

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

**FEDERAL COMMUNICATIONS COMMISSION ET AL. v.
FOX TELEVISION STATIONS, INC., ET AL.****CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT**

No. 10–1293. Argued January 10, 2012—Decided June 21, 2012*

Title 18 U. S. C. §1464 bans the broadcast of “any obscene, indecent, or profane language.” The Federal Communications Commission (Commission) began enforcing §1464 in the 1970’s. In *FCC v. Pacifica Foundation*, 438 U. S. 726, this Court found that the Commission’s order banning George Carlin’s “Filthy Words” monologue passed First Amendment scrutiny, but did not decide whether “an occasional expletive . . . would justify any sanction,” *id.*, at 750. In the ensuing years, the Commission went from strictly observing the narrow circumstances of *Pacifica* to indicating that it would assess the full context of allegedly indecent broadcasts rather than limit its regulation to an index of indecent words or pictures. However, it continued to note the important difference between isolated and repeated broadcasts of indecent material. And in a 2001 policy statement, it even included, as one of the factors significant to the determination of what was patently offensive, “whether the material dwells on or repeats at length” the offending description or depiction.

It was against this regulatory background that the three incidents at issue took place. Two concern isolated utterances of obscene words during two live broadcasts aired by respondent Fox Television Stations, Inc. The third occurred during an episode of a television show broadcast by respondent ABC Television Network, when the nude buttocks of an adult female character were shown for approximately seven seconds and the side of her breast for a moment. After these incidents, but before the Commission issued Notices of Apparent Lia-

*Together with *Federal Communications Commission v. ABC, Inc., et al.* (see this Court’s Rule 12.4), also on certiorari to the same court.

Syllabus

bility to Fox and ABC, the Commission issued its *Golden Globes Order*, declaring for the first time that fleeting expletives could be actionable. It then concluded that the Fox and ABC broadcasts violated this new standard. It found the Fox broadcasts indecent, but declined to propose forfeitures. The Second Circuit reversed, finding the Commission's decision to modify its indecency enforcement regime to regulate fleeting expletives arbitrary and capricious. This Court reversed and remanded for the Second Circuit to address respondents' First Amendment challenges. *FCC v. Fox Television Stations, Inc.*, 556 U. S. 502. On remand, the Second Circuit found the policy unconstitutionally vague and invalidated it in its entirety. In the ABC case, the Commission found the display actionably indecent, and imposed a \$27,500 forfeiture on each of the 45 ABC-affiliated stations that aired the episode. The Second Circuit vacated the order in light of its *Fox* decision.

Held: Because the Commission failed to give Fox or ABC fair notice prior to the broadcasts in question that fleeting expletives and momentary nudity could be found actionably indecent, the Commission's standards as applied to these broadcasts were vague. Pp. 11–18.

(a) The fundamental principle that laws regulating persons or entities must give fair notice of what conduct is required or proscribed, see, e.g., *Connally v. General Constr. Co.*, 269 U. S. 385, 391, is essential to the protections provided by the Fifth Amendment's Due Process Clause, see *United States v. Williams*, 553 U. S. 285, 304, which requires the invalidation of impermissibly vague laws. A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Ibid.* The void for vagueness doctrine addresses at least two connected but discrete due process concerns: Regulated parties should know what is required of them so they may act accordingly; and precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech. Pp. 11–12.

(b) These concerns are implicated here, where the broadcasters claim that the lengthy procedural history of their cases shows that they did not have fair notice of what was forbidden. Under the 2001 Guidelines in force when the broadcasts occurred, a key consideration was "whether the material dwell[ed] on or repeat[ed] at length" the offending description or depiction, but in the 2004 *Golden Globes Order*, issued after the broadcasts, the Commission changed course and held that fleeting expletives could be a statutory violation. It then

Syllabus

applied this new principle to these cases. Its lack of notice to Fox and ABC of its changed interpretation failed to give them “fair notice of what is prohibited.” *Williams, supra*, at 304. Pp. 12–13.

(c) Neither of the Government’s contrary arguments is persuasive. It claims that Fox cannot establish unconstitutional vagueness because the Commission declined to impose a forfeiture on Fox and said that it would not consider the indecent broadcast in renewing station licenses or in other contexts. But the Commission has the statutory power to take into account “any history of prior offenses” when setting a forfeiture penalty, 47 U. S. C. §503(b)(2)(E), and the due process protection against vague regulations “does not leave [regulated parties] . . . at the mercy of *noblesse oblige*.” *United States v. Stevens*, 559 U. S. ___, ___. The challenged orders could also have an adverse impact on Fox’s reputation with audiences and advertisers alike.

The Government argues that ABC had notice that its broadcast would be considered indecent. But an isolated statement in a 1960 Commission decision declaring that televising nudes might be contrary to §1464 does not suffice for the fair notice required when the Government intends to impose over a \$1 million fine for allegedly impermissible speech. Moreover, previous Commission decisions had declined to find isolated and brief moments of nudity actionably indecent. In light of these agency decisions, and the absence of any notice in the 2001 Guidance that seven seconds of nude buttocks would be found indecent, ABC lacked constitutionally sufficient notice prior to being sanctioned. Pp. 13–17.

(d) It is necessary to make three observations about this decision’s scope. First, because the Court resolves these cases on fair notice grounds under the Due Process Clause, it need not address the First Amendment implications of the Commission’s indecency policy or reconsider *Pacifica* at this time. Second, because the Court rules that Fox and ABC lacked notice at the time of their broadcasts that their material could be found actionably indecent under then-existing policies, the Court need not address the constitutionality of the current indecency policy as expressed in the *Golden Globes* Order and subsequent adjudications. Third, this opinion leaves the Commission free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements and leaves courts free to review the current, or any modified, policy in light of its content and application. Pp. 17–18.

613 F. 3d 317 (first case) and 404 Fed. Appx. 530 (second case), vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, BREYER, ALITO, and KAGAN, JJ., joined.

Syllabus

GINSBURG, J., filed an opinion concurring in the judgment. SOTOMAYOR, J., took no part in the consideration or decision of the cases.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 10–1293

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS *v.* FOX TELEVISION STATIONS, INC.,
ET AL.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS *v.* ABC, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[June 21, 2012]

JUSTICE KENNEDY delivered the opinion of the Court.

In *FCC v. Fox Television Stations, Inc.*, 556 U. S. 502, 529 (2009) (*Fox I*), the Court held that the Federal Communication Commission’s decision to modify its indecency enforcement regime to regulate so-called fleeting expletives was neither arbitrary nor capricious. The Court then declined to address the constitutionality of the policy, however, because the United States Court of Appeals for the Second Circuit had yet to do so. On remand, the Court of Appeals found the policy was vague and, as a result, unconstitutional. 613 F. 3d 317 (2010). The case now returns to this Court for decision upon the constitutional question.

I

In *Fox I*, the Court described both the regulatory framework through which the Commission regulates broadcast indecency and the long procedural history of

Opinion of the Court

this case. The Court need not repeat all that history, but some preliminary discussion is necessary to understand the constitutional issue the case now presents.

A

Title 18 U. S. C. §1464 provides that “[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined . . . or imprisoned not more than two years, or both.” The Federal Communications Commission (Commission) has been instructed by Congress to enforce §1464 between the hours of 6 a.m. and 10 p.m., see Public Telecommunications Act of 1992, §15(a), 106 Stat. 954, note following 47 U. S. C. §303, p. 113 (Broadcasting of Indecent Programming). And the Commission has applied its regulations to radio and television broadcasters alike, see *Fox I, supra*, at 505–506; see also 47 CFR §73.3999 (2010) (Commission regulation prohibiting the broadcast of any obscene material or any indecent material between 6 a.m. and 10 p.m.). Although the Commission has had the authority to regulate indecent broadcasts under §1464 since 1948 (and its predecessor commission, the Federal Radio Commission, since 1927), it did not begin to enforce §1464 until the 1970’s. See Campbell, *Pacifica* Reconsidered: Implications for the Current Controversy over Broadcast Indecency, 63 Fed. Com. L. J. 195, 198 (2010).

This Court first reviewed the Commission’s indecency policy in *FCC v. Pacifica Foundation*, 438 U. S. 726 (1978). In *Pacifica*, the Commission determined that George Carlin’s “Filthy Words” monologue was indecent. It contained “language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.” *Id.*, at 732 (quoting 56 F. C. C. 2d 94, 98 (1975)). This Court upheld

Opinion of the Court

the Commission’s ruling. The broadcaster’s statutory challenge was rejected. The Court held the Commission was not engaged in impermissible censorship within the meaning of 47 U. S. C. §326 (1976 ed.), see 438 U. S., at 735–739, and that §1464’s definition of indecency was not confined to speech with an appeal to the prurient interest, see *id.*, at 738–741. Finding no First Amendment violation, the decision explained the constitutional standard under which regulations of broadcasters are assessed. It observed that “broadcast media have established a uniquely pervasive presence in the lives of all Americans,” *id.*, at 748, and that “broadcasting is uniquely accessible to children, even those too young to read,” *id.*, at 749. In light of these considerations, “broadcasting . . . has received the most limited First Amendment protection.” *Id.*, at 748. Under this standard the Commission’s order passed constitutional scrutiny. The Court did note the narrowness of its holding, explaining that it was not deciding whether “an occasional expletive . . . would justify any sanction.” *Id.*, at 750; see also *id.*, at 760–761 (Powell, J., concurring in part and concurring in judgment) (“[C]ertainly the Court’s holding . . . 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”).

From 1978 to 1987, the Commission did not go beyond the narrow circumstances of *Pacifica* and brought no indecency enforcement actions. See *In re Infinity Broadcasting Corp.*, 3 FCC Rcd. 930 (1987); see also *In re Application of WGBH Educ. Foundation*, 69 F. C. C. 2d 1250, 1254 (1978) (Commission declaring it “intend[s] strictly to observe the narrowness of the *Pacifica* holding”). Recognizing that *Pacifica* provided “no general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast over a licensed radio or television station,” the Commission distinguished between

Opinion of the Court

the “repetitive occurrence of the ‘indecent’ words” (such as in the Carlin monologue) and an “isolated” or “occasional” expletive, that would not necessarily be actionable. 69 F. C. C. 2d, at 1254.

In 1987, the Commission determined it was applying the *Pacifica* standard in too narrow a way. It stated that in later cases its definition of indecent language would “appropriately includ[e] a broader range of material than the seven specific words at issue in [the Carlin monologue].” *In re Pacifica Foundation Inc.*, 2 FCC Rcd. 2698, 2699. Thus, the Commission indicated it would use the “generic definition of indecency” articulated in its 1975 *Pacifica* order, *Infinity Order*, 3 FCC Rcd., at 930, and assess the full context of allegedly indecent broadcasts rather than limiting its regulation to a “comprehensive index . . . of indecent words or pictorial depictions,” *id.*, at 932.

Even under this context based approach, the Commission continued to note the important difference between isolated and repeated broadcasts of indecent material. See *ibid.* (considering variables in determining whether material is patently offensive including “whether allegedly offensive material is isolated or fleeting”). In the context of expletives, the Commission determined “deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency.” *Pacifica Order*, 2 FCC Rcd., at 2699. For speech “involving the description or depiction of sexual or excretory functions . . . [t]he mere fact that specific words or phrases are not repeated does not mandate a finding that material that is otherwise patently offensive . . . is not indecent.” *Ibid.*

In 2001, the Commission issued a policy statement intended “to provide guidance to the broadcast industry regarding [its] caselaw interpreting 18 U. S. C. §1464 and [its] enforcement policies with respect to broadcast indecency.” *In re Industry Guidance on Commission’s Case Law Interpreting 18 U. S. C. §1464 and Enforcement*

Opinion of the Court

Policies Regarding Broadcast Indecency, 16 FCC Rcd. 7999. In that document the Commission restated that for material to be indecent it must depict sexual or excretory organs or activities and be patently offensive as measured by contemporary community standards for the broadcast medium. *Id.*, at 8002. Describing the framework of what it considered patently offensive, the Commission explained that three factors had proved significant:

“(1) [T]he 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.*, at 8003 (emphasis deleted).

As regards the second of these factors, the Commission explained that “[r]epetition of and persistent focus on sexual or excretory material have been cited consistently as factors that exacerbate the potential offensiveness of broadcasts. In contrast, where sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency.” *Id.*, at 8008. The Commission then gave examples of material that was not found indecent because it was fleeting and isolated, *id.*, at 8008–8009 (citing, *e.g.*, *L. M. Communications of South Carolina, Inc. (WYBB(FM))*, 7 FCC Rcd. 1595 (MMB 1992) (finding “a fleeting and isolated utterance” in the context of live and spontaneous programming not actionable)), and contrasted it with fleeting references that were found patently offensive in light of other factors, 16 FCC Rcd., at 8009 (citing, *e.g.*, *Tempe Radio, Inc. (KUPD-FM)*, 12 FCC Rcd. 21828 (MMB 1997) (finding fleeting language that clearly refers to sexual activity with a child to be patently

Opinion of the Court

offensive)).

B

It was against this regulatory background that the three incidents of alleged indecency at issue here took place. First, in the 2002 Billboard Music Awards, broadcast by respondent Fox Television Stations, Inc., the singer Cher exclaimed during an unscripted acceptance speech: “I’ve also had my critics for the last 40 years saying that I was on my way out every year. Right. So f*** ‘em.” 613 F. 3d, at 323. Second, Fox broadcast the Billboard Music Awards again in 2003. There, a person named Nicole Richie made the following unscripted remark while presenting an award: “Have you ever tried to get cow s*** out of a Prada purse? It’s not so f***ing simple.” *Ibid.* The third incident involved an episode of *NYPD Blue*, a regular television show broadcast by respondent ABC Television Network. The episode broadcast on February 25, 2003, showed the nude buttocks of an adult female character for approximately seven seconds and for a moment the side of her breast. During the scene, in which the character was preparing to take a shower, a child portraying her boyfriend’s son entered the bathroom. A moment of awkwardness followed. 404 Fed. Appx. 530, 533–534 (CA2 2011). The Commission received indecency complaints about all three broadcasts. See *Fox I*, 556 U. S., at 510; 404 Fed. Appx., at 534.

After these incidents, but before the Commission issued Notices of Apparent Liability to Fox and ABC, the Commission issued a decision sanctioning NBC for a comment made by the singer Bono during the 2003 Golden Globe Awards. Upon winning the award for Best Original Song, Bono exclaimed: “This is really, really, f***ing brilliant. Really, really great.” *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 19 FCC Rcd. 4975, 4976, n. 4

Opinion of the Court

(2004) (*Golden Globes Order*). Reversing a decision by its enforcement bureau, the Commission found the use of the F-word actionably indecent. *Id.*, at 4975–4976. The Commission held that the word was “one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language,” and thus found “any use of that word or a variation, in any context, inherently has a sexual connotation.” *Id.*, at 4978–4979. Turning to the isolated nature of the expletive, the Commission reversed prior rulings that had found fleeting expletives not indecent. The Commission held “the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent.” *Id.*, at 4980; see also *id.*, at 4982 (“Just as the Court [in *Pacifica*] held that . . . the George Carlin routine ‘could have enlarged a child’s vocabulary in an instant,’ we believe that even isolated broadcasts of the ‘F-Word’ in situations such as that here could do so as well”).

C

Even though the incidents at issue in these cases took place before the *Golden Globes Order*, the Commission applied its new policy regarding fleeting expletives and fleeting nudity. It found the broadcasts by respondents Fox and ABC to be in violation of this standard.

1

As to Fox, the Commission found the two Billboard Awards broadcasts indecent in *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002, and March 8, 2005*, 21 FCC Rcd. 2664 (2006). Numerous parties petitioned for a review of the order in the United States Court of Appeals for the Second Circuit. The Court of Appeals granted the Commission’s request for a voluntary remand so that it could respond to the

Opinion of the Court

parties' objections. *Fox Television Stations, Inc. v. FCC*, 489 F. 3d 444, 453 (2007). In its remand order, the Commission applied its tripartite definition of patently offensive material from its 2001 Order and found that both broadcasts fell well within its scope. See *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002, and March 8, 2005*, 21 FCC Rcd. 13299 (2006) (*Remand Order*); see also *Fox I, supra*, at 511–513 (discussing in detail the Commission's findings). As pertains to the constitutional issue in these cases, the Commission noted that under the policy clarified in the *Golden Globes Order*, "categorically requiring repeated use of expletives in order to find material indecent is inconsistent with our general approach to indecency enforcement." *Remand Order*, 21 FCC Rcd., at 13308; see also *id.*, at 13325 ("[U]nder our *Golden Globe* precedent, the fact that Cher used the 'F-word' once does not remove her comment from the realm of actionable indecency"). Though the Commission deemed Fox should have known Nicole Richie's comments were actionably indecent even prior to the *Golden Globes Order*, 21 FCC Rcd., at 13307, it declined to propose a forfeiture in light of the limited nature of the Second Circuit's remand. *Id.*, at 13321. The Commission acknowledged that "it was not apparent that Fox could be penalized for Cher's comment at the time it was broadcast." And so, as in the *Golden Globes* case it imposed no penalty for that broadcast. *Id.*, at 13324, 13326.

Fox and various intervenors returned to the United States Court of Appeals for the Second Circuit, raising administrative, statutory, and constitutional challenges to the Commission's indecency regulations. See *Fox Television Stations, Inc. v. FCC*, 489 F. 3d 444. In a 2-to-1 decision, with Judge Leval dissenting, the Court of Appeals found the *Remand Order* arbitrary and capricious because "the FCC has made a 180-degree turn regarding its treatment of 'fleeting expletives' without providing a reasoned

Opinion of the Court

explanation justifying the about-face.” 489 F. 3d, at 455. While noting its skepticism as to whether the Commission’s fleeting expletive regime “would pass constitutional muster,” the Court of Appeals found it unnecessary to address the issue. *Id.*, at 462.

The case came here on certiorari. Citing the Administrative Procedure Act, 5 U. S. C. §551 *et seq.*, this Court noted that the Judiciary may set aside agency action that is arbitrary or capricious. In the context of a change in policy (such as the Commission’s determination that fleeting expletives could be indecent), the decision held an agency, in the ordinary course, should acknowledge that it is in fact changing its position and “show that there are good reasons for the new policy.” *Fox I*, 553 U. S., at 515. There is no need, however, for an agency to provide detailed justifications for every change or to show that the reasons for the new policy are better than the reasons for the old one. *Ibid.*

Judged under this standard, the Court in *Fox I* found the Commission’s new indecency enforcement policy neither arbitrary nor capricious. *Id.*, at 517. The Court noted the Commission had acknowledged breaking new ground in ruling that fleeting and nonliteral expletives could be indecent under the controlling standards; the Court concluded the agency’s reasons for expanding the scope of its enforcement activity were rational. *Ibid.* Not only was it “certainly reasonable to determine that it made no sense to distinguish between literal and nonliteral uses of offensive words,” *ibid.*, but the Court agreed that the Commission’s decision to “look at the patent offensiveness of even isolated uses of sexual and excretory words fits with the context-based approach [approved] . . . in *Pacifica*.” *Ibid.* Given that “[e]ven isolated utterances can . . . constitute harmful ‘first blow[s]’ to children,” the Court held that the Commission could “decide it needed to step away from its old regime where nonrepetitive use of an expletive

Opinion of the Court

was *per se* nonactionable.” *Id.*, at 518. Having found the agency’s action to be neither arbitrary nor capricious, the Court remanded for the Court of Appeals to address respondents’ First Amendment challenges. *Id.*, at 529–530.

On remand from *Fox I*, the Court of Appeals held the Commission’s indecency policy unconstitutionally vague and invalidated it in its entirety. 613 F.3d, at 327. The Court of Appeals found the policy, as expressed in the 2001 Guidance and subsequent Commission decisions, failed to give broadcasters sufficient notice of what would be considered indecent. Surveying a number of Commission adjudications, the court found the Commission was inconsistent as to which words it deemed patently offensive. See *id.*, at 330. It also determined that the Commission’s presumptive prohibition on the F-word and the S-word was plagued by vagueness because the Commission had on occasion found the fleeting use of those words not indecent provided they occurred during a bona fide news interview or were “demonstrably essential to the nature of an artistic or educational work.” *Id.*, at 331 (internal quotation marks omitted). The Commission’s application of these exceptions, according to the Court of Appeals, left broadcasters guessing whether an expletive would be deemed artistically integral to a program or whether a particular broadcast would be considered a bona fide news interview. The Court of Appeals found the vagueness inherent in the policy had forced broadcasters to “choose between not airing . . . controversial programs [or] risking massive fines or possibly even loss of their licenses.” *Id.*, at 334. And the court found that there was “ample evidence in the record” that this harsh choice had led to a chill of protected speech. *Ibid.*

2

The procedural history regarding ABC is more brief. On February 19, 2008, the Commission issued a forfeiture

Opinion of the Court

order finding the display of the woman's nude buttocks in NYPD Blue was actionably indecent. See *In re Complaints Against Various Television Licensees Concerning Their February 24, 2003 Broadcast of the Program "NYPD Blue"*, 23 FCC Rcd. 3147 (2008). The Commission determined that, regardless of medical definitions, displays of buttocks fell within the category of displays of sexual or excretory organs because the depiction was "widely associated with sexual arousal and closely associated by most people with excretory activities." *Id.*, at 3150. The scene was deemed patently offensive as measured by contemporary community standards, *ibid.*; and the Commission determined that "[t]he female actor's nudity is presented in a manner that clearly panders to and titillates the audience," *id.*, at 3153. Unlike in the Fox case, the Commission imposed a forfeiture of \$27,500 on each of the 45 ABC-affiliated stations that aired the indecent episode. In a summary order the United States Court of Appeals for the Second Circuit vacated the forfeiture order, determining that it was bound by its *Fox* decision striking down the entirety of the Commission's indecency policy. See 404 Fed. Appx., at 533.

The Government sought review of both judgments, see Brief for Petitioners 1, and this Court granted certiorari, 564 U. S. ____ (2011). These are the cases before us.

II

A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. See *Connally v. General Constr. Co.*, 269 U. S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law"); *Papachristou v. Jacksonville*, 405 U. S. 156, 162 (1972)

Opinion of the Court

(“Living under a rule of law entails various suppositions, one of which is that ‘[all persons] are entitled to be informed as to what the State commands or forbids’” (quoting *Lanzetta v. New Jersey*, 306 U. S. 451, 453 (1939) (alteration in original))). This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment. See *United States v. Williams*, 553 U. S. 285, 304 (2008). It requires the invalidation of laws that are impermissibly vague. A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” *Ibid.* As this Court has explained, a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved. See *id.*, at 306.

Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. See *Grayned v. City of Rockford*, 408 U. S. 104, 108–109 (1972). When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.

These concerns are implicated here because, at the outset, the broadcasters claim they did not have, and do not have, sufficient notice of what is proscribed. And leaving aside any concerns about facial invalidity, they contend that the lengthy procedural history set forth above shows that the broadcasters did not have fair notice of what was forbidden. Under the 2001 Guidelines in force when the broadcasts occurred, a key consideration

Opinion of the Court

was “whether the material dwell[ed] on or repeat[ed] at length” the offending description or depiction. 613 F. 3d, at 322. In the 2004 *Golden Globes* Order, issued after the broadcasts, the Commission changed course and held that fleeting expletives could be a statutory violation. *Fox I*, 556 U. S., at 512. In the challenged orders now under review the Commission applied the new principle promulgated in the *Golden Globes* Order and determined fleeting expletives and a brief moment of indecency were actionably indecent. This regulatory history, however, makes it apparent that the Commission policy in place at the time of the broadcasts gave no notice to Fox or ABC that a fleeting expletive or a brief shot of nudity could be actionably indecent; yet Fox and ABC were found to be in violation. The Commission’s lack of notice to Fox and ABC that its interpretation had changed so the fleeting moments of indecency contained in their broadcasts were a violation of §1464 as interpreted and enforced by the agency “fail[ed] to provide a person of ordinary intelligence fair notice of what is prohibited.” *Williams, supra*, at 304. This would be true with respect to a regulatory change this abrupt on any subject, but it is surely the case when applied to the regulations in question, regulations that touch upon “sensitive areas of basic First Amendment freedoms,” *Baggett v. Bullitt*, 377 U. S. 360, 372 (1964); see also *Reno v. American Civil Liberties Union*, 521 U. S. 844, 870–871 (1997) (“The vagueness of [a content-based regulation of speech] raises special First Amendment concerns because of its obvious chilling effect”).

The Government raises two arguments in response, but neither is persuasive. As for the two fleeting expletives, the Government concedes that “Fox did not have reasonable notice at the time of the broadcasts that the Commission would consider non-repeated expletives indecent.” Brief for Petitioners 28, n. 3. The Government argues, nonetheless, that Fox “cannot establish unconstitutional

Opinion of the Court

vagueness on that basis . . . because the Commission did not impose a sanction where Fox lacked such notice.” *Ibid.* As the Court observed when the case was here three Terms ago, it is true that the Commission declined to impose any forfeiture on Fox, see 556 U. S., at 513, and in its order the Commission claimed that it would not consider the indecent broadcasts either when considering whether to renew stations’ licenses or “in any other context,” 21 FCC Rcd., at 13321, 13326. This “policy of forbearance,” as the Government calls it, does not suffice to make the issue moot. Brief for Petitioners 31. Though the Commission claims it will not consider the prior indecent broadcasts “in any context,” it has the statutory power to take into account “any history of prior offenses” when setting the level of a forfeiture penalty. See 47 U. S. C. §503(b)(2)(E). Just as in the First Amendment context, the due process protection against vague regulations “does not leave [regulated parties] . . . at the mercy of *noblesse oblige.*” *United States v. Stevens*, 559 U. S. ___, ___ (2010) (slip op., at 18). Given that the Commission found it was “not inequitable to hold Fox responsible for [the 2003 broadcast],” 21 FCC Rcd., at 13314, and that it has the statutory authority to use its finding to increase any future penalties, the Government’s assurance it will elect not to do so is insufficient to remedy the constitutional violation.

In addition, when combined with the legal consequence described above, reputational injury provides further reason for granting relief to Fox. Cf. *Paul v. Davis*, 424 U. S. 693, 708–709 (1976) (explaining that an “alteration of legal status . . . combined with the injury resulting from the defamation” justifies the invocation of procedural safeguards). As respondent CBS points out, findings of wrongdoing can result in harm to a broadcaster’s “reputation with viewers and advertisers.” Brief for Respondent CBS Television Network Affiliates Assn. et al. 17. This

Opinion of the Court

observation is hardly surprising given that the challenged orders, which are contained in the permanent Commission record, describe in strongly disapproving terms the indecent material broadcast by Fox, see, *e.g.*, 21 FCC Rcd., at 13310–13311, ¶30 (noting the “explicit, graphic, vulgar, and shocking nature of Ms. Richie’s comments”), and Fox’s efforts to protect children from being exposed to it, see *id.*, at 13311, ¶33 (finding Fox had failed to exercise “‘reasonable judgment, responsibility, and sensitivity to the public’s needs and tastes to avoid [a] patently offensive broadcast[t]’”). Commission sanctions on broadcasters for indecent material are widely publicized. See, *e.g.*, F. C. C. Fines Fox, N. Y. Times, Feb. 26, 2008, p. E2; F. C. C. Plans Record Fine for CBS, Washington Post, Sept. 24, 2004, p. E1. The challenged orders could have an adverse impact on Fox’s reputation that audiences and advertisers alike are entitled to take into account.

With respect to ABC, the Government with good reason does not argue no sanction was imposed. The fine against ABC and its network affiliates for the seven seconds of nudity was nearly \$1.24 million. See Brief for Respondent ABC, Inc., et al. 7 (hereinafter ABC Brief). The Government argues instead that ABC had notice that the scene in NYPD Blue would be considered indecent in light of a 1960 decision where the Commission declared that the “televising of nudes might well raise a serious question of programming contrary to 18 U. S. C. §1464.” Brief for Petitioners 32 (quoting *Enbanc Programming Inquiry*, 44 FCC 2303, 2307 (internal quotation marks omitted)). This argument does not prevail. An isolated and ambiguous statement from a 1960 Commission decision does not suffice for the fair notice required when the Government intends to impose over a \$1 million fine for allegedly impermissible speech. The Commission, furthermore, had released decisions before sanctioning ABC that declined to find isolated and brief moments of nudity actionably inde-

Opinion of the Court

cent. See, e.g., *In re Application of WGBH*, 69 F. C. C. 2d, at 1251, 1255 (declining to find broadcasts containing nudity to be indecent and emphasizing the difference between repeated and isolated expletives); *In re WPBN/WTOM License Subsidiary, Inc.*, 15 FCC Rcd. 1838, 1840 (2000) (finding full frontal nudity in Schindler's List not indecent). This is not to say, of course, that a graphic scene from Schindler's List involving nude concentration camp prisoners is the same as the shower scene from NYPD Blue. It does show, however, that the Government can point to nothing that would have given ABC affirmative notice that its broadcast would be considered actionably indecent. It is likewise not sufficient for the Commission to assert, as it did in its order, that though "the depiction [of nudity] here is not as lengthy or repeated" as in some cases, the shower scene nonetheless "does contain more shots or lengthier depictions of nudity" than in other broadcasts found not indecent. 23 FCC Rcd., at 3153. This broad language fails to demonstrate that ABC had fair notice that its broadcast could be found indecent. In fact, a Commission ruling prior to the airing of the NYPD Blue episode had deemed 30 seconds of nude buttocks "very brief" and not actionably indecent in the context of the broadcast. See Letter from Norman Goldstein to David Molina, FCC File No. 97110028 (May 26, 1999), in App. to Brief for Respondent ABC Television Affiliates Assn. et al. 1a; see also Letter from Edythe Wise to Susan Cavin, FCC File No. 91100738 (Aug. 13, 1992), *id.*, at 18a, 19a. In light of this record of agency decisions, and the absence of any notice in the 2001 Guidance that seven seconds of nude buttocks would be found indecent, ABC lacked constitutionally sufficient notice prior to being sanctioned.

The Commission failed to give Fox or ABC fair notice prior to the broadcasts in question that fleeting expletives and momentary nudity could be found actionably indecent.

Opinion of the Court

Therefore, the Commission's standards as applied to these broadcasts were vague, and the Commission's orders must be set aside.

III

It is necessary to make three observations about the scope of this decision. First, because the Court resolves these cases on fair notice grounds under the Due Process Clause, it need not address the First Amendment implications of the Commission's indecency policy. It is argued that this Court's ruling in *Pacifica* (and the less rigorous standard of scrutiny it provided for the regulation of broadcasters, see 438 U. S. 726) should be overruled because the rationale of that case has been overtaken by technological change and the wide availability of multiple other choices for listeners and viewers. See, e.g., ABC Brief 48–57; Brief for Respondent Fox Television Stations, Inc., et al. 15–26. The Government for its part maintains that when it licenses a conventional broadcast spectrum, the public may assume that the Government has its own interest in setting certain standards. See Brief for Petitioners 40–53. These arguments need not be addressed here. In light of the Court's holding that the Commission's policy failed to provide fair notice it is unnecessary to reconsider *Pacifica* at this time.

This leads to a second observation. Here, the Court rules that Fox and ABC lacked notice at the time of their broadcasts that the material they were broadcasting could be found actionably indecent under then-existing policies. Given this disposition, it is unnecessary for the Court to address the constitutionality of the current indecency policy as expressed in the *Golden Globes* Order and subsequent adjudications. The Court adheres to its normal practice of declining to decide cases not before it. See, e.g., *Sweatt v. Painter*, 339 U. S. 629, 631 (1950) (“Broader issues have been urged for our consideration, but we

Opinion of the Court

adhere to the principle of deciding constitutional questions only in the context of the particular case before the Court”).

Third, this opinion leaves the Commission free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements. And it leaves the courts free to review the current policy or any modified policy in light of its content and application.

* * *

The judgments of the United States Court of Appeals for the Second Circuit are vacated, and the cases are remanded for further proceedings consistent with the principles set forth in this opinion.

It is so ordered.

JUSTICE SOTOMAYOR took no part in the consideration or decision of these cases.

GINSBURG, J., concurring in judgment

SUPREME COURT OF THE UNITED STATES

No. 10–1293

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS *v.* FOX TELEVISION STATIONS, INC.,
ET AL.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS *v.* ABC, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[June 21, 2012]

JUSTICE GINSBURG, concurring in the judgment.

In my view, the Court’s decision in *FCC v. Pacifica Foundation*, 438 U. S. 726 (1978), was wrong when it issued. Time, technological advances, and the Commission’s untenable rulings in the cases now before the Court show why *Pacifica* bears reconsideration. Cf. *FCC v. Fox Television Stations, Inc.*, 556 U. S. 502, 532–535 (2009) (THOMAS, J., concurring).

**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 Broadcast of)	EB-03-IH-0353 ¹
the Program "NYPD Blue")	

FORFEITURE ORDER

Adopted: February 19, 2008

Released: February 19, 2008

By the Commission: Commissioner McDowell issuing a statement.

I. INTRODUCTION

1. In this Forfeiture Order, issued pursuant to section 503 of the Communications Act of 1934, as amended (the "Act"), and section 1.80 of the Commission's rules,² we find that ABC Television Network ("ABC") affiliated stations and ABC owned-and-operated stations listed in Attachment A, *infra*, broadcast indecent material during an episode of the program *NYPD Blue* on February 25, 2003, in willful violation of 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.³ Based on our review of the facts and circumstances in this case, we conclude that each station is liable for a forfeiture in the amount of \$27,500.

II. BACKGROUND

2. *NYPD Blue* was a weekly, hour-long program that ran on the ABC Television Network from 1993 through 2005. The Commission received numerous complaints alleging that certain affiliates of ABC and ABC owned-and-operated stations broadcast indecent material during the February 25, 2003 episode of *NYPD Blue* that aired at 9:00 p.m. in the Central and Mountain Standard Time Zones. After reviewing the complaints, the Enforcement Bureau (the "Bureau") sent a letter of inquiry to ABC on February 3, 2004.⁴ As a result of its investigation, the Bureau received a response from ABC and a tape of the episode.⁵

¹ The NAL Acct. No. and FRN number for each licensee subject to this Forfeiture Order are listed in Attachment A, *infra*.

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

³ See 18 U.S.C. § 1464; 47 C.F.R. § 73.3999.

⁴ See Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Susan L. Fox, ABC, Inc., dated February 3, 2004 ("*LOP*").

⁵ See Letter from Susan L. Fox, ABC, Inc., to William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated February 9, 2004; Letter from John W. Zucker, Senior Vice President, Law and Regulation, ABC, Inc., and Susan L. Fox, Vice President, Government Relations, The Walt Disney Company, to William D. Freedman, Deputy Chief, Investigations and Hearings

3. ABC's response to the Bureau's letter of inquiry confirmed the inclusion in the program of a scene, referenced in the complaints, in which a woman and a boy, who plays the eight-year old son of another character on the show, are involved in an incident that includes adult female nudity.⁶ Specifically, the woman's naked buttocks and a portion of her breasts were depicted in a scene in which she is shown disrobing and preparing to take a shower, and the boy unexpectedly enters the bathroom.⁷ ABC also confirmed that 52 of the stations about which we had received complaints aired the material outside the "safe harbor."⁸ In its responses to the letters of inquiry, ABC argued, without citing any authority, that the buttocks are not a sexual or excretory organ.⁹ ABC conceded that the scene included back and side nudity, but contended that it was "not presented in a lewd, prurient, pandering, or titillating way."¹⁰ ABC further asserted that the purpose of the scene was to "illustrate[] the complexity and awkwardness involved when a single parent brings a new romantic partner into his or her life," and that the nudity was not included to depict an attempted seduction or a sexual response from the young boy.¹¹ ABC also asserted that, because of the "modest number of complaints" the network received, and the program's generally high ratings, the contemporary community standards of the viewing community embrace, rather than reject, this particular material.¹²

4. On January 25, 2008, the Commission released the Notice of Apparent Liability for Forfeiture ("NAL"), finding that the material at issue apparently violated the broadcast indecency standard. Applying its two-prong indecency analysis, the Commission first found that the material depicted sexual or excretory organs or activities.¹³ The Commission then concluded that the material, in context, was patently offensive as measured by contemporary community standards for the broadcast medium and thus satisfied the second prong of our indecency standard. In reaching this conclusion, we reviewed each of the three principal factors relevant to a finding of patent offensiveness under our contextual analysis of indecency cases. We first determined that the material presented in the episode "contains explicit and graphic depictions of sexual organs."¹⁴ Turning to the second principal factor in our patent offensiveness inquiry, the Commission found "that the broadcast dwells on and repeats the sexual material."¹⁵ Finally, the Commission concluded that the material was shocking and titillating,

Division, Enforcement Bureau, Federal Communications Commission, dated February 17, 2004 ("*February 17 Response*").

⁶ See *Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue,"* Notice of Apparent Liability for Forfeiture, FCC 08-25, at ¶¶ 9-10 (rel. January 25, 2008) ("*NAL*").

⁷ See *id.*

⁸ The "safe harbor" is that part of each day between 10:00 p.m. and 6:00 a.m. in which indecent programming may be broadcast. See 47 C.F.R. § 73.3999(b) (stating that "[n]o licensee of a radio or television broadcast station shall broadcast on any day between 6:00 a.m. and 10:00 p.m. any material which is indecent.")

⁹ See *February 17 Response* at 7.

¹⁰ See *id.* at 9.

¹¹ See *id.* at 3-4, 9-11.

¹² See *id.* at 9.

¹³ See *NAL* at ¶ 11.

¹⁴ *Id.* at ¶ 12.

¹⁵ *Id.* at ¶ 13.

explaining, among other things, that “the scene’s depiction of adult female nudity, particularly the repeated shots of a woman’s naked buttocks, is titillating and shocking.”¹⁶

5. Accordingly, the *NAL* found the licensees of 52 stations that broadcast the episode apparently liable for forfeitures in the amount of \$27,500 per station for broadcasting indecent material, in apparent willful violation of 18 U.S.C. § 1464 and section 73.3999 of the Commission’s rules. In response to the *NAL*, numerous letters and pleadings were filed with the Commission.¹⁷

III. DISCUSSION

6. The proposed forfeiture amount in this case was assessed in accordance with section 503(b) of the Communications Act,¹⁸ section 1.80 of the Commission’s Rules,¹⁹ and the Commission’s forfeiture guidelines set forth in its *Forfeiture Policy Statement*.²⁰ In assessing forfeitures, section 503(b) of the Act requires that we take into account the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other matters as justice may require.²¹ As discussed further below, we have examined the licensees’ responses to the *NAL* pursuant to the aforementioned statutory factors, our rules, and the *Forfeiture Policy Statement*, and, with the exception of the seven stations listed in paragraph 56 hereof, we find no basis for cancellation or reduction of the forfeiture.

A. Application of Indecency Test to *NYPD Blue*

7. Indecency findings involve two fundamental determinations. First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition, *i.e.*, “the material must describe or depict sexual or excretory organs or activities.”²² In the *NAL*, the Commission concluded that the programming at issue here is within the scope of our indecency definition because it depicts sexual and excretory organs, specifically, an adult woman’s buttocks.²³ ABC and the ABC Affiliates contest this finding, arguing that the buttocks are not sexual or excretory organs and thus are outside the scope of indecency regulation. Relying primarily on medical texts, the ABC Affiliates argue that sexual organs are “biologically defined” as the genitalia or reproductive organs that are involved in reproduction.²⁴ Similarly, they argue that excretory organs include only the organs of the excretory system that eliminate urine and other waste products of metabolism, and that the “[t]he only external

¹⁶ *Id* at ¶ 14.

¹⁷ See Attachment B, *infra*, for a list of these submissions. To the extent that any of the submissions sought an extension of time within which to file a substantive response to the *NAL*, those requests are hereby denied for the reasons discussed below in Section III.B.2 of this Order.

¹⁸ See 47 U.S.C. § 503(b).

¹⁹ See 47 C.F.R. § 1.80.

²⁰ See *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997), *recons. denied*, 15 FCC Rcd 303 (1999) (“*Forfeiture Policy Statement*”).

²¹ See 47 U.S.C. § 503(b)(2)(D).

²² See *Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999, 8002 ¶ 7 (2001) (“*Indecency Policy Statement*”).

²³ See *NAL* at ¶ 11.

²⁴ See ABC Affiliates Response at 36-37.

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.”²⁵ ABC argues that the buttocks are not an excretory or sexual organ because they do not have a sexual or excretory physiological function.²⁶ In addition, both argue that the precedents cited in the *NAL* are inapposite and that the Commission has never treated mere depictions of naked buttocks as within the scope of its indecency definition.²⁷ All of these arguments lack merit.

8. The Commission has consistently interpreted the term “sexual or excretory organs” in its own definition of indecency as including the buttocks, which, though not physiologically necessary to procreation or excretion, are widely associated with sexual arousal and closely associated by most people with excretory activities.²⁸ Thus, the Commission has in many cases treated naked buttocks as coming within the scope of its indecency definition, even though it has not always concluded that particular depictions or descriptions were patently offensive and thus actionably indecent.²⁹

9. The indecency standard that we are applying here was formulated by the Commission to enforce 18 U.S.C. § 1464 through administrative action.³⁰ The Commission has broad discretion to interpret and apply the standards and terminology it has developed, as long as it does so in a manner that is consistent with the statute and the Constitution.³¹ In the context of interpreting and applying the statutory and regulatory proscription against indecent programming, it is appropriate to interpret these

²⁵ *Id.* at 37-38.

²⁶ See ABC Response at 15-16.

²⁷ See ABC Response at 16-21; ABC Affiliates Response at 39-44.

²⁸ See, e.g., *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 2664, 2681 ¶ 62, 2718 ¶ 225 (2006) (*Omnibus Order*) (finding buttocks are sexual and excretory organs within the subject matter scope of indecency definition); *Entercom Kansas City License, LLC*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 25011 ¶ 7 (2004) (comments concerning contestants’ genitals, buttocks and breasts describe or depict sexual or excretory organs); *Rubber City Radio Group*, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 14745, 14747 ¶ 6 (Enf. Bur. 2002) (dialogue in complaint referring to a “baby’s ass” referred to a child’s excretory organ and thus came within the first prong of the indecency definition).

²⁹ See *id.* Similarly, the Commission also has consistently treated female breasts as sexual organs though, like the buttocks, they are not physiologically necessary to procreation. See, e.g., *Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 19230 (2004) (“*Super Bowl NAL*”), *affirmed*, Forfeiture Order, 21 FCC Rcd 2760 (2006) (“*Super Bowl Forfeiture Order*”), *affirmed*, Order on Reconsideration, 21 FCC Rcd 6653 (2006), (“*Super Bowl Order on Reconsideration*”), on *appeal sub nom. CBS Corp. v. FCC*, No. 06-3575 (3d Cir. 2006).

³⁰ See 47 U.S.C. § 503(b)(1)(D).

³¹ See, e.g., *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (Court “shows great deference to the interpretation given the statute by the agency charged with its administration.... When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.”); *Dana Corp. v. ICC*, 703 F. 2d 1297, 1300 (D.C. Cir. 1983) (“The [ICC] has not violated its own rules, given the broad discretion it is accorded in interpreting them”); *Solite Corp. v. EPA*, 952 F. 2d 473, 497 (D.C. Cir. 1991) (“EPA’s determination... was thus the result of the Agency’s interpretation and application of its own rules, and the interpretation was far from ‘plainly wrong’”); *Chemical Waste Management, Inc. v. EPA*, 869 F. 2d 1526, 1538-39 (D.C. Cir. 1989) (“[a]n agency’s interpretation of its own regulations will be accepted unless it is plainly wrong”); *General Carbon Co. v. OSHRC*, 860 F.2d 479, 483 (D.C. Cir. 1988) (“petitioner, in asserting that the agency has misconstrued its own standards, has assumed a heavy burden.... This court has previously noted ‘the high level of deference to be afforded an agency on review when the issue turns on the interpretation of the agency’s own prior proclamations.’”).

terms not in a medical sense but rather in the sense of organs that are closely associated with sexuality or excretion and that are typically kept covered because their public exposure is considered socially inappropriate and shocking.³² We believe that it is appropriate to use the terms sexual or excretory organs – as we have in the past – in a manner consonant with the purpose of the regulatory regime to protect children from indecent depictions of organs associated with sex and excretion and sexual and excretory activities. The purpose of indecency regulation, obviously, is not to regulate procreation or excretion, so we do not think a technical physiological definition is appropriate.³³

10. Moreover, if we interpreted these terms in the narrow physiological sense advocated by ABC and the ABC Affiliates, the airwaves could be filled with naked buttocks and breasts during daytime and prime time hours because they would be outside the scope of indecency regulation (at least if no sexual or excretory activities were shown or discussed). We find it impossible to believe that ABC or the ABC Affiliates ever thought this to be the Commission’s policy. In short, while their Responses to the *NAL* are brimming with medical definitions and arguments, the respondents offer no legal or public policy reason for their argument, and we find it lacking in merit.

11. Contrary to the ABC Affiliates’ contention, the “rule of lenity” does not require that the Commission construe the indecency proscription in section 1464 narrowly even when it is imposing administrative sanctions for violations.³⁴ The Supreme Court made clear in *FCC v. Pacifica* that the removal of the indecency provision from the Communications Act and its codification in section 1464 of the criminal code in 1948 was not intended to effect any “substantive change.”³⁵ The Court thus found it unnecessary to “consider any question relating to the possible application of § 1464 as a criminal statute.”³⁶ It is similarly unnecessary here – all the more so because the term we are construing is one that

³² Under the “nuisance” rationale upheld by the Supreme Court in *Pacifica*, it is appropriate to treat as coming within the scope of the indecency definition those body parts that are considered socially inappropriate to reveal in public for “[a]s Mr. Justice Sutherland wrote a ‘nuisance may be merely a right thing in the wrong place, -- like a pig in the parlor instead of the barnyard.’” *FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978) (“*Pacifica*”). Under its nuisance approach, the Commission has determined that daytime and primetime broadcast programming is the “wrong place” to display naked buttocks in a patently offensive manner.

³³ Indeed, the arguments presented by the ABC Affiliates demonstrate the absurdity of employing a technical physiological definition in the context of indecency regulation. First, the ABC Affiliates maintain, from a medical standpoint, that the skin is an excretory organ because it excretes perspiration. *See* ABC Affiliates Response at 37 & n.42. But it is preposterous to suggest that any display of skin falls within the subject matter scope of our indecency regulation, and the ABC Affiliates even disclaim the logical consequence of their own argument, stating that the “ABC Affiliates do not believe that the Commission intends . . . to proscribe depictions of skin as an excretory organ.” *Id.* Such a concession indicates that the ABC Affiliates do not seriously believe their own argument – that the subject matter scope of our indecency regulation is to be determined through technical physiological definitions. Second, the ABC Affiliates draw a distinction between excretion, which they claim refers to the elimination of the waste products of metabolism from the body, and defecation, which refers to the elimination of feces, “undigested food and bacteria [that] have never been a part of the functioning of the body.” *Id.* at 38. Thus, pursuant to the technical physiological definitions presented by the ABC Affiliates, sweating would be considered an “excretory activity” while defecating would not. Again, such an approach makes no sense in the context of indecency regulation, and no reasonable person would believe that the Commission would use such technical definitions in the context of indecency regulation. We note, for instance, that according to the logic of the ABC Affiliates, two of the seven “Filthy Words” in the Carlin monologue at issue in *Pacifica* – “shit” and “tits” – would appear not to fall within the subject matter scope of our indecency definition.

³⁴ *See* ABC Affiliates Response at 44-45.

³⁵ *Pacifica*, 438 U.S. at 739 n.13.

³⁶ *Id.*

appears in the standard formulated by this Commission for purposes of imposing administrative forfeitures.

12. Turning to the second aspect of our indecency test, we also find that, in context and on balance, the complained-of material is patently offensive as measured by contemporary community standards for the broadcast medium. In our analysis of the three principal factors involved in determining whether material is patently offensive, “the overall context of the broadcast in which the disputed material appeared is critical. Each indecency case presents its own particular mix of these, and possibly other, factors, which must be balanced to ultimately determine whether the material is patently offensive and therefore indecent.”³⁷ Each of the three principal factors contributes to a finding of patent offensiveness here. ABC points to factors that, it argues, mitigate the patent offensiveness of the disputed material, in particular the *NYPD Blue* series’ “outstanding artistic and social merit,” the relationship of the scene in question to a theme stretching across multiple episodes, and the parental advisory and rating at the beginning of the episode.³⁸ On balance, however, for the reasons discussed below, we find that the material is patently offensive as measured by contemporary community standards for the broadcast medium.

13. First, we find that the depiction of an adult woman’s naked buttocks was sufficiently graphic and explicit to support an indecency finding. Indeed, we do not believe that the explicit and graphic nature of the material is reasonably debatable. Although the language-based examples that it provides are not entirely apposite, examination of the *Indecency Policy Statement* reveals that, in a case such as this one, the issue under the first principal factor is whether the visual depiction of the sexual or excretory organ is clear and unmistakable.³⁹ Here, the scene in question shows a female actor naked from behind, with her buttocks fully visible at close range. She is not wearing a g-string or other clothing, nor are the shots of her buttocks pixillated or obscured.⁴⁰ Thus, the material is sufficiently graphic and explicit to support an indecency finding.⁴¹ Although the partial views of her naked breast from behind and from the side are not sufficiently graphic and explicit, in and of themselves, to support an indecency finding, they also add somewhat to the first factor’s weight here.

14. The cases cited by the ABC Affiliates for the proposition that nudity is not necessarily graphic or explicit are easily distinguishable from this case.⁴² ABC cites cases in which the Commission

³⁷ *Indecency Policy Statement*, 16 FCC Rcd at 8003 ¶ 10. *See id.* at 8002-8003 ¶ 9 (“contextual determinations are necessarily highly fact-specific, making it difficult to catalog comprehensively all of the possible contextual factors that might exacerbate or mitigate the patent offensiveness of particular material.”).

³⁸ *See* ABC Response at 26; ABC Affiliates Response at 51-52, 54-55, 61-62

³⁹ *See Indecency Policy Statement*, 16 FCC Rcd at 8004-8008 ¶¶ 13-16.

⁴⁰ *Cf. Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, Memorandum Opinion and Order, 20 FCC Rcd 1920, 1927 ¶ 9 (2005) (“*PTC I*”) (material that involved “characters whose sexual and/or excretory organs were covered by bedclothes, household objects, or pixilation” but did not “actually depict[] sexual or excretory organs” held not sufficiently graphic or explicit to support a patent offensiveness finding).

⁴¹ *See Super Bowl Forfeiture Order*, 21 FCC Rcd at 2765-66 (broadcast of a female performer’s breast was graphic and explicit); *Young Broadcasting of San Francisco*, Notice of Apparent Liability, 19 FCC Rcd 1751 (2004) (broadcast of performer’s exposed penis was graphic and explicit).

⁴² *See* ABC Affiliates Response at 47. *See Omnibus Order* at 2716 ¶ 215 (scene from *The Today Show* was not graphic or explicit where “[t]he shot of the man’s penis is not at close range, and the overall focus of the scene is on the rescue attempt, not on the man’s sexual organ”); *Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, Memorandum Opinion and Order, 20 FCC Rcd 1931, 1938 ¶ 9 (2005) (“*PTC II*”) (“rudimentary depiction of a cartoon boy’s buttocks” was not

did not find depictions of naked buttocks to be patently offensive, but none held that the clear and unmistakable depiction of nudity was not sufficiently explicit to support a finding of patent offensiveness.⁴³ Rather, each held that the material at issue, in light of all of the relevant factors, was not patently offensive.⁴⁴ We emphasize that our finding with respect to explicitness does not represent a conclusion that the scene in question is pandering or titillating; that issue relates to our analysis of the third principal factor below. We simply conclude here that the disputed material's clear, unobscured, close-range visual depiction of a woman's buttocks was graphic and thus supports a finding of patent offensiveness.

15. Second, we find that the disputed material's repeated depictions of a woman's naked buttocks provide some support for a patent offensiveness finding. As set forth in the *Indecency Policy Statement*, the issue under the second principal factor is focus and repetition versus "passing or fleeting" reference to sexual or excretory material.⁴⁵ Here, the disputed scene includes repeated shots of a woman's naked buttocks and focuses on her nudity. At one point, when her buttocks already have been displayed once and she is about to step into the shower, the camera deliberately pans down her back to reveal another full view of her buttocks before panning up again. While we concede that a longer scene or additional depictions of nudity throughout the episode would weigh more heavily in favor of an indecency finding, we conclude here that the focus on and repeated shots of the woman's naked buttocks provides some support for a finding of indecency under the second factor.⁴⁶ In this regard, it is worth noting that our analysis under this factor is best viewed on a continuum rather than as a binary "all or nothing" determination. To be sure, the depiction here is not as lengthy or repeated as some of the cases cited by ABC and ABC Affiliates in which the Commission has indicated that this factor supported a finding of patent offensiveness (and thus does not provide as much support for a finding of patent offensiveness as was present in those cases).⁴⁷ However, this material does contain more shots or lengthier depictions of nudity, or more focus on nudity, than other cases involving nudity where the Commission has found that this factor did not weigh in favor of a finding of patent offensiveness.⁴⁸

16. Third, we find that the scene's pandering, titillating, and shocking nature supports a patent offensiveness finding. The female actor's nudity is presented in a manner that clearly panders to and titillates the audience. The viewer is placed in the voyeuristic position of viewing an attractive woman disrobing as she prepares to step into the shower. Moreover, not only does the scene include a shot of her naked buttocks as she removes her robe in front of the bathroom mirror, the scene goes farther, providing the audience with another full view of her naked buttocks as she stands in front of the shower. This second shot, in which the camera pans down her naked back to her buttocks, pauses for a moment and then pans up her back, highlights the salacious aspect of the scene, clearly suggesting that its interest lies at least partly in seeing the actress's naked buttocks. The subsequent camera shots of the boy's

sufficiently graphic or explicit to support a patent offensiveness finding).

⁴³ See ABC Response at 18-19.

⁴⁴ See *id.*

⁴⁵ See *Indecency Policy Statement*, 16 FCC Rcd at 8008 ¶ 17.

⁴⁶ See *id.*

⁴⁷ See ABC Response at 21-24; ABC Affiliates Response at 48-50.

⁴⁸ In any event, even were we to conclude that the second principal factor in our contextual analysis does not support a finding a patent offensiveness, we would still reach the same conclusion based on the strength of the first and third principal factors. See, e.g., *Super Bowl Forfeiture Order*, 21 FCC Rcd at 2766 ¶ 12; *Young Broadcasting of San Francisco*, 19 FCC Rcd at 1755 ¶¶ 10, 12 (broadcast of performer's exposed penis was graphic and explicit).

shocked face from between the woman's legs, and of her naked, partially-obscured upper torso from behind his head, also serve to heighten the titillating and shocking nature of the scene. We disagree with ABC's position that these shots convey "nothing sexual or lewd."⁴⁹ Although the scene does not depict any sexual response in the child, his presence serves to heighten the shocking nature of the scene's depiction of her nudity.⁵⁰

17. Contrary to ABC's arguments, comparison of the instant scene to Commission precedents does not undermine our finding regarding the third principal factor. The disputed material is easily distinguishable from the nudity addressed by the Commission in *Schindler's List*.⁵¹ In *Schindler's List*, the complainant conceded that the material he alleged to be actionably indecent was not presented to pander or titillate.⁵² Indeed, the "full frontal nudity" that aired outside of safe harbor and was the subject of the complaint was, as the ABC Affiliates explain, a scene depicting concentration group prisoners "made to run around the camp fully nude as the sick are sorted from the healthy."⁵³ While the scene is certainly disturbing, it is neither pandering nor titillating and bears no contextual resemblance to the material in *NYPD Blue*.⁵⁴ Accordingly, we disagree with the claim of the ABC Affiliates that it is

⁴⁹ ABC Response at 31.

⁵⁰ While the scene does not depict any sexual response in the child, the effect of the nudity on the child is joked about later in the episode. The woman, who is on the police force, is discussing with another policewoman whether seeing her naked might have a long-term impact on the boy when the older detective who is the boy's father walks into the squad room. The woman asks him: "How was he when you dropped him off at school?" He responds: "Dropped him off at a Hooters." When she looks perplexed, he adds: "He insisted," at which point she smiles and walks away.

⁵¹ See *WPBN/WTOM License Subsidiary, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 1838, 1840 (nudity in broadcast of *Schindler's List* not patently offensive when considered in context of World War II concentration camp).

⁵² See *id.* at 1840 ¶ 6.

⁵³ ABC Affiliates Response at 57.

⁵⁴ Neither do we credit ABC's argument that the nudity here is presented in a similar manner to the expletives in *Saving Private Ryan*. See ABC Response at 27, (citing 20 FCC Rcd 4507) (In *Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan"*, Memorandum Opinion and Order, 20 FCC Rcd 4507 (2005), the Commission found that use of coarse, vulgar expletives in broadcast of *Saving Private Ryan* not patently offensive when considered in wartime context). The conclusion that the material here (a woman disrobing to reveal her naked buttocks) is presented in a pandering and titillating manner whereas the material in *Saving Private Ryan* (expletives uttered by soldiers in the midst of World War II) was not presented in a pandering and titillating manner is entirely unremarkable.

“difficult to distinguish” the nudity here from the nudity in the *Schindler’s List* scene.⁵⁵ Likewise, the *Will and Grace* episode cited by ABC is easily distinguishable because it presents no nudity.⁵⁶

18. We also disagree with ABC’s contention that we are refusing to defer to its artistic judgment, in contrast to cases such as *Schindler’s List* and *Saving Private Ryan*.⁵⁷ We are not “second-guessing” an artistic decision by concluding that the nudity contained in *NYPD Blue* was graphic and presented in a pandering and titillating manner.⁵⁸ Art may very well be graphic, and we recognize that *NYPD Blue* was a longstanding television drama that garnered writing, directing, and acting awards, and that the scene in question related to a broad storyline of the show.⁵⁹ Our finding does not represent a conclusion that the disputed material lacked artistic or social merit. As the D.C. Circuit has recognized, however, “merit is properly treated as a factor in determining whether material is patently offensive, but it does not render such material per se not indecent.”⁶⁰ Further, we agree with ABC that the parental advisory and rating at the beginning of the program is relevant and weighs against a finding of indecency.⁶¹ As discussed above, however, we must weigh these factors along with the three principal factors above to ultimately determine whether the disputed material is patently offensive and therefore indecent. In context and on balance, we conclude that the graphic, repeated, pandering, titillating, and shocking nature of the scene’s visual depiction of a woman’s naked buttocks warrant a finding that it is patently offensive under contemporary community standards for the broadcast medium, notwithstanding any artistic or social merit and the presence of a parental advisory and rating. Therefore, it is actionably indecent.

B. Procedural Arguments

19. ABC and the ABC Affiliates raise several procedural objections to the *NAL*, including attacks on the sufficiency of the complaints underlying the Commission’s action and arguments that the parties have been denied their due process rights by the Commission because of an alleged delay in

⁵⁵ See ABC Affiliates Response at 58. For the same reason, we reject the ABC Affiliates’ assertion that the Commission has created a *per se* prohibition of nudity. We need not address Respondents’ reliance on unpublished staff letters denying indecency complaints against broadcasts of the film *Catch-22* and other programs that contained nudity. See ABC Response at 18-19, 25-27; ABC Affiliates Response at 58-60. See 47 C.F.R. § 0.445(e) (unpublished opinions and orders of the Commission or its staff “may not be relied upon, used or cited as precedent, except against persons who have actual notice of the document in question or by such persons against the Commission”); *Pathfinder Communications Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 9272, 9279 ¶¶ 13 & n.47 (2003); see also *Indep. Ins. Agents of America, Inc. v. Ludwig*, 997 F.2d 958, 962 (D.C. Cir. 1993) (“In the real world of agency practice, informal unpublished letters should not engender reliance.”) (internal quotes and citations omitted).

⁵⁶ See *Omnibus Order*, 21 FCC Rcd at 2702 ¶ 158 (“the touching of the breasts is not portrayed in a sexualized manner, and does not appear to elicit any sexual response from Grace.”).

⁵⁷ See ABC Response at 27; ABC Affiliates Response at 51-52.

⁵⁸ See ABC Affiliates Response at 52.

⁵⁹ See ABC Response at 26-27.

⁶⁰ *Action for Children’s Television v. FCC*, 852 F.2d 1332, 1340 (D.C. Cir. 1988) (“ACT I”)

⁶¹ As ABC points out, the Commission made clear in dismissing indecency complaints against broadcasts of *Schindler’s List* and *Saving Private Ryan* that a prominent broadcast parental advisory, while not necessarily precluding an indecency finding, should be considered in assessing the degree to which the broadcaster is acting in a responsible manner and the degree to which the public may be surprised and offended by unexpected material. See ABC Response at 34-35 (citing 20 FCC Rcd at 4513 ¶¶ 15-16, 15 FCC Rcd at 1840 ¶ 6, 1842 ¶ 13); ABC Affiliates Response at 61-62.

providing the complaints to them and the alleged truncated period afforded them to respond to the *NAL*. We address these arguments in turn.

1. Sufficiency of Complaints

20. ABC and the ABC Affiliates contend that the complaints underlying the *NAL* did not meet the requirements of the Commission's indecency enforcement policy and should have been summarily dismissed.⁶² Specifically, both ABC and the ABC Affiliates argue that the Commission failed to make an initial determination as to the sufficiency of each complaint in this case, as required by the *Omnibus Remand Order*. According to ABC and the ABC Affiliates, with one exception, the subject complaints in this case were identical "form" complaints generated by a single advocacy group. Furthermore, they claim there is no evidence that any of the complainants actually viewed the subject episode of *NYPD Blue* on the stations cited in the *NAL* or on any station.⁶³ For these reasons, ABC and the ABC affiliates argue that the complaints are not *bona fide*, actionable complaints and should have been dismissed for lack of sufficiency. Accordingly, they contend that the Commission should rescind the *NAL*.⁶⁴

21. The arguments advanced by ABC and ABC Affiliates regarding the sufficiency of the complaints are without merit because they are based upon a flawed understanding of our indecency enforcement policy.⁶⁵ As the Commission clarified in the *Omnibus Remand Order*, it is sufficient that viewers in markets served by each of the ABC Stations filed complaints identifying the allegedly indecent episode of *NYPD Blue* at issue.⁶⁶ Moreover, and contrary to the arguments of ABC and the ABC Affiliates, there is no requirement that a complaint include a statement that the complainant viewed the material alleged to be indecent. The Commission has considered and rejected similar arguments.⁶⁷

22. Each of the initial e-mail complaints received by the Commission specifically identified the February 25, 2003 episode of *NYPD Blue*, each stated that the material was aired on stations affiliated with the ABC Network, and each provided a significant excerpt of the allegedly indecent material.⁶⁸

⁶² See ABC Response at 10-14 (citing *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Order, 21 FCC Rcd 13299 (2006) ("*Omnibus Remand Order*")); ABC Affiliates Response at 21-34 (citing *Omnibus Order*, 21 FCC Rcd at 2673 ¶ 32, 2676 ¶ 42, 2687 ¶ 86; *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Order, 21 FCC Rcd 13299, 13328-329 ¶¶ 74-77 (2006) ("*Omnibus Remand Order*"). In addition, Channel 12 of Beaumont, Inc. (Beaumont), which joined in the ABC Affiliates Response, filed a supplement directed to matters pertinent to Station KBMT(TV). See Beaumont Response.

⁶³ See ABC Response at 10-14; ABC Affiliates Response at 23-29; Beaumont Response at 4.

⁶⁴ See ABC Response at 10-14; ABC Affiliates Response at 21-34; Beaumont Response at 6.

⁶⁵ See *Super Bowl Order on Reconsideration* 21 FCC Rcd at 6665 ¶ 30.

⁶⁶ See *Omnibus Remand Order*, 21 FCC Rcd at 13323 ¶ 57, n.180, 13328-329 ¶75.

⁶⁷ See *Omnibus Remand Order*, 21 FCC Rcd at 13323 ¶ 57, n.180

⁶⁸ We reject the ABC Affiliates' argument that the complaints singularly concern the exposure of a child actor to adult female nudity on the set of *NYPD Blue* during production of the episode and cannot be read to raise a broadcast indecency issue. See ABC Affiliates Response at 24. There is no reasonable basis for this extremely narrow construction of the complaints. Indeed, many of the complaints specifically stated, "it is shameless that this kind of broadcast is going unchallenged by the FCC." We note, in this regard, that the Commission does not require that indecency complaints be "letter perfect," or provide an exact description of the allegedly indecent material. See, e.g., *Indecency Policy Statement*, 16 FCC Rcd at 8015 ¶ 24 & n.20 citing *Citicasters Co., Licensee of Station KSJO(FM), San Jose, California*, Notice of Apparent Liability, 15 FCC Rcd 19095 (Enf. Bur. 2000)

Although the complainants initially did not provide call letters of a specific ABC affiliate or other information identifying the market in which the complainant resided, Commission staff requested further information on these points in follow-up e-mails to the complainants. Specifically, the staff requested information about the television station over which the complainant saw the subject program,⁶⁹ including, if available, the station's call letters or "the city and town in which the station you watched is located."⁷⁰ The staff received numerous responses to the follow-up e-mails identifying the ABC Stations referenced in the *NAL*.⁷¹ The follow-up emails permitted the staff to ensure that there was a complainant in the market of each of the ABC Stations against which a forfeiture is imposed herein, consistent with the Commission's enforcement policy.⁷²

23. Consequently, this complaint proceeding does not present the same issues as did the complaints against KMBC-TV discussed in the *Omnibus Order Remand* and which both ABC and the ABC Affiliates cite in their responses.⁷³ In that case, there were no complaints filed by anyone residing in the market served by KMBC-TV. Instead, the complaints were filed by a complainant residing outside the KMBC-TV market and there was nothing in the record to tie the complaints to KMBC-TV's local viewing area.⁷⁴ With respect to stations at issue in this Order, we have affirmative statements from the complainants tying the complaints to a particular ABC station or affiliated station.⁷⁵

24. Moreover, we find no merit in the argument by ABC and the ABC Affiliates that complaints which were not filed contemporaneously with the airing of the February 25, 2003, episode of *NYPD Blue* should be dismissed.⁷⁶ The Commission does not require complainants to file indecency complaints within a specified time frame.⁷⁷ Under these circumstances, we find that the *NAL* was consistent with our commitment to an appropriately restrained enforcement policy and recent

(forfeiture paid). Once the Commission receives a valid complaint, it reviews the program material to determine whether it is indecent.

⁶⁹ See e-mail from William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission dated December 29, 2005.

⁷⁰ *Id.*

⁷¹ Contrary to the ABC Affiliates' suggestion, there is no requirement that the complainant include a physical address matching the affiliate's television market. See ABC Affiliates Response at 23.

⁷² See *Indecency Policy Statement*, 16 FCC Rcd at 8015, ¶ 24 (requirements generally for consideration of an indecency complaint). There is no merit in the contention that it was improper for the staff to seek additional clarifying information from the complainants. The staff exercises its reasonable discretion in determining whether a particular complaint warrants further inquiry or should be dismissed as insufficient. The decision here to seek further identifying information was well within that discretion. In any event, even if the initial complaints had been dismissed, our ordinary practice would have afforded the complainants the option to refile their complaints with additional information.

⁷³ See ABC Response at 10-11; ABC Affiliates Response at 28-29; Beaumont Response at 4.

⁷⁴ See *Omnibus Remand Order*, 21 FCC Rcd at 13328-329 ¶ 75.

⁷⁵ We do note, however, that we must exclude as insufficient under the enforcement policy set forth in the *Omnibus Order* the complaints against 5 stations from the *NAL* – specifically, WBRZ-TV, Baton Rouge, LA; WXOW-TV, LaCrosse, WI; KMBC-TV, Kansas City, MO; KHOG-TV, Fayetteville, AR, and WDAY-TV, Fargo, ND.

⁷⁶ See ABC Response at 12-13; ABC Affiliates Response at 23-24; Beaumont Response at 4-6.

⁷⁷ See *Indecency Policy Statement*, 16 FCC Rcd at 8015, ¶ 24.

Commission practice to limit the imposition of forfeiture penalties to licensees whose stations serve markets from which specific complaints are received.⁷⁸

2. Notice and Length of Time to Respond to *NAL*

25. The ABC Affiliates contend that the length of time between when the episode aired and the *NAL* was issued, combined with the “unusually shortened” period of time they had for responding to the *NAL*, effectively deprived them of their administrative due process rights.⁷⁹ Beaumont, in a separate response, makes similar arguments.⁸⁰ More specifically, the ABC Affiliates claim that they did not know until the *NAL* was issued that there were pending complaints against the ABC affiliate stations concerning its broadcast of the subject *NYPD Blue* episode.⁸¹ The ABC Affiliates note that although the Commission issued a letter of inquiry to ABC, Inc., concerning the indecency complaints the Commission had received,⁸² the affiliates did not directly receive similar notice from the Commission and, therefore, did not have as much time as the ABC owned-and-operated stations to conduct a contemporaneous investigation of the facts. As such, they assert that pertinent records may be non-existent or hard to locate, and knowledgeable witnesses may no longer readily be available.⁸³ Moreover, they argue that

⁷⁸ The ABC Affiliates argue that the Commission's production of the complaints, pursuant to numerous FOIA and informal requests, compounded the alleged injury to their due process rights and more specifically, that the Commission never provided copies of complaints respecting eight of the stations cited in the *NAL*. See ABC Affiliates Response at 14-17, 22-23. Two of these stations, KTKA-TV and KFBB-TV, are no longer subject to forfeitures for reasons discussed elsewhere in this Order, and thus the argument as to them is moot. As to the remaining six stations, the Commission responded on an expedited basis to all requests for complaints concerning stations named in the *NAL* where the requesting party represented the station(s) whose complaints it sought. Our records reflect that the only party requesting the complaints for these six stations did not indicate that it represented these stations and the complaints were not, therefore, provided on an expedited basis. The complaints have now been provided, but any prejudice alleged to have resulted from the timing of their production must be attributed to the stations' failure to timely request them.

In addition, the ABC Affiliates point out that certain discrepancies among the responses to their FOIA requests for the underlying complaints - mainly, the format of the information provided - raised questions as to whether they had received copies of the genuine complaints. See ABC Affiliates Response at 22-23. We have since corrected any such deficiencies, to the extent they existed. We note, in this regard, that the parties have not established that they suffered any actual harm as a result of these discrepancies and that they were able to and did rely on the complaints in responding to the *NAL*. Moreover, in responding to the parties' requests for the underlying complaints, we explained that the copies we first produced were Access database versions of the complaints rather than the original Outlook e-mail versions. See E-mail from Ben Bartolome to Mark Prak, Wade Hargrove, and David Kushner, sent Monday, February 4, 2008, at 8:02 p.m. (attaching copies of complaints in Access Version) (copy of E-mail available in FCC record). The next day, we located and produced the original Outlook versions. See E-mail from Ben Bartolome to Mark Prak, Wade Hargrove, and David Kushner, sent Tuesday, February 5, 2008, at 4:54 p.m. (attaching copies of same complaints, but in Outlook version) (copy of E-mail available in FCC record). There is no question that the complaints we provided were “genuine.”

⁷⁹ See ABC Affiliates Response at 9-21.

⁸⁰ See Beaumont Response at 5-6.

⁸¹ See ABC Affiliates Response at 11-13.

⁸² See Letter from William D. Freedman, Deputy Chief, Investigations & Hearings Division, Enforcement Bureau, FCC to Susan L. Fox, Esq., ABC Inc., dated February 3, 2004 (“Letter of Inquiry”).

⁸³ See ABC Affiliates Response at 12.

once the *NAL* was issued, they were afforded only 17 days, rather than the usual 30 days, in which to respond and that this shortened period further prejudiced their rights.⁸⁴

26. We find no merit in ABC Affiliates' and Beaumont's due process arguments. Both parties fail to demonstrate that the Commission's process somehow impeded their ability to fully exercise their due process rights. The arguments advanced by the parties with respect to insufficient notice suggest a misunderstanding of the nature of the Commission's forfeiture process. Pursuant to section 1.80 of the Commission's rules, before imposing a forfeiture penalty, the Commission must provide each licensee with a written notice of apparent liability which includes an explanation of the nature of the misconduct, the rule section that the Commission believes was violated, and the proposed forfeiture amount. The *NAL* in this instance provided such required notice. There is no requirement that the Commission direct a letter of inquiry to a licensee as part of an investigation of alleged indecent programming aired by a broadcast station before issuing an *NAL*. Moreover, section 1.80 of the Commission's rules specifies that each licensee to which such notice is provided may file a written response demonstrating why a forfeiture penalty should not be imposed or should be reduced. By their responses to the *NAL* and various FOIA filings to obtain copies of complaints, the ABC Affiliates and other parties availed themselves of the opportunity to respond to the Commission's concerns, belying their claims to the contrary.

27. Furthermore, as a practical matter we are not persuaded that the ABC Affiliates suffered any harm from the shortened *NAL* response period or the time period between the broadcast and the *NAL* under the circumstances involved here. The principal record involved here is the tape of the episode, which the ABC Affiliates do not maintain was difficult to obtain. In addition, while they argue that individual stations may have had difficulty determining whether they aired the episode within the "safe harbor," ABC provided that information to the Commission in 2004.⁸⁵ The parties' timely filings also contradict any potential claim that they have suffered actual harm and/or that the *NAL* response time was so inadequate as to jeopardize their due process rights. The ABC Affiliates claim that "pertinent records of the broadcast *may* be non-existent or difficult to locate, and knowledgeable witnesses *may* no longer be readily available." They do not argue that such records or witnesses *were*, in fact, impossible to locate or that any particular material relevant to their case could not be found. At best, the parties argue inconvenience, which, even if true, they clearly surmounted, considering the number, coordinated nature, and overall comprehensiveness of their filings.

28. Section 1.80 provides that the "[r]espondent 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."⁸⁶ The Commission's rules do not state that the reasonable period of time will *always* be 30 days. A 30-day response period is not mandated. The rule only requires that the response period be reasonable, and the parties have not submitted evidence of actual harm or presented any persuasive arguments to convince the Commission that the 17 days afforded for a response in this case was not reasonable. Indeed, the evidence before us demonstrates that the ABC Affiliates were able to substantively respond to the *NAL* and to fully incorporate in that response relevant materials, including the underlying complaints in this proceeding. Legal counsel from 20 law firms and/or companies coordinated and responded to the *NAL* in one, consolidated, 70-page brief, with exhibits, on behalf of the majority of ABC affiliated stations. Accordingly, we conclude that the period

⁸⁴ We note that potential statute of limitations concerns under 28 U.S.C. § 2462 warranted the Commission's action in providing Respondents a shorter time period than usual to respond to the *NAL*.

⁸⁵ See *supra*, ¶2.

⁸⁶ See 47 C.F.R. § 1.80(f)(3) (emphasis added).

provided for the licensees' response was reasonable and that they were neither deprived of the required notice nor an opportunity to be heard.

29. The ABC Affiliates also complain that the quality of the notice received through the *NAL* does not meet the standards set forth in Section 1.80(f)(1)(ii) because it allegedly fails to “[s]et forth the nature of the act or omission charged against the respondent and the facts upon which such charge is based.”⁸⁷ We find this argument wholly unpersuasive. The *NAL* set forth the episode, air date and time, and a sufficient description of the content and how it violated the Commission’s indecency rules.⁸⁸ There is no requirement, as the ABC Affiliates suggest, that the Commission provide the underlying complaint itself as part of the notice. Accordingly, we reject this argument.

30. Finally, the ABC Affiliates’ argument that their due process rights have been denied because they did not have the benefit of producing evidence in the context of an administrative hearing proceeding is misplaced.⁸⁹ As the Commission has previously stated:

It is, of course, true that the complainant’s statement is “untested,” in that no evidentiary hearing has been held. However, the Communications Act of 1934, as amended (“Act”) permits the imposition of a forfeiture without an evidentiary hearing. The Act also protects the rights of parties subject to a forfeiture assessed without a hearing by providing that such a forfeiture cannot be used to the prejudice of the party unless it is paid or a court of competent jurisdiction has issued a final order after a trial *de novo* requiring that the forfeiture be paid.⁹⁰

Accordingly, given the foregoing, we deny the ABC Affiliates’ and Beaumont’s argument that the *NAL* should be rescinded based on any due process or insufficient notice grounds.

C. Other Arguments

1. Broadcast Satellite Station

31. Gray Television Licensee, Inc. (“Gray”), argues that the Commission should dismiss the case as to its satellite station, KLBY(TV), Colby, KS, and remove it from liability for the forfeiture assessed in the *NAL*.⁹¹ Gray explains that KLBY is a satellite station of Gray’s full-power station, KAKE-TV, Wichita, KS, which is already subject to the *NAL*.⁹² As such, Gray asserts that KLBY(TV) “offers little more than an extension of the signal of its parent station, and makes virtually no independent programming judgments about the programming it broadcasts.”⁹³ Further, it states that it broadcasts less than one half hour a week of programming that differs from the full power station.⁹⁴ Gray contends that

⁸⁷ See ABC Affiliates Response at 21; 47 C.F.R. § 1.80(f)(1)(ii).

⁸⁸ See *NAL* at ¶¶ 9-19.

⁸⁹ See ABC Affiliates Response at 10.

⁹⁰ See *Infinity Broadcasting Corporation of Los Angeles*, Memorandum Opinion and Order, 16 FCC Rcd 6867, 6869 ¶ 8 nn.2-3 (Enf. Bur. 2001), *affirmed*, *Memorandum Opinion and Order*, 17 FCC Rcd 9892 (2002).

⁹¹ See Motion to Dismiss, filed by Gray Television Licensee, Inc., Licensee of Stations KAKE-TV, Wichita, Kansas and KLBY(TV), Colby, Kansas, on February 11, 2008 (“Gray Response”).

⁹² See *id.* at 2.

⁹³ See *id.*

⁹⁴ See *id.*

the Commission's treatment of KLBY here is inconsistent with its differential treatment of satellite stations in other arenas, such as their exemption from television broadcast ownership restrictions.⁹⁵ Gray claims that subjecting it to forfeitures for both KAKE-TV and KLBY airing the same content would effectively make it more expensive to own satellite stations, which contrasts with the Commission's treatment in other contexts making it less burdensome to own satellite stations.⁹⁶ In making these arguments, Gray relies on precedent concerning ownership restrictions, the burdens an applicant must satisfy to own a satellite station, and limits on independent programming a satellite station may offer.⁹⁷

32. Notably, however, Gray does not cite indecency enforcement rules or policy to support its theory. While the Commission might have eased certain burdens on those seeking to own satellite stations, it has not made the pronouncement that Gray suggests, in effect, that the Commission should not apply the same indecency rules to satellite stations as it does to full-service stations. Nor has the Commission concurred in Gray's implicit contention that when a satellite station's parent station is subject to forfeiture for the airing indecent programming, the satellite station should not be fined for carrying the same material.⁹⁸

33. The Commission first authorized TV satellite operations in small or sparsely populated areas with insufficient economic bases to support full-service operations. As such, Gray is correct that KLBY offers "a unique and irreplaceable service."⁹⁹ That does not mean, however, that KLBY is effectively exempt from the Commission's indecency regulation. In fact, the Commission abolished the limit on the amount of original local programming that a satellite station may originate.¹⁰⁰ This elimination cuts against Gray's argument because it *chooses* for its satellite station to carry most of the same programming aired by its full-service parent station rather than originate different programming. In any event, there is no reason why the viewers of a satellite station should not expect it to abide by the same content restrictions as a full-service station. Accordingly, Gray is no less responsible for the programming of its satellite station than for its full-service station. Therefore, we reject Gray's arguments on these points.

⁹⁵ See *id.* at 1-2 (citing *Television Satellite Stations Review of Policy & Rules*, Second Further Notice of Proposed Rulemaking, 6 FCC Rcd 5010 ¶ 3 (1991); *Review of the Commission's Regulations Governing Television Broadcasting*, Report and Order, 14 FCC Rcd 12903, 12943 ¶ 90 (1999); *2002 Biennial Regulatory Review*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13710 ¶ 233 (2003); *Television Satellite Stations: Review of Policy & Rules*, Report and Order, 6 FCC Rcd 4212, 4215-16 ¶¶ 23-25 (1991)).

⁹⁶ See *id.* at 2.

⁹⁷ See *supra*, note 94.

⁹⁸ We note, in fact, that the Commission has previously imposed a forfeiture on a satellite station for violation of the indecency rules and has done so while concurrently imposing a forfeiture on the satellite station's parent station for airing the same programming. See, e.g., *Super Bowl NAL*, 19 FCC Rcd at 19235 ¶ 13 (finding satellite stations KCCO-TV and KCCW-TV and their parent station, WCCO-TV, apparently liable for forfeiture for their broadcast of the Super Bowl XXXVIII Halftime Show), *affirmed*, Forfeiture Order, 21 FCC Rcd 2760 (2006), *affirmed*, Order on Reconsideration, 21 FCC Rcd 6653 (2006), *pet. for review pending on different grounds*, *CBS Corp. v. FCC*, No. 06-3575 (3d Cir. Filed July 28, 2006).

On a related topic, we note that the Commission has specifically stated that it will apply indecency rules to the low power broadcast service. See *An Inquiry into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System*, 51 Rad. Reg. 2nd 476 ¶ 105 (1982) (noting that the statutory prohibitions against broadcast of obscene material apply to the low power service).

⁹⁹ See Gray Response at 2.

¹⁰⁰ See *Television Satellite Stations: Review of Policy & Rules*, Report and Order, 6 FCC Rcd 4212, 4215 ¶ 23 (1991) (eliminating 5% restriction on local programming by satellite television stations).

2. Statute of Limitations

34. Northeast Kansas Broadcast Service and KFBB Corporation correctly argue that the statute of limitations for the Commission to assess a forfeiture precludes it from assessing liability for KTKA-TV and KFBB-TV due to an intervening renewal grant for each station between the episode in question and the issuance of the *NAL*.¹⁰¹ The Commission accordingly cancels the *NAL* insofar as it relates to these stations.

D. Constitutional Issues

35. Respondents argue that imposition of a forfeiture in this case would violate the First Amendment. ABC contends that Commission's indecency standard is unconstitutional on its face. In support, it asserts that the justifications that existed for adopting the current indecency standard are no longer valid; the current indecency standard is impermissibly vague; the availability of new blocking technologies has rendered the current indecency standard overbroad; and the indecency standard is subjective in a way that violates the First Amendment. The ABC Affiliates assert that the Supreme Court's decision in *Pacifica* bars the Commission from regulating brief material; the Commission failed to follow the context-driven approach required by the First Amendment; a prohibition on all broadcast nudity is overbroad; and the Commission must apply local, not national, community standards of patent offensiveness. For the reasons discussed below, we reject Respondents' arguments.

36. *Validity of Indecency Test.* ABC argues that the underpinnings of the Commission's current indecency standard date back to the Supreme Court's decision in *Federal Communications Commission v. Pacifica Foundation*,¹⁰² and that the justifications upon which the Court relied in its decision – the uniquely pervasive presence of the broadcast medium and the unique accessibility of broadcasting to children – are no longer viable. In this regard, ABC argues that cable and satellite transmissions now reach the majority of the nation's television households and offer hundreds of channels as well as the signals of broadcast stations.¹⁰³

37. We disagree with ABC's claim that the justifications upon which the Supreme Court relied in *Pacifica* are no longer valid and note that the D.C. Circuit has rejected this precise argument: "Despite the increasing availability of receiving television, such as cable . . . there can be no doubt that the traditional broadcast media are properly subject to more regulation than is generally permissible under the First Amendment."¹⁰⁴ Notwithstanding ABC's arguments to the contrary, the broadcast media continue to have a "uniquely pervasive presence" in American life. The Supreme Court has recognized that "[d]espite the growing importance of cable television and alternative technologies, 'broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's

¹⁰¹ See Response of Former Licensee, filed by Northeast Kansas Broadcast Service, Inc., Former Licensee of Station KTKA-TV, Topeka, Kansas, on February 6, 2008; Letter to Benigno E. Bartolome, Acting Chief, Investigations and Hearings Division, Enforcement Bureau, filed by The Wooster Printing Company, Parent of the Former Licensee of Station KFBB-TV, Great Falls, Montana, filed on February 5, 2008.

¹⁰² See 438 U.S. 726 (1978).

¹⁰³ See ABC Response at 43 (citing *Fox Television Stations*, 489 F.3d at 464-66).

¹⁰⁴ *Action for Children's Television v. FCC*, 58 F.3d 654, 660 (D.C. Cir. 1995) (en banc) *cert. denied*, 516 U.S. 1043 (1996) ("*ACT III*"). See also *Prometheus Radio Project v. FCC*, 373 F.3d 372, 401-02 (3d Cir. 2004) (rejecting argument that broadcast ownership regulations should be subjected to higher level of scrutiny in light of rise of "non-broadcast media").

population.”¹⁰⁵ In 2003, 98.2% of households had at least one television, and 99% had at least one radio.¹⁰⁶ Although the majority of households with television subscribe to a cable or satellite service, millions of households continue to rely exclusively on broadcast television,¹⁰⁷ and the National Association of Broadcasters estimates that there are some 73 million broadcast-only television sets in American households.¹⁰⁸ Moreover, many of those broadcast-only televisions are in children’s bedrooms.¹⁰⁹ Although the broadcast networks have experienced declines in the number of viewers over the last several years, the programming they offer remains by far the most popular and is available to almost all households.¹¹⁰ Indeed, elsewhere in its response, ABC trumpets the fact that “*NYPD Blue* . . . enjoyed great popular success on the ABC Television Network, averaging more than 15 million viewers during its 12 years on the network.”¹¹¹

38. The broadcast media are also “uniquely accessible to children.” In this respect, broadcast television differs from cable and satellite television. Parents who subscribe to cable exercise some choice in their selection of a package of channels, and they may avoid subscribing to some channels that present programming that, in their judgment, is inappropriate for children. Indeed, upon the request of a subscriber, cable providers are required by statute to “fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it.”¹¹² In contrast, as the D.C. Circuit has observed, “broadcast audiences have no choice but to ‘subscribe’ to the entire output of traditional broadcasters.”¹¹³ The V-chip provides parents with some ability to control their children’s access to broadcast programming, but it does not eliminate the need for the Commission to vigorously enforce its indecency rules. In particular, as explained in further detail below, we note that numerous televisions do not contain a V-chip, and most parents who have a television set with a V-chip

¹⁰⁵ *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 190 (1997) (quoting *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968)). See *id.* at 194 (though broadcast television is “but one of many means for communication, by tradition and use for decades now it has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression.”).

¹⁰⁶ See U.S. Census Bureau, *Statistical Abstract of the United States* 737 (2006).

¹⁰⁷ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, 2506-07 ¶ 8, 2508 ¶ 15 (2006).

¹⁰⁸ See *id.* at 2552 ¶ 97. It also has been estimated that almost half of direct broadcast satellite subscribers receive their broadcast channels over the air, *Media Bureau Staff Report Concerning Over-the-Air Broadcast Television Viewers*, 2005 WL 473322, No. 04-210, ¶ 9 (MB Feb. 28, 2005), and many subscribers to cable and satellite still rely on broadcast for some of the televisions in their households. *Annual Assessment*, 21 FCC Rcd at 2508 ¶ 15.

¹⁰⁹ See Kaiser Family Foundation, *Generation M: Media in the Lives of 8-18 Year-olds* 77 (2005). According to the Kaiser Family Foundation report, 68 percent of children aged eight to 18 have a television set in their bedrooms, and nearly half of those sets do not have cable or satellite connections.

¹¹⁰ A large disparity in viewership still exists between broadcast and cable television programs. For example, during the week of February 4, 2008, each of the top ten programs on broadcast television had more than 12.5 million viewers, while only two programs on cable television that week – both professional wrestling programs – managed to attract more than 5 million viewers. See Nielsen Media Research, “Trend Index,” available at http://www.nielsen.com/media/toptens_television.html (visited Feb. 14, 2008). Indeed, that same week, 90 of the top 100-rated programs appeared on broadcast channels, and the highest rated cable program was number 71. See Television Bureau of Advertising, “Top 100 Programs on Broadcast and Subscription TV: Households,” available at http://www.tvb.org/nav/build_frameset.aspx (visited Feb. 14, 2008).

¹¹¹ ABC Response at 4.

¹¹² 47 U.S.C. § 560 (2000). See also *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000).

¹¹³ *ACT III*, 58 F.3d at 660.

are unaware of its existence or do not know how to use it.¹¹⁴ Accordingly, there is no merit to ABC's claim that *Pacifica* – and more importantly, our indecency rules – are invalid, obsolete or outdated.

39. *Vagueness and Overbreadth.* ABC argues that the Commission's indecency standard is unconstitutionally vague, citing *Reno v. ACLU*.¹¹⁵ *Reno* addressed the constitutionality of provisions of the Communications Decency Act ("CDA") that sought to protect minors from harmful material on the Internet. The Court determined that the CDA's indecency standard was impermissibly vague because it failed to define key terms, thereby provoking uncertainty among speakers and preventing them from discerning what speech would violate the statute.¹¹⁶ ABC asserts that, because the CDA definition of indecency was determined by the Court to be fatally imprecise, and the Commission's definition of indecency is similar to the CDA definition, it follows that the Commission's definition is similarly flawed.¹¹⁷

40. We reject ABC's arguments that the Commission's indecency standard is vague. That standard is essentially the same as the one used in the order that was reviewed in *Pacifica*,¹¹⁸ and the Supreme Court had no difficulty applying that definition and using it to conclude that the broadcast at issue in that case was indecent. We therefore agree with the D.C. Circuit that "implicit in *Pacifica*" is an acceptance of the FCC's generic definition of 'indecent' as capable of surviving a vagueness challenge."¹¹⁹

41. We also believe that ABC's reliance on *Reno* is without merit. The Court in *Reno* expressly distinguished *Pacifica*, giving three different reasons for doing so.¹²⁰ Thus, far from casting doubt on *Pacifica*'s vagueness holding, *Reno* recognizes its continuing vitality.

42. We also reject ABC's claim that the "contemporary community standards for the broadcast medium" criterion is impermissibly subjective.¹²¹ The "contemporary community standards for the broadcast medium" criterion – which was upheld by the Supreme Court in *Pacifica* – is that of an average broadcast listener or viewer.¹²² Our approach to discerning community standards parallels that

¹¹⁴ See *infra*, ¶ 47.

¹¹⁵ See ABC Response at 40-41 (citing 521 U.S. 844 (1997)).

¹¹⁶ *Id.* at 871.

¹¹⁷ ABC Response at 40.

¹¹⁸ See 438 U.S. at 732.

¹¹⁹ See *ACT I*, 852 F.2d at 1339; *accord ACT III*, 58 F.3d at 659. ABC also contends that "imposition of forfeitures in this case would be . . . inconsistent with the Commission's past treatment of similar broadcasts and similar material," thus rendering the Commission's indecency enforcement unconstitutionally vague. ABC Response at 39-40. As we explain above, *see supra* ¶¶ 13 - 18, there is no inconsistency, so this argument necessarily fails.

¹²⁰ See *Reno v. ACLU*, 521 U.S. 844, 867 (1997). First, the Court noted that the Commission is "an agency that [has] been regulating radio stations for decades," and that the Commission's regulations simply "designate when—rather than whether—it would be permissible" to air indecent material." *Id.* The CDA, in contrast, was not administered by an expert agency, and it contained "broad categorical prohibitions" that were "not limited to particular times." *Id.* Second, the CDA was a criminal statute, whereas the Commission has no power to impose criminal sanctions for indecent broadcasts. See *id.* at 867, 872. Third, unlike the Internet, the broadcast medium has traditionally "received the most limited First Amendment protection." *Id.* at 867.

¹²¹ See ABC Response at 41-42.

¹²² See *Indecency Policy Statement*, 16 FCC Rcd at 8002, ¶ 8 and n.15.

used in obscenity cases, where the jury is instructed to rely on its own knowledge of community standards in determining whether material is patently offensive.¹²³ Here, however, the Commission has the added advantage of being an expert agency, and as we have explained before, “[w]e rely on our collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups and ordinary citizens, to keep abreast of contemporary community standards for the broadcast medium.”¹²⁴ In applying this standard, the Commission does not apply its own “personal sensibilities,”¹²⁵ but at the same time it is settled that “merit is properly treated as a factor in determining whether material is patently offensive.”¹²⁶

43. The ABC Affiliates contend that the Commission’s application of community standards “is unconstitutionally overbroad because it constitutes a national standard to determine whether broadcast material is patently offensive, rather than local community standards.”¹²⁷ Instead, the ABC Affiliates contend that the Commission must “examine[] 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.”¹²⁸

44. This argument is unavailing. Our longstanding indecency test focuses on whether material is patently offensive as measured by contemporary community standards for the “broadcast medium” generally, rather than those of any particular community. That is the standard the Supreme Court affirmed in *Pacifica*, without any suggestion that the Commission erred by not determining whether broadcast of the Carlin monologue was patently offensive according to the community standards of New York, the only community in which there was a complaint about its broadcast.¹²⁹ If application of a national standard was appropriate in *Pacifica*, it clearly was in this case, which involves a national broadcast and complaints arising from many parts of the country.

45. For their contrary position, the ABC Affiliates rely principally on criminal obscenity prosecutions, which present distinct concerns not applicable to this non-criminal proceeding involving indecency, not obscenity.¹³⁰ Even in the context of obscenity, however, the Supreme Court has said only that the First Amendment does not *require* juries to apply nationwide community standards. States therefore have the option of defining obscenity based on more localized community standards, but nothing in the Supreme Court’s obscenity case law requires them to do so.¹³¹ Indeed, a national standard actually facilitates national broadcasting, since it provides more certainty and avoids the necessity of

¹²³ See *Smith v. United States*, 431 U.S. 291, 305 (1977).

¹²⁴ See *Infinity Radio License, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 5022, 5026 ¶ 12, *recon. denied*, 19 FCC Rcd 16959 (2004).

¹²⁵ See ABC Response at 42.

¹²⁶ See *ACT I*, 852 F.2d at 1340.

¹²⁷ See ABC Affiliates’ Response at 69.

¹²⁸ See ABC Affiliates’ Response at 69.

¹²⁹ See *Pacifica*, 438 U.S. at 729, 732.

¹³⁰ See *Pacifica*, 438 U.S. at 739 n.13 (“the validity of the civil sanctions [for violation of 18 U.S.C. § 1464] is not linked to the validity of the criminal penalty.”).

¹³¹ See *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974) (“*Miller* approved the use of such instructions [requiring application of state-specific community standards]; it did not mandate their use.”); see also *Ashcroft v. ACLU*, 535 U.S. 564, 587-89 (2002) (O’Connor, J., concurring in part and concurring in the judgment) (a national community standard for evaluating possible indecency on the Internet would be “not only constitutionally permissible, but also reasonable”).

tailoring national programming station-by-station based on the potentially disparate community standards of a nationwide television audience.¹³²

46. ABC also asserts that television viewers today are able to effectively prevent reception of any programming that they consider unsuitable for children through the use of voluntary ratings of programs by the entertainment industry and so-called “V-Chip” technology.¹³³ The existence of a less intrusive solution, according to ABC, thus renders the Commission’s regulatory scheme unconstitutionally overbroad.¹³⁴ Likewise, the ABC Affiliates state that the “V-chip is not itself dispositive of the legal issue in this case” but nonetheless claim that its availability creates “constitutional ramifications” militating against a finding of indecency here.¹³⁵

47. We reject these arguments. While we agree that the V-chip provides some assistance in protecting children from indecent material, it does not eliminate the need for the Commission to enforce its indecency rules. Numerous televisions do not contain a V-chip, and most parents who have a television set with a V-chip are unaware of its existence or do not know how to use it.¹³⁶ In addition, we note that some categories of programming, including news and sports, are not rated and, therefore, are not subject to blocking by V-chip technology.¹³⁷ Finally, numerous studies have raised serious questions about the accuracy of the television ratings on which the effectiveness of a V-chip depends.¹³⁸ In this case, for example, the V-chip would have failed a parent attempting to shield her children from exposure to nudity by filtering out all programs with an “S” content descriptor (for “sexual situations”) since ABC did not include such a descriptor for this program.¹³⁹

48. The ABC Affiliates also argue that a finding of indecency in this case is unconstitutionally overbroad because it amounts to proscription of “*all* non-sexual nudity on

¹³² See *Ashcroft*, 535 U.S. at 591 (Breyer, J., concurring in part and concurring in the judgment) (First Amendment militates in favor of national, as opposed to local, community standards in evaluating possible indecency on the Internet).

¹³³ See ABC Response at 43-45.

¹³⁴ See *id.* at 44.

¹³⁵ ABC Affiliates Response at 65-66.

¹³⁶ See *Super Bowl Order on Reconsideration*, 21 FCC Rcd at 6667 ¶ 37. According to a 2003 study, parents’ low level of V-chip use is explained in part by parents’ ignorance of the device and the “multi-step and often confusing process” necessary to use it. Annenberg Public Policy Center, *Parents’ Use of the V-Chip to Supervise Children’s Television Use* 3 (2003). Only 27 percent of mothers in the study group could figure out how to program the V-Chip, and “many mothers who might otherwise have used the V-Chip were frustrated by an inability to get it to work properly.” *Id.* at 4.

¹³⁷ See *Implementation of Section 551 of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 8232, 8242-43, ¶ 21 (1998).

¹³⁸ See, e.g., Barbara K. Kaye & Barry S. Sapolsky, *Offensive Language in Prime-Time Television: Four Years After Television Age and Content Ratings*, 48 *Journal of Broadcasting & Electronic Media* 554, 563-64 (2004) (finding that there was more coarse language broadcast during TV-PG programs than those rated TV-14, just the opposite of what these age-based ratings would lead a viewer to believe); Henry J. Kaiser Family Foundation, *Parents, Media and Public Policy: A Kaiser Family Foundation Survey* 5 (2004) (nearly 4 in 10 parents of children aged 2-17 stated that most television programs are not rated accurately); David A. Walsh & Douglas A. Gentile, *A Validity Test of Movie, Television, and Video-Game Ratings*, 107 *Pediatrics* 1302, 1306 (2001) (study finding that parents concluded that half of television shows the industry had rated as appropriate for teenagers were in fact inappropriate, “a signal that the ratings are misleading.”).

¹³⁹ See ABC Response at 6.

television.”¹⁴⁰ This argument is based on a false premise. As discussed above, our finding that the broadcast included a depiction of sexual or excretory organs – namely a woman’s buttocks – was necessary, but not sufficient, to find the broadcast indecent.¹⁴¹ We find the nudity here indecent because it was patently offensive when considered in light of contemporary community standards for the broadcast medium. In particular, we find that, in context, the material was shocking, pandering, and titillating.¹⁴² This case therefore does not present the question whether a prohibition on broadcast of all “non-sexual nudity” would be constitutionally overbroad.

49. *Conflict with Pacifica.* The ABC Affiliates also argue that the “*Pacifica* decision makes it clear that the fleeting nature of the nudity depicted here . . . may not be proscribed.”¹⁴³ We reject this contention. As an initial matter, the ABC Affiliates are wrong factually: the nudity included in this broadcast was not fleeting.¹⁴⁴ Even if it were, however, *Pacifica* would pose no barrier to a finding of indecency. First, *Pacifica* involved spoken expletives, not images of nudity. Even if it were true that the Court in *Pacifica* had drawn the First Amendment line at the twelve minutes it took Carlin to complete his monologue, there is no reason to believe it would require the same amount of repetition in a case of nudity.¹⁴⁵ In any event, contrary to the ABC Affiliates’ contention, *Pacifica* did not decide that regulation of brief expletives would be unconstitutional but instead expressly reserved the question.¹⁴⁶

50. The ABC Affiliates also contend that a forfeiture here would conflict with *Pacifica*’s recognition that “‘context is all-important’”¹⁴⁷ because of “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.”¹⁴⁸ Contrary to the ABC Affiliates’ contention, our finding of indecency takes full account of context and reflects careful application of three contextual factors we apply in all our indecency cases.¹⁴⁹ Moreover, it is settled that the Commission is permitted to regulate indecency between the hours of 6 a.m. and 10 p.m. – the time of day when children are most likely to be in the audience – and is not required to determine on a broadcast-by-broadcast basis whether children were watching.¹⁵⁰ The licensees could have, but did not,

¹⁴⁰ ABC Affiliates Response at 67.

¹⁴¹ See *supra* ¶ 7 .

¹⁴² See *supra* ¶ 16.

¹⁴³ ABC Affiliates Response at 63.

¹⁴⁴ See *supra* ¶ 15.

¹⁴⁵ Cf. *United States v. Martin*, 746 F.2d 964, 971-72 (3d Cir. 1984) (“The hackneyed expression, ‘one picture is worth a thousand words’ fails to convey adequately the comparison between the impact of the televised portrayal of actual events upon the viewer of the videotape and that of the spoken or written word upon the listener or reader.”)

¹⁴⁶ See 438 U.S. at 750.

¹⁴⁷ ABC Affiliates Response at 64 (quoting *Pacifica*, 438 U.S. at 750).

¹⁴⁸ ABC Affiliates Response at 64-65.

¹⁴⁹ See *supra* ¶¶ 12 - 18.

¹⁵⁰ See *ACT III*, 58 F.3d at 665-66. As the D.C. Circuit explained, ratings data likely under-estimate the number of children in the audience for indecent programming because “[c]hildren will not likely record, in a Nielsen diary or other survey, that they listen to or view programs of which their parents disapprove.” *Id.* at 665. In addition, the court noted that “changes in the program menu make yesterday’s findings irrelevant today” and “such station-and program-specific data do not take ‘children’s grazing’ into account.” *Id.* at 665-66.

broadcast this episode of *NYPD Blue* after 10 p.m. – as their counterparts in the Eastern and Pacific time zones did – and not run afoul of the Commission’s indecency regulations.

IV. CONCLUSION

51. Section 503(b) of the Act, 47 U.S.C. § 503(b), and section 1.80(a) of the Commission’s rules, 47 C.F.R § 1.80, both state that any person who willfully or repeatedly fails to comply with the provisions of the Act or the rules shall be liable for a forfeiture penalty. For purposes of section 503(b) of the Act, the term “willful” means that the violator knew it was taking the action in question, irrespective of any intent to violate the Commission’s rules.¹⁵¹ Based on our determination that the stations in question willfully broadcast this episode of *NYPD Blue* and the material before us, we find that the ABC stations willfully violated 18 U.S.C. § 1464 and section 73.3999 of the Commission’s rules, by airing indecent programming during the *NYPD Blue* program on February 25, 2003.

52. The Commission’s *Forfeiture Policy Statement* sets a base forfeiture amount of \$7,000 for the transmission of indecent or obscene materials.¹⁵² The *Forfeiture Policy Statement* also specifies that the Commission shall adjust a forfeiture based upon consideration of the factors enumerated in section 503(b)(2)(D) of the Act, 47 U.S.C. § 503(b)(2)(D), such as “the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.” For the following reasons, we find that \$27,500, the maximum applicable forfeiture during the time the material was broadcast, is an appropriate proposed forfeiture for the material found to be apparently indecent in this case. The scene depicts a woman’s naked buttocks in a graphic and shocking manner. The material was prerecorded, and ABC or its affiliates could have edited or declined the content prior to broadcast.¹⁵³ Although ABC included a warning, we find that a lower forfeiture is not warranted here in light of all the circumstances surrounding the apparent violation, including the shocking and titillating nature of the scene. On balance and in light of all of the circumstances, we find that a \$27,500 forfeiture amount for each station would appropriately punish and deter the apparent violation in this case. Therefore, we find that each licensee listed in the Attachment is apparently liable for a proposed forfeiture of \$27,500 for each station that broadcast the February 25, 2003, episode of *NYPD Blue* prior to 10 p.m.¹⁵⁴

53. Although we are informed that other stations not mentioned in any complaint also broadcast the complained-of episode of *NYPD Blue*, 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. This result is consistent with the approach set forth by the Commission in

¹⁵¹ See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387, 4388 (1991).

¹⁵² See *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Memorandum Opinion and Order, 12 FCC Rcd 17087, 17113 (1997), *recons. denied* 15 FCC Rcd 303 (1999) (“*Forfeiture Policy Statement*”); 47 C.F.R. § 1.80(b).

¹⁵³ See *Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program “Married By America” on April 7, 2003*, Notice of Apparent Liability, 19 FCC Rcd 20191, 20196 ¶ 16 (2004).

¹⁵⁴ The fact that the stations in question may not have originated the programming is irrelevant to whether there is an indecency violation. See *Review of the Commission’s Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates*, Notice of Proposed Rulemaking, 10 FCC Rcd 11951, 11961, ¶ 20 (1995) (internal quotation omitted) (“We conclude that a licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory.”).

its most recent indecency orders.¹⁵⁵ As indicated in those orders, our commitment to an appropriately restrained enforcement policy justifies this more limited approach toward the imposition of forfeiture penalties. Accordingly, we propose forfeitures as set forth in the Attachment.

54. We have thoroughly considered all of the licensees' arguments as well as the factors listed in section 503(b)(2)(D) of the Act. On balance, we believe that a forfeiture penalty in the base amount of \$27,500 against the stations listed in Attachment A is appropriate.

V. ORDERING CLAUSES

55. **ACCORDINGLY, IT IS ORDERED**, pursuant to section 503(b) of the Communications Act of 1934, as amended, and section 1.80 of the Commission's rules,¹⁵⁶ that each of the ABC stations listed in Attachment A of this Forfeiture Order are liable for a forfeiture in the amount of \$27,500 each for broadcasting indecent material, in willful violation of 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.

56. **IT IS FURTHER ORDERED** that the NAL is cancelled as to Northeast Kansas Broadcast Service, Inc., for KTKA-TV; KFBB Corporation, for KFBB-TV; Louisiana Television Broadcasting, LLC, for WBRZ-TV; WXOW-WQOW Television, Inc., for WXOW-TV; KMBC Hearst-Argyle Television, Inc., for KMBC-TV; KHBS Hearst-Argyle Television, Inc., for KHOG-TV; and Forum Communications Company, for WDAY-TV, for the reasons discussed elsewhere in this *Order*.

57. **IT IS FURTHER ORDERED**, pursuant to section 1.80 of the Commission's rules, that each of the stations listed in Attachment A of this Forfeiture Order **SHALL PAY** the full amount of its respective forfeiture by the close of business on Thursday, February 21, 2008. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account number and FRN Number referenced in the Attachment. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payments by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in box 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer - Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. Any station that pays its forfeiture by close of business on February 21 shall so notify Ben Bartolome, Acting Chief of the Enforcement Bureau's Investigations and Hearings Division, by email (Ben.Bartolome@fcc.gov) by close of business that day. The Commission will ensure that each of the stations listed in Attachment A of the Forfeiture Order is notified immediately upon release by the Commission.

58. **IT IS FURTHER ORDERED** that the Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that

¹⁵⁵ See *Omnibus Order*, 21 FCC Rcd at 2673 ¶ 32; *Omnibus Remand Order*, 21 FCC Rcd at 13328-329 ¶¶ 74-77.

¹⁵⁶ 47 C.F.R. § 1.80.

accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

59. **IT IS FURTHER ORDERED** that a copy of this Forfeiture Order shall be sent, by Certified Mail/Return Receipt Requested, to each of the licensees identified in Attachment A hereto and to their respective counsel and representatives identified in Attachment B hereto.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

ATTACHMENT A

Forfeitures For February 25, 2003
Broadcasts Of *NYPD Blue*

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Forfeiture Amount
Cedar Rapids Television Company, 2 nd Avenue at 5 th Street, NE, Cedar Rapids, IA 52401	0002589489	200832080013	KCRG-TV Cedar Rapids, IA	9719	\$27,500
Centex Television Limited Partnership, P. O. Box 2522, Waco, TX 76702	0001675719	200832080014	KXXV(TV) Waco, TX	9781	\$27,500
Channel 12 of Beaumont, Inc., 525 Interstate Highway, 10 South, Beaumont, TX 77701	0006587307	200832080015	KBMT(TV) Beaumont, TX	10150	\$27,500
Citadel Communications, LLC, 44 Pondfield Road, Suite 12, Bronxville, NY 10708	0003757481	200832080016	KLKN(TV) Lincoln, NE	11264	\$27,500
KLTV/KTRE License Subsidiary, LLC, 201 Monroe Street, RSA Tower 20 th Floor, Montgomery, AL 36104	0015798341	200832080017	KLTV(TV) Tyler, TX	68540	\$27,500
Duhamel Broadcasting Enterprises, 518 St. Joseph Street., Rapid City, SD 57701	0002433340	200832080018	KOTA-TV Rapid City, SD	17688	\$27,500
Gray Television Licensee Corp., 1500 North West Street, Wichita, KS 67203	0002746022	200832080020	KAKE-TV Wichita, KS	65522	\$27,500
Gray Television Licensee, Inc., P. O. Box 10, Wichita, KS 67201	0002746022	200832080021	KLBY(TV) Colby, KS	65523	\$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Forfeiture Amount
KSTP-TV, LLC, 3415 University Avenue, West, St. Paul, MN 55114- 2099	0009769621	200832080022	KSTP-TV St. Paul, MN	28010	\$27,500
KATC Communications, Inc., 1103 Eraste Landry Road, Lafayette, LA 70506	0003822285	200832080023	KATC(TV) Lafayette, LA	33471	\$27,500
KATV, LLC, P. O. Box 77, Little Rock, AR 72203	0001694462	200832080024	KATV(TV) Little Rock, AR	33543	\$27,500
KDNL Licensee, LLC, c/o Pillsbury Winthrop Shaw Pittman, LLP, 2300 N Street, NW, Washington, DC 20037-1128	0002144459	200832080025	KDNL-TV St. Louis, MO	56524	\$27,500
KETV Hearst- Argyle Television, Inc., c/o Brooks, Pierce, et al, P. O. Box 1800, Raleigh, NC 27602	0003799855	200832080026	KETV(TV) Omaha, NE	53903	\$27,500
KSWO Television Company, Inc., P. O. Box 708, Lawton, OK 73502	0001699248	200832080030	KSWO-TV Lawton, OK	35645	\$27,500
KTBS, Inc., P. O. Box 44227, Shreveport, LA 71104	0003727419	200832080031	KTBS-TV Shreveport, LA	35652	\$27,500
KTRK Television, Inc., 77 W. 66 th Street, Floor 16, New York, NY 10023- 6201	0012480109	200832080032	KTRK-TV Houston, TX	35675	\$27,500
KTUL, LLC, 3333 S. 29 th West Avenue, Tulsa, OK 74107	0001694413	200832080033	KTUL(TV) Tulsa, OK	35685	\$27,500
KVUE Television, Inc., 400 South Record Street, Dallas, TX 75202	0001545581	200832080034	KVUE(TV) Austin, TX	35867	\$27,500
McGraw-Hill Broadcasting Company, 123 Speer Boulevard, Denver, CO 80203	0003476827	200832080036	KMGH-TV Denver, CO	40875	\$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Forfeiture Amount
Media General Communication Holdings, LLC., 333 E. Franklin Street, Richmond, VA 23219-2213	0015751217	200832080037	WMBB(TV) Panama City, FL	66398	\$27,500
Mission Broadcasting, Inc., 544 Red Rock Drive, Wadsworth, OH 44281	0004284899	200832080038	KODE-TV Joplin, MO	18283	\$27,500
Mississippi Broadcasting Partners, c/o Anne Swanson, Dow Lohnes PLLC, 1200 New Hampshire Avenue, NW, Suite 800, Washington DC 20036-6802	0003828753	200832080039	WABG-TV Greenwood, MS	43203	\$27,500
Nexstar Broadcasting, Inc., 909 Lake Carolyn Parkway, Suite 1450, Irving, TX 75039	0009961889	200832080040	WDHN(TV) Dothan, AL	43846	\$27,500
New York Times Management Services Co. c/o New York Times Co., 229 W.43 rd Street, New York, NY 10036-3913	0003481587	200832080041	WQAD-TV Moline, IL	73319	\$27,500
Nexstar Broadcasting, Inc., 909 Lake Carolyn Parkway, Suite 1450, Irving, TX 75039	0009961889	200832080042	KQTV(TV) St. Joseph, MO	20427	\$27,500
NPG of Texas, L.P., 4140 Rio Bravo, El Paso, TX 79902	0006548028	200832080044	KVIA-TV El Paso, TX	49832	\$27,500
Ohio/Oklahoma Hearst-Argyle Television, c/o Brooks Pierce et al, P. O. Box 1800, Raleigh, NC 27602	0001587609	200832080045	KOCO-TV Oklahoma City, OK	12508	\$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Forfeiture Amount
Piedmont Television of Huntsville License, LLC, c/o Piedmont Television Holdings LLC, 7621 Little Avenue, Suite 506, Charlotte, NC 28226	0004063483	200832080046	WAAV-TV Huntsville, AL KSPR(TV) Springfield, MO	57292 35630	\$55,000
Pollack/Belz Communications Co., Inc., 5500 Poplar Lane, Memphis, TN 38119-3716	0006096200	200832080047	KLAX-TV Alexandria, LA	52907	\$27,500
Post-Newsweek Stations, San Antonio, Inc., c/o Post-Newsweek Stations, 550 West Lafayette Boulevard, Detroit, MI 48226-3140	0002149953	200832080048	KSAT-TV San Antonio, TX	53118	\$27,500
Scripps Howard Broadcasting Co., 312 Walnut Street, Cincinnati, OH 45202	0012487609	200832080049	KNXV-TV Phoenix, AZ	59440	\$27,500
Southern Broadcasting, Inc., P. O. Box 1645, Tupelo, MS 38802	0005411632	200832080050	WKDH(TV) Houston, MS	83310	\$27,500
Tennessee Broadcasting Partners, c/o Russell Schwartz, One Television Place, Charlotte, NC 28205	0003828696	200832080051	WBBJ-TV Jackson, TN	65204	\$27,500
Tribune Television New Orleans, Inc., 1 Galleria Boulevard, Suite 850, Metairie, LA 70001	0002847564	200832080052	WGNO(TV) New Orleans, LA	72119	\$27,500
WAPT Hearst-Argyle TV, Inc., (CA Corp.), P. O. Box 1800, Raleigh, NC 27602	0005008867	200832080053	WAPT(TV) Jackson, MS	49712	\$27,500
WDIO-TV, LLC, 3415 University Avenue West, St. Paul, MN 55114-2099	0004199139	200832080054	WDIO-TV Duluth, MN	71338	\$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Forfeiture Amount
WEAR Licensee, LLC, Pillsbury, Winthrop, Shaw, Pittman, LLP, 2300 N Street, NW, Washington, DC 20037-1128	0004970935	200832080055	WEAR-TV Pensacola, FL	71363	\$27,500
WFAA-TV, Inc., 400 South Record Street, Dallas, TX 75202	0001651496	200832080056	WFAA-TV Dallas, TX	72054	\$27,500
WISN Hearst-Argyle TV, Inc. (CA Corp.), P. O. Box 1800, Raleigh, NC 27602	0003792603	200832080057	WISN-TV Milwaukee, WI	65680	\$27,500
WKOW Television, Inc., P. O. Box 909, Quincy, IL 62306	0004383683	200832080058	WKOW-TV Madison, WI	64545	\$27,500
WKRN, G.P., c/o Brooks Pierce et al, P. O. Box 1800, Raleigh, NC 27602	0005015037	200832080059	WKRN-TV Nashville, TN	73188	\$27,500
WLS Television, Inc., 77 W. 66 th Street, Floor 16, New York, NY 10023-6201	0003471315	200832080060	WLS-TV Chicago, IL	73226	\$27,500
WSIL-TV, Inc., 5009 South Hulen, Suite 101, Fort Worth, TX 76132-1989	0002808137	200832080061	WSIL-TV Harrisburg, IL	73999	\$27,500
Young Broadcasting of Green Bay, Inc., c/o Brooks Pierce et al, P. O. Box 1800, Raleigh, NC 27602	0004994984	200832080063	WBAY-TV Green Bay, WI	74417	\$27,500

ATTACHMENT B

Pleadings Filed Responding to NAL¹⁵⁷

Responses to the Notices of Apparent Liability for Forfeiture:

- 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, filed on February 11, 2008, by Cedar Rapids Television Company, Licensee of Station KCRG-TV, Cedar Rapids, Iowa; Centex Television Limited Partnership, Licensee of Station KXXV(TV), Waco, Texas; Channel 12 of Beaumont, Inc., Licensee of Station KBMT(TV), Beaumont, Texas; Citadel Communications, LLC, Licensee of Station KLKN(TV), Lincoln, Nebraska; Duhamel Broadcasting Enterprises, Licensee of Station KOTA-TV, Rapid City, South Dakota; Forum Communications Company, Licensee of Station WDAY-TV, Fargo, North Dakota; Gray Television Licensee, Inc., Licensee of Stations KAKE-TV, Wichita, Kansas and KLBY(TV), Colby, Kansas; KATC Communications, Inc., Licensee of Station KATC(TV), Lafayette, Louisiana; KATV LLC, Licensee of Station KATV(TV), Little Rick Arkansas; KDNL Licensee, LLC, Licensee of Station KDNL-TV, St. Louis, Missouri; Hearst-Argyle Television, Inc., Parent of the Licensee of Stations KETV(TV), Omaha, Nebraska, KHOG-TV, Fayetteville, Arkansas, KMBC-TV, Kansas City, Missouri, KOCO-TV, Oklahoma City, Oklahoma, WAPT(TV), Jackson, Mississippi, and WISN-TV, Milwaukee, Wisconsin; KLTV/KTRE License Subsidiary, LLC, Licensee of Station KLTV(TV), Tyler, Texas; KSTP-TV, LLC, Licensee of Station KSTP-TV, St. Paul, Minnesota; KSWO Television Co., Inc., Licensee of Station KSWO-TV, Lawton, Oklahoma; KTBS, Inc., Licensee of Station KTBS-TV, Shreveport, Louisiana; KTUL, LLC, Licensee of Station KTUL(TV), Tulsa, Oklahoma; KVUE Television, Inc., Licensee of Station KVUE(TV), Austin, Texas; Louisiana Television Broadcasting, LLC, Licensee of Station WBRZ-TV, Baton Rouge, Louisiana; McGraw-Hill Broadcasting Company, Licensee of Station KMGH-TV, Denver, Colorado; Media General Communication Holdings, LLC, Licensee of Station WMBB(TV), Panama City, Florida; Mission Broadcasting, Inc., Licensee of Station KODE-TV, Joplin, Missouri; Mississippi Broadcasting Partners, Licensee of Station WABG-TV, Greenwood, Mississippi; Local TV Illinois License, LLC, Licensee of Station WQAD-TV, Moline, Illinois; Nexstar Broadcasting, Inc., Licensee of Stations WDHN(TV), Dothan, Alabama, and KQTV(TV), St. Joseph, Missouri; Northeast Kansas Broadcast Service, Inc., Former Licensee of Station KTKA-TV, Topeka, Kansas; NPG of Texas, L.P., Licensee of Station KVIA-TV, El Paso, Texas; Piedmont Television of Huntsville License, LLC, Licensee of Stations WAAY-TV, Huntsville, Alabama and KSPR(TV), Springfield, Missouri; Pollack/Belz Communications Co., Inc., Licensee of Station KLAX-TV, Alexandria, Louisiana; Post-Newsweek Stations, San Antonio, Inc., Licensee of Station KSAT-TV, San Antonio, Texas; Scripps Howard Broadcasting Company, Licensee of Station KNXV-TV, Phoenix, Arizona; Southern Broadcasting, Inc., Licensee of Station WKDH(TV), Houston, Texas; Tennessee Broadcasting Partners, Licensee of Station WBBJ-TV, Jackson, Tennessee; Tribune Company, Parent of the Licensee of Station WGNO(TV), New Orleans, Louisiana; WDIO-TV, LLC, Licensee of Station WDIO-TV, Duluth, Minnesota; WEAR Licensee, LLC, Licensee of Station WEAR-TV, Pensacola, Florida; WFAA-TV, Inc., Licensee of Station WFAA-TV, Dallas, Texas; WKOW Television, Inc., Licensee of Station WKOW-TV, Madison, Wisconsin; WKRN, G.P., Licensee of Station WKRN-TV, Nashville, Tennessee; WSIL-TV, Inc., Licensee of Station WSIL-TV, Harrisburg, Illinois; WXOK-WQOW Television, Inc., Licensee of Station WXOW-

¹⁵⁷ This list excludes any Freedom of Information Act requests.

TV, LaCrosse, Wisconsin; Young Broadcasting of Green Bay, Inc., Licensee of Station WBAY-TV, Green Bay, Wisconsin;

- Opposition of Channel 12 of Beaumont, Inc. to Notice of Apparent Liability for Forfeiture filed by Channel 12 of Beaumont, Inc. (“Beaumont”), Licensee of Station KBMT(TV), Beaumont, Texas, on February 11, 2008 (“Beaumont Response”);
- Letter to Benigno E. Bartolome, Acting Chief, Investigations and Hearings Division, Enforcement Bureau, filed by The Wooster Printing Company (“WPRC”), Parent of the former Licensee of Station KFBB-TV, Great Falls, Montana, filed on February 5, 2008 (“WPRC Response”);
- Statement of Support filed by Max Media of Montana II LLC (“Max Media”), current Licensee of Station KFBB-TV, Great Falls, Montana, filed on February 11, 2008 (“KFBB Response”);
- Opposition of ABC, Inc. to Notice of Apparent Liability for Forfeiture filed on February 11, 2008 by ABC, Inc. (“ABC”), Parent of the WLS Television, Inc., Licensee of Station WLS-TV, Chicago, Illinois, and KTRK Television, Inc., Licensee of Station KTRK-TV, Houston, Texas (“ABC Response”);
- Response of Former Licensee, filed by Northeast Kansas Broadcast Service, Inc. (“Northeast”), Former Licensee of Station KTKA-TV, Topeka, Kansas, on February 6, 2008 (“Northeast Response”);

Requests for Extension of Time:

- Petition for Extension of Time filed by Channel 12 of Beaumont, Inc., Licensee of Station KBMT(TV), Beaumont, Texas, on February 4, 2008;
- Letter to Matthew Berry, General Counsel, Federal Communications Commission, cc: Benigno E. Bartolome, Acting Chief, Investigations and Hearings Division, Enforcement Bureau, Request for Extension of Time on February 1, 2008 from Forum Communications Company, Licensee of Station WDAY-TV, Fargo, North Dakota; KVUE Television, Inc., Licensee of Station KVUE(TV), Austin, Texas; and WFAA-TV, Inc., Licensee of Station WFAA-TV, Dallas, Texas;
- Motion for Extension of Time filed by Pollack/Belz Communications Co., Inc., Licensee of Station KLAX-TV, Alexandria, Louisiana, on February 1, 2008;
- Motion for Extension of Time filed by Post-Newsweek Stations, San Antonio, Inc., Licensee of Station KSAT-TV, San Antonio, Texas, on February 1, 2008;
- Motion for Extension of Time KLTV/KTRE License Subsidiary, LLC, Licensee of Station KLTV(TV), Tyler, Texas, on February 1, 2008;
- Letter to Benigno E. Bartolome, Acting Chief, Investigations and Hearings Division, Enforcement Bureau, Request for Extension of Time on February 1, 2008 from Centex Television Limited Partnership, Licensee of Station KXXV(TV), Waco, Texas; and KSWO Television Co., Inc., Licensee of Station KSWO-TV, Lawton, Oklahoma;

- Letter to Benigno E. Bartolome, Acting Chief, Investigations and Hearings Division, Enforcement Bureau, Request for Extension of Time, from Scripps Hoard Broadcasting Company, Licensee of Station KNXV-TV, Phoenix, Arizona, on February 1, 2008;
- Motion by ABC Television Affiliates Association and Named Licensees for Extension of Time to Response to Notice of Apparent Liability for Forfeiture and Letter to Matthew Berry, General Counsel, Federal Communications Commission, cc: Benigno E. Bartolome, Acting Chief, Investigations and Hearings Division, Enforcement Bureau, Request for Extension of Time on February 1, 2008 from Cedar Rapids Television Company, Licensee of Station KCRG-TV, Cedar Rapids, Iowa; Citadel Communications, LLC, Licensee of Station KLKN(TV), Lincoln, Nebraska; Request for Extension of Time filed by Duhamel Broadcasting Enterprises, Licensee of Station KOTA-TV, Rapid City, South Dakota; KATV LLC, Licensee of Station KATV(TV), Little Rock Arkansas; Hearst-Argyle Television, Inc., Parent of the Licensee of Stations KETV(TV), Omaha, Nebraska; KHOG-TV, Fayetteville, Arkansas; KMBC-TV, Kansas City, Missouri; KOCO-TV, Oklahoma City, Oklahoma; WAPT(TV), Jackson, Mississippi; WISN-TV, Milwaukee, Wisconsin; KTBS, Inc., Licensee of Station KTBS-TV, Shreveport, Louisiana; KTUL, LLC, Licensee of Station KTUL(TV), Tulsa, Oklahoma; NPG of Texas, L.P., Licensee of Station KVIA-TV, El Paso, Texas; WKOW Television, Inc., Licensee of Station WKOW-TV, Madison, Wisconsin; WKRN, G.P., Licensee of Station WKRN-TV, Nashville, Tennessee; WSIL-TV, Inc., Licensee of Station WSIL-TV, Harrisburg, Illinois; WXOK-WQOW Television, Inc., Licensee of Station WXOW-TV, LaCrosse, Wisconsin; Young Broadcasting of Green Bay, Inc., Licensee of Station WBAY-TV, Green Bay, Wisconsin; Tennessee Broadcasting Partners, Licensee of Station WBBJ-TV, Jackson, Tennessee; Mississippi Broadcasting Partners, Licensee of Station WABG-TV, Greenwood, Mississippi; Request for Extension of Time filed by Louisiana Television Broadcasting, LLC, Licensee of Station WBRZ-TV, Baton Rouge, Louisiana;
- Motion for Extension of Time of KSPT-TV and WDIO-TV filed on February 4, 2008 by KSTP-TV, LLC, Licensee of Station KSTP-TV, St. Paul, Minnesota; WDIO-TV, LLC, Licensee of Station WDIO-TV, Duluth, Minnesota.

**STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL**

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

While I agree with the substance of the Commission's decision today, I write separately to note my concerns about a procedural aspect to this proceeding. After the Commission issued its notice of apparent liability for forfeiture, the stations were given only 17 days to file a response – far shorter than the 30 days that is our usual practice. In this instance, the 52 stations, represented by the network and affiliates association, had the resources and wherewithal to prepare a comprehensive and timely response. That may not always be the case. I hope that in future proceedings, we will grant parties a more reasonable opportunity to respond to Commission charges.

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

In the Matter of)	
)	
Complaints Against Various Television)	File Nos. EB-03-IH-0122 and
Licensees Concerning Their February 25,)	EB-03-IH-0353 ¹
2003 Broadcast of the Program "NYPD Blue")	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: January 25, 2008

Released: January 25, 2008

By the Commission: Commissioner Tate issuing a separate statement.

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* ("NAL"), issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (the "Act"), and Section 1.80 of the Commission's rules,² we find that the ABC Television Network ("ABC") affiliated stations and ABC owned-and-operated stations listed in the Attachment to this NAL aired material that apparently violates the federal restrictions regarding the broadcast of indecent material.³ Specifically, during the February 25, 2003 episode of the ABC program "NYPD Blue," aired at 9:00 p.m. Central Standard Time and Mountain Standard Time, these licensees each broadcast adult female nudity. Based upon our review of the facts and circumstances of this case, we conclude that each licensee listed in the Attachment is apparently liable for a monetary forfeiture in the amount of \$27,500 per station for broadcasting indecent material in apparent violation of 18 U.S.C. § 1464 and Section 73.3999 of the Commission's rules.

II. BACKGROUND

2. Section 1464 of Title 18, United States Code, prohibits the broadcast of obscene, indecent, or profane programming.⁴ The FCC rules implementing that statute, a subsequent statute establishing a "safe harbor" during certain hours, and the Act prohibit radio and television stations from broadcasting obscene material at any time and indecent material between 6 a.m. and 10 p.m.⁵

¹ The NAL/Acct. No. and FRN number for each licensee subject to this Notice are enumerated in the Attachment.

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

³ See 18 U.S.C. § 1464; 47 C.F.R. § 73.3999.

⁴ See 18 U.S.C. § 1464.

⁵ See 47 C.F.R. § 73.3999.

3. **Indecency Analysis.** Enforcement of the provisions restricting the broadcast of indecent, obscene, or profane material is an important component of the Commission’s overall responsibility over broadcast radio and television operations. At the same time, however, the Commission must be mindful of the First Amendment to the United States Constitution and Section 326 of the Act, which prohibit the Commission from censoring program material or interfering with broadcasters’ free speech rights.⁶ As such, in making indecency determinations, the Commission proceeds cautiously and with appropriate restraint.⁷

4. The Commission defines indecent speech as material that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium.⁸

Indecency findings involve at least two fundamental determinations. First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition—that is, the material must describe or depict sexual or excretory organs or activities. . . . Second, the broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast medium.⁹

⁶ See U.S. CONST., amend. I; 47 U.S.C. § 326. See also *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813-15 (2000).

⁷ See *Action for Children’s Television v. FCC*, 852 F.2d 1332, 1344, 1340 n. 14 (1988) (“*ACT I*”) (stating that “[b]roadcast material that is indecent but not obscene is protected by the First Amendment; the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what people may say and hear,” and that any “potential chilling effect of the FCC’s generic definition of indecency will be tempered by the Commission’s restrained enforcement policy.”).

⁸ See *Infinity Broadcasting Corporation of Pennsylvania*, Memorandum Opinion and Order, 2 FCC Rcd 2705 (1987) (subsequent history omitted) (citing *Pacifica Foundation*, Memorandum Opinion and Order, 56 FCC 2d 94, 98 (1975), *aff’d sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (“*Pacifica*”).

⁹ *Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999, 8002 ¶¶ 7-8 (2001) (“*Indecency Policy Statement*”) (emphasis in original). In applying the “community standards for the broadcast medium” criterion, the Commission has stated:

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

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

5. In our assessment of whether broadcast material is patently offensive, “the *full context* in which the material appeared is critically important.”¹⁰ Three principal factors are significant to this contextual analysis: (1) the explicitness or graphic nature of the material; (2) whether the material dwells on or repeats at length depictions or descriptions of sexual or excretory organs or activities; and (3) whether the material panders to, titillates, or shocks the audience.¹¹ In examining these three factors, we must weigh and balance them on a case-by-case basis to determine whether the broadcast material is patently offensive because “[e]ach indecency case presents its own particular mix of these, and possibly, other factors.”¹² In particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent,¹³ or, alternatively, removing the broadcast material from the realm of indecency.

6. ***Forfeiture Calculations.*** This *NAL* is issued pursuant to Section 503(b)(1) of the Act. Under that provision, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission or to have violated Section 1464 of Title 18, United States Code, shall be liable to the United States for a forfeiture penalty.¹⁴ Section 312(f)(1) of the Act defines willful as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law.¹⁵ The legislative history to Section 312(f)(1) clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,¹⁶ and the Commission has so interpreted the term in the Section 503(b) context.¹⁷

7. The Commission’s *Forfeiture Policy Statement* establishes a base forfeiture amount of \$7,000 for the transmission of indecent or obscene materials.¹⁸ The *Forfeiture Policy Statement* also specifies that the Commission shall adjust a forfeiture based upon consideration of the factors enumerated in Section 503(b)(2)(D) of the Act, such as “the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any

¹⁰ *Indecency Policy Statement*, 16 FCC Rcd at 8002 ¶ 9 (emphasis in original).

¹¹ *See id.* at 8002-15 ¶¶ 8-23.

¹² *Id.* at 8003 ¶ 10.

¹³ *See id.* at 8009 ¶ 19 (citing *Tempe Radio, Inc (KUPD-FM)*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 21828 (Mass Media Bur. 1997) (forfeiture paid), and *EZ New Orleans, Inc. (WEZB(FM))*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 4147 (Mass Media Bur. 1997) (forfeiture paid) (finding that the extremely graphic or explicit nature of references to sex with children outweighed the fleeting nature of the references).

¹⁴ *See* 47 U.S.C. § 503(b)(1)(B) & D. *See also* 47 C.F.R. 1.80(a)(1).

¹⁵ *See* 47 U.S.C. § 312(f)(1).

¹⁶ *See* H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

¹⁷ *See Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

¹⁸ *See Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) (“*Forfeiture Policy Statement*”); *see also* 47 C.F.R. § 1.80(b).

history of prior offenses, ability to pay, and such other matters as justice may require.”¹⁹ The statutory maximum forfeiture amount for violations that occurred in February 2003 is \$27,500.²⁰

III. DISCUSSION

8. ***The Programming.*** The Commission received numerous complaints alleging that certain affiliates of ABC and ABC owned-and-operated stations, as listed in the Attachment, broadcast indecent material during the February 25, 2003 episode of the ABC program “NYPD Blue” at 9:00 p.m. in the Central and Mountain Standard Time Zones.

9. The complaints refer to a scene at the beginning of the program, during which a woman and a boy, who appears to be about seven or eight years old, are involved in an incident that includes adult female nudity. As confirmed by a tape of the program provided by ABC, during the scene in question, a woman wearing a robe is shown entering a bathroom, closing the door, and then briefly looking at herself in a mirror hanging above a sink. The camera then shows her crossing the room, turning on the shower, and returning to the mirror. With her back to the camera, she removes her robe, thereby revealing the side of one of her breasts and a full view of her back. The camera shot includes a full view of her buttocks and her upper legs as she leans across the sink to hang up her robe. The camera then tracks her, in profile, as she walks from the mirror back toward the shower. Only a small portion of the side of one of her breasts is visible. Her pubic area is not visible, but her buttocks are visible from the side.

10. The scene shifts to a shot of a young boy lying in bed, kicking back his bed covers, getting up, and then walking toward the bathroom. The camera cuts back to the woman, who is now shown standing naked in front of the shower, her back to the camera. The frame consists initially of a full shot of her naked from the back, from the top of her head to her waist; the camera then pans down to a shot of her buttocks, lingers for a moment, and then pans up her back. The camera then shifts back to a shot of the boy opening the bathroom door. As he opens the door, the woman, who is now standing in front of the mirror with her back to the door, gasps, quickly turns to face the boy, and freezes momentarily. The camera initially focuses on the woman’s face but then cuts to a shot taken from behind and through her legs, which serve to frame the boy’s face as he looks at her with a somewhat startled expression. The camera then jumps to a front view of the woman’s upper torso; a full view of her breasts is obscured, however, by a silhouette of the boy’s head and ears. After the boy backs out of the bathroom and shuts the door, the camera shows the woman facing the door, with one arm and hand covering her breasts and the other hand covering her pubic area. The scene ends with the boy’s voice, heard through the closed door, saying “sorry,” and the woman while looking embarrassed, responds, “It’s okay. No problem.” The complainants contend that such material is indecent and request that the Commission impose sanctions against the licensees responsible for broadcasting this material.

11. ***Indecency Analysis.*** As an initial matter, we find that the programming at issue is within the scope of our indecency definition because it depicts sexual organs and excretory

¹⁹ *Forfeiture Policy Statement*, 12 FCC Rcd at 17100-01 ¶ 27.

²⁰ The statutory maximum amount for violations occurring after November 13, 2000, and before September 7, 2004, is \$27,500. See 65 FR 60868-01 (2000); see also *Amendment of Section 1.80 of the Commission’s Rules*, Order, 19 FCC Rcd 10945, 10946 ¶ 6 (2004) (amending rules to increase maximum penalties due to inflation since last adjustment of penalty rates).

organs – specifically an adult woman’s buttocks.²¹ Although ABC argues, without citing any authority, that the buttocks are not a sexual organ,²² we reject this argument, which runs counter to both case law²³ and common sense.

12. We also find that the material is, in the context presented here, patently offensive as measured by contemporary community standards for the broadcast medium. Turning to the first principal factor in our contextual analysis, the scene contains explicit and graphic depictions of sexual organs. The scene depicts multiple, close-range views of an adult woman’s naked buttocks. In this respect, this case is similar to other cases in which we have held depictions of nudity to be graphic and explicit.²⁴

13. Turning to the second factor in our contextual analysis, although not dispositive, we find that the broadcast dwells on and repeats the sexual material. We have held that repetition and persistent focus on sexual or excretory material is a relevant factor in evaluating the potential offensiveness of broadcasts.²⁵ Here, the scene in question revolves around the woman’s nudity and includes several shots of her naked buttocks. The material is thus dwelled upon and repeated.

14. With respect to the third factor, we find that the scene’s depiction of adult female nudity, particularly the repeated shots of a woman’s naked buttocks, is titillating and shocking. ABC concedes that the scene included back and side nudity, but contends that it was “not presented in a lewd, prurient, pandering, or titillating way.”²⁶ ABC asserts that the purpose of the scene was to “illustrate[] the complexity and awkwardness involved when a single parent brings a new romantic partner into his or her life,” and that the nudity was not included to depict

²¹ See *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order, 21 FCC Rcd 2664, 2681 ¶ 62, *vacated in part on other grounds*, 21 FCC Rcd 13299 (2006) (subsequent history omitted) (“2006 Indecency Omnibus Order”).

²² See *Response* at 7.

²³ See, e.g., *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000) (Supreme Court did not disturb a city’s indecency ordinance prohibiting public nudity, where the buttocks was listed among other sexual organs/body parts subject to the ordinance’s ban on nudity); *Loce v. Time Warner Entertainment Advance/Newhouse Partnership*, 191 F.3d 256, 269 (2d. Cir. 1999) (upholding state district court’s determination that Time Warner’s decision to not transmit certain cable programming that it reasonably believed indecent (some of which included “close-up shots of unclothed breasts and buttocks”) did not run afoul of the Constitution).

²⁴ See, e.g., *Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 19230, 19235 ¶ 13 (2004) (“*Super Bowl NAL*”) (finding that a broadcast of a performer’s exposed breast was graphic and explicit), *affirmed*, Forfeiture Order, 21 FCC Rcd 2760 (2006), *affirmed*, Order on Reconsideration, 21 FCC Rcd 6653 (2006), *appeal pending*. See also *Young Broadcasting of San Francisco, Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 1751, 1755 ¶ 11 (2004) (“*Young Broadcasting NAL*”) (finding that a broadcast of a performer’s exposed penis was graphic and explicit), *NAL response pending*.

²⁵ See *Indecency Policy Statement*, 16 FCC Rcd at 8008 ¶ 17 (citing cases); see also *Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program “Married By America” on April 7, 2003*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 20191, 20195 ¶ 11 (2004) (“*Married By America NAL*”) (*NAL response pending*); *Entercom Seattle License, LLC*, Order on Review, 19 FCC Rcd 9069, 9073-74 ¶ 13 (2004), *petition for recon. pending*.

²⁶ See *Response* at 9.

an attempted seduction or a sexual response from the young boy.²⁷ Even accepting ABC's assertions as to the purpose of the scene, they do not alter our conclusion that the scene's depiction of adult female nudity is titillating and shocking. As discussed above, the scene includes multiple, close-up views of the woman's nude buttocks, with the camera at one point panning down her naked back for a lingering shot of her buttocks. The 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. Thus, we find that the scene in question, which included repeated and lingering images of a woman naked from the back, with close-up views of her naked buttocks, presented adult female nudity in a manner that shocks and titillates viewers.

15. Finally, we reject ABC's argument that, because of the "modest number of complaints" the network received,²⁸ and the program's generally high ratings,²⁹ the contemporary community standards of the viewing community embrace, rather than reject, this particular material. As a matter of clarification, while ABC may not have received many complaints about the program, the Commission received numerous complaints, including thousands of letters from members of various citizen advocacy groups. The Commission's indecency determinations are not governed by the number of complaints received about a given program, however, nor do they turn on whether the program or the station that broadcast it happens to be popular in its particular market.³⁰ Indeed, with respect to the latter factor, the fact that the program is watched by a significant number of viewers serves to increase the likelihood that children were among those who may have seen the indecent broadcasts, thereby increasing the public harm from the licensees' misconduct.

16. In sum, although the broadcast of nudity is not necessarily indecent in all contexts,³¹ taking into account the three principal factors in our contextual analysis, we conclude that the broadcast of the material at issue here is apparently indecent. As reviewed above, the material in this episode was explicit, dwelled upon, and shocking, pandering and titillating. The complained-of material was broadcast by the licensees listed in the Attachment within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under Section 73.3999 of the Commission's rules.³² Although ABC included in the program a warning that "this police drama contains adult language and partial nudity,"³³ the Supreme Court has ruled that such warnings are not necessarily effective because the audience is constantly changing stations.³⁴ Therefore,

²⁷ See *id.* at 3-4, 9-11.

²⁸ See *id.* at 9, n.7.

²⁹ See *id.* at 9.

³⁰ See *The Rusk Corporation*, Notice of Apparent Liability for Forfeiture, 8 FCC Rcd 3228, 3229 (1993) (forfeiture paid).

³¹ Compare *WPBN/WTOM MO&O*, 15 FCC Rcd at 1840-41 ¶¶ 8-13 (finding that nudity in the broadcast of the movie "Schindler's List" was not indecent because it was not patently offensive in context) with *Young Broadcasting NAL*, 19 FCC Rcd at 1756, ¶ 14 (finding that exposure of male genitalia was patently offensive because it was gratuitous and apparently intended to shock and titillate the audience).

³² See 47 C.F.R. § 73.3999.

³³ Response at 10-11.

notwithstanding the warning, there is a reasonable risk that children may have been in the audience and the broadcast is legally actionable.³⁵

17. **Forfeiture Calculation.** We find that the ABC affiliates and ABC owned-and-operated stations listed in the Attachment consciously and deliberately broadcast the programming at issue here. Accordingly, we find that each broadcast in apparent violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999 was willful within the meaning of Section 503(b)(1) of the Act, and subject to forfeiture.

18. We therefore turn to the proposed forfeiture amount, which is based on the factors enumerated in Section 503(b)(2)(D) of the Act and the facts and circumstances of this case. For the following reasons, we find that \$27,500 is an appropriate proposed forfeiture for the material found to be apparently indecent in this case. The scene depicts a nude woman with her buttocks entirely exposed. The material was prerecorded, and ABC or its affiliates could have edited or declined the content prior to broadcast.³⁶ Although ABC included a warning, we find that a lower forfeiture is not warranted here in light of all the circumstances surrounding the apparent violation, including the shocking and titillating nature of the scene. On balance and in light of all of the circumstances, we find that a \$27,500 forfeiture amount for each station would appropriately punish and deter the apparent violation in this case. Therefore, we find that each licensee listed in the Attachment is apparently liable for a proposed forfeiture of \$27,500 for each station that broadcast the February 25, 2003, episode of “NYPD Blue” prior to 10 p.m.³⁷

19. Although we are informed that other stations not mentioned in any complaint also broadcast the complained-of episode of “NYPD Blue,” 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. This result is consistent with the approach set forth by the Commission in its most recent indecency orders.³⁸ As indicated in those orders, our commitment to an appropriately restrained enforcement policy justifies this more limited approach toward the imposition of forfeiture penalties. Accordingly, we propose forfeitures as set forth in the Attachment.

IV. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission’s rules, that the licensees of the stations that are affiliates of the ABC Television Network and of the stations

(...continued from previous page)

³⁴ See *Pacifica*, 438 U.S. at 748-49.

³⁵ See *Action for Children’s Television v. FCC*, 58 F. 3d 654, 660-63 (D.C. Cir. 1995) (*en banc*), *cert. denied*, 516 U.S. 1072 (1996).

³⁶ See *Married By America NAL*, 19 FCC Rcd at 20196 ¶ 16.

³⁷ The fact that the stations in question may not have originated the programming is irrelevant to whether there is an indecency violation. See *Review of the Commission’s Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates*, Notice of Proposed Rulemaking, 10 FCC Rcd 11951, 11961, ¶ 20 (1995) (internal quotation omitted) (“We conclude that a licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory.”).

³⁸ See *2006 Indecency Omnibus Order*, 21 FCC Rcd at 2673 ¶ 32.

owned and operated by ABC, as enumerated in the Attachment, are hereby NOTIFIED of their APPARENT LIABILITY FOR FORFEITURE in the amount of \$27,500 per station for willfully violating 18 U.S.C. § 1464 and Section 73.3999 of the Commission's rules by their broadcast of the program "NYPD Blue" on February 25, 2003.

21. IT IS FURTHER ORDERED that a copies of this *NAL* shall be sent by Certified Mail, Return Receipt Requested, to John W. Zucker, Senior Vice President, Law & Regulation, ABC Inc., 77 West 66th Street, New York, New York 20024, and to Susan L. Fox, Vice President, Government Relations, The Walt Disney Company, 1150 17th Street, N.W., Suite 400, Washington, D.C. 20036, and to the licensees of the stations listed in the Attachment, at their respective addresses noted therein.

22. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's rules, that not later than February 11, 2008, each licensee identified in the Attachment SHALL PAY the full amount of its proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of their proposed forfeiture.

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

24. The responses, if any, must be mailed to Benigno E. Bartolome, Acting Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 4-C330, Washington D.C. 20554, and MUST INCLUDE the relevant *NAL*/Acct. No. referenced for each proposed forfeiture in the Attachment hereto.

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

26. Requests for payment of the full amount of this *NAL* under an installment plan should be sent to: Associate Managing Director – Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.³⁹

³⁹ See 47 C.F.R. § 1.1914.

27. Accordingly, IT IS ORDERED that the complaints in this *NAL* proceeding ARE GRANTED to the extent indicated herein, AND ARE OTHERWISE DENIED, and the complaint proceeding IS HEREBY TERMINATED.⁴⁰

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁴⁰ Consistent with Section 503(b) of the Act and consistent Commission practice, for the purposes of the forfeiture proceeding initiated by this *NAL*, the only parties to such proceeding will be the licensees specified in the Attachment.

ATTACHMENTProposed Forfeitures For February 25, 2003
Broadcasts Of "NYPD Blue"

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Proposed Forfeiture Amount
Cedar Rapids Television Company, 2 nd Avenue at 5 th Street, NE, Cedar Rapids, IA 52401	0002589489	200832080013	KCRG-TV Cedar Rapids, IA	9719	\$27,500
Centex Television Limited Partnership, P. O. Box 2522, Waco, TX 76702	0001675719	200832080014	KXXV(TV) Waco, TX	9781	\$27,500
Channel 12 of Beaumont, Inc., 525 Interstate Highway, 10 South, Beaumont, TX 77701	0006587307	200832080015	KBMT(TV) Beaumont, TX	10150	\$27,500
Citadel Communications, LLC, 44 Pondfield Road, Suite 12, Bronxville, NY 10708	0003757481	200832080016	KLKN(TV) Lincoln, NE	11264	\$27,500
KLTV/KTRE License Subsidiary, LLC, 201 Monroe Street, RSA Tower 20 th Floor, Montgomery, AL 36104	0015798341	200832080017	KLTV(TV) Tyler, TX	68540	\$27,500
Duhamel Broadcasting Enterprises, 518 St. Joseph Street,, Rapid City, SD 57701	0002433340	200832080018	KOTA-TV Rapid City, SD	17688	\$27,500
Forum Communications Company, 301 8 th Street South, P. O. Box 2466, Fargo, ND 58103	0002480085	200832080019	WDAY-TV Fargo, ND	22129	\$27,500
Gray Television Licensee Corp., 1500 North West Street, Wichita, KS 67203	0002746022	200832080020	KAKE-TV Wichita, KS	65522	\$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Proposed Forfeiture Amount
Gray Television Licensee, Inc., P. O. Box 10, Wichita, KS 67201	0002746022	200832080021	KLBY(TV) Colby, KS	65523	\$27,500
KSTP-TV, LLC, 3415 University Avenue, West, St. Paul, MN 55114- 2099	0009769621	200832080022	KSTP-TV St. Paul, MN	28010	\$27,500
KATC Communications, Inc., 1103 Eraste Landry Road, Lafayette, LA 70506	0003822285	200832080023	KATC(TV) Lafayette, LA	33471	\$27,500
KATV, LLC, P. O. Box 77, Little Rock, AR 72203	0001694462	200832080024	KATV(TV) Little Rock, AR	33543	\$27,500
KDNL Licensee, LLC, c/o Pillsbury Winthrop Shaw Pittman, LLP, 2300 N Street, NW, Washington, DC 20037-1128	0002144459	200832080025	KDNL-TV St. Louis, MO	56524	\$27,500
KETV Hearst- Argyle Television, Inc., c/o Brooks, Pierce, et al, P. O. Box 1800, Raleigh, NC 27602	0003799855	200832080026	KETV(TV) Omaha, NE	53903	\$27,500
KFBB Corporation, L.L.C., c/o Wooster Republican Printing Company, 40 S Linden Ave, Alliance, OH 44601-2447	0011094281	200832080027	KFBB-TV Great Falls, MT	34412	\$27,500
KHBS Hearst- Argyle Television, Inc., c/o Brooks, Pierce, et al, P. O. Box 1800, Raleigh, NC 27602	0001587088	200832080028	KHOG-TV Fayetteville, AR	60354	\$27,500
KMBC Hearst- Argyle Television, Inc., c/o Brooks, Pierce, et al, P.O. Box 1800, Raleigh, NC 27602	0001675974	200832080029	KMBC-TV Kansas City, MO	65686	\$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Proposed Forfeiture Amount
KSWO Television Company, Inc., P. O. Box 708, Lawton, OK 73502	0001699248	200832080030	KSWO-TV Lawton, OK	35645	\$27,500
KTBS, Inc., P. O. Box 44227, Shreveport, LA 71104	0003727419	200832080031	KTBS-TV Shreveport, LA	35652	\$27,500
KTRK Television, Inc., 77 W. 66 th Street, Floor 16, New York, NY 10023- 6201	0012480109	200832080032	KTRK-TV Houston, TX	35675	\$27,500
KTUL, LLC, 3333 S. 29 th West Avenue, Tulsa, OK 74107	0001694413	200832080033	KTUL(TV) Tulsa, OK	35685	\$27,500
KVUE Television, Inc., 400 South Record Street, Dallas, TX 75202	0001545581	200832080034	KVUE(TV) Austin, TX	35867	\$27,500
Louisiana Television Broadcasting, LLC, P. O. Box 2906, Baton Rouge, LA 70821	0001714344	200832080035	WBRZ-TV Baton Rouge, LA	38616	\$27,500
McGraw-Hill Broadcasting Company, 123 Speer Boulevard, Denver, CO 80203	0003476827	200832080036	KMGH-TV Denver, CO	40875	\$27,500
Media General Communication Holdings, LLC., 333 E. Franklin Street, Richmond, VA 23219-2213	0015751217	200832080037	WMBB(TV) Panama City, FL	66398	\$27,500
Mission Broadcasting, Inc., 544 Red Rock Drive, Wadsworth, OH 44281	0004284899	200832080038	KODE-TV Joplin, MO	18283	\$27,500
Mississippi Broadcasting Partners, c/o Anne Swanson, Dow Lohnes PLLC, 1200 New Hampshire Avenue, NW, Suite 800, Washington DC 20036-6802	0003828753	200832080039	WABG-TV Greenwood, MS	43203	\$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Proposed Forfeiture Amount
Nexstar Broadcasting, Inc., 909 Lake Carolyn Parkway, Suite 1450, Irving, TX 75039	0009961889	200832080040	WDHN(TV) Dothan, AL	43846	\$27,500
New York Times Management Services Co. c/o New York Times Co. 229 W. 43 rd Street New York, NY 10036-3913	0003481887	200832080041	WQAD-TV Moline, IL	73319	\$27,500
Nexstar Broadcasting, Inc., 909 Lake Carolyn Parkway, Suite 1450, Irving, TX 75039	0009961889	200832080042	KQTV(TV) St. Joseph, MO	20427	\$27,500
Northeast Kansas Broadcast Service, Inc., 2121 S.W. Chelsea Avenue, Topeka, KS 66604	0001841766	200832080043	KTKA-TV Topeka, KS	49397	\$27,500
NPG of Texas, L.P., 4140 Rio Bravo, El Paso, TX 79902	0006548028	200832080044	KVIA-TV El Paso, TX	49832	\$27,500
Ohio/Oklahoma Hearst-Argyle Television, c/o Brooks Pierce et al, P. O. Box 1800, Raleigh, NC 27602	0001587609	200832080045	KOCO-TV Oklahoma City, OK	12508	\$27,500
Piedmont Television of Huntsville License, LLC, c/o Piedmont Television Holdings LLC, 7621 Little Avenue, Suite 506, Charlotte, NC 28226	0004063483	200832080046	WAAY-TV Huntsville, AL KSPR(TV) Springfield, MO	57292 35630	\$55,000
Pollack/Belz Communications Co., Inc., 5500 Poplar Lane, Memphis, TN 38119-3716	0006096200	200832080047	KLAX-TV Alexandria, LA	52907	\$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Proposed Forfeiture Amount
Post-Newsweek Stations, San Antonio, Inc., c/o Post-Newsweek Stations, 550 West Lafayette Boulevard, Detroit, MI 48226-3140	0002149953	200832080048	KSAT-TV San Antonio, TX	53118	\$27,500
Scripps Howard Broadcasting Co., 312 Walnut Street, Cincinnati, OH 45202	0012487609	200832080049	KNXV-TV Phoenix, AZ	59440	\$27,500
Southern Broadcasting, Inc., P. O. Box 1645, Tupelo, MS 38802	0005411632	200832080050	WKDH(TV) Houston, MS	83310	\$27,500
Tennessee Broadcasting Partners, c/o Russell Schwartz, One Television Place, Charlotte, NC 28205	0003828696	200832080051	WBBJ-TV Jackson, TN	65204	\$27,500
Tribune Television New Orleans, Inc., 1 Galleria Boulevard, Suite 850, Metairie, LA 70001	0002847564	200832080052	WGNO(TV) New Orleans, LA	72119	\$27,500
WAPT Hearst-Argyle TV, Inc., (CA Corp.), P. O. Box 1800, Raleigh, NC 27602	0005008867	200832080053	WAPT(TV) Jackson, MS	49712	\$27,500
WDIO-TV, LLC, 3415 University Avenue West, St. Paul, MN 55114-2099	0004199139	200832080054	WDIO-TV Duluth, MN	71338	\$27,500
WEAR Licensee, LLC, Pillsbury, Winthrop, Shaw, Pittman, LLP, 2300 N Street, NW, Washington, DC 20037-1128	0004970935	200832080055	WEAR-TV Pensacola, FL	71363	\$27,500
WFAA-TV, Inc., 400 South Record Street, Dallas, TX 75202	0001651496	200832080056	WFAA-TV Dallas, TX	72054	\$27,500
WISN Hearst-Argyle TV, Inc. (CA Corp.), P. O. Box 1800, Raleigh, NC 27602	0003792603	200832080057	WISN-TV Milwaukee, WI	65680	\$27,500

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID Nos.	Proposed Forfeiture Amount
WKOW Television, Inc., P. O. Box 909, Quincy, IL 62306	0004383683	200832080058	WKOW-TV Madison, WI	64545	\$27,500
WKRN, G.P., c/o Brooks Pierce et al, P. O. Box 1800, Raleigh, NC 27602	0005015037	200832080059	WKRN-TV Nashville, TN	73188	\$27,500
WLS Television, Inc., 77 W. 66 th Street, Floor 16, New York, NY 10023-6201	0003471315	200832080060	WLS-TV Chicago, IL	73226	\$27,500
WSIL-TV, Inc., 5009 South Hulen, Suite 101, Fort Worth, TX 76132-1989	0002808137	200832080061	WSIL-TV Harrisburg, IL	73999	\$27,500
WXOW-WQOW Television, Inc., P.O. Box 909, Quincy, IL 62306	0005012216	200832080062	WXOW-TV La Crosse, WI	64549	\$27,500
Young Broadcasting of Green Bay, Inc., c/o Brooks Pierce et al, P. O. Box 1800, Raleigh, NC 27602	0004994984	200832080063	WBAY-TV Green Bay, WI	74417	\$27,500

**STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE**

Our action today should serve as a reminder to all broadcasters that Congress and American families continue to be concerned about protecting children from harmful material and that the FCC will enforce the laws of the land vigilantly. In fact, pursuant to the Broadcast Decency Act of 2005, Congress increased the maximum authorized fines ten-fold. The law is simple. If a broadcaster makes the decision to show indecent programming, it must air between the hours of 10 p.m. and 6 a.m. This is neither difficult to understand nor burdensome to implement.