a sexual organ.

There are a variety of different organs and structures that comprise the excretory system in humans. The most significant of these, for purposes of this proceeding, are the kidneys and urinary system, which includes ureters leading from the kidneys to the urinary bladder and the urethra, a channel that drains urine from the bladder and which empties in females in the urogenital sinus or vestibule and extends through the penis in males.[42] *See* Gordon Alexander, GENERAL BIOLOGY 203-04 (2d ed. 1962); *see also* N.A. Campbell, BIOLOGY 882 (2d ed. 1990) (discussing kidneys, ureters, urinary bladder, and urethra "which empties near the vagina of females or through the penis of males"); W.H. Mason & N.L. Marshall, HUMAN SIDE OF BIOLOGY 428-35 (discussing structure and function of excretory system); *id.* at 565, Fig. 23-3 (illustrating the "separate openings of the excretory [urethral orifice] and reproductive [vaginal orifice] systems"). The only external organs or structures of the excretory system are the penis, in males, and the urethral opening, in females, which appears between the walls of the labia.

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[42] Other excretory organs include the lungs, which excrete carbon dioxide; the liver, which excretes hemoglobin breakdown products; the intestine, which excretes certain heavy metals; and the skin, which excretes perspiration (a solution of water, salt, and some urea). *See* S.S. Mader, INQUIRY INTO LIFE 292-94 (5th ed. 1988). The ABC Affiliates do not believe the Commission intends, nor has the authority, to proscribe depictions of skin as an excretory organ, and, accordingly, nothing further will be said concerning the matter.

Buttocks are not excretory organs.

As one authority observes:

> At this point, it might be helpful to remember that the term *defecation*, and not *excretion*, is used to refer to the elimination of feces from the body. Substances that are excreted are waste products of metabolism. Undigested food and bacteria, which make up feces, have never been a part of the functioning of the body, but salts that are passed into the gut are excretory substances because they were once metabolites of the body.

S.S. Mader, INQUIRY INTO LIFE 294 (emphases in original). The lower end of the digestive tract, which eliminates solid wastes, terminates in the anus. The buttocks are not an organ or structure of the digestive system, either. Because there is no allegation, nor can there be, that the *NYPD Blue* scene depicts the anus, it is not necessary to consider whether the anus should or should not be considered an excretory organ or structure.

The *Notice* rejected ABC's argument that buttocks are neither sexual nor excretory organs, but that rejection offered no scientific, lexicographic, or factual basis, which, as demonstrated above, it would be impossible to do. Instead, the *Notice* contends that "case law" and "common sense" support its finding that buttocks are sexual organs, citing two cases. These cases, however, do not support—and, in fact, refute—the Commission's claim that buttocks are sexual (or excretory) organs.[43]

The first of these two cases, *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), involved a constitutional challenge to a local ordinance prohibiting a person from knowingly or intentionally "appear[ing] in a state of nudity" in a public place. In ruling the ordinance passed constitutional muster, the U.S. Supreme Court did not construe the term "sexual organ" or

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[43] In its *Omnibus Order*, the Commission relied upon the same two cases in support of its finding that video footage of an infant child's bare buttocks "depicts both excretory and sexual organs." *Omnibus Order*, ¶ 225 n.285.

"excretory organ," nor did it decide whether buttocks constitute sexual or excretory organs. Significantly, in citing *City of Erie*, the Commission relies on the language of the ordinance at issue rather than on any holding actually reached by the Court. The ordinance defined "nudity" to include, among other things, "the showing of the human male or female genital [sic], pubic area or buttocks with less than a fully opaque covering; the showing of the female breast with less than a fully opaque coverage of any part of the nipple." *City of Erie*, 529 U.S. at 284.[44]

The fact that a particular locale defined "nudity" to include buttocks has no bearing on the question of whether the ABC Affiliates depicted sexual or excretory organs. The measure of a broadcaster's conduct under the Commission's indecency rules has never turned—at least until now—on whether nudity is shown or described. Indeed, nudity can involve the exposure of far more—or far less—than a person's sexual and excretory organs because whether a person is nude does not depend upon the visibility of any particular part of the human body.[45] If the ordinance at issue in *City of Erie* had not specified what states of undress it proscribed, it likely

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[44] The definition of "nudity" in the ordinance reads in full:

> "Nudity" means the showing of the human male or female genital [sic], pubic area or buttocks with less than a fully opaque covering; the showing of the female breast with less than a fully opaque coverage of any part of the nipple; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and give the realistic appearance of nipples and/or areola.

City of Erie, 529 U.S. at 284.

[45] *See* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1241 (defining "nude" to mean "being without clothing; naked").

would have been constitutionally infirm.[46]

Moreover, the very language of the ordinance demonstrates that buttocks are not genitals, a term synonymous with external sexual organs. If buttocks were genitals, it would have been unnecessary for the City of Erie to include buttocks in its definition of nudity because it had already included the word "genital" [sic].[47] To conclude otherwise would render the city's inclusion of buttocks in its definition superfluous and thus would offend a familiar canon of statutory construction. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (recognizing the "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant" and holding that "[w]e are reluctant to treat statutory terms as surplusage in any setting, and we decline to do so here" (quotations and citations omitted)).[48]

Courts have read the terms "sexual organs," "private parts" and "genitals" in a way that

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[46] In *Vaughn v. St. Helena Parish Police Jury*, 192 F. Supp. 2d 562, 574-75 (M.D. La. 2001), *aff'd*, 82 Fed. Appx. 105 (5th Cir. Nov. 11, 2003), for example, the district court issued an order preliminarily enjoining enforcement of a public nudity ban because its failure to define "partial nudity" meant that "only persons donning full body suits are clearly safe from the application of the ordinance" and therefore that the ordinance was impermissibly overbroad.

[47] It is noteworthy that other legislative bodies have chosen not to include buttocks within the definition of nudity. *See, e.g.*, TENN. CODE ANN. § 39-13-511(a)(2)(A) ("'Nudity' or 'state of nudity' means the showing of the bare human male or female genitals or pubic area with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of the areola, or the showing of the covered male genitals in a discernibly turgid state."). This refutes the Commission's implicit suggestion that buttocks are sexual organs because, when exposed, they may fall within the meaning of nudity.

[48] In *Ways v. City of Lincoln*, 274 F.3d 514 (8th Cir. 2001), the Eighth Circuit addressed an ordinance prohibiting sexual contact in business establishments. The ordinance defined "sexual contact" to mean "the intentional touching of a person's sexual organ, buttocks, or breasts, whether covered or not, or kissing, when such contact can reasonably be construed as being for the purpose of sexual arousal or gratification of either party or any observer." *Ways*, 274 F.3d at 516. Again, if the term "buttocks" were subsumed by the more general term "sexual organ," then it would not have been necessary to include the term "buttocks" in the definition.

makes clear that buttocks are not sexual organs because they are not part of the male or female reproductive anatomy. For example, in construing a Texas statute criminalizing sexual assault, the appellate courts of Texas have held that the term "female sexual organ" is a "more general term than 'vagina' and refers to the entire female genitalia, including both vagina and the vulva." *Karnes v. State*, 873 S.W.2d 92, 96 (Tex. Ct. App. 1994); *see also Flowers v. State*, No. 05-00-01523-CR, 2002 WL 31247093 (Tex. Ct. App. Oct. 8, 2002) ("The term 'private parts,' or 'privates' is synonymous with genitals or sexual organ."). Similarly, the Eighth Circuit has held that the posting of a picture of a minor "mooning"—i.e., a picture showing the minor's buttocks—did not constitute an instance of sexual abuse or exploitation under 18 U.S.C. § 2251 because "the partial buttocks exhibited in the mooning picture is not of genitals or of a pubic area." *United States v. Gleich*, 397 F.3d 608, 614 (8th Cir. 2005).

Courts of various jurisdictions have reached similar results in cases construing the reach of public indecency or indecent exposure statutes. For example, Florida's indecency statute forbids any person, among other things, "to expose or exhibit his sexual organs in any public place." FLA. STAT. § 800.03. The appellate courts of Florida have specifically held that the term "sexual organ" does not include buttocks: "No esoteric discussion is required in order to define or describe 'sexual organs,' nor the location thereof on the human anatomy. Suffice to say, that exposure of the pubic hair or buttocks or legs (or all three) does not constitute exposure of the sexual organ." *G & B of Jacksonville, Inc. v. Florida*, 362 So. 2d 951, 956 (Fla. Dist. Ct. App. 1978); *see also Beckham v. Florida*, 934 So. 2d 681, 686 (Fla. Dist. Ct. App. 2006) (holding officers lacked reasonable suspicion to believe defendant's partial exposure of his buttocks amounted to criminal activity, where indecent exposure statute required "'lascivious' exposition

or exhibition of the defendant's sexual organs").[49]

The second case the Commission relies upon in support of its finding that buttocks are sexual organs is equally inapposite. That case involved claims brought by independent producers of television programming against a local cable operator after the cable operator refused to carry several of their programs. *See Loce v. Time Warner Entm't Advance/Newhouse P'ship*, 191 F.3d 256 (2d Cir. 1999). The cable operator rejected the programming as indecent under 47 U.S.C. § 532 and under its own policy, a decision the Second Circuit ultimately upheld as reasonable under the circumstances. The Commission presumably relies upon the *Loce* case because the definition of indecency used by the cable operator tracks that under the Commission's own rules—programming that the cable operator "reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium." *Loce*, 191 F.3d at 260. As the facts of the *Loce* case make clear, however, its holding does not support the Commission's position

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[49] *See also People v. Massicot*, 118 Cal. Rptr. 2d 705 (Cal. Ct. App. 2002) (holding prohibition against exposure of "his person, or private parts thereof" requires exposure of genitals and therefore was not violated by exposure of "bare shoulders, thighs and buttocks"); *Duvallon v. District of Columbia*, 515 A.2d 724 (D.C. 1986) (holding defendant did not violate public indecency statute by baring her buttocks and side of her breast, where statute prohibited "indecent exposure of his or her person," which the court construed to mean human genitalia). *Cf. Driscoll v. Schmidt*, 354 F. Supp. 1225, 1227 (W.D. Wis. 1973) (observing that commentary to Wisconsin Jury Instructions defines "private parts" to mean "the genital or reproductive organs"); *State v. Carter*, 601 P.2d 287 (Ariz. 1979) (holding that the term "private parts" is "limited to the genital and excretory organs"); *Commonwealth v. Arthur*, 650 N.E.2d 787 (Mass. 1995) (holding common-law conception of indecent exposure is limited to the exposure of genitalia); *State v. Fly*, 501 S.E.2d 656 (N.C. 1998) (holding that the term "private parts" means "the external organs of sex and excretion" and noting "our agreement with the conclusion of the majority below that buttocks are not private parts within the meaning of the statute," but concluding on the facts of the case that a reasonable jury could find that defendant had exposed his private parts); *State v. Parenteau*, 55 Ohio Misc. 2d 10 (1990) (holding that the term "private parts" means "genitals" or "external organs of sex").

that buttocks are sexual organs.[50]

The Commission describes the programming at issue in *Loce* as "includ[ing] 'close-up shots of unclothed breasts and buttocks.'" *Notice*, ¶ 11 n.23. The programming at issue here differs significantly from this incomplete description because the *NYPD Blue* episode did not include "close-up shots of unclothed breasts." As the *Notice* concedes, at no point was the nipple or areola of a breast visible; nor could they have been, since, as ABC informed the Commission in its 2004 response to a letter of inquiry, the actress wore opaque fabric over those portions of her body, as well as over her pubic region.[51]

More importantly, the programming in *Loce* included a plethora of sexually explicit images, language, and innuendo and substantial depictions of sexual activity not referenced by the Commission. According to the Second Circuit, one of the programs the cable operator refused to carry featured:

> [S]cenes of women dancing topless, fondling their breasts, pressing their breasts against customers' faces, or simulating acts of sex and masturbation. The episode also contained advertisements for various other nude and topless dance clubs in Syracuse, as well as advertisements for an "escort service" promising "we make house and hotel calls." One or more of the commercials showed women topless, contained lines such as "Bring your hard dicks down here," and depicted a topless woman performing a "lap dance" on [one of the producers of the program].

Loce, 191 F.3d at 260. Thus, the portion of the opinion quoted by the Commission represents just a snippet of the Second Circuit's description of the programming, which reads in full:

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[50] Nor does *Loce* support any notion that buttocks are excretory organs. Although the programs the cable operator refused to carry showed bare buttocks (among other things), the Second Circuit did *not* find that the programming depicted excretory organs. *See Loce*, 191 F.3d at 269.

[51] *See* Letter from John W. Zucker and Susan L. Fox to William D. Freedman (Feb. 17, 2004), at 6.

> Within this framework, the district court properly concluded that there was no genuine issue of fact to be tried as to the reasonableness of Time Warner's rejection of the three LWS episodes in question. "The Best of Lookers" and "The All Black Special" included the scenes described in Part I.B. above, and plaintiffs did not dispute Time Warner's Rule 56 Statement assertion that those episodes contained such features as repeated nudity, including close-up camera shots of unclothed breasts and buttocks; simulated acts of sex and masturbation; advertisements for strip clubs, "escort" services, "1-800" telephone-sex hotlines, and stores selling sexual devices; and double-entendre highly suggestive of sexual acts, as well as repeated use of language such as "tits," "ass," "dick," and "shit." On this record, no rational factfinder could find that Time Warner's belief that "The Best of Lookers" and "The All Black Special" depicted sexual activities or organs in a patently offensive manner as measured by contemporary community standards was not reasonable.

Loce, 191 F.3d at 269.

When understood in context, neither the passage of *Loce* quoted by the Commission nor the holding of *Loce* offers any support for the notion that a brief depiction of a woman's buttocks in a non-sexualized context is indecent or that buttocks are sexual or excretory organs. At the very minimum, the pervasiveness and explicitness of the content considered in *Loce* undermines the Commission's finding of apparent liability in this case. More particularly, the lack of any suggestion in *Loce* or *City of Erie* that buttocks are sexual or excretory organs leaves the Commission without any authority—from case law or otherwise—for its threshold finding that the *NYPD Blue* episode depicted sexual or excretory organs.

Of course, 18 U.S.C. § 1464 is a criminal statute, and the Commission has applied a construction to that statute so that it only reaches "sexual or excretory organs or activities." *Policy Statement*, ¶ 7. But the "rule of lenity" requires that a criminal statute be construed narrowly, even when applied in a noncriminal context.[52] According to that settled rule of

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[52] A statute that has criminal applications is subject to the rule of lenity even when (continued . . .)

construction, to the extent that any ambiguity exists regarding the scope and application of a criminal statute, the ambiguity must be construed against broad application of the statute. *See United States v. Bass*, 404 U.S. 336, 348 (1971) ("where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant"). Narrow construction of criminal statutes is necessary to avoid imposing criminal penalties for conduct that defendants had no fair warning was proscribed:

> Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability.

Liparota v. United States, 471 U.S. 419, 427 (1985); *see also Crandon v. United States*, 494 U.S. 152, 158 (1990) (where "governing standard is set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage"; rule "serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability"). Although the ABC Affiliates do not believe there is any question that buttocks are not sexual or excretory organs, to the extent there is ambiguity, the Commission must apply the rule of lenity here.

In short, buttocks are neither sexual nor excretory organs, as demonstrated by science and case law, and the complained-of material is simply outside the scope of the Commission's indecency enforcement authority.

(. . . continued)
applied in a non-criminal context. *See, e.g., Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (noting that because courts "must interpret [a] statute consistently, whether [they] encounter its application in a criminal or noncriminal context, the rule of lenity applies" even in noncriminal context); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992) (plurality op.) (applying rule of lenity to tax statute in civil setting because statute had criminal applications).

B. The Depiction of Buttocks for Fewer Than 7 Seconds Is Not Patently Offensive

The Commission also applied the second prong of its indecency analysis, whether the material was patently offensive, incorrectly and in an arbitrary and capricious manner for the context in which buttocks were depicted. In analyzing patent offensiveness, the Commission looks "not [to] the sensibilities of any individual complainant" but rather evaluates whether the programming at issue would be patently offensive to "an average broadcast viewer or listener." *Policy Statement*, ¶ 8 (internal quotation marks and citation omitted). The Commission has stated that "[i]n determining whether material is patently offensive, the *full context* in which the material appeared is critically important." *Id.*, ¶ 9 (emphasis in original). The Commission has also summarized the principal factors used in determining whether material is patently offensive:

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

Id., ¶ 10 (emphases in original). No single factor is determinative, and these factors (and possibly other, unidentified factors) are to be balanced in making an indecency determination. *See id.* Generally, the more explicit or graphic, repetitive, or titillating or shocking the material is, the more likely it is that the Commission will find the material to be indecent. *See id.*, ¶¶ 12, 17.

As to the first factor, the *Notice* asserts that the scene depicts "multiple, close-range views of an adult woman's naked buttocks" and suggests that a finding of explicitness or graphicness is consistent with other cases finding nudity to be graphic and explicit. *Notice*, ¶ 12 (citing *Young Broadcasting of San Francisco, Inc.*, 19 FCC Rcd 1751 (2004), and *Complaints*

Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, 21 FCC Rcd 2760 (2006) ("*Forfeiture Order*"), *reconsideration*, 21 FCC Rcd 6653 (2006) ("*Order on Reconsideration*"), *on appeal sub nom. CBS Corp. v. FCC*, No. 06-3575 (3d Cir. 2006) (the "*Super Bowl* case")). The *Notice*'s finding is conclusory and its reliance on the *Young Broadcasting* and *Super Bowl* cases misplaced.

The scene depicts a woman's full buttocks for fewer than 5 seconds and depicts the buttocks from the side for fewer than 2 seconds. The Commission has never held that mere nudity is graphic or explicit *per se*. Indeed, in one case, the Commission held that the depiction of a penis was *not* graphic or explicit. *See Omnibus Order*, ¶ 215. In another case, the Commission held that the depiction of an animated character's buttocks as he entered a school shower was not graphic or explicit either. *See Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, 20 FCC Rcd 1931 (2005), ¶¶ 6, 9. And, in a third case, the Enforcement Bureau held that the depiction of a woman shown nude from the rear as she straddled her lover in a sex scene was "not sufficiently graphic." Letter from William D. Freedman, File No. EB-03-IH-0644 (Apr. 21, 2004) (concerning movie *Hollywood Wives: The Next Generation*) (together with associated complaint).[53]

Neither the *Young Broadcasting* case nor the *Super Bowl* case supports the *Notice*'s conclusion. *Young Broadcasting* involved the depiction of a penis, not buttocks. The *Super Bowl* case involved the depiction of a breast and nipple, not buttocks. Moreover, both of these decisions were released *after* the *NYPD Blue* episode in question aired, but, prior to these two

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[53] *Cf. Omnibus Order*, ¶ 226 (home video showing child's nude buttocks falling on a pacifier was only "marginally explicit").

cases, the Commission had never released a decision holding nudity in a television program to be graphic or explicit. Thus, the finding in the instant *Notice* that the depiction of buttocks is graphic and explicit and holding the ABC Affiliates apparently liable for the same is an arbitrary and capricious change in enforcement policy.

As to the second factor, the *Notice* finds that the scene dwells on and repeats sexual material because the scene "revolves around the woman's nudity and includes several shots of her naked buttocks." *Notice*, ¶ 13. However, nudity appeared in the 57-second scene, which was part of an hour-long drama, for fewer than 7 seconds. It is difficult to see how material that constitutes less than 0.25% of the entire program can be said to be dwelled upon or sufficiently repeated. Moreover, the Enforcement Bureau has found longer depictions of nudity not to satisfy this factor. For example, the movie *Catch-22* contains one scene depicting the character Captain John Yossarian's full buttocks for 30 seconds as he stands "out of uniform" to receive a medal. In dismissing a complaint brought against KCET-TV, Los Angeles, California, for exhibiting the movie, the Enforcement Bureau characterized the nudity as "very brief." Letter from Norman Goldstein to David Molina, File No. 97110028 (May 26, 1999). In another case, a 10-second scene in which a woman is shown nude from the rear as she straddled her lover in a sex scene was found to be "not sufficiently . . . sustained." Letter from William D. Freedman, File No. EB-03-IH-0644 (Apr. 21, 2004) (concerning movie *Hollywood Wives: The Next Generation*) (together with associated complaint and response). In a third case, a child's nude buttocks falling back upon a pacifier was found not to have dwelled upon or repeated the material because the "program shows the relevant segment once and then moves on to other videotapes." *Omnibus Order*, ¶ 226. Similarly, in *NYPD Blue* the scene is shown only once and it is then followed by multiple other scenes in an hour-long drama.

The *Notice*'s citations do not support its conclusory assertion that the 7 seconds of nudity were dwelled upon or repeated. In the only television case cited, the segment in issue, featuring strippers at bachelor/bachelorette parties, lasted *six minutes*, which is 50 times longer than the nudity that was depicted in *NYPD Blue*. *See Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married by America" on April 7, 2003*, 19 FCC Rcd 20191 (2004), ¶ 11. The other two cited cases refer to radio discussions of sexual or excretory organs or activities and are, accordingly, hardly probative of whether a visual image was dwelt upon or repeated. In any event, the two instances referenced in the *Policy Statement* concern a shock jock who, on one occasion, referred at least 14 times to female genitalia as a "beaver," and, on the other occasion, engaged in an extended discussion on passing gas and defecating. *See Policy Statement*, ¶ 17 (citing, respectively, *Citicasters Co. (WXTB(FM))*, 13 FCC Rcd 15381 (1998), and *Citicasters Co. (WXTB(FM))*, 13 FCC Rcd 22004 (1998), *aff'd* FCC 00-230 (June 27, 2000)). In the other case, morning radio hosts engaged in an extended discussion of whether an erect penis could lift or pull objects and discussed preparations for a contest during which an individual in the studio attempted to put a harness on his penis. The discussion extended over multiple breaks in the morning show and over multiple days. *See Entercom Seattle License, LLC*, 19 FCC Rcd 9069 (2004), ¶¶ 2, 13, & attached transcript, *pet. for recon. pending*. These radio broadcasts clearly repeated the complained-of material. In contrast, the scene in *NYPD Blue* lasted only 57 seconds and buttocks were depicted for fewer than 7 seconds of that time. The scene required the nudity to illustrate the surprise and embarrassment that both characters experienced when Theo walked in on McDowell, but it is simply a mischaracterization to conclude, as the *Notice* does, that the scene dwelled upon or repeated the depiction of buttocks.

Moreover, in comparison with other radio cases, the depiction in *NYPD Blue* is far less

repetitive than other material the Commission has determined not to be actionable. For example, *KBOO Foundation*[54] involved the song "Your Revolution" which referred variously to sexual activities "between these thighs" (12 times), "knock me up," "doing it" (six times), "smacking it up, flipping it or rubbing it down," "humping," "six foot blow job machine," "touching your lips to my triple dip of French vanilla, butter pecan, chocolate deluxe," "put it in my mouth," and "giving up my behind," for a total of at least 25 individual references to sexual intercourse, anal sex, fellatio, and cunnilingus. In addition, the song referred variously to sexual organs as "my bush," a male individual "hard as hell," and "feeling your nature rise." Despite this repetition, the Commission rescinded the NAL. Similarly, *Citadel Broadcasting Co.*[55] involved the "radio edit" version of the song "The Real Slim Shady" which referred variously, at least seven times, to sexual activities, including masturbation and bestiality, as "hump a dead moose," "my bum is on your lips" (twice), "give it [bum] a little kiss," "grabbin' his you know what," "when I'm BLEEP or jerkin'," and "said I'm jerkin.'" Again, despite this repetition, the Commission rescinded the NAL.

As to the third factor, the *Notice* contains a conclusory assertion that the depiction of buttocks is "titillating and shocking," but it primarily does so because it found the depiction to be "repeated" and "repeated and lingering" multiple times. *Notice*, ¶ 14. That analysis, however, conflates the third factor with the second factor. Moreover, the specific "lingering shot of her buttocks" upon which this finding appears to depend lasted fewer than 2 seconds. "Linger,"

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[54] *KBOO Foundation, (KBOO-FM)*, Memorandum Opinion and Order, 18 FCC Rcd 2472 (EB 2003), ¶ 9, *rescinding* Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 10731 (EB 2001).

[55] *Citadel Broadcasting Co. (KKMG(FM), Pueblo, Colorado)*, Memorandum Opinion and Order, 17 FCC Rcd 483 (2002), *rescinding* Notice of Apparent Liability, 16 FCC Rcd 11839 (2001).

however, means "to proceed slowly" or "to be tardy in acting; procrastinate."[56] A camera shot that lasts fewer than 2 seconds cannot accurately or rationally be described as "lingering."

The only independent analysis as to the third factor is the *Notice*'s discussion that "partial views of the woman's breasts, as well as the camera shots of the boy's shocked face from between her legs and of her upper torso from behind his head, are also relevant contextual factors that serve to heighten the titillating and shocking nature of the scene." *Notice*, ¶ 14. The *Notice* itself acknowledges that "[o]nly a small portion of the side of one of her breasts is visible" at one point, *Notice*, ¶ 9, and that the character's breasts are obscured or covered in the remaining camera shots after the boy enters the bathroom, *Notice*, ¶ 10. Because the *Notice*, correctly, does not contend that the brief glimpse of the side of a breast is indecent, it is inappropriate to rely on that glimpse, which occurs earlier in the scene, to support the finding that the "lingering" depiction of buttocks is titillating and shocking. As for the camera shots from behind the boy's head and from between the woman's legs, neither shot depicts buttocks, and, in fact, the depiction of buttocks occurs only *before* those two camera shots. It is plainly inappropriate for the *Notice* to rely on later camera shots to conclude that an earlier image is titillating and shocking. This rhetorical trick is no substitute for honest analysis.

It is equally clear that the Commission has substituted its own artistic judgment for that of the *NYPD Blue* director in conveying the emotions of surprise and embarrassment in the scene. Just as the Commission correctly declined to second-guess the artistic and creative decisions that led to the inclusion and retention of expletives in the broadcast of the acclaimed dramatic motion picture *Saving Private Ryan*, *see Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's*

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[56] AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1047.

Presentation of the Film "Saving Private Ryan," 20 FCC Rcd 4507 (2005) ("*Saving Private Ryan*"), ¶ 14, so, too, should it decline to second-guess the decisions to include and retain fewer than 7 seconds of the depiction of nudity in the acclaimed dramatic series *NYPD Blue.*

Moreover, the *Notice*'s determination that this brief depiction of non-sexual and non-excretory nudity was titillating and shocking is at variance with numerous other Commission decisions which fully considered the surrounding context, especially the Commission's 2001 *Policy Statement* which offered the best guidance on this issue at the time of the *NYPD Blue* broadcast. *See, e.g., Policy Statement*, ¶ 21 (depiction of realistic sex organ models was clinical and instructional, not pandering or titillating (citing *King Broadcasting Co. (KING-TV)*, 5 FCC Rcd 2971 (1990))); *id.* (discussion of orgasms on *Oprah Winfrey Show* not titillating because subject matter alone does not render material indecent (citing Letter to Chris Giglio (July 20, 1994))); *id.* (discussion of orgasms on *Geraldo Rivera Show* not titillating (citing Letter to Gerald P. McAtee (Oct. 26, 1989)))[57]; *id.* (use of F-word 10 times in 7 sentences not pandering or titillating in news report on John Gotti's trial (citing *Peter Branton*, 6 FCC Rcd 610 (1991))); *id.* (full context of nudity in *Schindler's List* not titillating (citing *WPBN/WTOM License Subsidiary, Inc. (WPBN-TV and WTOM-TV)*, 15 FCC Rcd 1838 (2000) ("*Schindler's List* case"))).

More recently, in the 2006 *Omnibus Order*, the Commission held that two characters (one male) adjusting another character's breasts upwards was not used to pander, titillate, or

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[57] *See also Capstar TX Limited Partnership (KTXQ(FM))*, Notice of Apparent Liability for Forfeiture, DA 00-2287 (2000), ¶ 7 ("We note that while material that is more graphic is more likely to be found indecent, the context in which material is offered is essential to making a determination as to whether material is indecent. For example, the 'Geraldo' episode discussed in the *Letter to Gerald P. McAtee* was not patently offensive within the meaning of the statute because the program as a whole was a serious discussion of sex with people knowledgeable in the field.").

shock because

> the episode addresses the anxiety associated with a first date and Grace's friends' efforts to lend assistance—a topic that is not shocking, pandering, or titillating. Moreover, the touching of the breasts is not portrayed in a sexualized manner, and does not appear to elicit any sexual response from Grace.

Omnibus Order, ¶ 158 ("*Will & Grace*"). This type of sensitivity to context is what is altogether missing from the current *Notice*. The *NYPD Blue* scene is not portrayed in a sexualized manner and does not elicit a sexual response from either the woman or the boy. The *Notice* simply discounts the entire purpose of the episode in order to reach its pre-ordained conclusion.

Also in the *Omnibus Order*, the Commission held that an explicit discussion of teen sex practices was not titillating because it was designed to inform viewers about an important topic. Moreover, "[t]o the extent the material is shocking, it is due to the existence of such practices among teenagers" rather than the explicitness of the descriptions. *Omnibus Order*, ¶ 178 ("*Oprah Winfrey Show*"). Similarly, to the extent the *NYPD Blue* scene is shocking, it is because the scene is intentionally designed to show the surprise, embarrassment, and awkwardness arising from a non-related woman and boy adjusting to life together in the cramped quarters of a New York apartment. Other decisions are in accord. *See Omnibus Order*, ¶ 162 ("*Two and a Half Men*") (hernia exam, accompanied by mildly suggestive remarks, was not "eroticized" and so not presented in a manner that shocks, panders to, or titillates the audience); *id.*, ¶ 165 ("*Committed*") (implied grabbing of man's genitals while he sang the National Anthem not shocking or titillating because it was not presented in a sexual manner); *id.*, ¶¶ 166-71 ("*Golden Phoenix Hotel & Casino Commercial*") (where Vegas showgirls, wearing sexually suggestive costumes, jump on bed with man and second scene shows man's bare chest with lipstick marks on his face, the bed scenes do not shock or titillate because no sexual acts or organs are shown); *id.*, ¶ 204 ("*Family Guy*") (repeated references to "penis" in connection with a father's concern

that he is not as well-endowed as his son did not titillate or shock because the episode "addressed the father's feelings of inferiority, and the topic is presented in an indirect, humorous manner"); *id.*, ¶ 223 ("*The Simpsons*") (scene of pole-dancing in strip club did not titillate or shock because it was a "relatively brief vignette about the male characters' romantic ineptitude"); *id.*, ¶ 226 ("*America's Funniest Home Videos*") (child's nude buttocks falling on pacifier not shocking or titillating because it was "not sexualized in any manner").

The essential lesson of these various decisions discussed in the *Policy Statement* and *Omnibus Order* is that when complained-of material is not presented in a sexualized manner it will not be found to have been presented to titillate, shock, or pander. There is nothing sexualized about the nudity depicted in the *NYPD Blue* scene. The scene presents nothing more than a woman's quotidian routine after awakening of preparing to shower for the day, as she would have done countless times in her apartment; the simultaneous routine of a boy waking up and heading to the bathroom; and the surprise and embarrassment both experience when they unexpectedly encounter one another in the bathroom. The *Notice*'s conclusion that 7 seconds depicting nude buttocks in this 57-second scene "shocks and titillates viewers" is simply unsupportable.

In sum, it is plain that the complained-of matter in the *NYPD Blue* episode fails *each* of the factors in the Commission's "patently offensive" inquiry. That result is really no surprise since mere nudity itself is not indecent *per se* and it is otherwise impossible to see how the depiction of buttocks for fewer than 7 seconds in an utterly non-sexual manner could ever be patently offensive as measured by contemporary community standards.

Furthermore, according to Nielsen ratings, the *NYPD Blue* episode broadcast on February 25, 2003, was watched by an audience of 11.6 million viewers. The *Notice* states that the Commission received "*thousands* of letters from members of various citizen advocacy

groups." *Notice*, ¶ 15 (emphasis added). That number, however, is belied by the number of actual complaints the Commission produced to the ABC Affiliates pursuant to their various informal and FOIA requests, which is just 117 unique complaints. Moreover, as discussed in detail above, none of these 117 complaints is *bona fide* under the principles established in the *Omnibus Remand Order*. There is simply no evidence that any actual viewer of the program on any of the ABC Affiliates' stations filed a complaint with the Commission about the actual nudity that was depicted. When 11.6 million people watch a program and not a single genuine, verifiable complaint is filed complaining about the depiction of buttocks, it is difficult to discern how the Commission could conclude that the show included material that was so "shocking" and "patently offensive as measured by contemporary community standards" as to be legally indecent. To the contrary, the Commission's conclusion contradicts its oft-repeated statement that, in determining whether a broadcast is "patently offensive" and indecent, "the standard is that of an *average* broadcast viewer or listener and *not the sensibilities of an individual complainant.*" *Policy Statement*, ¶ 8 (quoting *Schindler's List* case, ¶ 10) (emphases added). Here, by contrast, the Commission is willing to allow the substantially belated objections of special interest advocacy groups to trump the judgments of the millions of American viewers across the country who repeatedly tuned in to watch *NYPD Blue*.

V. The *Notice* Is Inconsistent with Prior Commission Precedent

The legal errors in the *Notice* are manifold. *First*, "the Commission may not impose upon [broadcasters] its private notions of what the public ought to hear." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 650 (1994) (quoting *Network Programming Inquiry*, Report and Statement of Policy, 25 Fed. Reg. 7293 (1960)); *see also United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000) ("Judgments [about art and literature] are for the individual to

make, not for the Government to decree . . . ."). *Second*, the Commission cannot in all contexts, consistent with the First Amendment, "reduce the adult population . . . to . . . only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). *Third*, the Commission cannot ignore its own precedent that requires it to consider the "full context" and to evaluate the depiction of buttocks in that full context as an average broadcast viewer would do and not as a supersensitive complainant from a private advocacy group with a particular agenda. *See, e.g.*, *AT&T Corp. v. FCC*, 236 F.3d 729, 736 (D.C. Cir. 2001) (stating that the FCC "cannot silently depart from previous policies or ignore precedent" (internal quotation marks and citations omitted)); *id.* at 737 (stating that the FCC's "conclusory statements cannot substitute for the reasoned explanation that is wanting in this decision" (internal quotation marks and citation omitted)).

Even if the Commission were somehow not obligated to explain substantively how the depiction of nude buttocks satisfies each piece of its standard indecency analysis, the determination that the fleeting depiction of nude buttocks in this *NYPD Blue* episode is actionably indecent would still be arbitrary and capricious in light of the disparate treatment of depictions of nude buttocks and other examples of nudity in other complaint proceedings, especially in view of the well-established principle that nudity itself is not *per se* indecent. *Cf. Cervantes v. United States*, 330 F.3d 1186, 1187, 1190 (9th Cir. 2003) (chastising the government for its argument where its interest "is not that it shall win a case, but that justice shall be done"); *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 969 (D.C. Cir. 1999) (court will not accept agency determination that would not be entertained by anyone with an elementary understanding of the issue).

At the time of the *NYPD Blue* broadcast in question, on February 25, 2003, the Commission had *never* released an NAL finding any television station liable for the broadcast of nudity, fleeting or otherwise. The *Young Broadcasting* and *Super Bowl* cases came later. In fact,

the *Notice* amounts to a reversal of the Commission's previously established principle by essentially making the depiction of nudity indecent *per se*. To the extent the Commission seeks to hold the ABC Affiliates liable for this broadcast and to impose forfeitures upon them, it has failed to offer any explanation for any change in enforcement practice that could warrant these actions. Such regulatory conduct is plainly arbitrary and capricious under the law. *See Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007), *petition for cert. filed*, No. 07-582 (U.S. Nov. 1, 2007).

Prior to the *NYPD Blue* broadcast, the leading case on televised nudity was the *Schindler's List* case. That film, broadcast on the NBC television network as a national television event, contained numerous depictions of nudity. These depictions included depictions of buttocks and full frontal nudity in at least two extended scenes. In one scene, which lasts slightly more than 4 minutes, males and females disrobe and are made to run around the camp fully nude as the sick are sorted from the healthy. During the scene there are at least eight different camera shots depicting either full male or female adult nudity, female breasts, or male or female buttocks, and the nudity is depicted for approximately 82 seconds. The second scene, which lasts slightly less than 3 minutes, involves women disrobing and entering the showers. During this scene there are at least eight different camera shots depicting either female breasts, buttocks, or pubic areas, and the nudity is depicted for approximately 45 seconds. The depictions of nudity in these scenes are non-sexualized, like the depiction of buttocks in *NYPD Blue*. In sum, the film *Schindler's List* contains depictions of nudity, including buttocks and full frontal nudity, for more than 2 minutes (at least 127 seconds).

Despite the multiple depictions of nudity, the Commission correctly held that

> [N]udity itself is not *per se* indecent. If the definition of what constitutes actionably indecent programming were as absolute as claimed by [the complainant], there simply would be no need for

> or practical impact of the remainder of that definition—that the programming in question be measured against the contemporary community standards for the broadcast medium.

Schindler's List, ¶ 11. Ultimately, the Commission upheld a staff determination that examined not just the individual depictions of nudity but the *full* context of the film, which included its subject matter ("a historical view of World War II and wartime atrocities"), "the manner of its presentation," and "the warnings that accompanied the broadcast of this film." *Id.*, ¶¶ 3, 13. What the Commission expressly did *not* do is apply the "standards of any particular community or individual viewer or complainant," *id.*, ¶ 13, such as the advocacy group that generated the so-called complaints against the *NYPD Blue* episode here.

It is difficult to distinguish the depiction of nude buttocks in *NYPD Blue* from the depictions of nudity in *Schindler's List* in any meaningful way that can result in liability arising from the former but not the latter. Like *Schindler's List*, *NYPD Blue* was critically-acclaimed, award-winning programming. Like *Schindler's List*, *NYPD Blue* was accompanied by warnings about its mature content. Like *Schindler's List*, *NYPD Blue* dealt with serious situations showing the best and worst of humanity. Like *Schindler's List*, the nudity depicted in *NYPD Blue* was incidental to the larger storytelling, was brief in the overall context of the drama, and was entirely non-sexualized. Rational decision-making could not find the fleeting depiction of bare buttocks in *NYPD Blue* actionably indecent but not the more extensive bare-breasted and full frontal nudity of *Schindler's List*. The only conceivable manner in which to differentiate the two programs is that of artistic taste, but that avenue is not open to the Commission.

While *Schindler's List* was the leading case at the time of the *NYPD Blue* broadcast, numerous other decisions had found televised nudity, including sexualized nudity, to be nonactionable. A complaint against the film *Catch-22* was dismissed, although the film contains three scenes of nudity, two of which were broadcast outside the safe harbor. In the first scene, a

fantasy sequence, the character Captain John Yossarian swims to a platform on which a woman is standing. She completely disrobes, throws her garment into the water, and waves to Yossarian to swim toward her. After the woman disrobes, she is shown completely nude—nipples, areolas, and pubic area—in three different shots for a total of approximately 11 seconds. In the second, more extended scene, Captain Yossarian is shown nude from behind, with his full buttocks depicted for 30 seconds, as he stands to receive a medal "out of uniform."[58] The decision characterized these depictions as "very brief" and in the context of a "full length drama, the primary theme of which was the horrors of war." Letter from Norman Goldstein to David Molina, File No. 97110028 (May 26, 1999). Other decisions prior to the *NYPD Blue* broadcast are in accord. Thus, a complaint against the film *Devices and Desires* was dismissed, although the complainant alleged that the film contained "scenes of a topless woman in bed with her lover, with her breasts very clearly exposed [and] several scenes of a topless woman running on the beach." Letter from Edythe Wise to Suzan Cavin, File No. 91100738 (Aug. 13, 1992) (together with associated complaint). A complaint against a newscast segment was dismissed, although the complaint alleged that the news story cut from strip club dancers appearing on the witness stand during a trial to a scene at the strip club itself showing a woman's "completely bare" buttocks and, when she turned around, "complete genital nudity" for approximately 5-7 seconds. Letter from Edythe Wise to Deborah Engleman, File No. 91060832 (Apr. 14, 1992) (together with associated complaint). A complaint against the program *The People Next Door* was dismissed, despite the allegation that the program contained a scene with a woman "shown nude

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[58] In the third scene, which appears to have been broadcast after 10:00 p.m. local time, Yossarian is shown in bed with a woman, apparently after sex. Both of the woman's breasts, including nipples and areolas, are depicted for approximately 32 seconds as they engage in a discussion.

from the waist up." Letter from Edythe Wise to Donald E. Wildmon, File No. C11-144 (Feb. 23, 1990) (together with accompanying complaint). Finally, in a complaint against scenes of nudity in *Monty Python's Flying Circus*, among other programs, the Commission expressly found that there was no evidence that the television station had engaged in the type of repeated shock treatment necessary to trigger action under *Pacifica*. *See WGBH Educational Foundation*, 69 F.C.C.2d 1250 (1978), ¶¶ 2, 10.[59]

This Commission precedent, particularly the *Schindler's List* and *Catch-22* cases, demonstrates that the Commission has not analyzed the "full context" of the *NYPD Blue* episode—despite its assertion to the contrary in the *Notice*, it has not analyzed the context at all. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 n.7 (1975) ("Scenes of nudity in a

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[59] Only twice before the airing of the *NYPD Blue* episode had the Commission ever released a decision holding television stations liable for broadcasting indecent material. Neither of them involved nudity.

In *Grant Broadcasting Sys. II, Inc. (WJPR-TV, Lynchburg, Virginia; WFXR-TV, Roanoke, Virginia)*, 12 FCC Rcd 8277 (1997) ("*WJPR/WFXR*"), characters in an action movie used variations of "fuck" sixteen times, variations of "shit" seven times, "asshole" once, and "hard on" once. The Commission stated that "the subject excerpts are indecent in that they contain repetitious and gratuitous use of language that refers to sexual and excretory activities or organs in patently offensive terms. Further, we note that commercials promoting children's sporting events were aired throughout the broadcast of the movie."

In *Telemundo of Puerto Rico License Corp. (WKAQ-TV, San Juan, Puerto Rico)*, 16 FCC Rcd 7157 (2001) ("*WKAQ-TV*"), multiple skits on a weekly program contained multiple incidents, including multiple scripted verbal references to "mother fucker," "son fucker," "cocksucker," masturbation, oral and anal sex, oral-anal contact, and homosexual sex, as well as visual depictions of phallic symbols, sexual devices, a used condom, an inflatable female doll, a pornographic magazine, and the zipping of pants accompanied by a reference to oral sex. The transcripts attached to the *WKAQ* NAL include commentary that efforts to edit or "bleep out" certain words and phrases were done in a manner that left the words and phrases understandable or observable (by lip reading) by viewers.

Obviously, neither of these cases can support the imposition of liability on the ABC Affiliates for broadcasting the *NYPD Blue* episode.

movie, like pictures of nude persons in a book, must be considered as a part of the whole work. . . . [A] motion picture must be considered as a whole, and not as isolated fragments or scenes of nudity."). Instead, the *Notice*, essentially *sub silentio*, creates a new rule that nudity is *per se* indecent. This *de facto* rule is worse than the *per se* rules established in the *Golden Globes* case for use of the F-word and in the *Omnibus Order* for use of the S-word because at least in those cases the Commission was explicit about what it was doing. Here, instead, the Commission is ignoring a proper contextual analysis and substituting its artistic judgment for that of the show's award-winning creative team while, at the same time, failing to honor its own commitment under the First Amendment to "proceed with caution and exercise restraint given the high value our Constitution places on freedom and choice in what the people say and hear." *Saving Private Ryan*, ¶ 14. This is not reasoned agency decision-making that can withstand judicial scrutiny. Moreover, it violates the Communications Act's stricture prohibiting censorship. *See* 47 U.S.C. §326 ("Nothing in this Act shall be understood or construed to give the Commission the power of censorship . . . , and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.").

Furthermore, in dismissing indecency and profanity complaints against the broadcast of "fuck" and other coarse language in *Saving Private Ryan*, the Commission cited approvingly the parental warnings provided at the time of the broadcast by the ABC Television Network, including both the aural and visual viewer advisory and the parental ratings code. *See Saving Private Ryan*, ¶ 15. As a result of these advisories, the Commission said "parents had ample warning that this film contained material that might be unsuitable for children and could have exercised their own judgment about the suitability of the language for their children in the context of this film." *Id.* Similarly, in dismissing indecency complaints about NBC's broadcast

of *Schindler's List*, the Commission cited the inclusion of clear advisories as part of its determination that the broadcast, considered in its full context, was not patently offensive and therefore not indecent. *See Schindler's List*, ¶ 13.[60] The *NYPD Blue* episode in question here bore the on-air rating TV-14-DLV, and the episode was also preceded by an express visual and audio advisory.[61] In other words, as with the *Saving Private Ryan* and *Schindler's List* broadcasts, parents were provided "ample warning" that the programs contained material that might not be suitable for children, allowing parents to "exercise their own judgment." But the *Notice* dismisses the program's rating and warning on the ground that "such warnings are not necessarily effective because the audience is constantly changing stations." *Notice*, ¶ 16. This rationale, however, is plainly contradicted by the Commission's own precedent. Just as clear parental warnings were found by the Commission to militate against a finding of indecency or profanity in the *Saving Private Ryan* and *Schindler's List* cases, so should they here, for otherwise the Commission's action is merely arbitrary and capricious.

In the end, the Commission's incorrect determination that the fleeting depiction of mere nudity, constituting fewer than 7 seconds of bare buttocks in the hour-long *NYPD Blue* episode,

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[60] *Cf.* Letter from William D. Freedman to Boone Smith, File No. EB-03-IH-0697 (Dec. 8, 2004) (dismissing complaint against program *Warrior Queen*, stating that "PBS rated the program TV-14 S, V to warn viewers that it presented intense violence and intense sexual situations," and citing *Schindler's List* in support); *see also* Letter from William D. Freedman, File No. EB-03-IH-0644 (Apr. 21, 2004) (concerning movie *Hollywood Wives: The Next Generation*) (stating that "there is a way that one can avoid objectionable programming. Most television and cable networks voluntarily rate much of their programming to alert viewers if a show contains language or other material that a viewer may find inappropriate. The Act requires that all televisions 13 inches or larger manufactured after 1999 be equipped with a V-chip, which can use these ratings to block individual programs or channels.").

[61] "THIS POLICE DRAMA CONTAINS ADULT LANGUAGE AND PARTIAL NUDITY. VIEWER DISCRETION IS ADVISED."

is actionably indecent is not merely a failure of the Commission to conduct the proper contextual analysis. Rather, no amount of detailed explanation can resuscitate a determination that so thoroughly ignores Commission precedent and otherwise elevates the patent offensiveness of bare buttocks beyond that of frontal nudity, both male and female. Because the *NYPD Blue* determination is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, the Commission should rescind the *Notice*.

VI. The Fleeting Depiction of Buttocks in *NYPD Blue* Cannot Be Proscribed Under *Pacifica*

Even were the *Notice* not arbitrary and capricious, the Commission's indecency scheme is unconstitutional as applied to the ABC Affiliates' broadcast of *NYPD Blue*. This conclusion follows directly from *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), the governing Supreme Court precedent in this realm, whose narrow holding can provide no support for a Commission finding of indecency in this case.

The *Pacifica* decision makes it clear that the fleeting nature of the nudity depicted here—comprising less than 0.25% of an hour-long drama—may not be proscribed. As Justice Powell stated in his opinion, without which there would have been no majority:

> This is not to say, however, 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. . . .
>
> The Commission's holding, and certainly the Court's holding today, does not speak to cases involving the *isolated* use of a potentially offensive word in the course of a radio broadcast, as distinguished from the *verbal shock treatment* administered by respondent here.

Pacifica, 438 U.S. at 759-60, 760-61 (Powell, J., concurring in part and concurring in the judgment) (emphases added); *see also id.* at 757 (Powell, J., concurring in part and concurring in

the judgment) (noting that the language "was repeated over and over as a sort of verbal shock treatment"). It is impossible to square the pre-recorded 12-minute Carlin monologue in *Pacifica*—a "verbal shock treatment" "repeated over and over"—with the isolated depiction of fewer than 7 seconds of non-sexualized nudity—bare buttocks—during an award-winning, one-hour police drama. *See also Pacifica*, 438 U.S. at 750 ("We have not decided that an occasional expletive in [an Elizabethan comedy] would justify any sanction . . . .").

That *Pacifica* demonstrates that the First Amendment does not tolerate a finding of indecency in this instance is further bolstered by Justice Brennan's opinion:

> Having insisted that it seeks to impose sanctions on radio communications only in the limited circumstances present here, I believe that the FCC is estopped from using either this decision or its own orders in this case, 56 F.C.C.2d 94 (1975) and 59 F.C.C.2d 892 (1976), 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 "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs." 56 F.C.C.2d, at 98. *For surely broadcasters are not now on notice that the Commission desires to regulate any offensive broadcast other than the type of "verbal shock treatment" condemned here*, or even this "shock treatment" type of offensive broadcast during the late evening.

Pacifica, 438 U.S. at 772 n.7 (Brennan, J., dissenting) (emphases added).

Indeed, *Pacifica* made it clear that "context is all-important." *Pacifica*, 438 U.S. at 750. In fact, the Court stated that the

> content of the program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant.

Id. This raises two contextual analyses that the Commission should now consider after having basically ignored them in the *Notice*. *First*, the Commission ignored the fact that the depiction of

bare buttocks occurred in a gritty, realistic police drama unlikely to attract an audience of children, even at 9:00 p.m. The *Pacifica* Court itself suggested that a broadcast of Chaucer's ribald *Miller's Tale* during prime time would not be sanctionable because children would not be adversely affected by it, despite its use of offensive sexual language such as "prively he caughte hire by the quentye," *id.* at 750 n.29—a pun on the C-word, which is one of the seven dirty words. Like the *Miller's Tale*, *NYPD Blue* was not a show marketed to children, and it was not one "likely to command the attention of many children" in any event. *Id.*; *cf. Saving Private Ryan*, ¶ 10 (noting importance of *Pacifica* Court's reference to the *Miller's Tale* as part of contextual consideration).

Second, the Commission failed to consider and discuss the fact that television broadcasts are not the same as radio broadcasts. Following passage of the Telecommunications Act of 1996, the television industry created a voluntary program ratings system, *see* Pub. L. No. 104-104, § 551(b), (e), 110 Stat. 140-42 (Feb. 8, 1996); *Implementation of Section 551 of the Telecommunications Act of 1996; Video Program Ratings*, 13 FCC Rcd 8232 (1998), and, since January 1, 2000, all television sets with screens 13 inches and larger contain a V-chip that permits blocking of rated programs, *see* 47 U.S.C. §§303(x), 330(c); 47 C.F.R. §15.120(b). Consequently, unlike the unrated radio broadcast of the George Carlin monologue which could not be blocked by technology to unwitting listeners, this *NYPD Blue* episode was rated (TV-14-DLV) and could have been blocked by parents on any V-chip equipped television set that was programmed to do so. There is, then, a difference between the radio broadcast at issue in *Pacifica* and the television broadcast at issue here with constitutional ramifications that cannot be silently ignored.[62] The V-chip is not itself dispositive of the legal issue in this case.

[62] For instance, one such ramification is that the V-chip offers a less restrictive means to (continued . . .)

Nevertheless, it is one of various factors—and, indeed, an important one—the Commission should take into consideration in determining whether, in the overall context, the language was indecent.[63]

The narrow holding of *Pacifica* permitted the Commission to proscribe the unrated radio broadcast of a 12-minute verbal shock treatment of seven dirty words at 2:00 in the afternoon when children were very likely to be in the audience, upon the complaint of a father who inadvertently heard that broadcast with his child. But that is not this case. In this case, the Commission has proscribed the depiction of mere nudity, bare buttocks, which are neither sexual nor excretory organs, for a *de minimis* amount of time, fewer than 7 seconds, in an hour-long adult drama rated with an advisory about its partial nudity that was broadcast at 10:00 at night to the majority of Americans and at 9:00 to the remainder and that was unlikely to attract the interest of children, upon the cookie-cutter complaints of an advocacy group and with no evidence that any *bona fide* viewers of the cited television stations actually complained.

The Commission's conclusion in the *Notice* is not in accord with *Pacifica*, and it is not in accord with longstanding Commission precedent at the time of the *NYPD Blue* broadcast or the Commission's current procedural and enforcement regime with respect to mere, non-sexual

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(. . . continued)
regulate speech that is otherwise protected under the First Amendment.

[63] *See also* Letter from William D. Freedman, File No. EB-03-IH-0644 (Apr. 21, 2004) (concerning movie *Hollywood Wives: The Next Generation*) (stating that "there is a way that one can avoid objectionable programming. Most television and cable networks voluntarily rate much of their programming to alert viewers if a show contains language or other material that a viewer may find inappropriate. The Act requires that all televisions 13 inches or larger manufactured after 1999 be equipped with a V-chip, which can use these ratings to block individual programs or channels."); Letter from William D. Freedman to Boone Smith, File No. EB-03-IH-0697 (Dec. 8, 2004) (concerning programs *Warrior Queen* and *Take a Girl Like You*) (same).

nudity. For these reasons, the Commission's decision is arbitrary and capricious and violates the ABC Affiliates' rights under the First Amendment.[64]

VII. The *Notice* Is Unconstitutionally Vague and Overbroad As Applied to This *NYPD Blue* Episode

The *Notice*'s determination that the depiction of buttocks, in a non-sexualized manner for fewer than 7 seconds, is patently offensive is unconstitutionally vague and overbroad as applied to the ABC Affiliates.[65]

Nudity, as the Commission itself has held, is not indecent on its face. Indeed, as the Supreme Court has observed, some nudity is "innocent or even educational." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 (1975). From those premises, it is difficult, if not impossible, to see how bare buttocks, without more, can be considered either graphic or explicit. Quite simply, it is unconstitutional to proscribe *all* non-sexual nudity on television, especially nudity as harmless as buttocks. But that is the effect of the Commission's *Notice*, however much it may attempt to distinguish the *Schindler's List* case from the instant one. *See Notice*, ¶ 16 n.31. Indeed, the Commission's attempt to distinguish the adult frontal nudity in *Schindler's List* shows that the Commission is engaging in forbidden content discrimination. The Commission's

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[64] In fact, originalists would note that the First Amendment was never intended to limit indecent speech at all. *See* Kenneth R. Bowling, *"A Tub to the Whale": The Adoption of the Bill of Rights*, *in* THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES 51 (P.T. Conley & J.P. Kaminski, eds., 1992) (stating that "[Roger] Sherman's attempt to limit Madison's absolute guarantee of the freedoms of speech and press by requiring that the words be decent failed in the committee").

[65] A standard is unconstitutionally vague when persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). A standard is unconstitutionally overbroad when it "sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected." *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

standard, whatever it is, is hopelessly—and fatally—vague. *Cf. Fox Television Stations*, 489 F.3d at 463 (observing that the Commission's standard "fails to provide the clarity required by the Constitution, creates an undue chilling effect on free speech, and requires broadcasters to 'steer far wider of the unlawful zone'" (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958))).

However, even the Commission's ultimate basis for its indecency scheme, the protection of minors, cannot change the fact that the First Amendment forbids the Commission to sit as government censor of the speech in issue here and impose sanctions for this program segment. As the Supreme Court stated in *Erznoznik*, a case involving films containing nudity to which minors could be accidentally subjected:

> [A]ssuming the ordinance is aimed at prohibiting youths from viewing the films, the restriction is broader than permissible. The ordinance is not directed against sexually explicit nudity, nor is it otherwise limited. Rather, it sweepingly forbids display of all films containing any uncovered buttocks or breasts, irrespective of context or pervasiveness. Thus it would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous. The ordinance also might prohibit newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach. Clearly all nudity cannot be deemed obscene even as to minors. Nor can such a broad restriction be justified by any other governmental interest pertaining to minors. Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors. Thus, if Jacksonville's ordinance is intended to regulate expression accessible to minors it is overbroad in its proscription.

Erznoznik, 422 U.S. at 213-24 (citations and note omitted).

The *Notice* is also wholly lacking in any analysis of whether the *NYPD Blue* episode was patently offensive as measured by contemporary community standards. The *Notice* merely states the standard and rejects ABC's argument that community standards were not violated because of

the program's high ratings (11.6 million viewers) but *de minimis* number of complaints (fewer than 200 at the network level). *See Notice*, ¶¶ 4, 15. Not only is this lack of analysis or evidence a serious defect under administrative law principles, but the standard the Commission appears to have applied is unconstitutionally overbroad because it constitutes a national standard to determine whether broadcast material is patently offensive, rather than local community standards. *See, e.g., Notice*, ¶ 4 n.9 (stating that the "contemporary standards for the broadcast medium" criterion "is *not* a local one and does not encompass any particular geographic area" but is that of an "average broadcast viewer" (quotation marks and citation omitted) (emphasis added)). The Supreme Court has clearly stated that 18 U.S.C. § 1464 does not establish a "national standard." *See Sable Communications, Inc. v. FCC*, 492 U.S. 115, 124-25 (1989) ("Section 223(b) [of Title 47] no more establishes a 'national standard' of obscenity than do federal statutes prohibiting the mailing of obscene materials, 18 U.S.C. § 1461, or the broadcasting of obscene messages, 18 U.S.C. § 1464." (citation omitted)); *cf. Hamling v. United States*, 418 U.S. 87, 104-05 (1974) (stating that, "as a matter of constitutional law and federal statutory construction," the contemporary community standards requirement of *Miller v. California*, 413 U.S. 15 (1973), "permit[s] a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case"). The *Notice* gives no indication whatsoever that it examined the mores of the more than four dozen various geographic communities in which the *NYPD Blue* episode was viewed and for which the ABC Affiliates are being cited. The *Notice*'s determination that the *NYPD Blue* episode is patently offensive as measured by contemporary community standards is arbitrary and unconstitutional as applied to the ABC Affiliates.

In sum, the *Notice* is unconstitutionally vague and overbroad as applied to the *NYPD Blue* episode because it is proscribing a simple depiction of non-sexual nudity, but mere nudity is not indecent *per se*, either under law or as measured by contemporary community standards in the communities of license of the ABC Affiliates.

Conclusion

For the foregoing reasons, each of the undersigned licensees or former licensees requests cancellation of the proposed forfeiture. The *Notice* should be rescinded in its entirety.

Respectfully submitted,

ABC TELEVISION AFFILIATES ASSOCIATION

By: /s/ Wade H. Hargrove
Wade H. Hargrove
Mark J. Prak
David Kushner

BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, L.L.P.
Wachovia Capitol Center
Suite 1600
150 Fayetteville Street
Raleigh, North Carolina 27601

Its Attorneys

CEDAR RAPIDS TELEVISION COMPANY
CITADEL COMMUNICATIONS, LLC
KETV HEARST-ARGYLE TELEVISION, INC.
KHBS HEARST-ARGYLE TELEVISION, INC.
KMBC HEARST-ARGYLE TELEVISION, INC.
KTBS, INC.
LOUISIANA TELEVISION BROADCASTING, LLC
MISSISSIPPI BROADCASTING PARTNERS
NPG OF TEXAS, L.P.
OHIO/OKLAHOMA HEARST-ARGYLE TELEVISION, INC.
TENNESSEE BROADCASTING PARTNERS
WAPT HEARST-ARGYLE TELEVISION, INC.
WISN HEARST-ARGYLE TELEVISION, INC.
WKOW TELEVISION, INC.
WKRN, G.P.
WSIL-TV, INC.
WXOW-WQOW TELEVISION, INC.
YOUNG BROADCASTING OF GREEN BAY, INC.

By: /s/ Wade H. Hargrove
Wade H. Hargrove
Mark J. Prak
David Kushner

BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, L.L.P.
Wachovia Capitol Center
Suite 1600
150 Fayetteville Street
Raleigh, North Carolina 27601

Their Attorneys

CENTEX TELEVISION LIMITED PARTNERSHIP
KSWO TELEVISION COMPANY, INC.

By: /s/ David D. Oxenford
David D. Oxenford
Brendan Holland

DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, NW
Suite 200
Washington, D.C. 20006

Their Attorneys

CHANNEL 12 OF BEAUMONT, INC.

By: /s/ Robert B. Jacobi
Robert B. Jacobi

COHN AND MARKS, LLP,
1920 N Street, NW
Suite 300
Washington, D.C. 20036

Its Attorneys

DUHAMEL BROADCASTING ENTERPRISES

By: /s/ Richard R. Zaragoza
Richard R. Zaragoza

PILLSBURY WINTHROP SHAW PITTMAN, LLP
2300 N Street, NW
Washington, D.C. 20037-1122

Its Attorneys

FORUM COMMUNICATIONS COMPANY
KVUE TELEVISION, INC.
WFAA-TV, INC.

By: /s/ John E. Fiorini
John E. Fiorini
James Bayes

WILEY REIN, LLP,
1776 K Street, NW
Washington, D.C. 20006

Their Attorneys

GRAY TELEVISION LICENSEE, INC.

By: /s/ Robert A. Beizer
Robert A. Beizer
Vice President
Law and Development
Gray Television
4370 Peachtree Road, NE
Atlanta, GA 30319

KATC COMMUNICATIONS, INC.
McGRAW-HILL BROADCASTING COMPANY, INC.
MEDIA GENERAL COMMUNICATIONS HOLDINGS, LLC
NEW YORK TIMES MANAGEMENT SERVICES

By: /s/ John R. Feore, Jr.
John R. Feore, Jr.
M. Anne Swanson

DOW LOHNES, PLLC
1200 New Hampshire Avenue, NW
Washington, D.C. 20036

Their Attorneys

KATV, LLC
KTUL, LLC

By: /s/ Jerald N. Fritz
Jerald N. Fritz
Senior Vice President
Legal and Strategic Affairs
Allbritton Communications Company
1000 Wilson Blvd.
Suite 2700
Arlington, VA 22209

KDNL LICDENSEE, LLC
WEAR LICENSEE, LLC

By: /s/ Barry M. Faber
Barry M. Faber
Vice President and General Counsel
Sinclair Broadcast Group
10706 Beaver Dam Road
Hunt Valley, MD 21030

KLTV/KTRE LICENSE SUBSIDIARY, LLC
POST-NEWSWEEK STATIONS, SAN ANTONIO, INC.

By: /s/ Stephen A. Weiswasser
Stephen A. Weiswasser
Robert Sherman

COVINGTON & BURLING, LLP
1201 Pennsylvania Avenue, NW
Washington, D.C. 20004

Their Attorneys

KSTP-TV, LLC
WDIO-TV, LLC

By: /s/ Charles R. Naftalin
Charles R. Naftalin
Leighton T. Brown

HOLLAND & KNIGHT, LLP
2099 Pennsylvania Avenue, NW
Suite 100
Washington, D.C. 20006

Their Attorneys

MISSION BROADCASTING, INC.
NEXSTAR BROADCASTING, INC.

By: /s/ Howard M. Liberman
Howard M. Liberman

DRINKER, BIDDLE & REATH, LLP
1500 K Street, NW
Suite 1100
Washington, D.C. 20005

Their Attorneys

MISSISSIPPI BROADCASTING PARTNERS
TENNESSEE BROADCASTING PARTNERS

By: /s/ Russell J. Schwartz
Russell J. Schwartz
Senior Vice President/General Counsel
Bahakel Communications, Ltd.
1 Television Place
Charlotte, NC 28205

NORTHEAST KANSAS BROADCAST SERVICE, INC.
PIEDMONT TELEVISION OF HUNTSVILLE LICENSE, LLC
PIEDMONT TELEVISION OF SPRINGFIELD LICENSE, LLC

By: /s/ Joseph M. Di Scipio
Joseph M. Di Scipio

FLETCHER, HEALD & HILDRETH, PLC
11th Floor
1300 North 17th Street
Arlington, VA 22209

Their Attorneys

POLLACK/BELZ COMMUNICATION COMPANY, INC.

By: /s/ Barry D. Wood
Barry D. Wood
Stuart W. Nolan, Jr.

WOOD, MAINES & NOLAN, PC
4121 Wilson Boulevard, Suite 101
Arlington, VA 22203

Their Attorneys

SCRIPPS HOWARD BROADCASTING CO.
WOOSTER REPUBLICAN PRINTING COMPANY*

By: /s/ Kenneth C. Howard, Jr.
Kenneth C. Howard, Jr.

BAKER & HOSTETLER, LLP
1050 Connecticut Avenue, NW
Suite 1100
Washington, D.C. 20036

Their Attorneys

* In lieu of KFBB Corporation, L.L.C., which was, prior to its dissolution, a subsidiary of Wooster.

SOUTHERN BROADCASTING, INC.

By: /s/ Robert E. Levine
Robert E. Levine

LAW OFFICES OF ROBERT E. LEVINE
1750 K Street, NW
Suite 350
Washington, D.C. 20006

Its Attorneys

TRIBUNE TELEVISION NEW ORLEANS, INC.

By: /s/ Charles J. Sennet
Charles J. Sennet
Senior Counsel
Tribune Company
435 North Michigan Avenue
Chicago, IL 60611

By: /s/ R. Clark Wadlow
R. Clark Wadlow

SIDLEY AUSTIN, LLP
1501 K Street, NW
Washington, D.C. 20005

Its Attorneys

WKOW TELEVISION, INC.
WXOW-WQOW TELEVISION, INC.

By: /s/ Kenneth E. Satten
Kenneth E. Satten
Wade Lindsay

WILKINSON BARKER KNAUER, LLP
2300 N Street, NW
Suite 700
Washington, D.C. 20037

Their Attorneys

February 11, 2008

The following licensees and former licensees, by and through their above-signing counsel or officer, hereby join in this Opposition to the *Notice of Apparent Liability for Forfeiture*, FCC 08-25, and request its cancellation:

Licensee	NAL Acct. No.	Station Call Sign and Community of License	Facility ID No.
Cedar Rapids Television Company	200832080013	KCRG-TV Cedar Rapids, IA	9719
Centex Television Limited Partnership	200832080014	KXXV(TV) Waco, TX	9781
Channel 12 of Beaumont, Inc.	200832080015	KBMT(TV) Beaumont, TX	10150
Citadel Communications, LLC	200832080016	KLKN(TV) Lincoln, NE	11264
Duhamel Broadcasting Enterprises	200832080018	KOTA-TV Rapid City, SD	17688
Forum Communications Company	200832080019	WDAY-TV Fargo, ND	22129
Gray Television Licensee, Inc.*	200832080020	KAKE-TV Wichita, KS	65522
Gray Television Licensee, Inc.	200832080021	KLBY(TV) Colby, KS	65523
KATC Communications, Inc.	200832080023	KATC(TV) Lafayette, LA	33471
KATV, LLC	200832080024	KATV(TV) Little Rock, AR	33543
KDNL Licensee, LLC	200832080025	KDNL-TV St. Louis, MO	56524
KETV Hearst-Argyle Television, Inc.	200832080026	KETV(TV) Omaha, NE	53903
KHBS Hearst-Argyle Television, Inc.	200832080028	KHOG-TV Fayetteville, AR	60354

* The *Notice* erroneously identified the licensee of KAKE-TV as "Gray Television Licensee Corp."

Licensee	NAL Acct. No.	Station Call Sign and Community of License	Facility ID No.
KLTV/KTRE License Subsidiary, LLC	200832080017	KLTV(TV) Tyler, TX	68540
KMBC Hearst-Argyle Television, Inc.	200832080029	KMBC-TV Kansas City, MO	65686
KSTP-TV, LLC	200832080022	KSTP-TV St. Paul, MN	28010
KSWO Television Company, Inc.	200832080030	KSWO-TV Lawton, OK	35645
KTBS, Inc.	200832080031	KTBS-TV Shreveport, LA	35652
KTUL, LLC	200832080033	KTUL(TV) Tulsa, OK	35685
KVUE Television, Inc.	200832080034	KVUE(TV) Austin, TX	35867
Louisiana Television Broadcasting, LLC	200832080035	WBRZ-TV Baton Rouge, LA	38616
McGraw-Hill Broadcasting Company, Inc.	200832080036	KMGH-TV Denver, CO	40875
Media General Communications Holdings, LLC	200832080037	WMBB(TV) Panama City, FL	66398
Mission Broadcasting, Inc.	200832080038	KODE-TV Joplin, MO	18283
Mississippi Broadcasting Partners	200832080039	WABG-TV Greenwood, MS	43203
New York Times Management Services	200832080041	WQAD-TV Moline, IL	73319
Nexstar Broadcasting, Inc.	200832080042	KQTV(TV) St. Joseph, MO	20427
	200832080040	WDHN(TV) Dothan, AL	43846
Northeast Kansas Broadcast Service, Inc.	200832080043	KTKA-TV Topeka, KS	49397

Licensee	NAL Acct. No.	Station Call Sign and Community of License	Facility ID No.
NPG of Texas, L.P.	200832080044	KVIA-TV El Paso, TX	49832
Ohio/Oklahoma Hearst-Argyle Television, Inc.	200832080045	KOCO-TV Oklahoma City, OK	12508
Piedmont Television of Huntsville License, LLC Piedmont Television of Springfield License, LLC	200832080046	WAAY-TV Huntsville, AL KSPR(TV) Springfield, MO	57292 35630
Pollack/Belz Communication Company, Inc.	200832080047	KLAX-TV Alexandria, LA	52907
Post-Newsweek Stations, San Antonio, Inc.	200832080048	KSAT-TV San Antonio, TX	53118
Scripps Howard Broadcasting Co.	200832080049	KNXV-TV Phoenix, AZ	59440
Southern Broadcasting, Inc.	200832080050	WKDH(TV) Houston, MS	83310
Tennessee Broadcasting Partners	200832080051	WBBJ-TV Jackson, TN	65204
Tribune Television New Orleans, Inc.	200832080052	WGNO(TV) New Orleans, LA	72119
WAPT Hearst-Argyle Television, Inc.	200832080053	WAPT(TV) Jackson, MS	49712
WDIO-TV, LLC	200832080054	WDIO-TV Duluth, MN	71338
WEAR Licensee, LLC	200832080055	WEAR-TV Pensacola, FL	71363
WFAA-TV, Inc.	200832080056	WFAA-TV Dallas, TX	72054
WISN Hearst-Argyle Television, Inc.	200832080057	WISN-TV Milwaukee, WI	65680
WKOW Television, Inc.	200832080058	WKOW-TV Madison, WI	64545

Licensee	NAL Acct. No.	Station Call Sign and Community of License	Facility ID No.
WKRN, G.P.	200832080059	WKRN-TV Nashville, TN	73188
Wooster Republican Printing Company, in lieu of KFBB Corporation, L.L.C. (dissolved)	200832080027	KFBB-TV Great Falls, MT	34412
WSIL-TV, Inc.	200832080061	WSIL-TV Harrisburg, IL	73999
WXOW-WQOW Television, Inc.	200832080062	WXOW-TV La Crosse, WI	64549
Young Broadcasting of Green Bay, Inc.	200832080063	WBAY-TV Green Bay, WI	74417