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

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

ORDER

Adopted: November 6, 2006 **Released: November 6, 2006**

By the Commission: Commissioner Adelstein concurring in part, dissenting in part, and issuing a statement.

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I. INTRODUCTION

1. In this Order, we address complaints alleging that four television programs ("The 2002 Billboard Music Awards," "The 2003 Billboard Music Awards," "NYPD Blue," and "The Early Show") contained indecent and/or profane material.[1] After considering the comments submitted by broadcasters as well as other interested parties, we find that comments made by Nicole Richie during "The 2003 Billboard Music Awards" and by Cher during the "The 2002 Billboard Music Awards" are indecent and profane as broadcast but that the complained-of material aired on "The Early Show" is neither indecent nor profane. In addition, we dismiss on procedural grounds the complaints involving "NYPD Blue" as inadequate to trigger enforcement action.

II. BACKGROUND

2. On March 15, 2006, the Commission released Notices of Apparent Liability and a Memorandum Opinion and Order ("*Omnibus Order*") resolving numerous complaints that television broadcasts aired between February 2, 2002, and March 8, 2005, contained indecent, profane, and/or obscene material.[2] Section III.A of the *Omnibus Order* proposed monetary forfeitures against six

[1] For purposes of this Order, we refer to all of the complained-about episodes of "NYPD Blue" as a single "program."

[2] *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 (2006) ("*Omnibus Order*"), *pets. for* (continued....)

different television broadcasts for apparent violations of our prohibitions against indecency and/or profanity.[3] Section III.C addressed twenty-eight broadcasts that we concluded did not violate indecency, profanity, and/or obscenity restrictions for various reasons.[4] In the portion of the *Omnibus Order* at issue here, Section III.B, the Commission considered complaints filed against four programs.

3. "*The 2002 Billboard Music Awards.*" The Commission received a complaint concerning "The 2002 Billboard Music Awards" program that aired on Station WTTG(TV), Washington, DC, beginning at 8:00 p.m. Eastern Standard Time on December 9, 2002.[5] The complaint specifically alleged that during the broadcast Cher, an award winner, stated, "'People have been telling me I'm on the way out every year, right? So fuck 'em.'"[6]

4. "*The 2003 Billboard Music Awards.*" The Commission received a number of complaints about the "The 2003 Billboard Music Awards" program that aired on Fox Television Network stations beginning at 8:00 p.m. Eastern Standard Time on December 10, 2003.[7] The complaints concerned a segment in which Nicole Richie, an award presenter, stated, "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple."[8]

5. "*NYPD Blue.*" The Commission received complaints concerning the use of the term "bullshit" in several "NYPD Blue" episodes that aired on KMBC-TV, Kansas City, Missouri, beginning at 9:00 p.m. Central Standard Time on various dates between January 14 and May 6, 2003.[9]

6. "*The Early Show.*" The Commission received a viewer complaint that Station KDKA-TV, Pittsburgh, Pennsylvania, licensed to CBS Broadcasting, Inc. ("CBS"), aired the word "bullshit"

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review pending, *Fox Television Stations, Inc. v. FCC*, No. 06-1760-AG (2d Cir. filed Apr. 13, 2006), *remanded and partially stayed*, Sept. 7, 2006 ("*Remand Order*").

[3] *Id.* at 2670-90 ¶¶ 22-99.

[4] *Id.* at 2700-20 ¶¶ 146-232.

[5] *Id.* at 2690 ¶ 101. *See* Letter from Lara Mahaney, Director of Corporate and Entertainment Affairs, PTC to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (August 22, 2003).

[6] *Id.* The Enforcement Bureau obtained a videotape of the broadcast that confirmed the allegation in the complaint. *Omnibus Order,* 21 FCC Rcd at 2690 ¶ 101.

[7] *Id.* at 2692 ¶ 112.

[8] *Id.* at ¶ 112 and n. 164.

[9] *Id.* at 2696 ¶ 125. The Commission provided the following descriptions of the complained-of portions of the broadcasts:

> 1/14/03 episode (Det. Sipowitz in response to his partner's arrest by Internal Affairs): "Alright, this is Bullshit!"
>
> 2/4/03 episode (Det. Sipowitz to street officer regarding that officer's partner framing Sipowitz's partner): "Over time – over what – bullshit, a beef!"
>
> 2/18/03 episode (stated by a suspect who bragged about, but now denies, killing his daughter): "I told people I killed Samia to try and get respect back. She had ashamed me and my community look at me as a fool." Det. 1: "You took credit for killing your daughter?! Bullshit!"
>
> 4/15/03 episode (Det. harassing suspect who had harassed prosecutor): "I'm hoping this bullshit about you trying to get under ADA Haywood's skin is a misunderstanding."
>
> 5/6/03 episode (Captain to Det. who harassed suspect in 4/15 episode): "He said you nearly assaulted his client last night.' Det.: 'Well, that's a bunch of bullshit."

Id. at n. 187.

during "The Early Show" at approximately 8:10 a.m. Eastern Standard Time on December 13, 2004.[10] A videotape obtained from CBS showed that during a live interview with Twila Tanner, a contestant on the CBS program "Survivor: Vanuatu," Ms. Tanner referred to another contestant as a "bullshitter."[11]

7. In Section III.B of the *Omnibus Order*, the Commission found that the broadcasts at issue apparently violated the statutory and regulatory prohibitions against airing indecent and profane material.[12] In light of the circumstances, however, the Commission did not initiate forfeiture proceedings against the relevant licensees.[13] All of the broadcasts discussed in Section III.B, except for the "The Early Show," preceded the *Golden Globe Awards Order*,[14] in which the Commission made clear that the isolated use of an offensive expletive could be actionably indecent.[15] The FCC also stated that its precedent at the time of "The Early Show" broadcast "did not clearly indicate that the Commission would take enforcement action against an isolated use" of "shit" (the "S-Word") or its variants.[16] Accordingly, consistent with its commitment to proceed with caution and restraint in this area, the Commission decided that it would not take any adverse action against any licensee as a result of these apparent violations.[17]

8. Following release of the *Omnibus Order*, several parties petitioned for judicial review of Section III.B, asserting a variety of constitutional and statutory challenges. Fox Television Stations, Inc. ("Fox") and CBS filed a joint petition for review in the United States Court of Appeals for the Second Circuit.[18] ABC Television Network ("ABC") and Hearst-Argyle Television, Inc. ("Hearst") filed a joint petition for review in the United States Court of Appeals for the D.C. Circuit, which later transferred the petition to the Second Circuit. The Second Circuit consolidated the petitions on June 14, 2006.[19]

9. At the same time, several parties complained to the Commission about the process the Commission followed in formulating Section III.B of the *Omnibus Order*. The Commission ordinarily provides broadcasters with an opportunity to file responses and raise arguments before imposing forfeiture liability.[20] With one exception, however, the FCC did not seek the views of the licensees

[10] *Id.* at 2698-99 ¶ 137.

[11] *Id. See id.* at 2699 n. 199 ("In commenting on the strategy employed by the fellow contestant, Ms. Tanner stated: 'I knew he was a bullshitter from Day One.' The interviewer, Julie Chen, recognized the inappropriateness of the language, stating: 'I hope we had the cue ready on that one . . . We can't say that word . . . There is a delay.'").

[12] *Id.* at 2690-2700 ¶¶ 100-45. *See* 18 U.S.C. § 1464; 47 C.F.R. § 73.3999. However, with respect to complaints regarding the use of the words "dick" and "dickhead" in episodes of "NYPD Blue," the Commission found that in context the broadcasts of these terms were not patently offensive under its contextual analysis and based on FCC precedent. *Omnibus Order*, 21 FCC Rcd at 2696-97 ¶ 127.

[13] *Omnibus Order*, 21 FCC Rcd at 2690 ¶ 100.

[14] *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program,* Memorandum Opinion and Order, 18 FCC Rcd 19859 (Enf. Bur. 2003), *review granted*, 19 FCC Rcd 4975, 4981 ¶¶ 13-14 (2004) ("*Golden Globe Awards Order*"), *petitions for stay and recon. pending*.

[15] *See Omnibus Order*, 21 FCC Rcd at 2692 ¶ 111, 2695 ¶ 124, 2698 ¶ 136.

[16] *Id.* at 2700 ¶ 145.

[17] *Id.* at 2690 ¶ 100.

[18] *See supra* n. 2 (noting pending petitions for review).

[19] The Second Circuit also granted motions to intervene in the Fox-CBS case by NBC Universal, Inc., NBC Telemundo License Co., NBC Television Affiliates, FBC Television Affiliates Association, CBS Television Network Affiliates Association, and the Center for Creative Community, Inc. Before transferring the ABC-Hearst case, the D.C. Circuit granted ABC Television Affiliates Association's motion to intervene.

[20] *See* 47 U.S.C. § 503(b)(4)(A); *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, 8015-16 ¶¶ 26-27 (2001) ("*Indecency Policy Statement*").

affected by Section III.B of the *Omnibus Order* because the Commission did not impose any sanctions on them.[21] Following the release of the *Omnibus Order*, broadcasters complained that they should have had an opportunity to present their views before the Commission reached its decisions in Section III.B. Upon reflection, the Commission agreed and stated that it wanted to ensure that all of the affected licensees were afforded a full opportunity to be heard before the Commission issued a final decision with respect to the broadcasts at issue. Accordingly, on July 5, 2006, the Commission asked the Second Circuit for a voluntary remand of the case and stay of the briefing schedule. The Commission asked the court to remand the case for 60 days in order to afford interested parties an opportunity to file responses and the Commission an opportunity to give the issues further consideration.

10. The Second Circuit granted the Commission's motion on September 7, 2006, remanding for a period of 60 days "for the entry of a further final or appealable order of the FCC following such further consideration as the FCC may deem appropriate in the circumstances."[22] On the same day, the Commission announced a two-week filing period for interested parties wishing to submit comments concerning the four cases.[23] The Enforcement Bureau separately issued Letters of Inquiry ("LOIs") to Fox, CBS, and KMBC Hearst-Argyle Television, Inc. on September 7, 2006, and to those broadcasters as well as other parties to the Second Circuit proceeding on September 18, 2006.

III. DISCUSSION

11. Consistent with our commitment to consider the comments and LOI responses filed following the Second Circuit's *Remand Order* and to take a fresh look at the issues raised by the four programs at issue on remand, we vacate Section III.B of the *Omnibus Order* in its entirety and replace it with the decisions below.

A. "The 2003 Billboard Music Awards"

12. *The Programming.* The Commission, Fox, stations licensed to Fox or its affiliated companies, and affiliates of the Fox Television Network all received a number of complaints from individual viewers and organizations alleging that Fox stations aired indecent material during "The 2003 Billboard Music Awards" program on December 10, 2003 between 8 p.m. and 10 p.m. Eastern Standard Time.[24] The complainants alleged that Nicole Richie, who with Paris Hilton presented an award on the program, uttered language that was indecent and profane in violation of 18 U.S.C. § 1464 and the Commission's rule restricting the broadcast of indecent material. The complainants requested that the Commission impose sanctions against each station that aired the remarks.

13. The Bureau sent Fox a letter of inquiry on January 7, 2004.[25] Fox responded on January 30, 2004, attaching a transcript of the material at issue.[26] According to Fox, the program announcer

[21] The Commission did send a narrow Letter of Inquiry ("LOI") regarding "The 2003 Billboard Music Awards" broadcast, receiving a limited response from Fox on January 30, 2004. Fox also responded to a supplemental LOI without presenting new legal arguments. The Commission did not send LOIs regarding the complained-of broadcasts of "The 2002 Billboard Music Awards," "NYPD Blue," and "The Early Show" prior to the court's remand.

[22] *Remand Order* at 2.

[23] *See* Public Notice, *FCC Announces Filing Procedures In Connection With Court Remand of Section III.B of the Commission's March 15, 2006 Omnibus Order Resolving Numerous Broadcast Television Indecency Complaints*, DA 06-1739 (rel. Sept. 7, 2006).

[24] FCC File Nos. EB-03-IH-0617, EB-04-IH-0295, EB-04-IH-0091.

[25] *See* Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to Fox Television Stations, Inc. (January 7, 2004).

introduced Paris Hilton and Nicole Richie, stars of the Fox Television Network show "The Simple Life,"[27] as follows: "To present the award for Top 40 Mainstream Track, here are two babes whose lives are anything but mainstream. From their hit TV series, 'The Simple Life,' please welcome Nicole Richie and Paris Hilton." Following that introduction, Paris Hilton and Nicole Richie walked onstage to present the award. Fox-owned stations and Fox affiliates in the Eastern and Central Time Zones then broadcast the following exchange between them:

Paris Hilton:	Now Nicole, remember, this is a live show, watch the bad language.
Nicole Richie:	Okay, God.
Paris Hilton:	It feels so good to be standing here tonight.
Nicole Richie:	Yeah, instead of standing in mud and [audio blocked]. Why do they even call it "The Simple Life?" Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple.[28]

14. Fox contends that this broadcast was not actionably indecent. Although Fox concedes that it broadcast the F-Word, it argues that the word, in context, did not depict or describe sexual activities but rather, "at most," was a "vulgar expletive used to express emphasis," and thus is outside the scope of the Commission's indecency definition.[29] As for the use of the S-Word, Fox does not deny that it was used in the excretory sense. It argues, however, that the dialogue "contained at most a passing reference to an excretory by-product (i.e., 'cow shit') and an expletive used for emphasis," that the dialogue lasted only 22 seconds, and that it was not pandering, titillating or shocking.[30] Therefore, Fox contends that the dialogue is not actionably indecent.

15. *Indecency Analysis*. 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.[31] Thus, indecency findings require two primary 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 material must be patently offensive as measured by contemporary

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[26] *See* Letter from John C. Quale, Counsel, Fox Television Stations, Inc., to Investigations and Hearings Division, Enforcement Bureau, FCC, File No. EB-03-IH-0617 (January 30, 2004) ("*Response*").

[27] "The Simple Life," which debuted on December 2, 2003, followed Ms. Hilton's and Ms. Richie's fish-out-of-water adventures upon being transplanted from Beverly Hills, California to an Arkansas farm for 30 days. A *New York Times* review described the show as "[a]n updated 'Green Acres'" featuring "Ms. Hilton, 22, of the hotel fortune, and Ms. Richie, also 22, daughter of the pop singer Lionel Richie." Alessandra Stanley, *With a Rich Girl Here and a Rich Girl There*, N.Y. Times, Dec. 2, 2003, at E1. The cover of the Simple Life DVD describes Ms. Hilton and Ms. Richie in the following manner: "They're Rich. They're Sexy. They're TOTALLY-OUT-OF-CONTROL!" Discussing Fox executives' original idea for the show in an interview, one executive touched on the same excretory theme as "The 2003 Billboard Awards" script, stating that "'[t]hey wanted to see stilettos in cow shit.'"
http://web.archive.org/web/20040215040316/http://www.tvweek.com/topstorys/112403simplelife.html.
Daily Variety's review of the premiere episode also described Ms. Richie's penchant for "bad language," labeling her as "potty-mouthed." Brian Lowry, *The Simple Life*, Daily Variety, Nov. 25, 2003 at 4.

[28] *See Response* at 3-4.

[29] *Id.* at 12-13.

[30] *Id.*

[31] *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)).

community standards for the broadcast medium.[32] In our assessment of whether broadcast material is patently offensive, "the full context in which the material appeared is critically important."[33] Three principal factors are significant to this contextual analysis: (1) the explicitness or graphic nature of the description; (2) whether the material dwells on or repeats at length the descriptions; and (3) whether the material panders to, titillates or shocks the audience.[34] In examining these three factors, we must weigh and balance them 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."[35] In particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent,[36] or, alternatively, removing the broadcast material from the realm of indecency.[37]

16. With respect to the first determination, Fox does not dispute that Ms. Richie's comment – "Have you ever tried to get cow shit out of a Prada purse?" – refers to excrement, and we conclude that it is clearly within the scope of our indecency definition. Fox does contend that Ms. Richie's use of the "F-Word" – in the statement "[i]t's not so fucking simple" – does not describe sexual activities and thus falls outside the scope of our indecency definition, but we disagree. A long line of precedent indicates that the use of the "F-Word" for emphasis or as an intensifier comes within the subject matter scope of our indecency definition.[38] Given the core meaning of the "F-Word," any use of that word has a sexual connotation even if the word is not used literally. Indeed, the first dictionary definition of the "F-Word" is sexual in nature.[39] Moreover, it hardly seems debatable that the word's power to "intensify" and offend

[32] *Indecency Policy Statement*, 16 FCC Rcd at 8002 ¶ 8 (emphasis in original); *see Omnibus Order*, 21 FCC Rcd at 2667 ¶ 12.

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

[34] *Id.* at 8002-15 ¶¶ 8-23.

[35] *Id.* at 8003 ¶ 10.

[36] *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) (extremely graphic or explicit nature of references to sex with children outweighed the fleeting nature of the references); *EZ New Orleans, Inc. (WEZB(FM))*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 4147 (Mass Media Bur. 1997) (forfeiture paid) (same)).

[37] *Indecency Policy Statement*, 16 FCC Rcd at 8010 ¶ 20 ("the manner and purpose of a presentation may well preclude an indecency determination even though other factors, such as explicitness, might weigh in favor of an indecency finding").

[38] *See, e.g.*, *Grant Broadcasting System II, Inc. Licensee WJPR-TV*, 12 FCC Rcd 8277, 8279 (Mass Media Bur. 1997) (NAL issued for non-literal uses of the "F-Word" and the "S-Word," such as "this fucking place is going to blow up"); *Pacifica Foundation, Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 2698, 2699 ¶¶ 12-13 (1987) (subsequent history omitted) (distinguishing between the use of "expletives" and "speech involving the description or depiction of sexual . . . functions" but indicating that both fall within the subject matter scope of our indecency definition). The Enforcement Bureau's departure from this precedent in its *Golden Globe Awards* decision, *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards,"* Memorandum Opinion and Order, 18 FCC Rcd 19859 (Enf. Bur. 2003), was contrary to this precedent and thus appropriately overturned by the Commission. While the Bureau cited two cases for the proposition that the use of the "F-Word" did not necessarily fall within the subject matter scope of our indecency definition, both cases were inapposite. First, the "F-Word" was not even an issue in *Entercom*, which addressed the words "prick" and "piss," and, in any event, was a Bureau rather than a Commission decision. *See Entercom Buffalo License, LLC (WGR(AM))*, Order, 17 FCC Rcd 11997 (Enf. Bur. 2002). Second, in *Peter Branton*, the Commission did not rule that the some uses of the "F-Word" fell outside the subject matter scope of our indecency definition. Rather, we decided that the uses of the "F-Word" there were not "patently offensive" in the context of the news programming at issue in that case. *See Peter Branton,* 6 FCC Rcd 610 (1991), *appeal dismissed,* 993 F.2d 906 (D.C. Cir. 1993), *cert. den.* 511 U.S. 1052 (1994).

[39] *See, e.g.,* American Heritage College Dictionary 559 (4th ed. 2002) (defining the F-Word as "1: to have sexual intercourse with").

derives from its implicit sexual meaning.[40] Accordingly, we conclude that, as we stated in *Golden Globe*,[41] its use inherently has a sexual connotation and thus falls within the scope of our indecency definition. The material thus warrants further scrutiny to determine whether it is patently offensive as measured by contemporary community standards for the broadcast medium. Looking at the three principal factors in our contextual analysis, we conclude that it is.

17. We will first address the first and third principal factors in our contextual analysis – the explicitness or graphic nature of the material and whether the material panders to, titillates, or shocks the audience. The complained-of material is quite graphic and explicit. Ms. Richie's comment referring to excrement conveys a graphic image of Ms. Richie trying to scrape cow excrement out of her designer hand bag. Because of her use of the "S-Word," Ms. Richie's description also contained quite vulgar language. Furthermore, the vulgar description of excrement was coupled with the use of the "F-Word." As we have previously concluded, the "F-Word" is one of the most vulgar, graphic, and explicit words for sexual activity in the English language.[42] Here, Ms. Richie's use of the "F-Word" coupled with her graphic and explicit description of the handling of excrement during a live broadcast of a popular music awards ceremony when children were expected to be in the audience was vulgar and shocking.[43] Her comments were also presented in a pandering manner. As part of their dialogue, Ms. Hilton reminded Ms. Richie to "watch the bad language," a comment that served to preview and highlight for the viewing audience Ms. Richie's remarks. Moreover, Fox does not argue that there was any justification for Ms. Richie's comments.[44]

18. We note that when the Supreme Court stressed the importance of context in *Pacifica*, it mentioned as relevant contextual factors the time of day of the broadcast, program content as it affects "the composition of the audience," and the nature of the medium.[45] All of these factors support the conclusion that the dialogue here was patently offensive in context. The complained-of material was broadcast early in prime time. The program's content was, as discussed above, graphic, explicit and vulgar, both in its excretory description and its use of the "F-Word." The program was designed to draw a large nationwide audience that could be expected to include many children interested in seeing their favorite music stars. Although there is no requirement that we document the presence of children in the audience for a program that is subject to an indecency complaint and is aired between 6 a.m. and 10 p.m.,[46] we note that in this case a significant portion of the viewing audience for this program was under 18. According to Nielsen ratings data, during an average minute of "The 2003 Billboard Music Awards"

[40] *See* Robert F. Bloomquist, *The F-Word: A Jurisprudential Taxonomy of American Morals (In a Nutshell),* 40 Santa Clara L. Rev. 65, 98 (1999) ("all F-word usage has at least an implicit sexual meaning").

[41] *See Golden Globe Awards Order*, 19 FCC Rcd at 4979 ¶ 8.

[42] *See id.*

[43] To the extent that Fox argues that it did not present Ms. Richie's comment for "shock value," *see, e.g., Response* at 13, it fundamentally misunderstands the contextual analysis employed by the Commission. "In evaluating whether material is indecent, we examine the material itself and the manner in which it is presented, not the subjective state of mind of the broadcaster." *Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, Order on Reconsideration, 21 FCC Rcd 6653, 6657-58 ¶ 12 (2006) ("*Super Bowl Order on Reconsideration*"), *pet. for review pending*, *CBS Corp. v. FCC*, No. 06-3575 (3d Cir. filed July 28, 2006).

[44] For example, Fox does not argue that Ms. Richie's remarks had any artistic merit or were necessary to convey any message.

[45] *See Pacifica*, 438 U.S. at 749-51.

[46] *See Action for Children's Television v. FCC*, 58 F.3d 654, 665 (D.C. Cir. 1995) (en banc) ("*ACT III*") (holding that the Commission could rely on bright-line time channeling rule and rejecting contention that it was required to use "station-specific and program-specific data in assessing whether children are at risk of being exposed to broadcast indecency"), *cert. denied*, 516 U.S. 1072 (1996).

broadcast, 2,312,000 (23.4%) of the 9,871,000 people watching the program were under 18, and 1,089,000 (11%) were between the ages of 2 and 11. In addition, we note that this program was rated TV-PG(DL). Such a rating would *not* have put parents or others on notice of such vulgar language, and the broadcast contained no other warnings to viewers that it might contain material highly unsuitable for children.[47] This no doubt helps explain the strong feelings that many of the complainants, particularly those who were watching the program with their children, expressed regarding the unexpectedly vulgar content.[48] In light of all of these factors, we conclude that the first and third factors in our contextual analysis both weigh heavily in favor of a finding that the material is patently offensive.

19. With respect to the second factor in our contextual analysis – whether the complained-of material was sustained or repeated – Fox argues that the dialogue here was a "fleeting and isolated utterance" and that such material is not actionably indecent.[49] We disagree.

20. Fox's argument that a "fleeting and isolated utterance" is not actionably indecent is based largely on staff letters and dicta in decisions predating the Commission's *Golden Globe Awards Order*. For example, in a 1987 decision clarifying that our indecency definition was not restricted only to the seven words contained in the George Carlin monologue determined to be indecent in *Pacifica,* the Commission distinguished in dicta between "expletives" – words such as the "F-Word" or the "S-Word" used outside of their core sexual or excretory meanings – and descriptions of sexual or excretory functions. And, in so doing, the Commission suggested: "If a complaint focuses solely on the use of

[47] Fox notes that its policy is to rate any programming containing the "F-Word" TV-MA. *See* Letter from John C. Quale to Marlene H. Dortch, Secretary, FCC, in FCC File Nos. EB-03-IH-0460, EB-03-IH-0617, EB-04-IH-0295, EB-04-IH-0091 at 4 (filed Sept. 29, 2006) ("Fox Response to 9/18/2006 LOI"). The TV-MA rating (mature audience only) signifies that the program is specifically designed to be viewed by adults and therefore may be unsuitable for children under 17. In the context of a TV-MA rated program, an "L" would signify "crude indecent language." The TV-PG rating (parental guidance suggested), by contrast, merely signifies that the program contains material that parents may find unsuitable for younger children, and that parents may want to watch the program with their younger children. TV-PG is the most common rating, covering a majority of the programs that are rated. *See* Nancy Signorielli, *Age-Based Ratings, Content Designations, and Television Content: Is There a Problem?*, 8 Mass Comm. & Soc'y 277, 293 (2005) (six in ten rated programs are rated TV-PG). The "D" signifies that the program may contain some suggestive dialogue, and the "L" signifies that the program may contain some infrequent coarse language. Moreover, we note that the TV-PG(DL) rating appeared only at the beginning and once in the middle of the program; thus, a viewer tuning into this 2-hour broadcast at another time may not even have been aware that it was rated TV-PG(DL). *See Pacifica*, 438 U.S. at 748 ("Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content.").

[48] *See, e.g.,* e-mail complaint from individual to Fox station KMSP(TV), Minneapolis, dated December 10, 2003 ("I would appreciate it if you would pass on my intense opinion of the Billboard Awards and Nicole Ritchie (sic). We teach our kids that people like her have a potty mouth. My children were watching part of this program and happened to catch her vulgarity. We will not finish watching the awards nor will we continue to watch fox network in this household."); e-mail complaint from individual to Fox station WTVT(TV), Tampa, dated January 21, 2004 ("Fox insults my ears and those of my wife and children with the "f" word, etc. and we leave you for good . . ."); e-mail complaint from individual to Fox station KMSP(TV), Minneapolis, dated December 10, 2003 ("Why are you allowing that kind of language at 8:00 p.m. for all ages of people to hear? . . . It was disgusting and very disturbing. . . "); e-mail complaint from individual to Fox station KMSP(TV), Minneapolis, dated December 13, 2003 ("I was watching the event with my 12 and 13 y/o daughters. . . the amount of swearing that was done and the severity of some of the words was horrible. . . Watching TV has become very unpredictable these days . . . I do not feel it is a safe source of entertainment for our children. . . ."); complaint from individual to David Solomon, Chief of Enforcement Bureau, dated December 12, 2003 ("I was horrified to learn that some of the young children in the school that I teach in viewed the program. Several of these children are among those children who have social problems and are often in trouble. Is this what our children have to look toward for example on how to live? Would you want your children or grandchildren to mimic these entertainers ?????") All of these complaints except for the last one to the FCC's Enforcement Bureau are attached to Fox's January 30, 2004 *Response*.

[49] *Response* at 12, 13.

expletives, we believe that . . . deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency."[50] The Commission made clear, however, that repetition was *not* required when speech "involv[es] a description or depiction of sexual or excretory functions" and that "[t]he mere fact that specific words or phrases are not *repeated* does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent."[51] In this case, Ms. Richie's use of the "S-Word" clearly involved "a description of excretory functions."[52]

21. Subsequent to this 1987 guidance, there were several Bureau-level decisions finding the isolated use of an expletive not to be actionably indecent.[53] In no case, however, did the Commission itself, when evaluating an actual program, find that the isolated use of an expletive, such as the "F-Word," as broadcast was not indecent or could not be indecent. In our 2001 *Indecency Policy Statement*,[54] we explained that "where sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency,"[55] but also noted "even relatively fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness."[56] Then, in 2004, the Commission itself considered for the first time in an enforcement action whether a single use of an expletive could be indecent. And in evaluating the broadcast of the F-Word during "The Golden Globe Awards," we overturned the Bureau-level decisions holding that an isolated expletive could not be indecent and disavowed our 1987 dicta on which those decisions were based.

22. While it is important to understand the history of the Commission's decisions in this area, we reject Fox's suggestion that Nicole Richie's comments would not have been actionably indecent prior to our *Golden Globe* decision.[57] Rather, Ms. Richie's remarks would have been actionably indecent prior to our *Golden Globe* decision for three separate reasons. First, even under our pre-*Golden Globe* dicta, the offensive material here does not consist solely of the use of expletives; as discussed above, the "S-Word" was used here in its excretory sense and was integral to a graphic and vulgar description that clearly falls within the scope of our indecency rule. As we stated in our 1987 guidance, "repetitive use" was not required under such circumstances.[58] Second, the offensive language was "repeated" in that it included not one but two extremely graphic and offensive words. Third, there seems to be little doubt that Ms. Richie's comments were deliberately uttered and that she planned her comments in advance.[59] Ms. Hilton's opening remark to Ms. Richie that this was a live show and she should "watch the bad language" strongly suggests that the offensive language that followed was not spontaneous. Further, there is nothing in Ms. Richie's confident and fluid delivery of the lines, and her use of multiple offensive words, that

[50] *Pacifica Foundation, Inc.,*2 FCC Rcd at 2699. *See also New Indecency Enforcement Standards To Be Applied to All Broadcast and Amateur Radio Licensees*, Public Notice, 2 FCC Rcd 2726 (1987).

[51] *See Pacifica Foundation, Inc.*, 2 FCC Rcd at 2699 (emphasis added).

[52] *Id*.

[53] *See, e.g.*, *Golden Globe Awards Order*, 19 FCC Rcd at 4981 ¶ 12 n. 32 (listing Bureau-level decisions).

[54] *Indecency Policy Statement*, 16 FCC Rcd at 8008-09 ¶¶ 17-19.

[55] *Id*. at 8008 ¶ 17.

[56] *Id*. at 8009 ¶ 19.

[57] In this respect, our decision differs from our suggestion in Section III.B of the *Omnibus Order*, now vacated, that prior to the Commission's decision in *Golden Globe* this broadcast would not have warranted enforcement action because it involved an "isolated use of expletives." *See Omnibus Order*, 21 FCC Rcd at 2695 ¶ 124. For the reasons discussed above, we do not believe that our prior suggestion accurately reflected the context of this broadcast or Commission precedent.

[58] *Pacifica Foundation, Inc.*, 2 FCC Rcd at 2699.

[59] *See id.* (discussing "deliberate" use of expletives).

suggests that any of the language was a spontaneous slip of the tongue. Thus, given the presence of a graphic description of excretory functions, the presence of multiple offensive words, and the deliberate nature of Ms. Richie's comments, we conclude that this broadcast would have been actionably indecent consistent with prior Commission guidance even in the absence of our *Golden Globe* decision.[60]

23. In addition, this broadcast is actionably indecent under the *Golden Globe Awards Order*.[61] In that Order, we stated that 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."[62] While, as explained above, Commission dicta and Bureau-level decisions issued before *Golden Globe* had suggested that expletives had to be repeated to be indecent but "descriptions or depictions of sexual or excretory functions" did not need to be repeated to be indecent, we believe that this guidance was seriously flawed. We thus reaffirm that it was appropriate to disavow it. To begin with, any strict dichotomy between "expletives" and "descriptions or depictions of sexual or excretory functions" is artificial and does not make sense in light of the fact that an "expletive's" power to offend derives from its sexual or excretory meaning.[63] Indeed, this is why it has long been clear that such words fall within the subject matter scope of our indecency definition, which since *Pacifica* has involved the description of sexual or excretory organs or activities.[64] Moreover, in certain cases, it is difficult (if not impossible) to distinguish whether a word is being used as an expletive or as a literal description of sexual or excretory functions. Finally, and perhaps most importantly, categorically requiring repeated use of expletives in order to find material indecent is inconsistent with our general approach to indecency enforcement, which stresses the critical nature of context.[65] In evaluating whether material is patently offensive, the Commission's approach has generally been to examine all factors relevant to that determination.[66] To the extent that Commission dicta had previously suggested that one of these factors – whether material had been repeated – would always be decisive in a certain category of cases, we believe that such dicta was at odds with the Commission's overall enforcement policy and was appropriately disavowed.

24. Turning back to "The 2003 Billboard Music Awards" broadcast, we believe that we need not ignore "the first blow" to the television audience in the circumstances presented here.[67] Nor do we think that *Pacifica* requires that approach. The major broadcast networks ("Networks") argue that the *Pacifica* Court "would have never approved" an indecency enforcement regime that applied to isolated and fleeting expletives.[68] But this claim finds no support in *Pacifica*, in which the Court specifically reserved the question of "an occasional expletive" and noted that it addressed only the "particular

[60] For these reasons, Ms. Richie's comments differ significantly from the language involved in the two Bureau-level decisions finding fleeting expletives not to be indecent that were cited in the *Indecency Policy Statement*. *See Indecency Policy Statement*, 16 FCC Rcd at 8008-09 ¶ 18. Rather, they are more similar to the material in the *LBJS Broadcasting Company* Notice of Apparent Liability cited in the *Indecency Policy Statement* because they combine a graphic and vulgar description of sexual or excretory material with an expletive. *Id*. at 8009 ¶ 19, *citing LBJS Broadcasting Company*, 13 FCC Rcd 20956 (Mass Media Bur. 1998) (forfeiture paid) (finding broadcast apparently indecent for use of phrase "[s]uck my dick you fucking cunt").

[61] *See Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 12.

[62] *Id*.

[63] *See supra* para. 16.

[64] *Pacifica*, 438 U.S. at 742.

[65] *Indecency Policy Statement*, 16 FCC Rcd at 8002-03 ¶ 9.

[66] *Id.* at ¶¶ 9-10.

[67] *Pacifica*, 438 U.S. at 748-49.

[68] Joint Comments of Fox, CBS, NBC Universal, Inc. and NBC Telemundo License Co. in DA 06-1739 at 3 (filed Sept. 21, 2006) ("*Joint Comments*").

broadcast" at issue in that case.[69] Indeed, we think it significant that the "occasional expletive" contemplated by the Court was one that occurred in "a two-way radio conversation between a cab driver and a dispatcher," – a conversation not broadcast to a wide audience – "or a telecast of an Elizabethan comedy," settings far removed from the broadcast at issue here.[70]

25. In explaining the special nature of the broadcast medium, the Supreme Court emphasized the "pervasive presence [of the broadcast medium] in the lives of all Americans" and that indecent broadcasts invade the privacy of the home. It rejected the argument that one could protect oneself by turning off the broadcast upon hearing indecent language: "To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow."[71] We believe that granting an automatic exemption for "isolated or fleeting" expletives unfairly forces viewers (including children) to take "the first blow." Indeed, it would as a matter of logic permit broadcasters to air expletives at all hours of a day so long as they did so one at a time. For example, broadcasters would be able to air any one of a number of offensive sexual or excretory words, regardless of context, with impunity during the middle of the afternoon provided that they did not air more than one expletive in any program segment.[72] Such a result would be inconsistent with our obligation to enforce the law responsibly. We do not believe that viewers of free television broadcasts utilizing the public airwaves should feel, as so many of the complaining viewers of "The 2003 Billboard Music Awards" clearly do, that they cannot safely allow their families to watch prime-time broadcasts.[73]

26. Nor, as discussed above, are the Networks correct in their suggestion that fleeting utterances have never before been regulated. On the contrary, our *Golden Globe Awards* decision was not the first time that a fleeting utterance had been found to be indecent.[74] We have long recognized that "even relatively fleeting references may be found indecent" if the context makes them patently offensive.[75]

27. We thus conclude that the fact that the offensive dialogue here was relatively brief is not dispositive under these particular circumstances. This is not a case involving a single, spontaneously uttered expletive. Rather, it was two sentences, one of which contained a graphic excretory description and the other a vulgar expletive used to heighten the effect of the excretory description. And, as noted above, these statements were not spontaneous slips of the tongue, but rather were planned by the speaker and presaged by the introductory remark to "watch the bad language."

28. With respect to our analysis of the complained-of material, we emphatically reject the argument made by Fox and other broadcasters that the "contemporary community standards" employed by the Commission merely reflect the "subjective opinions" or "the tastes of the individuals with seats on the Commission."[76] Rather, as we have previously stated, in evaluating material, we rely on the

[69] *Pacifica*, 438 U.S. at 742, 750.

[70] *Id.* at 750.

[71] *Id.* at 748-49.

[72] Such words could include grossly offensive sexual terms such as "cunt."

[73] *See* complaints listed in note 48 *supra*. Like the broadcast in *Pacifica*, Ms. Richie's statements "could have enlarged a child's vocabulary in an instant." *Pacifica*, 438 U.S. at 749.

[74] *Indecency Policy Statement*, 16 FCC Rcd at 8009 ¶ 19.

[75] *See id.* (listing examples of isolated utterances found to be actionably indecent).

[76] *Joint Comments* at 10-11.

Commission's "collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups, and ordinary citizens."[77]

29. In this case, moreover, our assessment of contemporary community standards for the broadcast medium is strongly bolstered by broadcasters' own practices. As mentioned above, during the 10:00 p.m.-6:00 a.m "safe harbor," broadcasters are permitted to air indecent and profane material. Nevertheless, with rare exceptions, they do not allow the "F-Word" or the "S-Word" to be broadcast during that time period. Fox, for example, "generally prohibit[s] use of any form of the F-word or S-word during any day part, *including late-night programming*."[78] NBC also "does not broadcast the 'F-Word' and the 'S-Word'" during the "safe harbor" "except in unusual circumstances" and generally does not allow such language to be broadcast on its flagship late-night program "The Tonight Show with Jay Leno."[79] Similarly, ABC, even during safe harbor hours, "generally has not approved the broadcast of the 'f-word' and the 's-word.'"[80] For instance, during a recent broadcast of "Nightline," ABC deleted uses of the "F-Word" in a piece on actor Mark Wahlberg.[81] CBS, likewise, indicates that "[g]enerally speaking, broadcast[s] of the 'F-word' and 'S-word' are not permitted under CBS's Television Network Standards *at any time of [the] day*."[82] Hearst also reports that its general policy, "which applies *at all times*, is that vulgar language such as the F-Word and the S-Word [is] not to be knowingly broadcast."[83] To be sure, each of the broadcasters avers that in certain contexts, such as the motion picture *Saving Private Ryan*, they do permit the broadcast of the "F-Word" and the "S-Word." However, none of these examples bears even the slightest resemblance to Nicole Richie's comments during "The 2003 Billboard Music Awards."[84] Indeed, in Congressional testimony, Fox's President of Entertainment recognized that the very comments at issue here – Ms. Richie's remarks – contained "inappropriate language."[85] Moreover, Fox edited out her comments in its broadcasts to the Mountain and Pacific Time Zones.

30. Taken as a whole, broadcasters' practices with respect to programming aired during the safe harbor reflect their recognition that airing the "F-Word" and the "S-Word" on broadcast television is generally offensive to the viewing audience and, in the usual case, not consistent with contemporary community standards for the broadcast medium. They also reinforce our conclusion that Nicole Richie's comments during "The 2003 Billboard Music Awards" were patently offensive under contemporary community standards. For all of these reasons, we conclude that, given the explicit, graphic, vulgar, and

[77] *Infinity Radio License, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 5022, 5026 ¶ 12 (2004).

[78] Fox Response to 9/18/2006 LOI at 4 (emphasis added).

[79] Letter from F. William LeBeau to Marlene H. Dortch, Secretary, FCC, File Nos. EB-03-IH-0355, EB-03-IH-0460, EB-03-IH-0617, EB-04-IH-0295, EB-04-IH-0091, EB-05-IH-0007 at 4-5 (Sept. 29, 2006) ("NBC Response to 9/18/2006 LOI").

[80] Letter from John W. Zucker, Senior Vice President, ABC, Inc. to Marlene H. Dortch, Secretary, FCC, File No. EB-03-IH-0355 at 2 (Sept. 29, 2006) ("ABC Response to 9/18/2006 LOI").

[81] "Nightline," Sept. 29, 2006.

[82] Letter from Anne Lucey, Senior Vice President, CBS Corp. to Marlene H. Dortch, Secretary, FCC, File No. EB-05-IH-0007 at 2 (Sept. 29, 2006) ("CBS Response to 9/18/2006 LOI") (emphasis added).

[83] Response of Hearst-Argyle Television, Inc., File No. EB-03-IH-0355 at 3 (Sept. 29, 2006) ("Hearst Response to 9/18/2006 LOI") (emphasis added).

[84] *See* ABC Response to 9/18/2006 LOI at 2; CBS Response to 9/18/2006 LOI at 2-3; Hearst Response to 9/18/2006 LOI at 4-5; NBC Response to 9/18/2006 LOI at 3-4; Fox Response to 9/18/2006 LOI at 4.

[85] *H.R. 3717, the 'Broadcast Decency Enforcement Act of 2004': Hearing Before the Subcommittee on Telecommunications and the Internet of the House Comm. On Energy & Commerce*, 107th Congress, (Feb. 26, 2004) (statement of Gail Berman).

shocking nature of Ms. Richie's comments, they were patently offensive under contemporary community standards for the broadcast medium and thus indecent as broadcast.[86]

31. We also disagree that it would be inequitable to hold Fox responsible for airing offensive language during "The 2003 Billboard Music Awards" due to the live, unscripted nature of the material.[87] In disclaiming responsibility, Fox states that Nicole Richie's and Paris Hilton's scripted dialogue did not contain the "F-Word" or "S-Word." Rather, Ms. Richie's first scripted line read: "Yeah – instead of standing in mud and pig crap." When she spoke, she substituted "cow shit" (which was blocked out in the audio feed) for "pig crap" in that line. In the sentences at issue here, Ms. Richie was scripted to say "Have you ever tried to get cow manure out of a Prada purse? It's not so freaking simple."[88]

32. Fox also describes the measures it employed to delete objectionable material from the broadcast. It says that as in previous years – including during "The 2002 Billboard Music Awards" broadcast when it aired Cher's use of the phrase "fuck 'em" – it utilized a five-second delay that it normally used during the production of live entertainment programming. A Broadcast Standards employee monitored the broadcast and operated a "delay button" that enables an employee to edit out objectionable content before it airs. Fox also assigned a Broadcast Standards representative to the event to review the script, attend dress rehearsals and be present at the event, as it normally did for the production of live entertainment events. During "The 2003 Billboard Music Awards" program, the employee operating the delay button edited out the vulgar phrase "cow shit" the first time Ms. Richie said it, but failed to edit out the remaining offensive language discussed above. The program aired several hours later on stations in the Mountain and Pacific time zones, and Fox did remove the offensive language before it aired on those stations.[89]

33. As Fox points out, the FCC has long recognized that it may be inequitable to hold a licensee responsible for airing offensive speech during live coverage of a public event under some circumstances.[90] But the Commission has not hesitated to enforce its indecency standard where, as here, a licensee fails to exercise "reasonable judgment, responsibility and sensitivity to the public's needs and tastes to avoid patently offensive broadcasts."[91] Here, the original script for "The 2003 Billboard Music

[86] The Networks also complain about the Commission's analysis of contemporary community standards in other pending proceedings, such as *The Blues: Godfathers and Sons*. *See Joint Comments* at 10. In the case of *The Blues*, the Commission has issued only a Notice of Apparent Liability for Forfeiture, *see Omnibus Order* at 2683-87 ¶¶ 72-85, and we will address such issues in further proceedings in that case.

[87] *See Response* at 13.

[88] *Id.* at 6.

[89] *Id.* at 8-9. Following this broadcast, Fox implemented a longer delay mechanism and a second delay button for all live broadcasts to serve as a back-up. *Id*. at 9. In its recent response to a LOI relating to the broadcast of "The 2002 Billboard Music Awards," Fox states that it now uses a total of four delay buttons for all live broadcasts of entertainment programming. In addition, it "recognizes that certain performers may present more risk of spontaneous objectionable content during live performances than others" and thus "has begun to tape in advance certain performances to air during otherwise 'live' broadcasts." *See* Letter from John C. Quale to Marlene H. Dortch, Secretary, FCC, File No. EB-03-IH-0460 at 6 (Sept. 21, 2006) ("Fox Response to 9/7/06 LOI").

[90] *Pacifica*, 438 U.S. at 733 n. 7, *quoting Pacifica Foundation*, 59 FCC 2d at 893 n. 1. *See Response* at 12.

[91] *Pacifica Foundation, Inc.*, 2 FCC Rcd at 2700 ¶ 18. *See Liability of San Francisco Century Broadcasting, L.P.*, Memorandum Opinion and Order, 8 FCC Rcd 498, 499 ¶ 7 (1993) ("the mere fact that a show is live does not excuse a station from exercising its editorial responsibilities, especially where commonly available screening techniques can eliminate the element of surprise."), *citing Sound Broadcasting Corp.*, Notice of Apparent Liability, 6 FCC Rcd 2174 (Mass Media Bur. 1991); *Radio Station KFMH-FM, Muscatine, Iowa*, Notice of Apparent Liability, 9 FCC Rcd 1681, 1681-82 (Mass Media Bur. 1994) (rejecting contention that licensee should not be held responsible for broadcasting live and unscripted offensive material from an outside source where the broadcaster suspected "that the caller involved was the same person who had told the objectionable joke only eight minutes (continued....)

Awards" increased the likelihood that Ms. Richie would ad-lib offensive remarks; as noted above, it called for her to make excretory references to "pig crap" and "cow manure," and to substitute the euphemism "freaking" for the "F-Word."[92] Such a script might have posed minimal risk in the hands of some performers. Relying on Ms. Hilton and Ms. Richie to avoid vulgar language, however, involved a substantially greater risk.[93] As Fox well knew, Ms. Richie frequently used indecent language in inappropriate contexts. For example, during the three episodes of "The Simple Life" that it broadcast in the days leading up to the "The 2003 Billboard Music Awards," Fox felt it necessary to bleep expletives (the "F-Word" or "S-Word") uttered by Ms. Richie no fewer than nine times.[94] Yet Ms. Richie was still selected as a presenter for the live, prime-time awards show, and Fox has not claimed it made any effort to caution Ms. Richie about its broadcast standards for the program or that it took any special precautions (beyond its standard five-second delay) to guard against her use of expletives on the air. Indeed, Fox does not even contend that it took any action against Ms. Richie after this episode.

34. Even more significant, the particular five-second delay and editing system that Fox used in this case had already proved inadequate to delete Cher's offensive language during Fox's broadcast of "The 2002 Billboard Music Awards" the previous year. During that broadcast, Cher, when accepting an award, had stated, "'People have been telling me I'm on the way out every year, right? So fuck 'em.'"[95] According to Fox, the employee in charge of deleting objectionable material did not act quickly enough and ended up editing out dialogue that aired after Cher's comment.[96] Despite this failure, Fox took no additional precautions to avoid airing such material the next year.[97] The record also demonstrates that steps may be taken, such as adding "delay buttons" or lengthening the delay, that allow for far more effective editing of potentially objectionable content.[98] Here, Fox itself contends that the time delay and editing system that it used for "The 2003 Billboard Music Awards" was inadequate, maintaining that it

(...continued from previous page)
earlier" but "chose to place the call on the air rather than to discontinue the broadcast or to use precautions such as a delay device."); *L.M. Communications*, Notice of Apparent Liability, 7 FCC Rcd 1595 (Mass Media Bur. 1992) (rejecting argument that broadcaster should not be sanctioned for airing indecent material within live and unscripted programming where "the scatological material as broadcast involved a deliberate and repetitive use of the word 'crap' to heighten the audience's awareness of and attention to the subsequent use of the term 'shit' by the announcer.").

[92] *See Response* at 6; *see also Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, Forfeiture Order, 21 FCC Rcd 2760, 2769 ¶ 19 (2006) (citing evidence that "there is always a risk that performers will ad-lib remarks or take unscripted actions, and that the risk level varies according to the nature of the performance.") (subsequent history omitted).

[93] *See supra* note 27. As discussed above, Fox advertised Ms. Hilton and Ms. Richie as being "totally-out-of-control" on the cover of the Simple Life DVD. Additionally, *The Los Angeles Times* review of the first episode of "The Simple Life" describes Ms. Hilton and Ms. Richie as "out-of-control." Carina Chocano, *Work for a Living? What a Concept*, L.A. Times, Dec. 2, 2003, at 1 (Calendar Section).

[94] "*The Simple Life*," Season 1, Episodes 1-3. In addition, Ms. Richie's penchant for cursing is highlighted in a scene during the first episode in which their host, reviewing the house rules with them, states "no cussing or bad language," at which point the camera focuses on Ms. Richie giggling helplessly at Ms. Hilton. Their penchant for vulgarity is also illustrated during the third episode in two scenes at a local fast food franchise where Ms. Richie and Ms. Hilton are working for the day. Directed to change the letters of a sign out front to read "Half Price Burgers All Day," they instead arrange the letters to read "1/2 Price Anal Salty Weiner Bugers." Later, standing on the curb in costumes of the restaurant's mascot, an animated milkshake, they stick up their respective middle fingers (which are pixilated) to passersby.

[95] *See infra* para. 56.

[96] *See* Fox Response to 9/7/06 LOI at 5.

[97] *See Response* at 5.

[98] *See, e.g., id.* at 8-9.

imposed on the operator a "Herculean task" because he was "essentially trying to watch two programs at once – the live version occurring in real-time and the delayed version that was broadcast seconds later."[99] Then, if he heard or saw objectionable content, he was required to "press the appropriate audio and/or video delay buttons at the precise instant necessary to eliminate the objectionable content from the delayed feed" while at the same time "staying abreast of the continuing live feed."[100] In short, under these circumstances, Fox should have recognized the high risk that "The 2003 Billboard Music Awards" broadcast raised of airing indecent material. Nevertheless, Fox chose to rely on the same delay and editing system that had proved inadequate the previous year to delete an expletive during the same show. We are not persuaded, therefore, that Fox's efforts to edit out the offensive language were diligent or reasonable.

35. We recognize that no delay and editing system is foolproof and that there is always a possibility of human error in using delay equipment to edit live programming. The Commission can and will consider these facts in deciding what, if any, remedy is appropriate. In this case, however, as discussed above, we conclude that Fox's efforts to prevent and edit out Ms. Richie's comments were not diligent or reasonable.

36. Holding Fox responsible for airing indecent material in this case does not place live broadcasts at risk or impose undue burdens on broadcasters.[101] This case does not involve breaking news coverage that Fox and other broadcasters have traditionally presented in so-called "real time."[102] Nevertheless, Fox argues that "[t]he live presentation of awards shows . . . is what makes this content so compelling."[103] Fox, however, did not even decide to air the program live in much of the country. Rather, viewers in the Mountain Time Zone saw the program with a one-hour delay, and those in the Pacific Time Zone experienced a three-hour delay. We find it difficult to understand why viewers on the East Coast would no longer find "live programming" to be "compelling" with a ten-second delay while it is evidently acceptable to provide this programming to viewers in the western half of the country with a one-hour or three-hour delay. Moreover, with respect to awards shows as a whole, the record reflects that the vast majority of awards shows are not aired by major networks live in the Pacific Time Zone.[104] Rather, they are generally broadcast with a three-hour delay, thus undermining any assertion that it is important that viewers see the presentation of the awards without the comparatively minimal delay required to remove indecent language.

37. Under the circumstances, we fail to see how a delay of five, ten, or even fifteen seconds meaningfully affects the value of this programming or significantly implicates First Amendment values. In this vein, we note that so-called "live" programming is not literally live – viewers at home do not see an event at the very time that it is actually occurring. Rather, there is a natural delay caused by the time

[99] Fox Response to 9/18/2006 LOI at 10 n. 21.

[100] *Id.* By contrast, Fox states that its current time delay and editing system "relies upon technology to ensure that once an edit button is pressed, the potentially objectionable content is edited at the right time during the delayed feed." *Id*. As stated above, Fox's current system also utilizes more than one employee "to provide redundancy." *Id*. at 10.

[101] *See Joint Comments* at 12-16.

[102] Since this case does not involve breaking news or sports programming, we do not address issues involving such programming here. But as we recognize elsewhere in this Order, "in light of the important First Amendment interests at stake as well as the crucial role that context plays in our indecency determinations, it is imperative that we proceed with the utmost restraint when it comes to news programming." *See infra*, § III.C.

[103] See *Joint Comments*, Appendix X (Declaration of Peter Ligouri) at ¶ 2.

[104] Of the 32 awards shows that were broadcast by the major networks and are discussed in the record, only the Academy Awards aired live in all time zones. *See* ABC Response to 9/18/2006 LOI at 2; NBC Response to 9/18/2006 LOI at 4 and Exh. C.; Fox Response to 9/18/2006 LOI at 3-4; CBS Response to 9/18/2006 LOI at 7.

that it takes a signal to reach viewers. The record shows that digital signals, for example, may take up to 1.3 to 3.3 seconds to reach viewers over-the-air.[105] And, if viewers are receiving such signals through a cable operator or satellite provider, there may be an additional delay of up to 3 seconds.[106] Finally, if a viewer has a digital video recorder, there is another additional delay of approximately another half-second.[107] Thus, using a conservative estimate, a viewer may be watching an event more than three seconds after it occurs, even in the absence of any delay technology. In light of this, we fail to see how there is a meaningful adverse impact on a viewer's experience because he or she learns the winner of the Billboard Award for Top 40 Mainstream Track some eight to eighteen seconds after the winner is announced on stage in Las Vegas (with a delay) as opposed to after the normal three to six seconds (without one).

38. Finally, we note that our decision here will not deprive Fox of the ability to present such programming in substantially the same way that it has in the past. Fox has utilized a time delay and other procedures to avoid airing patently offensive material during live entertainment broadcasts such as "The 2003 Billboard Music Awards" for years before the Commission's decision in the *Golden Globe Awards Order*.[108] We also disagree that "delaying live broadcasts to edit potentially offensive language inevitably results in overbroad censorship of appropriate material."[109] As the D.C. Circuit observed, "some degree of self-censorship is inevitable and not necessarily undesirable so long as proper standards are available."[110] The possibility that an over-zealous broadcast standards employee may "dump" material that is not actionably indecent during the live presentation of an awards show does not outweigh the compelling interest in preventing patently offensive broadcasts such as the one that occurred in this case.

39. For all of these reasons, we conclude that Fox's broadcast of "The 2003 Billboard Music Awards" violated the prohibitions in 18 U.S.C. § 1464 and the Commission's rules against broadcast indecency and that it is not inequitable to hold Fox responsible for these violations.

40. *Profanity Analysis*. Consistent with our decisions in the *Golden Globe Awards Order* and the *Omnibus Order*, we also find that the complained-of language in the program at issue violated Section 1464's prohibition on the broadcast of "profane" utterances.[111] In the *Golden Globe Awards Order*, the Commission concluded that the "F-Word" was profane within the meaning of Section 1464 because, in context, it constituted vulgar and coarse language "'so grossly offensive to members of the public who actually hear it as to amount to a nuisance.'"[112] Similarly, we concluded in the *Omnibus*

[105] Fox Response to 9/18/2006 LOI at 11.

[106] *Id.*

[107] *Id. See* ABC Response to 9/18/2006 LOI at 7-8 (reporting that transmitting signals from ABC's New York Broadcast Center to affiliates results in less than a two second delay, that feeding live material from remote locations to ABC's New York Broadcast Center may cause an additional delay of up to a second, and that distribution of the signals to the consumers through cable and satellite systems may cause an additional delay).

[108] *See Response* at 8; *see also* Fox Response to 9/7/06 LOI at 5. In addition, Fox uses delays for live entertainment broadcasts even after 10 p.m. *See id.* at 5-7. The Commission's indecency regulation does not apply at that time, *see* 47 C.F.R. § 73.3999(b), so Fox obviously has reasons apart from regulatory compulsion for using a delay**.**

[109] *Joint Comments* at 15.

[110] *Action for Children's Television v. FCC*, 59 F.3d 1249, 1261 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1072 (1996) (*ACT IV*), *citing Pacifica*, 438 U.S. at 743. *See ACT III*, 58 F.3d at 666 ("Whatever chilling effects may be said to inhere in the regulation of indecent speech, these have existed ever since the Supreme Court first upheld the FCC's enforcement of section 1464 of the Radio Act.").

[111] 18 U.S.C. § 1464.

[112] *Golden Globe Awards Order*, 19 FCC Rcd at 4981 ¶ 13, *quoting Tallman v. United States*, 465 F.2d 282, 286 (7th Cir. 1972).

Order that the "S-Word" is a vulgar excretory term so grossly offensive to members of the public that it amounts to a nuisance and is presumptively profane.[113] In certain cases, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.[114] However, such circumstances are not present here: Fox does not contend that Ms. Richie's profane language was essential to informing viewers on a matter of public importance or that modifying the language would have had a material impact on its function as a source of news and information. On the contrary, Fox sought (albeit unsuccessfully) to delete the profane language, and did remove it before the program aired on time delay in the Mountain and Pacific Time Zones.[115] It is undisputed that the complained-of material, including the "F-Word" and the "S-Word," was broadcast within the 6 a.m. to 10 p.m. time frame relevant to a profanity determination.[116] Because there was a reasonable risk that children may have been in the audience at the time of the broadcast on December 10, 2003,[117] the broadcast is legally actionable.

41. Contrary to the Networks' *Joint Comments*, we believe that our interpretation of "profane" as used in Section 1464 is appropriate.[118] The word has long carried a variety of meanings, including non-religious meanings.[119] Several courts have interpreted the word in a non-religious sense, consistent with the established rule that a court should construe a statute, if reasonably possible, to avoid constitutional problems.[120] Further, when viewed in its statutory context with the words "obscene" and

[113] *Omnibus Order*, 21 FCC Rcd at 2686 ¶ 81 ("Like the 'F-Word,' [the 'S-Word'] is one of the most offensive words in the English language, the broadcast of which is likely to shock the viewer and disturb the peace and quiet of the home.").

[114] *Id.* at 2669 ¶ 19, *citing Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* Memorandum Opinion and Order, 20 FCC Rcd 4507, 4512-14 ¶¶ 13-18 (2005).

[115] *Response* at 8.

[116] *See Omnibus Order*, 21 FCC Rcd at 2666 ¶ 8.

[117] *See supra* para. 18 (noting that, according to Nielsen ratings data, 23.4% of the people watching an average minute of "The 2003 Billboard Music Awards" broadcast were under 18, and 11% were between the ages of 2 and 11).

[118] *See Joint Comments* at 28-32; Thomas Jefferson Center For the Protection of Free Expression Comments at 11-15 (Sept. 21, 2006).

[119] The 1891 edition of the Century Dictionary includes this definition of profane: "2. To put to a wrong use; employ basely or unworthily." Century Dictionary 4754 (1891 ed.). In an appendix to his concurring opinion in *Burstyn v. Wilson*, 343 U.S. 495, 533-40 (1952), Justice Frankfurter collected definitions of "sacrilege," "blasphemy," and "profane" dating to 1651. The earliest of these definitions of profane is "to apply any thing sacred to common use. To be irreverent to sacred persons or things. To put to a wrong use." *Id.* at 536, *quoting* Rider, A New Universal English Dictionary (London, 1759). The next is "To violate; to pollute.—To put to wrong use." *Id.* at 537, *quoting* Kenrick, A New Dictionary of the English Language (London, 1773). Frankfurter's concurring opinion also notes that Funk & Wagnalls' New Standard Dictionary of the English Language, first copyrighted in 1913, includes a definition of "to profane" as "3. To vulgarize; give over to the crowd." *Id.* at 527 n. 48. Thus, we disagree that Congress clearly would have understood the term in 1927 to mean only blasphemous or sacrilegious. *Joint Comments* at 28.

[120] *See Tallman v. United States*, 465 F.2d at 286; *State v. Richards*, 896 P.2d 357, 364 (Id. App. 1995) (in rejecting a vagueness challenge to state statute proscribing telephone harassment through, *inter alia*, "obscene, lewd or profane language," construing "profane" to mean "characterized by abusive language . . . cursing or vituperation . . ."); *see also United States v. Hicks*, 980 F.2d 963, 970 n. 9 (5th Cir. 1992) (angry reference to flight attendant as a "bitch" and angry admonition that she should get her "ass" to the plane's kitchen qualified as "profane"). We disagree with the Networks that *Tallman* addressed the word's meaning in *dicta*, and that the case actually refutes the Commission's interpretation because the Court cited with approval *Duncan v. United States*, 48 F.2d 128 (9th Cir.), *cert. denied*, 383 U.S. 863 (1931), and *Gagliardo v. United States*, 366 F.2d 720 (9th Cir. 1966). *See Joint* (continued....)

"indecent," both of which have vulgar overtones, we believe that the word "profane" is reasonably interpreted in the related sense of "grossly offensive."[121] We do not read the cases cited by the Networks as precluding a non-religious interpretation. *Duncan* upheld a conviction for broadcasting profanity where the defendant "referred to an individual as 'damned,'" "used the expression 'By God' irreverently," and "announced his intention to call down the curse of God upon certain individuals."[122] But the court held only that this language was "within the meaning of that term" as used in the Radio Act of 1927, not that the provision *only* covered such language.[123] *Gagliardo* addressed the meaning of "profane" in Section 1464 only in *dicta*, because the government in that case did not contend that the words at issue were profane.[124] Finally, the fact that the Commission has a specific rule addressing "obscene" and "indecent" programming[125] plainly does not foreclose the agency from exercising in an adjudication its express statutory authority to take enforcement action against broadcasts that are "profane."[126]

42. *Constitutional Issues.* The Networks offer a variety of arguments attacking the constitutionality of the Commission's indecency framework as it relates to "The 2003 Billboard Music Awards" broadcast. We do not find any of these arguments to be persuasive.

(...continued from previous page)
Comments at 31. *Tallman* held that the word "profane" in Section 1464 must be interpreted narrowly as, *inter alia*, "denoting language which under contemporary community standards is so grossly offensive to members of the public who actually hear it as to amount to a nuisance" to preserve its validity in response to a facial constitutional challenge. *Tallman*, 465 F.2d at 286. The Court cited *Duncan* and *Gagliardo* solely as examples of prior judicial interpretations available to the trial judge had jury instructions on the word's meaning been necessary, without approving or even identifying such interpretations. *Id.* We also reject the Networks' argument that the rule of lenity counsels against the Commission's interpretation of "profane." *See Joint Comments* at 30, n. 34. Among other things, the Networks make no showing that their preferred construction of the term is any narrower than the Commission's. Indeed, we think it likely that more broadcast speech would be considered "profane" under the Networks' interpretation of the term than under ours. *See also infra* para. 54 (explaining that the *Pacifica* Court squarely rejected the argument that the FCC's civil authority to enforce Section 1464 must be interpreted in accordance with rules that apply to criminal statutes, such as the rule of lenity).

[121] *See State v. Richards*, 896 P.2d at 364 ("when words appear in a list or are otherwise associated, they should be given related meanings."), *citing Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1 (1985), *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303 (1961), 2A Norman J. Singer, Southerland's Statutes and Statutory Construction § 47.16 at 183 (5th ed. 1992); *United States v. Hicks*, 980 F.2d at 970 n. 9 ("By 'profanity' or 'vulgarity,' we refer to words that, while not obscene, nevertheless are considered generally offensive by contemporary community standards."). The fact that the words "indecent" and "profane" in Section 1464 have "separate" meanings does not render our interpretation of profane "implausible." *See Joint Comments* at 31, *quoting Pacifica*, 438 U.S. at 739-40. We recognize that the two words have separate meanings, and the Commission interprets the two words differently. Our enforcement policy limiting the regulation of profane language to words that are sexual or excretory in nature or are derived from such terms stems from First Amendment considerations rather than the meaning of the word. *See Omnibus Order*, 21 FCC Rcd at 2669 ¶ 18.

[122] *Duncan*, 48 F.2d at 133-34 (the phrase "God damn it" uttered in anger was not profane under Section 1464).

[123] *Id.* at 134. *Duncan* was decided before constitutional law evolved to the point that such language could not be proscribed. *See Burstyn v. Wilson*, 343 U.S. 495 (1952) (holding unconstitutional a New York statute authorizing state officials to license films for public exhibition unless the films are "sacrilegious").

[124] *Gagliardo*, 366 F.2d at 725 ("God damn it" uttered in anger not legally profane). The FCC did not address whether "profane" could be interpreted in a non-religious sense in *Raycom America, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 4186 (2003) (portions of "The West Wing" in which a character "'scream[ed] at God,' and made irreverent references toward the deity—'[y]ou're a sonofabitch, you know that?,' and 'have I displeased you, you feckless thug?'" not actionably profane), and *Warren B. Appleton*, 28 FCC 2d 36 (Broadcast Bur. 1971) ("damn" not actionably profane), because those cases involved language with religious connotations.

[125] 47 C.F.R. § 73.3999.

[126] 47 U.S.C. § 1464; 47 U.S.C. § 503(b)(1)(D). *See Joint Comments* at 32.

43. First, the Networks argue that our definition of indecency is unconstitutionally vague.[127] However, that definition is essentially the same as the one that we articulated in the order under review in *FCC v. Pacifica Foundation*.[128] The Supreme Court had no difficulty in applying that definition and using it to conclude that the broadcast at issue in that case was indecent.[129] We 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."[130]

44. The Networks suggest that the Supreme Court's more recent decision in *Reno v. ACLU*[131] has "undermine[d] any constitutional defense of the Commission's current approach" to indecency.[132] In *Reno*, the Court considered the constitutionality of the Communications Decency Act of 1996 (CDA), a statute that regulated indecency on the Internet and that contained a definition similar to ours.[133] Though the Court did not hold that the statute was "so vague that it violates the Fifth Amendment," it concluded that "the many ambiguities concerning the scope of its coverage render it problematic for purposes of the First Amendment."[134]

45. *Reno* in no way undermines *Pacifica*. On the contrary, the Court in *Reno* expressly distinguished *Pacifica*, and it gave three different reasons for doing so. 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.[135] The CDA, in contrast, was not administered by an expert agency, and it contained "broad categorical prohibitions" that were "not limited to particular times."[136] Second, the CDA was a criminal statute, whereas the Commission has no power to impose criminal sanctions for indecent broadcasts.[137] Third, unlike the Internet, the broadcast medium has traditionally "received the most limited First Amendment protection."[138] Thus, far from casting doubt on *Pacifica*'s vagueness holding, *Reno* recognizes its continuing vitality.

46. The Networks also argue that the more relaxed level of First Amendment scrutiny discussed in *Pacifica* should no longer apply to broadcasting in light of changes in the media marketplace. Specifically, they contend that because of the prevalence of other media, such as the Internet and cable and satellite television, "it is fanciful to believe that aggressive enforcement of § 1464 against broadcasters will be effective in preventing children from being exposed to potentially offensive words."[139]

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[127] *See*, *e.g.*, *Joint Comments* at 7-8.

[128] *Pacifica*, 438 U.S. at 732.

[129] *See id.* at 739, 741.

[130] *Action for Children's Television v. FCC*, 852 F.2d 1332, 1339 (D.C. Cir. 1988) ("*ACT I*"); *accord ACT III*, 58 F.3d at 659.

[131] 521 U.S. 844 (1997).

[132] *Joint Comments* at 7.

[133] *See* 47 U.S.C. § 223(d) (1994 Supp. II).

[134] *Reno*, 521 U.S. at 870.

[135] *Id.* at 867.

[136] *Id.*

[137] *See id.* at 867, 872; *see also Pacifica*, 438 U.S. at 750 (declining to decide whether an indecent broadcast "would justify a criminal prosecution").

[138] *Reno*, 521 U.S. at 867 (quoting *Pacifica*, 438 U.S. at 748).

[139] *Joint Comments* at 22.

47. We disagree that technological changes have undermined the validity of the reasoning in *Pacifica*.[140] In *Pacifica*, the Court identified two reasons why broadcasting has received "the most limited First Amendment protection."[141] First, "the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home."[142] Second, "broadcasting is uniquely accessible to children, even those too young to read."[143]

48. Notwithstanding the growth of other communications media, courts have recognized the continuing validity of these rationales. In 1994, the Supreme Court reaffirmed that "our cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media."[144] And the D.C. Circuit has rejected precisely the argument advanced by the Networks here: "Despite the increasing availability of other means 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."[145]

49. 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 population.'"[146] 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."[147] In 2003, 98.2% of households had at least one television, and 99% had at least one radio.[148] The Networks correctly point out that almost 86% of households with television subscribe to a cable or satellite service.[149] That still leaves 15.4 million households that rely exclusively on broadcast television, hardly an inconsequential number.[150] In addition, it has been estimated that almost half of direct broadcast satellite subscribers receive their broadcast channels over the air,[151] and many subscribers to cable and

[140] In any event, the Commission has no authority to overrule *Pacifica*. *Cf. Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

[141] *Pacifica*, 438 U.S. at 748.

[142] *Id*.

[143] *Id.* at 749.

[144] *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994); *see also Reno*, 521 U.S. at 868 (recognizing "special justifications for regulation of the broadcast media").

[145] *ACT III*, 58 F.3d at 660. *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 the rise of "non-broadcast media").

[146] *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)).

[147] *Id.* at 194.

[148] U.S. Census Bureau, *Statistical Abstract of the United States* 737 (2006).

[149] *Joint Comments* at 21 (citing *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, ¶ 8 (2006) ("*Annual Assessment*")).

[150] *Annual Assessment*, 21 FCC Rcd at 2508 ¶ 15; *see also* Comments of the Walt Disney Co. in MB Docket No. 04-210 at 2 (filed Aug. 11, 2004) ("Disney/ABC stresses that these customers [relying on broadcast only] represent a significant portion of our potential viewing audience.").

[151] *Media Bureau Staff Report Concerning Over-the-Air Broadcast Television Viewers*, No. 04-210, ¶ 9 (MB Feb. 28, 2005), *available at* 2005 WL 473322, at *2.

satellite still rely on broadcast for some of the televisions in their households.[152] All told, the National Association of Broadcasters ("NAB") estimates that there are an estimated 73 million broadcast-only television sets in American households.[153] Moreover, many of those broadcast-only televisions are in children's bedrooms. According to a 2005 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.[154]

50. In addition, the bare number of cable and satellite service subscribers does not reflect the large disparity in viewership that still exists between broadcast and cable television programs. For example, during the week of September 18, 2006, each of the top ten programs on broadcast television had more than 15 million viewers, while only one program on cable television that week managed to attract more than 5 million viewers.[155] Similarly, of the 495 most-watched television programs during the 2004-2005 season, 485 appeared on broadcast television, and the highest-rated program on cable television was only the 257th most-viewed program of the season.[156]

51. 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."[157] In contrast, as the D.C. Circuit has observed, "broadcast audiences have no choice but to 'subscribe' to the entire output of traditional broadcasters."[158] The V-chip provides parents with some ability to control their children's access to broadcast programming. But most 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.[159] In addition, the effectiveness of a V-chip depends on the accuracy of program ratings; a V-chip is of little use when, as here, the rating does not reflect the material that is broadcast.[160] In light of the TV-PG

[152] *Annual Assessment*, 21 FCC Rcd at 2508 ¶ 15.

[153] *Id.* at 2552 ¶ 97. The NAB has properly characterized this number as "enormous." Reply Comments of the National Association of Broadcasters and the Association for Maximum Service Television, Inc. in MB Docket No. 04-210 at i (filed Sept. 7, 2004).

[154] *See* Kaiser Family Foundation, *Generation M: Media in the Lives of 8-18 Year-olds* 77 (2005).

[155] *See* Nielsen Media Research, "Top 10 Broadcast TV Programs for the Week of September 18, 2006;" Nielsen Media Research, "Top 10 Cable TV Programs for the Week of September 18, 2006."

[156] *See* Television Bureau of Advertising, "Season-to-Date Broadcast vs. Subscription TV Primetime Ratings: 2004-2005," *available at* http://www.tvb.org/rcentral/ViewerTrack/FullSeason/fs-b-c.asp?ms=2004-2005.asp.

[157] 47 U.S.C. § 560 (2000); *see also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000).

[158] *ACT III*, 58 F.3d at 660.

[159] *See Super Bowl Order on Reconsideration*, 21 FCC Rcd at 6667 ¶ 37. In Congressional testimony shortly after the 2003 Billboard Music Awards, Fox's President of Entertainment acknowledged that the V-chip and television ratings were "underutilized." *H.R. 3717, the 'Broadcast Decency Enforcement Act of 2004': Hearing Before the Subcommittee on Telecommunications and the Internet of the House Comm. On Energy & Commerce*, 107th Congress, (Feb. 26, 2004) (statement of Gail Berman). According to a 2003 study, parents' low level of V-chip use is explained in part by parents' unawareness 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.

[160] *See supra* para. 18, n. 46; *Super Bowl Order on Reconsideration*, 21 FCC Rcd at 6667-68 ¶ 37.

rating given to "The 2003 Billboard Music Awards," even an informed use of a V-chip would not necessarily have protected children from Ms. Richie's vulgar comments,[161] and studies demonstrate that inaccurate ratings are far from an isolated problem. In a Kaiser Family Foundation survey, for example, nearly 4 in 10 parents of children aged 2-17 stated that most television programs are not rated accurately.[162]

52. Broadcast television is also significantly different from the Internet. The Internet, unlike television, is not accessible to children "too young to read."[163] And parents who wish to control older

[161] *See supra* para. 18, n. 46.

[162] Henry J. Kaiser Family Foundation, *Parents, Media and Public Policy: A Kaiser Family Foundation Survey* 5 (2004) ("Kaiser Survey"). Likewise in a study published in the journal *Pediatrics*, parents concluded that half of television shows the industry had rated as appropriate for teenagers were in fact inappropriate, a finding the study authors called "a signal that the ratings are misleading." David A. Walsh & Douglas A. Gentile, *A Validity Test of Movie, Television, and Video-Game Ratings*, 107 Pediatrics 1302, 1306 (2001).

Academics who have studied the television rating system share parents' assessment that the ratings are often inaccurate. A 2002 study found that many shows that should carry content descriptors do not, therefore leaving parents unaware of potentially objectionable material. *See* Dale Kunkel, *et al.*, *Deciphering the V-Chip: An Examination of the Television Industry's Program Rating Judgments*, 52 Journal of Communications 112 (2002). For example, the study found that 68 percent of prime-time network shows without an "L" descriptor contained "adult language," averaging nearly three scenes with such language per show. *See id.* at 132; *see also id.* at 131 (finding that 20 percent of shows rated TV-G – supposedly appropriate for all ages – included objectionable language, including "bastard," "bitch," "shit," and "whore"). In fact, "in all four areas of sensitive material – violence, sexual behavior, sexual dialogue, and adult language – the large majority of programs that contain such depictions are not identified by a content descriptor." *Id.* at 136. The study's authors concluded that "[p]arents who might rely solely on the content-based categories to block their children's exposure to objectionable portrayals would be making a serious miscalculation, as the content descriptors actually identify only a small minority of the full range of violence, sex, and adult language found on television." *Id.*

A 2004 study also raised serious questions about the accuracy of television ratings. It found 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. 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); *see also* Parents Television Council, *The Ratings Sham: TV Executives Hiding Behind A System That Doesn't Work* (April 2005) (study of 528 hours of television programming concluding that numerous shows were inaccurately and inconsistently rated); *Effectiveness of Media Rating Systems: Subcommittee of Science, Technology, and Space of the Senate Comm. On Commerce, Science & Transp.*, 107th Congress (2004) (statement of Ms. Patti Miller, director, Children and the Media Program for Children Now) ("Can parents depend on the accuracy of the ratings systems? Sadly, the answer is no.").

An economist studying the question of why broadcasters consistently "underlabel" their programs concluded that they are likely responding to economic incentives. *See* James T. Hamilton, *Who Will Rate the Ratings?*, *in The V-Chip Debate: Content Filtering from Television to the Internet* 133, 143, 149 (Monroe E. Price, ed. 1998). He found that programs with more restrictive ratings command lower advertising revenues. *See id.* at 143. The desire to charge more for commercials and fear of "advertiser backlash" over shows with more restrictive ratings "means that networks have incentives to resist the provision of content-based information." *Id.* at 149; *see also* Kunkel, 52 Journal of Communications at 114 ("[T]he prospect that applying 'higher' ratings to a program could reduce audience size raises a self-interest concern regarding the accuracy with which judgments about program ratings are determined.").

Finally, even assuming *arguendo* that the content descriptors were accurately applied, they would not assist the majority of parents because they are not sufficiently understood. The Kaiser Survey found that only 51% of parents understand that "V" stands for violence; only 40% understand "L" stands for language; only 37% understand "S" stands for sex; and only 4% understand that "D" stands for suggestive or sexual dialogue. Kaiser Survey at 6.

[163] *Pacifica*, 438 U.S. at 749. *See, e.g., Youth, Pornography, and the Internet,* ed. by Dick Thornburgh and Herbert S. Lin, p. 115 (National Academy Press 2002) ("As a general rule, young children do not have the cognitive skills (continued....)

children's access to inappropriate material can use widely available filtering software -- an option that, whatever its flaws, lacks an effective analog in the context of broadcast television[164] in light of the numerous problems with the V-chip and program ratings discussed above.[165]

53. *No Sanction Proposed*. For the reasons stated above, we conclude that "The 2003 Billboard Music Awards" contained indecent and profane material in violation of Section 1464 and our rules. Fox stations broadcast indecent and profane language in an awards show that aired between 6 a.m. and 10 p.m. and was watched by people of all ages. Under the circumstances, however, we propose no forfeiture here. We originally declined to propose a sanction in this case because the broadcast occurred prior to the *Golden Globe Awards Order*. As discussed above, we believe on further consideration that the complained-of language was actionable under Commission decisions preceding the *Golden Globe Awards Order*. Nevertheless, we still decline to propose a forfeiture here. To begin with, proposing a sanction would require issuance of a notice of apparent liability, which would not be "a further final or appealable order of the FCC," as required by the *Remand Order*.[166] In addition, even absent the requirement that we issue a "final or appealable order," we would not exercise our enforcement discretion to propose a forfeiture here given the limited remand under which we are proceeding. Accordingly, we find that no forfeiture is warranted in this case.[167] In light of our decision not to impose a forfeiture, we will not require the licensees of any of the stations that broadcast the material to report our finding here to us as part of their renewal applications, and we will not consider the broadcast to have an adverse impact upon such licensees as part of the renewal process or in any other context.

54. In light of our decision not to impose a forfeiture, we need not address whether the violations of Section 1464 and our rule were willful within the meaning of Section 503(b).[168] We disagree with the Networks, however, that Section 1464 is not violated unless a broadcaster acts with the

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(...continued from previous page)
needed to navigate the Internet independently. Knowledge of search strategies is limited if not nonexistent, and typing skills are undeveloped.").

[164] *See Reno*, 521 U.S. at 877. Filtering software, for example, can block access to a website based on the software's evaluation of the site's content. The V-chip, in contrast, does not evaluate television programs itself and therefore is only effective if the programs have been given accurate ratings. However, to the extent that filtering software is ineffective and children are still able to access indecent material on the Internet, we note that Congress has sought to address this problem through the Child Online Protection Act, a statute whose validity is still being litigated. *See Ashcroft v. ACLU*, 542 U.S. 656 (2004) (affirming preliminary injunction). We note that the Networks also refer to the availability of video game consoles as another medium that, in their view, is as pervasive as television. *See Joint Comments* at 21-22. Video games differ from broadcast television in that games must be purchased individually, so a parent who purchases a video game console for a child retains the ability to determine which games the child will play.

[165] *See supra* para. 51 and nn. 159-162.

[166] *Remand Order* at 2. *See* 47 U.S.C. § 503(b)(4)(C); *ACT IV*, 59 F.3d at 1254, *citing Pleasant Broadcasting Co. v. FCC*, 564 F.2d 496 (D.C. Cir. 1977).

[167] In light of recent legislation, the Networks raise the prospect of future fines in excess of $65 million for "a single, fleeting instance of indecent speech." *Joint Comments* at 16. We do not believe, however, that a case similar to "The 2003 Billboard Music Awards" arising in the future would merit the maximum fine permitted under the Broadcast Decency Enforcement Act. *See* Pub. L. 109-235, 102 Stat. 491 (June 15, 2006), *to be codified* at 47 U.S.C. § 503(b)(2)(C)(ii). While that Act, once we adopt implementing regulations, will provide the Commission with the flexibility to impose appropriate fines in egregious cases, the Commission will continue to follow a restrained enforcement policy in imposing forfeitures in this area.

[168] *See* 47 U.S.C. §§ 503(b)(1)(B) & (D). We also need not address whether responsibility would lie with independent Fox affiliates in addition to the licensees owned by Fox. *Cf. 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, 19240-41 ¶ 25 (2004).

state of mind required for a criminal conviction.[169] The Supreme Court has squarely rejected the argument that the FCC's civil authority to enforce Section 1464 must be interpreted in accordance with rules that apply to criminal statutes, explaining: "The legislative history of the provisions establishes their independence. As enacted in 1927 and 1934, the prohibition on indecent speech was separate from the provisions imposing civil and criminal penalties for violating the prohibition. . . Although the 1948 codification of the criminal laws and the addition of new civil penalties changed the statutory structure, no substantive change was apparently intended. . . Accordingly, we need not consider any question relating to the possible application of § 1464 as a criminal statute."[170] Thus, the *mens rea* necessary for a criminal conviction is not a prerequisite to the Commission's finding a Section 1464 violation.[171]

B. "The 2002 Billboard Music Awards"

55. *The Programming.* The Commission received a complaint alleging that WTTG(TV), Washington, DC, broadcast indecent material during "The 2002 Billboard Music Awards" program which aired at 8 p.m. Eastern Standard Time on December 9, 2002.[172] Specifically, the complainant alleged that while accepting an award, Cher stated: "People have been telling me I'm on the way out every year, right? So fuck 'em."[173] The "2002 Billboard Music Awards" was broadcast nationwide on the Fox Television Network.

56. Examination of a videotape of the broadcast reveals that Cher, a singer and actress, was presented with an "Artist Achievement Award" during "The 2002 Billboard Music Awards" program. Cher had been selected to receive this award at least three weeks before the broadcast.[174] In the course of

[169] *Joint Comments* at 24-26. We also reject, as contrary to the plain meaning of the Act, the Networks' contention that we may not impose forfeitures for violations of our indecency rule under section 503(b)(1)(B). While the Networks suggest that the Commission's indecency rule, 47 C.F.R. § 73.3999, merely represents a decision by the Commission to restate 18 U.S.C. § 1464, the indecency rule was adopted by the Commission pursuant to the direction of Congress. *See* Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949, Section 16 (1992).

[170] *Pacifica*, 438 U.S. at 739 n.13.

[171] The Networks' reliance on *FCC v. ABC*, 347 U.S. 284, 296 (1954), for the proposition that "'[t]here cannot be one construction for the Federal Communications Commission and another for the Department of Justice'" is misplaced. *Joint Comments* at 24. In that case, the Court rejected the broad construction urged by the Commission of a statutory prohibition against a "lottery, gift enterprise, or similar scheme" in part because "the same construction would likewise apply in criminal cases." *FCC v. ABC*, 347 U.S. at 296. In contrast, the intent required to impose civil penalties for Section 1464 violations has no impact on its possible application as a criminal statute. *See Pacifica*, 438 U.S. at 739 n. 13.

[172] FCC File No. EB-03-IH-0460. *See* Letter from Lara Mahaney, Director of Corporate and Entertainment Affairs, PTC to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (August 22, 2003). As noted in the *Golden Globe Awards Order,* the Commission's Enforcement Bureau had dismissed an earlier complaint concerning the same broadcast on the same station eight months earlier. *See* Letter from Charles Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, FCC to RadioEsq@aol.com, EB-02-IH-0861-MT (December 18, 2002), *cited in Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 12 n.32 (noting Bureau dismissal of complaint). However, Fox has raised no claim of administrative res judicata, and thus, because that defense has been waived, we need not consider it. *Cf. Kern Oil & Ref. Co. v. Tenneco Oil Co.*, 840 F.2d 730, 735 (9th Cir. 1988).

[173] *See* Letter from Lara Mahaney, Director of Corporate and Entertainment Affairs, PTC to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (August 22, 2003).

[174] *See* Press Release, "Cher to Receive the Artist Achievement Award on the 2002 Billboard Music Awards Monday, Dec. 9 on Fox" (Nov. 14, 2002), attached to Letter from John C. Quale, Counsel of Fox, to Benigno E. Bartolome, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, File No. EB-03-IH-0460 (September 21, 2006) ("Fox Response to 9/7/2006 LOI").

her remarks accepting the award, she stated as follows: "I've had unbelievable support in my life and I've worked really hard. I've had great people to work with. Oh, yeah, you know what? I've also had critics for the last 40 years saying that I was on my way out every year. Right. So fuck 'em. I still have a job and they don't."

57. Following the Second Circuit's remand, the Bureau sent Fox a letter of inquiry on September 7, 2006 concerning "The 2002 Billboard Music Awards" broadcast.[175] Fox responded on September 21, 2006.[176] Fox's response confirms that it broadcast the material described in the complaint.[177] Nevertheless, Fox argues that its broadcast of the "F-Word," in context, did not depict or describe sexual activities but rather, "at most," was a "vulgar expletive directed as an insult toward an individual or group against whom the speaker held deep-seated feelings of ill-will," and thus is outside the scope of the Commission's indecency definition.[178] Further, Fox argues that the complained-of material was not actionably indecent because it "contained at most the passing use of an expletive used to convey an insult," it "lasted only a couple of seconds out of a two-hour program," and Fox did not present it to pander to or titillate the audience, or for shock value.[179] Therefore, Fox contends that the dialogue is not actionably indecent.[180]

58. *Indecency Analysis*. With respect to the first prong of the indecency test, Fox contends that Cher's statement "fuck 'em" does not describe sexual activities and thus falls outside the scope of our indecency definition. We disagree. As discussed above, a long line of precedent indicates that both literal and non-literal uses of the "F-Word" come within the subject matter scope of our indecency definition.[181] Given the core meaning of the "F-Word," any use of that word has a sexual connotation.[182] Moreover, it hardly seems debatable that the word's power to insult and offend derives from its sexual meaning.[183] Here, for example, Cher's use of the "F-Word" to reference a sexual act as a metaphor to express hostility to her critics is inextricably linked to the sexual meaning of the term.[184] Accordingly, we conclude that, as we stated in *Golden Globe*,[185] its use falls within the scope of our indecency definition. The material thus warrants further scrutiny to determine whether it is patently offensive as measured by contemporary community standards for the broadcast medium. Looking at the three principal factors in our contextual analysis, we conclude that it is.

59. We will first address the first and third principal factors in our contextual analysis – the

[175] *See* Letter from Benigno E. Bartolome, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to Fox Television Stations, Inc., File No. EB-03-IH-0460 (September 7, 2006).

[176] *See* Fox Response to 9/7/2006 LOI.

[177] *Id.* at 2.

[178] *Id.* at 10.

[179] *Id.*

[180] Fox also suggests that the complaint should be dismissed because it fails to specifically allege that the complainant viewed "The 2002 Billboard Music Awards." *See id.* at 2. We disagree. Our practice has never been to require such an allegation in order for a complaint to be considered. It is sufficient that the complaint originated from within the market of the station against which the complaint is filed. *See Indecency Policy Statement*, 16 FCC Rcd at 8015 ¶ 24; *see also Super Bowl Order on Reconsideration*, 21 FCC Rcd at 6665 ¶ 30.

[181] *See supra* note 38.

[182] *See supra* para. 16.

[183] *See supra* note 40.

[184] *See* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 224 (1994) (explaining the sexual meaning of the metaphorical use of the "F-Word" as a verb).

[185] *See Golden Globe Awards Order*, 19 FCC Rcd at 4979 ¶ 8.

explicit or graphic nature of the material and whether the material panders to, titillates, or shocks the audience. As we have previously concluded, the "F-Word" is one of the most vulgar, graphic, and explicit words for sexual activity in the English language.[186] Moreover, the gratuitous use of this language during a live broadcast of a popular music awards ceremony when children were expected to be in the audience was vulgar and shocking. The complained-of material was broadcast in prime time, and the program was designed to draw a large nationwide audience that could be expected to include many children interested in seeing their favorite music stars.[187] As in the case of "The 2003 Billboard Music Awards,"[188] a significant portion of the viewing audience for this program was under 18. According to Nielsen ratings data, during an average minute of "The 2002 Billboard Music Awards" broadcast, 2,608,000 (27.9%) of the 9,361,000 people watching the program were under 18, and 1,186,000 (12.7%) were between the ages of 2 and 11. In addition, the program's TV-PG rating[189] would *not* have put parents or others on notice of such vulgar language, and the broadcast contained no other warnings to viewers that it might contain material highly unsuitable for children.[190] Furthermore, Fox does not argue that there was any justification for Cher's comment.[191] In light of all of these factors, we conclude that the first and third factors in our contextual analysis weigh in favor of a finding that the material is patently offensive.[192]

60. We next turn to the second factor in our contextual analysis – whether the complained-of material was sustained or repeated. Fox argues that this factor precludes a finding of indecency. As reviewed above, Commission dicta and Bureau-level decisions issued before our *Golden Globe* decision had suggested that expletives had to be repeated to be indecent but that such a repetition requirement would not apply to "descriptions or depictions of sexual or excretory functions." In this case, Cher did more than use the "F-Word" as a mere interjection or intensifier. Rather, she used the word to describe or reference a sexual act as a metaphor to express hostility to her critics. The fact that she was not literally suggesting that people engage in sexual activities does not necessarily remove the use of the term from the realm of descriptions or depictions. This case thus illustrates the difficulty in making the distinction between expletives on the one hand and descriptions or depictions on the other. Particularly in light of this lack of clarity, we acknowledge that it was not apparent that Fox could be penalized for Cher's comment at the time it was broadcast. This case also shows that the inquiry into whether a word is used an expletive rather than a description or depiction is wholly artificial. Whether used as an expletive, or as a description or depiction, the offensive nature of the "F-Word" is inherently tied to the term's sexual meaning.

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[186] *See id.*

[187] *See Pacifica*, 438 U.S. at 749-51 (identifying as relevant contextual factors the time of day of the broadcast, program content as it affects "the composition of the audience," and the nature of the medium). *See also supra* para. 18.

[188] *See supra* para. 18

[189] Fox Response to 9/7/2006 LOI at 6.

[190] *See supra* n. 47. In the context of a broadcast rated "TV-PG," an "L" content description warning would not have alerted parents to the use of the "F-word." *See id.* Nonetheless, the "2002 Billboard Music Award," unlike the 2003 version of the same show, did not include even that inadequate "L" content descriptor. So parents relying on the ratings would not have expected even mild "coarse" language, much less the "F-Word."

[191] For instance, Fox does not contend that Cher's comment had any artistic merit or was necessary to convey any message.

[192] Fox's argument that it did not present Cher's comment for "shock value" misunderstands the contextual analysis employed by the Commission, under which "we examine the material itself and the manner in which it is presented, not the subjective state of mind of the broadcaster." *Super Bowl Order on Reconsideration*, 21 FCC Rcd at 6657-58 ¶ 12.

61. In any event, under our *Golden Globe* precedent, the fact that Cher used the "F-Word" once does not remove her comment from the realm of actionable indecency.[193] We stated in *Golden Globe* that 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."[194] To be sure, the fact that material is not repeated does weigh against a finding of indecency, and in certain cases, when all of the relevant factors are considered together, this factor may tip the balance in a decisive manner. This, however, is not one of those cases.

62. We believe that Cher's use of the "F-Word" here during a program aired in prime time was patently offensive under contemporary community standards for the broadcast medium. The patent offensiveness is compounded by the fact that the warnings accompanying the broadcast were inadequate and misleading.[195] We do not believe that the Commission should ignore "the first blow" to the television audience in the particular circumstances presented here.[196] Our determination, moreover, is consistent with the networks' own broadcast standards during the "safe harbor," which would not allow the broadcast of a single use of the "F-Word" under these circumstances.[197] Such standards reflect the networks' recognition that even a single use of the "F-Word" under most circumstances is not consistent with contemporary community standards for the broadcast medium. Indeed, Fox edited out Cher's comment in its broadcasts to the Mountain and Pacific Time Zones.

63. In sum, we conclude that, given the explicit, graphic, vulgar, and shocking nature of Cher's use of the "F-Word," Fox's broadcast was patently offensive under contemporary community standards for the broadcast medium.

64. Fox also argues that it should not be held responsible for airing Cher's comment. In particular, Fox argues that Cher's remarks were unscripted and that the five-second delay and editing system that it used for "The 2002 Billboard Music Awards" previously had been effective in preventing the airing of objectionable material.[198] We need not address these arguments, however, because we decide that it would not be equitable to sanction Fox for a different reason. Specifically, as discussed above, it was not clear at the time that broadcasters could be punished for the kind of comment at issue here.[199]

65. *Profanity Analysis*. Consistent with our decisions in the *Golden Globe Awards Order* and the *Omnibus Order*, we also find that Cher's use of the "F-Word" in the program at issue violated Section 1464's prohibition on the broadcast of "profane" utterances.[200] In the *Golden Globe Awards Order*, the Commission concluded that the "F-Word" was profane within the meaning of Section 1464 because, in context, it constituted vulgar and coarse language "'so grossly offensive to members of the public who actually hear it as to amount to a nuisance.'"[201] In certain cases, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of

[193] *See Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 12.

[194] *Id*.

[195] *See supra* para. 59.

[196] *Pacifica*, 438 U.S. at 748-49.

[197] *See supra* para. 29.

[198] *See* Fox Response to 9/7/06 LOI at 4-6, 10.

[199] *See supra* para. 60; *see also Golden Globe Awards Order*, 19 FCC Rcd at 4982 ¶ 15.

[200] 18 U.S.C. § 1464.

[201] *Golden Globe Awards Order*, 19 FCC Rcd at 4981 ¶ 13, *quoting Tallman*, 465 F.2d at 286.

an artistic or educational work or essential to informing viewers on a matter of public importance.[202] However, such circumstances are not present here: Fox does not contend that Cher's profane language was essential to informing viewers on a matter of public importance or that modifying the language would have had a material impact on its function as a source of news and information. On the contrary, Fox maintains that it attempted to delete the profane language, and did remove it before the program aired on time delay in the Mountain and Pacific Time Zones.[203] It is undisputed that the "F-Word" was broadcast within the 6 a.m. to 10 p.m. time frame relevant to a profanity determination.[204] Because it was broadcast at a time of day when there was a reasonable risk of children's presence in the audience (indeed, as detailed above, over two-and-a-half million viewers of the broadcast were under the age of 18),[205] the broadcast is legally actionable.

66. *No Sanction Proposed*. For the reasons stated above, we conclude that "The 2002 Billboard Music Awards" contained indecent and profane material in violation of Section 1464 and our rules. Fox stations broadcast indecent and profane language in an awards show that aired between 6 a.m. and 10 p.m. and was watched by people of all ages. Under the circumstances, however, we find that no forfeiture is warranted in this case for the reason set forth above.[206] In light of our decision not to impose a forfeiture, we will not require the licensees of any of the stations that broadcast the material to report our finding here to us as part of their renewal applications, and we will not consider the broadcast to have an adverse impact upon such licensees as part of the renewal process or in any other context.[207]

C. "The Early Show"

67. "The Early Show" is a two-hour morning program that airs weekdays on the CBS Television Network. On December 13, 2004, the program devoted significant coverage to discussion of the CBS program "Survivor: Vanuatu," which had crowned its winner the prior evening. As part of that coverage, "The Early Show" co-host Julie Chen conducted a live interview with the final four contestants from "Survivor: Vanuatu." During that interview, Ms. Chen asked runner-up Twila Tanner whether she agreed with fourth-place finisher Eliza Orlins that Chris Daugherty, the winner of the program, would have prevailed had he been matched up in the finals against Ms. Orlins. Ms. Tanner then responded, "Not necessarily. I knew he was a bullshitter from Day One."

68. A viewer subsequently filed a complaint with the Commission that Station KDKA-TV, Pittsburgh, Pennsylvania, which is licensed to CBS Broadcasting Inc., aired Ms. Tanner's comment at approximately 8:10 a.m. Eastern Standard Time, on December 13, 2004, and alleged that the comment

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[202] *Omnibus Order* at 2669 ¶ 19, *citing Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* Memorandum Opinion and Order, 20 FCC Rcd 4507, 4512-14 ¶¶ 13-18 (2005).

[203] Fox Response to 9/7/2006 LOI at 10.

[204] *See Omnibus Order*, 21 FCC Rcd at 2666 ¶ 8.

[205] *See supra* para. 59 (noting that, according to Nielsen ratings data, 27.9% of the people watching an average minute of "The 2002 Billboard Music Awards" broadcast were under 18, and 12.7% were between the ages of 2 and 11); *see also Pacifica*, 438 U.S. at 749-50 (discussing government's interest in protecting children from "offensive expression")

[206] *See supra* para. 64. In light of our decision not to impose a forfeiture, we need not address whether the violations of Section 1464 and our rule were willful within the meaning of Section 503(b).

[207] The constitutional arguments raised by the Networks relating to the application of our indecency framework to "The 2002 Billboard Music Awards" are the same as the constitutional arguments that we have already addressed with respect to the "2003 Billboard Music Awards" broadcast. We reject those arguments for the same reasons given above. *See supra* para. 42-52.

was indecent and profane.[208] In response to the Commission's letter of inquiry, CBS does not deny that the comment in question was broadcast on KDKA-TV.[209] However, CBS argues, among other things, that the material is not actionable because it was spoken during a *bona fide* news interview.[210]

69. In the *Omnibus Order*, we "recognize[d] the need for caution with respect to complaints implicating the editorial judgment of broadcast licensees in presenting news and public affairs programming, as these matters are at the core of the First Amendment's free press guarantee."[211] Indeed, when we denied an indecency complaint regarding material that was aired during "The Today Show," which is a competitor of "The Early Show," we reiterated the need for the Commission to exercise caution with respect to news programming.[212]

70. This restrained approach is consistent with a long line of Commission precedent. For example, in *Peter Branton*, the Commission held that an NPR news story on John Gotti, which included a wiretap of a conversation in which Gotti repeatedly used variations of the "F-Word," was not indecent because "it was an integral part of a bona fide news story."[213] The Commission explained that "we traditionally have been reluctant to intervene in the editorial judgments of broadcast licensees on how best to present serious public affairs programming to their listeners."[214]

71. In today's Order, we reaffirm our commitment to proceeding with caution in our evaluation of complaints involving news programming. To be sure, there is no outright news exemption from our indecency rules.[215] Nevertheless, in light of the important First Amendment interests at stake as well as the crucial role that context plays in our indecency determinations, it is imperative that we proceed with the utmost restraint when it comes to news programming.

72. Some critics have questioned whether the segments of "The Early Show" devoted to "Survivor: Vanuatu" are legitimate news programming or instead are merely promotions for CBS's own entertainment programming.[216] CBS nevertheless maintains in its LOI response that its interview of the

[208] FCC File No. EB-05-IH-0007.

[209] *See* Letter From Robert Corn-Revere, Counsel to CBS, to Marlene H. Dortch, Secretary, FCC, File No. EB-05-IH-0007 (Sept. 21, 2006), at 1 ("CBS Response to 9/7/2006 LOI").

[210] *See id.* at 4.

[211] *Omnibus Order*, 21 FCC Rcd at 2668 ¶ 15.

[212] *Id.* at 2717 ¶ 218.

[213] *Peter Branton,* 6 FCC Rcd at 610. *See Infinity Broadcasting Corp. of Pennsylvania,* Memorandum Opinion and Order, 3 FCC Rcd 930, 937 n. 31 (1987), *vacated on other grounds sub nom. ACT I*, (noting that "context will always be critical to an indecency determination and . . . the context of a bona fide news program will obviously be different from the contexts of the three broadcasts now before us, and, therefore, would probably be of less concern."); *Indecency Policy Statement,* 16 FCC Rcd at 8002-03 (stating that "[e]xplicit language in the context of a bona fide newscast might not be patently offensive.").

[214] *Peter Branton*, 6 FCC Rcd at 610.

[215] *See, e.g., Evergreen Media Corporation of Chicago AM*, Memorandum Opinion and Order, 6 FCC Rcd 5950, 5951 (Mass Media Bur. 1991) (finding talk show segment discussing pornographic photographs of Vanessa Williams to be indecent and concluding that "[e]ven if it had been argued that the [show] in question was comparable to a news program, the Vanessa Williams segment contained vulgar material presented in a pandering and titillating manner unlike anything found in the *Branton* case."); *Pacific and Southern Company Inc. (KSD-FM)*, Notice of Apparent Liability, 6 FCC Rcd 3689 (Mass Media Bur. 1990) (forfeiture paid) (finding that "exceptionally explicit and vulgar" material that was "presented in a pandering manner" was indecent even though it "arguably concerned an incident that was at the time 'in the news.'").

[216] *See, e.g.*, Howard Rosenberg, *The Fact Is, the Joke is the News*, Broadcasting & Cable, Nov. 1, 2004, at 32 ("Even more common is the venerable, widespread practice of cross-promotion, as on The Early Show, a production (continued....)

"Survivor: Vanuatu" contestants was a "*bona fide* news interview." "The Early Show" is produced by CBS News and addressed a variety of other topics that morning, including a suicide bombing in Iraq, the withdrawal of Bernard Kerik as a candidate to serve as Secretary of Homeland Security, and the apparent poisoning of then-Ukrainian opposition leader Viktor Yushchenko, which clearly fall under the rubric of news programming. In light of these factors and our commitment to exercising caution in this area, we believe it is appropriate in these circumstances to defer to CBS's plausible characterization of its own programming. Accordingly, we find that, in the *Omnibus Order*, we did not give appropriate weight to the nature of the programming at issue (i.e., news programming).

73. Turning to the specific material that is the subject of the complaint, we can certainly understand that viewers may have been offended by Ms. Tanner's coarse language. Nevertheless, given the nature of her comment and our decision to defer to CBS's characterization of the program segment as a news interview, we conclude, regardless of whether such language would be actionable in the context of an entertainment program, that the complained-of material is neither actionably indecent nor profane in this context. Accordingly, we deny the complaint.

D. "NYPD Blue"

74. As discussed above, the Commission received complaints regarding several "NYPD Blue" episodes that aired on KMBC-TV, Kansas City, Missouri, and other unidentified ABC Television Network affiliates beginning at 9:00 p.m. Central Standard Time, in which the "S-Word" was used.[217] In the *Omnibus Order*, the Commission found those broadcasts containing the "S-Word" to be apparently indecent and profane.[218] In its response to the Commission's letter of inquiry, KMBC Hearst-Argyle Television, Inc. ("Hearst"), licensee of KMBC-TV, does not dispute that it aired the complained-of material. Hearst argues, however, that the complaints should either be dismissed on procedural grounds or denied on the merits.

75. Raising an argument that we did not previously consider, Hearst contends that the Commission should dismiss the complaints as insufficient under the enforcement policy set forth in the *Omnibus Order*.[219] One complaint was filed against each of the "NYPD Blue" broadcasts at issue, and each of these complaints was filed by the same person. All of these complaints stated that the complained-of broadcast "originally aired at 9:00 p.m. CST on Kansas City affiliate KMBC" and was "also seen in homes across the country on ABC affiliates."[220] However, as Hearst accurately maintains, none of the complaints was filed by anyone residing in the market served by KMBC-TV. Nor were any of the complaints filed by anyone residing in a market where the complained-of material aired outside of the 10:00 p.m.-6:00 a.m. safe harbor. Instead, each complaint was filed by the same individual from Alexandria, Virginia, where, as Hearst points out,[221] the material was aired during the safe harbor.[222] In

(...continued from previous page)
of CBS News, which each Friday devotes a lengthy segment to 'covering' the previous night's Survivor episode on the network, as if who got bumped off was an actual news story. As a bonus, The Early Show folds itself into this fantasy from a special set outfitted to resemble Survivor.").

[217] FCC File No. EB-03-IH-0355.

[218] *Omnibus Order*, 21 FCC Rcd at 2696-98 ¶¶ 125-36.

[219] KMBC Hearst-Argyle Television, Inc. Response to Letter of Inquiry and Memorandum of Law, File No. EB-03-IH-0355 at 8 (Sept. 21, 2006) ("Hearst Response to 9/7/2006 LOI").

[220] *See* Letters from Lara Mahaney, Director of Corporate and Entertainment Affairs, PTC, to David Solomon, Chief, Enforcement Bureau, dated July 1 and July 3, 2003.

[221] Hearst Response to 9/7/2006 LOI at 11, n.9.

[222] *See supra* note 217 and accompanying text. The letterhead of each complaint identified contact information for PTC's office in Alexandria, Virginia, as well as a PTC office in Los Angeles, California.

addition, none of the complaints contains any claim that the out-of-market complainant actually viewed the complained-of broadcasts on KMBC-TV or any other ABC affiliate where the material was aired outside of the safe harbor.[223] Thus, there is nothing in the record either to tie the complaints to Station KMBC-TV's local viewing area (or the local viewing area of any station where the material was aired outside of the safe harbor), or to suggest that the broadcast programming at issue was the subject of complaints from anyone who viewed the programming on any station that aired the material outside of the safe harbor.

76. We therefore agree with Hearst that we should dismiss the complaints regarding "NYPD Blue" pursuant to the enforcement policy that we announced in the *Omnibus Order*. There, the Commission stated that it would propose forfeitures only against licensees and stations whose broadcasts of actionable material were the subject of a viewer complaint filed with the Commission,[224] explaining that "[i]n the absence of complaints concerning the program filed by viewers of other stations, it is appropriate that we sanction only the licensee of the station whose viewers complained about that program."[225] In addition to demonstrating appropriate restraint in light of First Amendment values, this enforcement policy preserves limited Commission resources, while still vindicating the interests of local residents who are directly affected by a station's airing of indecent and profane material.

77. Based on consideration of Hearst's arguments, we agree that consistent application of our restrained enforcement policy requires us to apply the same approach to this case that we applied to the notices of apparent liability in the *Omnibus Order*. While this case does not involve the imposition of forfeitures against KMBC-TV or any other licensee, the sufficiency of a complaint is the first step rather than the last step in the Commission's analysis. Thus, as Hearst puts it, "[o]nly the dismissal of the NYPD Blue complaints will bring [this case] into harmony with the Commission's announced enforcement policy."[226] Accordingly, we dismiss these complaints.

IV. ORDERING CLAUSES

78. Accordingly, IT IS ORDERED that Section III.B of the *Omnibus Order* is VACATED in its entirety.

79. IT IS FURTHER ORDERED that the complaints referenced in this Order involving "The 2003 Billboard Music Awards" and "The 2002 Billboard Music Awards" are GRANTED to the extent set forth herein and OTHERWISE DENIED.

80. IT IS FURTHER ORDERED that the complaints referenced in this Order involving "The Early Show" are DENIED.

81. IT IS FURTHER ORDERED that the complaints referenced in this Order involving "NYPD Blue" are DISMISSED.

82. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to Susan L. Fox, Esq., Vice President, Government Relations, The Walt Disney Company, 1150 17th Street, N.W., Suite 400, Washington, D.C. 20036.

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[223] *See id*.

[224] *Omnibus Order,* 21 FCC Rcd at 2673 ¶ 32, 2676 ¶ 42, 2687 ¶ 86.

[225] *Id.* at 2687 ¶ 86. *See Super Bowl Order on Reconsideration*, 21 FCC Rcd at 6665 ¶ 30 (under the enforcement policy announced in the *Omnibus Order*, "it is sufficient that viewers in markets served by each of the CBS Stations filed complaints with the Commission identifying the allegedly indecent program broadcast by the CBS Stations.").

[226] Hearst Response to 9/7/2006 LOI at 11.

83. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to John W. Zucker, Esq., Senior Vice President, Law-Regulation, ABC, Inc., 77 West 66th Street, New York, N.Y. 10024.

84. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to Seth Waxman, Esq., Counsel to The Walt Disney Company, Wilmer, Cutler, Pickering, Hale & Dorr, LLP, 2445 M Street, N.W., Washington, D.C. 20037.

85. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to Anne Lucey, Esq., Senior Vice President, Regulatory Policy, CBS Corporation, 601 Pennsylvania Ave., N.W., Suite 540, Washington, DC 20004.

86. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to Robert Corn-Revere, Counsel to CBS Corp., Davis Wright Tremaine, LLP, 1500 K Street, N.W., Suite 450, Washington, D.C. 20005-1272.

87. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to Mark J. Prak, Esq., Counsel to Hearst-Argyle Television, Inc., Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, 150 Fayetteville Street, Suite 1600 Wachovia Capitol Center, Raleigh, North Carolina 27601.

88. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to Maureen A. O'Connell, Esq., News Corporation, 444 North Capitol Street, N.W., Suite 740, Washington, D.C. 20001.

89. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to John Quale, Esq., Counsel to Fox Television Stations, Inc., Skadden, Arps, Slate, Meagher & Flom, LLP, 1440 New York Ave., N.W., Washington, D.C. 20005.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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

Re: Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, Order

Today's *Order* is pursuant to a grant from the United States Court of Appeals for the Second Circuit of the Commission's voluntary remand request to reconsider portions of the March 15, 2006, *Omnibus Order*.[1] In that decision, I concurred in part and dissented in part because I believed the Commission had failed to develop a consistent and coherent indecency enforcement policy. It was my hope that the Commission would use this remand to clarify and rationalize our indecency regime,[2] but regulatory convenience and avoidance have prevailed instead. I am, therefore, compelled again to concur in part and dissent in part.

The proverbial "elephant in the room" looming over today's decision is the *Golden Globe Awards Order*,[3] which inexplicably has been pending reconsideration for more than two and one-half years. While the Commission has simply refused to review the *Golden Globe* case, we have relied upon, expanded and applied it more than any other indecency case in the past two years. As the foundational basis for the Commission's decision in the cases involved in this remand, we should review and finalize this watershed decision. [4]

As I stated in the *Omnibus Order*, "by failing to address the many serious concerns raised in the *Golden Globe Awards* case, before prohibiting the use of additional words, we fall short of meeting the [appropriate] constitutional standard and walking the tightrope of a restrained enforcement policy."[5] Today, we fail again. Litigation strategy should not be the dominant factor guiding policy when First Amendment protections are at stake.

In its remand request, the Commission asked the Second Circuit for an opportunity to consider the concerns of broadcasters before issuing a final decision. Yet squandering this opportunity, the Commission fails to consider fully all concerns relating to an August 22, 2003, complaint against the December 9, 2002, broadcast of "The Billboard Music Awards" by WTTG(TV) in Washington, D.C.

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[1] *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 (2006) *("Omnibus Order").*

[2] Today's decision presumes that the general statement that the Commission's "collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups, and ordinary citizens," *and nothing more*, is sufficient to inform the public and broadcasters what we believe are the national, contemporary community standards of the broadcast medium. *In re Infinity Radio License, Inc.,* Memorandum Opinion and Order, 19 FCC Rcd 5022, 5026 (2004); *compare*, *Reno v. ACLU*, 521 U.S. 844 (1997) (finding the terms "indecent", "patently offensive" and "in context" were so vague that criminal enforcement would violate the fundamental constitutional principles, but while recognizing "the history of extensive government regulation of broadcasting").

[3] *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Memorandum Opinion and Order, 18 FCC Rcd 19859 (Enf. Bur. 2003), *reversed*, 19 FCC Rcd 4975 (2004) ("*Golden Globe Awards Order*"), *petitions for stay and recon. pending* (since April 2004) .

[4] *Golden Globe Awards Order* at ¶¶ 9, 12 and 14 (eviscerating our longstanding standard for "isolated or fleeting" expletives, establishing that any use of the "F-word" or a variation, in any context, "invariably invokes a coarse sexual image," and changing our 30-year standard of what constitutes profanity).

[5] *Omnibus Order*, Statement of Commissioner Jonathan S. Adelstein, concurring in part, dissenting in part, 21 FCC Rcd *at* 2726.

This *Order* does not adequately address the Enforcement Bureau's December 18, 2002, decision letter, which denied the same complaint on the merits.[6] No one filed either a petition for reconsideration or an application for review and, consequentially, the decision letter became a final order. It seems patently unfair for the Commission to re-adjudicate the same complaint, involving the same parties on the same cause of action, first in the initial decision letter, then in the *Omnibus Order*, and then again in today's *Order*. The Supreme Court has held that the principle of *res judicata* applies to an adjudicative administrative proceeding where the agency has properly resolved disputes of fact and the parties have had an adequate opportunity to litigate.[7] The Commission should not have re-adjudicated this complaint a second time in the *Omnibus Order*. Certainly today, the third time around, this complaint should be dismissed, or the Commission should reverse the Enforcement Bureau's decision letter and the resultant final order.

More broadly, today's *Order* notes that the Supreme Court in *Pacifica* stressed context and we have repeatedly said "the full context in which the material appeared is critically important." Yet the Commission's analyses of the 2002 and 2003 broadcasts of "The Billboard Music Awards" are limited exclusively to a few seconds of a two-hour program. No consideration whatsoever is given to the entirety of the program. While it is perfectly reasonable to conclude that, after considering the entire program, the vulgarity and shock value of a particular scene permeated and dominated the program, the Commission should consider the totality of the program, rather than limit our consideration to an isolated programming segment.

Similarly, the Commission's justification for denying the complaint against the December 12, 2004, broadcast of "The Early Show," and reversing its indecency and profanity findings reflect the arbitrary, subjective and inconsistent nature of the Commission's decision-making.[8] In the *Omnibus Order*, the Commission concluded that the use of the s-word was shocking "*particularly* during a morning news interview,"[9] and that this "vulgarity in a morning television interview is *of particular concern* and *weighs heavily* in our analysis."[10] Today, without any legal support found in American jurisprudence, the Commission, *sua sponte*, creates a new "plausible"[11] standard to determine the threshold question of whether a particular program segment qualifies as a "*bona fide* news interview."[12] While the Commission admits that "there is no outright news exemption from our indecency rules," it will nevertheless defer to a broadcaster's "plausible characterization of its own programming." I not only fail to find a legal basis for the Commission's latest invention,[13] I also fail to understand the justification for

[6] The decision letter dismissing a complaint against the December 9, 2002, broadcast of "The Billboard Music Awards" by WTTG (TV), Washington, D.C., was referenced in footnote 32 of the *Golden Globe Awards Order*, and in footnote 9 of my Statement in that *Order*.

[7] *United States v. Utah Constr. & Min. Co.*, 384 U.S. 394, 422 (1966).

[8] In the *Omnibus Order*, with respect to "The Early Show," the Commission said: "In rare contexts, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance. We caution, however, that we will find this to be the case only in unusual circumstances, and such circumstances are clearly not present here." *Omnibus Order*, ¶ 144.

[9] *See Omnibus Order,* 21 FCC Rcd at 2699 ¶ 141 [emphasis added].

[10] *Id.* [emphasis added].

[11] ¶ 72, *supra.*

[12] *Id.* [emphasis in original].

[13] Looking at this contorted reasoning one must wonder whether the Commission is attempting to avoid reconsideration of its policy enunciated in the *Omnibus Order* that, consistent with *Golden Globe,* any variant, of the S-word is inherently excretory. *Omnibus Order* at 2699 ¶ 139.

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such a shift in reasoning. While the creation of this "infotainment" exception that can be invoked by a broadcaster's plausible characterization" may be convenient in this order today, it will surely create unintended consequences in future cases.

Even as applied, this new "plausible" standard is problematic. In this case, the CBS "Early Show" interview of contestants from the CBS program "Survivor: Vanuatu" was a cross promotion of a network's primetime entertainment programming on the same network's morning show. It stretches the bounds to argue this is legitimate news or public affairs programming. It is unreasonable to say that the latest contestant to be voted off the island or the latest contestant to hear "you're fired" or even "come on down" is "serious public affairs programming."[14] The network creates its own "reality" on a reality show, and we are somehow to believe that developments within its own artificial world are news? The only news here is how far this Commission is willing to stretch the definition of "news."

I also dissent in part from the Commission's decision to dismiss numerous complaints against several nationally televised episodes of the ABC network program "NYPD Blue" because the complaints did not come from viewers who resided in the station's media market. While the Commission has not changed its decision on the merits of the complaints, it has relied on an arbitrary procedural change in our enforcement policy that creates an unnecessary disconnect between the basis of our indecency authority and our enforcement policy, and encourages letter-writing campaigns, which will further burden Commission resources.

The Commission has long maintained, and does not now dispute, that we enforce a national, contemporary community standard, not a local one. For instance, in an effort to justify its authority in today's *Order*, the Commission observes that the broadcast medium has a "special nature" and "a uniquely pervasive presence in American life."[15] The Commission points out the "the Supreme Court emphasized the 'pervasive presence [of the broadcast medium] in the lives of all Americans' and that indecent broadcasts invade the privacy of the home."[16] Yet, the Commission's new enforcement policy is inconsistent with the national standard we impose and the pervasiveness of the medium we regulate.

This new enforcement policy is also inconsistent with the Commission's reasoning in other sections of today's *Order*. For example, as an important factor weighing in support of its finding that the 2002 and 2003 broadcasts of "The Billboard Music Awards" are indecent, the Commission cites Nielsen rating data on the total number of children under 18 and children between ages 2 and 11 who watched the programs, nationally. Yet based on our enforcement policy, the Commission will actually only protect children in the particular local media market where there is a complaint.[17]

The consequences of this new policy reveal its lack of logic. When the Commission determines a *national* network broadcast violates our *national* community standards, we will only fine the *local* station that has a complaint filed against it by a viewer in its media market. Although our obligation is to enforce the law to protect all children, we will only fine a local station that has the misfortune of being in a market where a parent or an adult made the effort to complain. This policy is misguided because a

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[14] *Peter Branton*, 6 FCC Rcd 610 (1991).

[15] *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978).

[16] *See id.,* citing *Rowan v. Post Office Dept.,* 397 U.S. 728 (1970).

[17] *Order*, ¶¶ 18, 59 and 65.

sufficient and valid complaint is truly the first, and an important, step in our indecency enforcement regime. The complaint and the complainant serve an important role, but the real party in interest is the Commission, acting on behalf the public, rather than the specific individual or organization that brings allegedly indecent material to our attention.

According to the new enforcement policy, even after we have determined the complained-of material is indecent, we will willfully blind ourselves to the potentially millions of children and households that watched the indecent program. The new policy would fine only the local station and only if the complainant is in its coverage area. Other stations will essentially be "sitting ducks," waiting for an in-market viewer to file a complaint about the same program, in order for the Commission to act. I do not understand how we can say we are faithfully enforcing the law when we are aware of violations of the law that we simply choose to ignore.

This is not the restrained enforcement policy encouraged by the Supreme Court in *Pacifica*.[18] Restraint applies to the standard we use in our decision-making and the manner in which we decide what constitutes actionable, indecent material.[19] Restraint applies to the development of a coherent framework that is based on rational and principled distinctions.

The power to limit speech should be exercised responsibly, and with the utmost caution. While I agree with some aspects of today's *Order*, I respectfully cannot support our reasoning. For that reason, I concur in part and dissent in part.

[18] *Pacifica*, 438 U.S. at 763, POWELL J, *concurring in part and concurring in judgment*.

[19] The Commission claims that "the sufficiency of a complaint is the first step rather that the last step in the Commission's analysis." *Order*, ¶ 77. However, in the single complaint filed against the "The 2002 Billboard Music Awards," for example, the complainant does not even aver that she watched the program. Quite the contrary, the complaint was filed "on behalf of the Parents Television Council and its over 800,000 members." The complainant alleges, the broadcast "was seen in homes across the country on the Fox network, and in Washington DC." Based on the Commission's reasoning in today's *Order* and the *Golden Globe Awards Order,* this complaint does not state a *prima facie* case to justify Commission action. *See Order*, ¶¶ 40 and 65 (stating that "[i]n the *Golden Globe Awards Order*, the Commission concluded that the F-Word was profane within the meaning of Section 1464 because, in context, it contained vulgar and coarse language 'so grossly offensive to members of the public who *actually hear* it as to amount to a nuisance'") (emphasis added). *See also Order*, ¶ 75 (stating that complaints against "NYPD Blue" are justifiably dismissed because "none of the complaints contains any claim that the out-of market complainant actually viewed the complained-of broadcasts") (emphasis added).