

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

In the Matter of
Industry Guidance On the Commission's
Case Law Interpreting 18 U.S.C. § 1464
and Enforcement Policies Regarding
Broadcast Indecency
File No. EB-00-IH-0089

POLICY STATEMENT

Adopted: March 14, 2001

Released: April 6, 2001

By the Commission: Commissioners Ness and Furchtgott-Roth issuing separate statements;
Commissioner Tristani dissenting and issuing a statement.

I. INTRODUCTION

1. The Commission issues this Policy Statement to provide guidance to the broadcast
industry regarding our case law interpreting 18 U.S.C. § 1464 and our enforcement policies with respect
to broadcast indecency. This document is divided into five parts. Section I gives an overview of this
document. Section II provides the statutory basis for indecency regulation and discusses the judicial
history of such regulation. Section III describes the analytical approach the Commission uses in making
indecency determinations. This section also presents a comparison of selected rulings intended to
illustrate the various factors that have proved significant in resolving indecency complaints. The cited
material refers only to broadcast indecency actions and does not include any discussion of case law
concerning indecency enforcement actions in other services regulated by this agency such as cable,
telephone, or amateur radio. Section IV describes the Commission's broadcast indecency enforcement
process. Section V is the conclusion.

II. STATUTORY BASIS/JUDICIAL HISTORY

2. It is a violation of federal law to broadcast obscene or indecent programming.
Specifically, Title 18 of the United States Code, Section 1464 (18 U.S.C. § 1464), prohibits the utterance
of "any obscene, indecent, or profane language by means of radio communication."¹ Congress has given
the Federal Communications Commission the responsibility for administratively enforcing 18 U.S.C. §
1464. In doing so, the Commission may revoke a station license, impose a monetary forfeiture, or issue a
warning for the broadcast of indecent material.² See 47 U.S.C. Sections 312(a)(6) and 503(b)(1)(D).

¹ Obscene and profane language and depictions are not within the scope of this Policy Statement.

² Although Section 1464 is a criminal statute, the Commission has authority to impose civil penalties for the
broadcast of indecent material without regard to the criminal nature of the statute. FCC v. Pacifica Foundation, 438
U.S. 726, 739, n. 13 (1978); see also Action for Children's Television v. FCC, 852 F.2d 1332, 1335 (D.C.Cir. 1988) (see
(continued....))

3. The FCC's enforcement policy under Section 1464 has been shaped by a number of judicial and legislative decisions. In particular, because the Supreme Court has determined that obscene speech is not entitled to First Amendment protection, obscene speech cannot be broadcast at any time.³ In contrast, indecent speech is protected by the First Amendment, and thus, the government must both identify a compelling interest for any regulation it may impose on indecent speech and choose the least restrictive means to further that interest.⁴ Even under this restrictive standard, the courts have consistently upheld the Commission's authority to regulate indecent speech, albeit with certain limitations.

4. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), provides the judicial foundation for FCC indecency enforcement. In that case, the Supreme Court held that the government could constitutionally regulate indecent broadcasts.⁵ In addition, the Court quoted the Commission's definition of indecency with apparent approval.⁶ The definition, "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs," has remained substantially unchanged since the time of the *Pacifica* decision.⁷ Moreover, the definition has been specifically upheld against constitutional challenges in the *Action for Children's Television (ACT)* cases in the D.C. Circuit Court of Appeals.⁸ Further, in *Reno v. ACLU*, 521 U.S. 844 (1997), the U.S. Supreme Court struck down an indecency standard for the Internet but did not question the constitutionality of our broadcast indecency standard. Rather, the Court recognized the "special justifications for regulation of the broadcast media that are not applicable to other speakers." *Reno v. ACLU*, 521 U.S. at 868.⁹

5. Although the D.C. Circuit approved the FCC's definition of indecency in the *ACT* cases, it also established several restrictive parameters on FCC enforcement. The court's decisions made clear

(Continued from previous page) _____

n. 8 for full case history) (Commission has authority to sanction licensees for broadcast of indecent material). The Department of Justice is responsible for prosecution of criminal violations of the statute.

³ See *Miller v. California*, 413 U.S. 15 (1973), *reh'g. denied*, 414 U.S. 881 (1973); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989); 47 C.F.R. § 73.3999(a). Obscene speech is defined by a three-part test: (1) an average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient interest; (2) the material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable law; and (3) the material, taken as a whole, must lack serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. at 24.

⁴ *Sable v. FCC*, 492 U.S. at 126.

⁵ *Id.* at 748-50 (upholding Commission declaratory order that afternoon broadcast of a recording of a 12 minute monologue entitled "Filthy Words" was indecent as broadcast); see also 742-47 (Stevens, J.) and 757-61 (Powell, J.).

⁶ *Id.* at 732.

⁷ *Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 8 FCC Rcd 704, n. 10 (1993). See also *Action for Children's Television v. FCC*, 852 F.2d 1332, 1338 (D.C.Cir. 1988) and *Action for Children's Television v. FCC*, 58 F.3d 654, 657 (D.C. Cir. 1995) (see n. 8 for full case history).

⁸ *Action for Children's Television v. FCC*, 852 F.2d 1332, 1339 (D.C.Cir. 1988) ("*ACT I*"); *Action for Children's Television v. FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1282 (1992) ("*ACT II*"); *Action for Children's Television v. FCC*, 58 F.3d 654, 657 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 701 (1996) ("*ACT III*").

⁹ These special justifications included the history of extensive government regulation of the broadcast medium, the scarcity of available frequencies at its inception, and broadcast's "invasive" nature. *Id.* See also *Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 15 FCC Rcd 303, 305-06 (1999) ("courts have repeatedly upheld the Commission's indecency standard").

that the FCC had to identify the compelling government interests that warranted regulation and also explain how the regulations were narrowly tailored to further those interests. In *ACT I*, the court rejected as inadequately supported the Commission's determination that it could reach and regulate indecent material aired as late as 11:00 p.m., and remanded the cases involved to the Commission for proceedings to ascertain the proper scope of the "safe harbor" period, that is, the time during which indecent speech may be legally broadcast. Before the Commission could comply with the court's remand order, however, Congress intervened and instructed the Commission to adopt rules that enforced the provisions of 18 U.S.C. § 1464 on a "24 hour per day basis."¹⁰ The rule adopted to implement this legislative mandate was stayed and was ultimately vacated by the court in *ACT II* as unconstitutional. In 1992, responding to the decision in *ACT II*, Congress directed the Commission to adopt a new "safe harbor" – generally 12 midnight to 6:00 a.m., but 10:00 p.m. to 6:00 a.m. for certain noncommercial stations. The Commission implemented this statutory scheme in January 1993.¹¹ Before this rule could become effective, however, the court stayed it pending judicial review. In 1995, the D.C. Circuit, *en banc*, held in *ACT III* that there was not a sufficient justification in the record to support a preferential "safe harbor" period for noncommercial stations and that the more restrictive midnight to 6:00 a.m. "safe harbor" for commercial stations was therefore unconstitutional. The court concluded, however, that the less restrictive 10:00 p.m. to 6:00 a.m. "safe harbor" had been justified as a properly tailored means of vindicating the government's compelling interest in the welfare of children and remanded the case to the Commission "with instructions to limit its ban on the broadcasting of indecent programs to the period from 6:00 a.m. to 10:00 p.m." *ACT III*, 58 F.3d at 669-70. The Commission implemented the court's instructions by appropriately conforming Section 73.3999 of its rules.¹² These changes became effective on August 28, 1995.¹³

6. Thus, outside the 10:00 p.m. to 6:00 a.m. safe harbor, the courts have approved regulation of broadcast indecency to further the compelling government interests in supporting parental supervision of children and more generally its concern for children's well being. *Act III*, 58 F.3d at 661 (and cases cited therein).¹⁴ The principles of enforcement articulated below are intended to further these interests.

¹⁰ *Making Appropriations for the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies for the Fiscal Year Ending September 30, 1989, and for Other Purposes*, Pub. L. No. 100-459, Section 608, 102 Stat. 2186, 2228 (1988).

¹¹ *Public Telecommunications Act of 1992*, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, 954 (1992); *Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, Report and Order, 8 FCC Rcd 704 (1993).

¹² *Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, Memorandum Opinion and Order, 10 FCC Rcd 10558 (1995).

¹³ 60 FR 44439 (August 28, 1995).

¹⁴ The Commission has also identified "protection of the home against intrusion by offensive broadcasts" as a compelling government interest. The court did not address the validity of that interest. *ACT III*, 58 F.3d at 660-61. The Supreme Court has noted, however, that the "uniquely pervasive presence" of the broadcast media, with the audience continually tuning in and out, so as to make content warnings less effectual, is a reason for affording broadcast media more limited First Amendment protections as compared to other forms of communications. *FCC v. Pacifica Foundation*, 438 U.S. at 748-49.

III. INDECENCY DETERMINATIONS

A. Analytical Approach

7. Indecency findings involve at least two fundamental determinations. First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition – that is, the material must describe or depict sexual or excretory organs or activities. *WPBN/WTOM License Subsidiary, Inc. (WPBN-TV and WTOM-TV)*, 15 FCC Rcd 1838, 1840-41 (2000).

8. Second, the broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast medium. In applying the "community standards for the broadcast medium" criterion, the Commission has stated:

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

WPBN/WTOM License Subsidiary, Inc., 15 FCC Rcd at 1841.¹⁵

9. In determining whether material is patently offensive, the *full context* in which the material appeared is critically important.¹⁶ It is not sufficient, for example, to know that explicit sexual terms or descriptions were used, just as it is not sufficient to know only that no such terms or descriptions were used. Explicit language in the context of a *bona fide* newscast might not be patently offensive,¹⁷ while sexual innuendo that persists and is sufficiently clear to make the sexual meaning inescapable might be.¹⁸ Moreover, contextual determinations are necessarily highly fact-specific, making it difficult to catalog comprehensively all of the possible contextual factors that might exacerbate or mitigate the patent offensiveness of particular material.¹⁹ An analysis of Commission case law reveals that various factors

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

¹⁶ *WPBN/WTOM License Subsidiary, Inc.*, 15 FCC Rcd at 1841; *Infinity Broadcasting Corp.*, 3 FCC Rcd 930, 931-32 (1987), *aff'd in part, vacated in part, remanded sub nom. Act I*, 852 F.2d 1332 (D.C. Cir. 1988) (subsequent history omitted).

¹⁷ *Peter Branton*, 6 FCC Rcd 610 (1991), *aff'd sub nom. Branton v. FCC*, 993 F.2d 906 (D.C. Cir. 1993), *cert. denied* 511 U.S. 1052 (1994).

¹⁸ See *Great American Television and Radio Company, Inc. (WFBQ(FM))*, 6 FCC Rcd 3692 (MMB 1990) ("Candy Wrapper").

¹⁹ See *e.g., Infinity Broadcasting Corp.*, 3 FCC Rcd 930, 931-32 (1987), *aff'd in part, vacated in part* (continued....)

have been consistently considered relevant in indecency determinations. By comparing cases with analogous analytical structures, but different outcomes, we hope to highlight how these factors are applied in varying circumstances and the impact of these variables on a finding of patent offensiveness.

B. Case Comparisons

10. The principal factors that have proved significant in our decisions to date are: (1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; (3) *whether the material appears to pander or is used to titillate*, or *whether the material appears to have been presented for its shock value*. In assessing all of the factors, and particularly the third factor, the overall context of the broadcast in which the disputed material appeared is critical. Each indecency case presents its own particular mix of these, and possibly other, factors, which must be balanced to ultimately determine whether the material is patently offensive and therefore indecent. No single factor generally provides the basis for an indecency finding. To illustrate the noted factors, however, and to provide a sense of the weight these considerations have carried in specific factual contexts, a comparison of cases has been organized to provide examples of decisions in which each of these factors has played a particularly significant role, whether exacerbating or mitigating, in the indecency determination made.

11. It should be noted that the brief descriptions and excerpts from broadcasts that are reproduced in this document are intended only as a research tool and should not be taken as a meaningful selection of words and phrases to be evaluated for indecency purposes without the fuller context that the tapes or transcripts provide. The excerpts from broadcasts used in this section have often been shortened or compressed. In order to make the excerpts more readable, however, we have frequently omitted any indication of these ellipses from the text. Moreover, in cases where material was included in a complaint but not specifically cited in the decision based on the complaint, we caution against relying on the omission as if it were of decisional significance. For example, if portions of a voluminous transcript are the object of an enforcement action, those portions not included are not necessarily deemed not indecent. The omissions may be the result of an editing process that attempted to highlight the most significant material within its context. No inference should be drawn regarding the material deleted.

1. Explicitness/Graphic Description Versus Indirectness/Implication

12. The more explicit or graphic the description or depiction, the greater the likelihood that the material will be considered patently offensive. Merely because the material consists of double entendre or innuendo, however, does not preclude an indecency finding if the sexual or excretory import is unmistakable.

13. Following are examples of decisions where the explicit/graphic nature of the description of sexual or excretory organs or activities played a central role in the determination that the broadcast was indecent.

WYSP(FM), Philadelphia, PA

“Howard Stern Show”

(Continued from previous page) _____
on other grounds, remanded sub nom. Act I, 852 F.2d 1332 (D.C. Cir. 1988) (subsequent history omitted).

God, my testicles are like down to the floor . . . you could really have a party with these . . . Use them like Bocci balls.

(As part of a discussion of lesbians) I mean to go around porking other girls with vibrating rubber products . . .

Have you ever had sex with an animal? Well, don't knock it. I was sodomized by Lambchop.

Indecent – Warning Issued. *Infinity Broadcasting Corporation of Pennsylvania (WYSP(FM)), 2 FCC Rcd 2705 (1987), aff'd 3 FCC Rcd 930 (1987), aff'd in part, vacated in part on other grounds, remanded sub nom. Act I, 852 F.2d 1332 (D.C. Cir. 1988) (subsequent history omitted). Excerpted material (only some of which is cited above) consisted of “vulgar and lewd references to the male genitals and to masturbation and sodomy broadcast in the context of . . . ‘explicit references to masturbation, ejaculation, breast size, penis size, sexual intercourse, nudity, urination, oral-genital contact, erections, sodomy, bestiality, menstruation and testicles.’” 3 FCC Rcd at 932.*

WSUC-FM, Cortland, NY

“I’m Not Your Puppet” Rap Song

The only thing that was on my mind, was just shoving my dick up this bitch's behind. I looked at the girl and said, babe, your ass ain't nothing but a base hit. I'm going to have to get rid of your ass, yeah, 'cause you're on my dick, dick, ding-a-ling. Popped my dick in her mouth, and we rocked it back and forth. Now that she sucked my dick and Tony fuck you in the ass. I pulled out my dick, popped it in her mouth, and she sucked it.

Indecent – NAL Issued. *State University of New York (WSUC-FM), 8 FCC Rcd 456 (1993), forfeiture reduced 13 FCC Rcd 23810 (1998) (forfeiture paid). The Commission concluded that the language used in this broadcast “describes sexual activities in patently offensive terms and is therefore indecent.” 8 FCC Rcd at 456.*

WQAM(AM), Miami, FL

“Uterus Guy” Song

I don't want to grow up, I'm a uterus guy. I want to spend a week or so right here between your thighs. Inhale your clam, with my head jammed by your quivering, crushing gams. No, I don't want to get up or get a towel to dry, cause I wouldn't be a uterus guy. I don't want to get up, I'm a uterus guy and I know where to lick and chew exactly where you like. You'll have more fun when I make you come, with my nose between your thighs.

Indecent – NAL Issued. *WQAM License Limited Partnership (WQAM(AM)), 15 FCC Rcd 1475 (1999), aff'd 15 FCC Rcd 2518 (2000), recon. denied FCC 00-266, released July 26, 2000. The Commission held that the “song’s sexual import is lewd, inescapable and understandable.” 15 FCC Rcd at 2520.*

KROQ(FM), Los Angeles, CA

“You Suck” Song

I know you're really proud cause you think you're well hung but I think its time you learn how to use your tongue. You say you want things to be even and you want things to be fair but you're afraid to get your teeth caught in my pubic hair. If you're lying there expecting

me to suck your dick, you're going to have to give me more than just a token lick. . . . Go down baby, you suck, lick it hard and move your tongue around. If you're worried about babies, you can lower your risk, by giving me that special cunnilingus kiss. . . . you can jiggle your tongue on my clit. Don't worry about making me have an orgasm. . . . You asshole, you shit. I know it's a real drag, to suck my cunt when I'm on the rag. . . . You tell me it's gross to suck my yeast infection. How do you think I feel when I gag on your erection.

Indecent – NAL Issued. *Infinity Broadcasting Corporation of Los Angeles (KROQ(FM)), 13 FCC Rcd 25349 (MMB 1998), aff'd 15 FCC Rcd 10667 (EB 2000), petition for reconsideration pending* (graphically and explicitly describes sexual and excretory organs or activities).

WXTB(FM), Clearwater, FL

“Bubba, The Love Sponge”

Most women don't like swallowing, but I do. The trick is you need to swallow at the right time. Do it when you're deep throating. . . . I like pleasure giving, I like a pleasure giving woman who really, really likes to enjoy giving oral. . . . She does more than just go up and down, she's creative by licking, nibbling and using overall different techniques. . . . The sexy turn on for me is when I . . . expel into my partner's mouth. . . . I don't mind giving BJs . . . if a man doesn't get off, that means he wasn't quite excited by my techniques.

Indecent – NAL Issued. *Citicasters Co. (WXTB(FM)), 13 FCC Rcd 22004 (1998), aff'd FCC 00-230, released June 27, 2000 (forfeiture paid).*

14. Less explicit material and material that relies principally on innuendo to convey a sexual or excretory meaning have also been cited by the Commission as actionably indecent where the sexual or excretory meaning was unmistakable.

KLLOL(FM), Houston, TX

“Stevens and Pruett Show”

The doctor was talking about size. The man complained earlier that he was so large that it was ruining his marriages. Big is good if the guy knows how to use it. She is so big she could handle anything. Some of these guys, a very few of them, a hand full are like . . . two hands full. Twelve inches, about the size of a beer can in diameter. So, now could you handle something like that? It's actually ruined marriages. A big organ for a big cathedral. Somebody big is just going to have to find somebody that's big.

Indecent – NAL Issued. *The Rusk Corporation (KLLOL(FM)), 8 FCC Rcd 3228 (1993) (forfeiture paid).* As to the use of innuendo in the cited passages, the Commission said: “[W]hile [the licensee] may have substituted innuendo and double entendre for more directly explicit sexual references and descriptions in some instances, unmistakable sexual references remain that render the sexual meaning of the innuendo inescapable.” 8 FCC Rcd at 3228.

KGB-FM, San Diego, CA

“Candy Wrapper” Song

I whipped out my Whopper and whispered, Hey, Sweettart, how'd you like to Crunch on my Big Hunk for a Million Dollar Bar? Well, she immediately went down on my Tootsie Roll and you know, it was like pure Almond Joy. I couldn't help but grab her delicious Mounds, ... this little Twix had the Red Hots. ... as my Butterfinger went up her tight little Kit Kat, and

she started to scream Oh, Henry! Oh, Henry! Soon she was fondling my Peter Paul, and Zagnuts and I knew it wouldn't be long before I blew my Milk Duds clear to Mars and gave her a taste of the old Milky Way. ... I said, Look ... why don't you just take my Whatchamacallit and slip it up your Bit-O-Honey. Oh, what a piece of Juicy Fruit she was too. She screamed Oh, Crackerjack. You're better than the Three Musketeers! as I rammed my Ding Dong up her Rocky Road and into her Peanut Butter Cup. Well, I was giving it to her Good 'n Plenty, and all of a sudden, my Starburst. ... she started to grow a bit Chunky and ... Sure enough, nine months later, out popped a Baby Ruth.

Indecent – NAL Issued. *KGB, Inc. (KGB-FM)*, 7 FCC Rcd 3207 (1992), forfeiture reduced 13 FCC Rcd 16396 (1998) (forfeiture paid). *See also Great American Television and Radio Company, Inc. (WFBQ(FM)/WNDE(AM))*, 6 FCC Rcd 3692, 3693 (MMB 1990) (forfeiture paid) (“While the passages arguably consist of double entendre and indirect references, the language used in each passage was understandable and clearly capable of a specific sexual meaning and, because of the context, the sexual import was inescapable.”); and *WIOD, Inc. (WIOD(AM))*, 6 FCC Rcd 3704 (MMB 1989) (forfeiture paid) (“notwithstanding the use of candy bar names to symbolize sexual activities, the titillating and pandering nature of the song makes any thought of candy bars peripheral at best”).

**KSJO(FM), San Jose, CA
Hillbillies”**

Song to Tune of “Beverly

Come a listen to a story about a man named Boas, a poor politician that barely kept his winky fed, then one day he’s poking a chick and up from his pants came a bubbling crude. Winky oil. Honey pot. Jail Bait. . . . So, he loaded up his winky and he did it with Beverly. Big Breasts. Only 15 years old.

Indecent – NAL Issued. *Narragansett Broadcasting Company of California, Inc. (KSJO(FM))*, 5 FCC Rcd 3821 (1990) (forfeiture paid). “Even in the cases of double entendre, not only was the language understandable and clearly capable of a specific sexual or excretory meaning but, because of the context, the sexual and excretory import was inescapable.” 5 FCC Rcd at 3821.

**KMEL(FM), San Francisco, CA
Song**

“Rick Chase Show”; “Blow Me”

Blow me, you hardly even know me, just set yourself below me and blow me, tonight. Hey, a handy would certainly be dandy, but it’s not enough to slow (unintelligible) me, hey, you gotta blow me all night. Hey, when you pat your lips that way, I want you night and day, when you squeeze my balls so tight. I want to blow my love, hey, with all my might.

Indecent – NAL Issued. *San Francisco Century Broadcasting, L.P. (KMEL(FM))*, 7 FCC Rcd 4857 (1992), *aff’d* 8 FCC Rcd 498 (1993) (forfeiture paid). Commission found that the language dwelled on descriptions of sexual organs and activities, “was understandable and clearly capable of a specific sexual meaning and, because of the context, the sexual import was inescapable.” 8 FCC Rcd at 498.

15. Compare the following case in which the material aired was deemed not to be actionably indecent.

WFBQ(FM)/WNDE(AM), Indianapolis, IN**“Elvis” and “Power, Power, Power”**

As you know, you gotta stop the King, but you can't kill him . . . So you talk to Dick Nixon, man you get him on the phone and Dick suggests maybe getting like a mega-Dick to help out, but you know, you remember the time the King ate mega-Dick under the table at a 095 picnic . . . you think about getting mega-Hodgie, but that's no good because you know, the King was a karate dude . . .

Power! Power! Power! Thrust! Thrust! Thrust! First it was Big Foot, the monster car crunching 4x4 pickup truck. Well, move over, Big Foot! Here comes the most massive power-packed monster ever! It's Big Peter! (Laughter) Big Peter with 40,000 Peterbilt horsepower under the hood. It's massive! Big Peter! Formerly the Big Dick's Dog Wiener Mobile. Big Peter features a 75-foot jacked up monster body. See Big Peter crush and enter a Volvo. (Laughter) . . . strapped himself in the cockpit and put Big Peter through its paces. So look out Big Foot! Big Peter is coming! Oh my God! It's coming! Big Peter! (Laughter)

Not Indecent. *Great American Television and Radio Company, Inc. (WFBQ(FM)/WNDE(AM)), 6 FCC Rcd 3692 (MMB 1990).* The licensee provided a fuller transcript of the cited “Elvis” excerpt and explained the context in which it was aired, arguing that no sexual meaning was intended and that no such meaning would be reasonably understood from the material taken as a whole. The licensee also explained the regional humor of the Power, Power, Power excerpt and the context in which it was broadcast. The Mass Media Bureau held that the material was not indecent because the “surrounding contexts do not appear to provide a background against which a sexual import is inescapable.” 6 FCC Rcd at 3693.

16. In assessing explicitness, the Commission also looks to the audibility of the material as aired. If the material is difficult or impossible to understand, it may not be actionably indecent. However, difficulty in understanding part of the material or an attempt to obscure objectionable material will not preclude a finding of indecency where at least some of the material is recognizable or understandable.

KGB-FM, San Diego, CA**“Sit on My Face” Song**

Sit on my face and tell me that you love me. I'll sit on your face and tell you I love you, too. I love to hear you moralize when I'm between your thighs. You blow me away. Sit on my face and let me embrace you. I'll sit on your face and then I'll love you (?) truly. Life can be fine, if we both sixty-nine. If we sit on faces (?) the ultimate place to play (?). We'll be blown away.

Indecent – NAL Issued. *KGB, Inc. (KGB-FM), 7 FCC Rcd 3207 (MMB 1992), forfeiture reduced 13 FCC Rcd 16396 (1998) (forfeiture paid).* The song was found to be actionably indecent despite English accent and “ambient noise” because the lyrics were sufficiently understandable. 7 FCC Rcd at 3207.

WWKX(FM), Woonsocket, RI**“Real Deal Mike Neil Show”**

Douche bag, hey what's up, fu(Bleep)ck head? . . . You his fuck (Bleep) ho or what? You his fuck (Bleep) bitch man, where you suck his dick every night? . . . Suck some di(Bleep)ck make some money for Howard and pay your pimp okay?

Indecent – NAL Issued. *Back Bay Broadcasting (WWKX(FM))*, 14 FCC Rcd 3997, 3998 (MMB 1999) (forfeiture paid). Material was found to be actionably indecent despite attempt to obscure objectionable language because “editing was ineffective and merely resulted in a “bleep” in the middle of clearly recognizable words (or in some cases a “bleep” after the word).” The Mass Media Bureau held that “[b]ecause the words were recognizable, notwithstanding the editing,” they were indecent within the context used in this broadcast.

2. Dwelling/Repetition versus Fleeting Reference

17. Repetition of and persistent focus on sexual or excretory material have been cited consistently as factors that exacerbate the potential offensiveness of broadcasts. In contrast, where sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency.

WXTB(FM), Clearwater, FL

“Bubba, The Love Sponge”

Could you take the phone and rub it on you Chia Pet? Oh, let me make sure nobody is around. Okay, hang on a second (Rubbing noise). Okay I did it. . . . Now that really your little beaver? That was mine. Your what? That was my little beaver? Oh I love when a girl says beaver. Will you say it again for me honey please? It was my little beaver. . . . Will you say, Bubba come get my beaver? Bubba, would come get my little beaver? . . . tell me that doesn't do something for you. That is pretty sexy. . . . bring the beaver. It will be with me. We got beaver chow. I can't wait, will you say it for me one more time? Say what? My little beaver or Bubba come get my little beaver? Okay, Bubba come get my beaver. Will you say, Bubba come hit my beaver? Will you say it? Bubba, come hit my beaver. That is pretty sexy, absolutely. Oh, my God, beaver.

Indecent – NAL Issued. *Citicasters Co. (WXTB(FM))*, 13 FCC Rcd 15381 (MMB 1998) (forfeiture paid).

WXTB(FM), Clearwater, FL

“Bubba, The Love Sponge”

Well, it was nice big fart. I'm feeling very gaseous at this point but there, so far has been no enema reaction, as far as. There's been no, there's been no expelling? No expelling. But I feel mucus rising. . . . Can't go like. (Grunting sound) Pushing, all I keep doing is putting out little baby farts. . . . on the toilet ready to go. . . . Push it, strain it. It looks normal. Just average, average. Little rabbit one. Little rabbit pellets. I imagine maybe, we'll break loose. Push hard Cowhead. I'm pushing, I got veins popping out of my forehead. Go ahead, those moles might pop right off. You can tell he's pushing. I'm out of breath. One more, last one. One big push.

Indecent – NAL Issued. *Citicasters Co. (WXTB(FM))*, 13 FCC Rcd 22004 (1998), *aff'd* FCC 00-230, released June 27, 2000 (forfeiture paid). The cited material dwells on excretory activities and the Commission found it to be patently offensive.

18. Compare the following cases where material was found not indecent because it was fleeting and isolated.

WYBB(FM), Folly Beach, SC

“The Morning Show”

The hell I did, I drove mother-fucker, oh. Oh.

Not Indecent. *L.M. Communications of South Carolina, Inc. (WYBB(FM))*, 7 FCC Rcd 1595 (MMB 1992). The “broadcast contained only a fleeting and isolated utterance which, within the context of live and spontaneous programming, does not warrant a Commission sanction.” 7 FCC Rcd at 1595.

KPRL(AM)/KDDDB(FM), Paso Robles, CA

News Announcer Comment

Oops, fucked that one up.

Not Indecent. *Lincoln Dellar, Renewal of License for Stations KPRL(AM) and KDDDB(FM)*, 8 FCC Rcd 2582, 2585 (ASD, MMB 1993). The “news announcer’s use of single expletive” does not “warrant further Commission consideration in light of the isolated and accidental nature of the broadcast.”

19. In contrast, even relatively fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness. Examples of such factors illustrated by the following cases include broadcasting references to sexual activities with children and airing material that, although fleeting, is graphic or explicit.

KUPD-FM, Tempe, AZ

Announcer Joke

What is the best part of screwing an eight-year-old? Hearing the pelvis crack.

Indecent – NAL Issued. *Tempe Radio, Inc. (KUPD-FM)*, 12 FCC Rcd 21828 (MMB 1997) (forfeiture paid). Although fleeting, the language clearly refers to sexual activity with a child and was found to be patently offensive.

WEZB-FM, New Orleans, LA

Announcer Joke

What’s the worst part of having sex with your brother? . . . You got to fix the crib after it breaks and then you got to clean the blood off the diaper.

Indecent – NAL Issued. *EZ New Orleans, Inc. (WEZB(FM))*, 12 FCC Rcd 4147 (MMB 1997) (forfeiture paid).

KLBJ(FM), Austin, TX**DJ Comments**

Suck my dick you fucking cunt.

Indecent – NAL Issued. *LBSJ Broadcasting Company, L.P. (KLBJ(FM))*, 13 FCC Rcd 20956 (MMB 1998) (forfeiture paid). Although fleeting, the material is explicit and was found to be indecent.

3. Presented in a Pandering or Titillating Manner or for Shock Value

20. The apparent purpose for which material is presented can substantially affect whether it is deemed to be patently offensive as aired. In adverse indecency findings, the Commission has often cited the pandering or titillating character of the material broadcast as an exacerbating factor. Presentation for the shock value of the language used has also been cited. As Justice Powell stated in his opinion in the Supreme Court's decision affirming the Commission's determination that the broadcast of a comedy routine was indecent, "[T]he language employed is, to most people, vulgar and offensive. It was chosen specifically for this quality, and it was repeated over and over as a sort of verbal shock treatment." *FCC v. Pacifica Foundation*, 438 U.S. 726, 757 (1978) (Powell, J., concurring in part and concurring in the judgment). On the other hand, 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. In the following cases, the decisions looked to the manner of presentation as a factor supporting a finding of indecency.

KLLOL(FM), Houston, TX**“Stevens & Pruett Show”**

Sex survey lines are open. Today's question, it's a strange question and we hope we have a lot of strange answers. What makes your hiney parts tingle? When my husband gets down there and goes (lips noise). ... I love oral sex. ... Well, my boyfriend tried to put Hershey kisses inside of me and tried to lick it out and it took forever for him to do it.

Indecent – NAL Issued. *Rusk Corporation (KLLOL(FM))*, 5 FCC Rcd 6332 (MMB 1990) (forfeiture paid). Explicit description in a program that focused on sexual activities in a lewd, vulgar, pandering and titillating manner.

WEBN(FM), Cincinnati, OH**“Bubba, The Love Sponge”**

All I can say is, if you were listening to the program last night you heard Amy and Stacy . . . come in here, little lesbians that they are. Little University of Cincinnati ho's and basically that we could come over and watch them. We got over to the house. . . . They start making out a little bit. They go to bed. They get, they start, they're starting like a mutual 69 on the bed. Guido all of a sudden whips it out. . . . Rather than take care of each other . . . Guido is like knee deep with the butch bitch and all of a sudden here is the fem bitch looking at me. Hot. I get crazy. I hook up a little bit. Then Guido says, hey, I done got mine, how about we switching? So I went into the private bedroom with the butch bitch and then got another one.

Indecent – NAL Issued. *Jacor Broadcasting Corporation (WEBN(FM))*, 13 FCC Rcd 4152 (MMB 1997), *aff'd* 13 FCC Rcd 5825 (MMB 1997) (forfeiture paid).

WXTB(FM), Clearwater, FL**“Bubba, The Love Sponge”**

Take the phone and I want you to rub it on it hard. I want to hear the telephone, okay? Okay honey. (Rubbing noises) You hear that? A little bit longer though please. I'm on the edge right now. A little bit faster. (Rubbing noises) You get that? That's nice. Could you do it again and then scream my name out, please? Like you're having an orgasm? Yeah. Go ahead. Okay. (Rubbing noises) Mm mm. That's it? It's got to be longer than that Ginny, come on work with me. Be a naughty girl. Be a little slutty bitch that you are. One more time. Okay. (Rubbing Noises).

Indecent – NAL Issued. *Citicasters Co. (WXTB(FM))*, 13 FCC Rcd 15381 (MMB 1998) (forfeiture paid).

21. In determining whether broadcasts are presented in a pandering or titillating manner, the context of the broadcast is particularly critical. Thus, even where language is explicit, the matter is graphic, or where there is intense repetition of vulgar terms, the presentation may not be pandering or titillating, and the broadcast may not be found actionably indecent.

KING-TV, Seattle, WA**“Teen Sex: What About the Kids?”**

Broadcast of portions of a sex education class in a local high school that included the use of very realistic sex organ models and simulated demonstrations of various methods of birth control as well as frank discussions of sexual topics.

Not Indecent. *King Broadcasting Co. (KING-TV)*, 5 FCC Rcd 2971 (1990). The Commission held that although the program dealt explicitly with sexual issues and included the use of very graphic sex organ models, "the material presented was clinical or instructional in nature and not presented in a pandering, titillating or vulgar manner." 5 FCC Rcd at 2971.

WABC-TV, New York, NY**“Oprah Winfrey Show”
(How to Make Romantic Relations with
Your Mate Better)**

Okay, for all you viewers out there with children watching, we're doing a show today on how to make romantic relations with your mate better. Otherwise known as s-e-x. ... I'm very aware there are a number of children who are watching and so, we're going to do our best to keep this show rated "G" but just in case, you may want to send your kids to a different room. And we'll pause for a moment while you do that. ... According to experts and recent sex surveys the biggest complaints married women have about sex are ... their lovemaking is boring ... American wives all across the country have confessed to using erotic aids to spice up their sex life and ... thousands of women say they fantasize while having sex with their husbands. ... And most women say they are faking it in the bedroom. [Quiz:] I like the way my partner looks in clothing. ... I like the way my partner looks naked. ... I like the way my partner's skin feels. ... I like the way my partner tastes. ...

[Psychologist and panelists:] Do you know that you can experience orgasm, have you experienced that by yourself? No, I have not ... Okay, one of the things that, well, you all know what I'm talking about. ... You need to at least know how to make your body get

satisfied by yourself. Because if you don't know how to do it, how is he going to figure it out? He doesn't have your body parts, he doesn't know.

Not Indecent. Letter from Chief, Complaints and Investigations Branch, Enforcement Division, Mass Media Bureau to Chris Giglio (July 20, 1994). Subject matter alone does not render material indecent. Thus, while material may be offensive to some people, in context, it might not be actionably indecent.

KTVI-TV, St. Louis, MO

**“Geraldo Rivera Show”
(Unlocking the Great Mysteries of Sex)**

We have seen such a slew of sex books ... "Your G-spot," "How to Have Triple Orgasms." One of the biggest myths ... either we go all the way or we do nothing. ... He just missed an opportunity to make love, not all the way ... but to share a moment of passion and a moment of closeness. ... It's important that a man learn to use the penis the way an artist uses a paintbrush ... and if a woman is also willing to learn how to move her vagina. ... With good control of PC muscles, a man can separate orgasm from ejaculation and have more than one orgasm. ... Really great sex is always based on feeling safe enough with your partner to open up. Passion is just the expression of a tremendous sense of connection you feel. If you think sex is pleasurable, try making love and having sex at the same time for turning pleasure into ecstasy.

Not Indecent. Letter from Chief, Complaints and Investigations Branch, Enforcement Division, Mass Media Bureau, to Gerald P. McAtee (October 26, 1989). While offensive to some, the material was not found to be indecent.

**WSMC-FM, Collegedale, TN
[National Public Radio]**

“All Things Considered”

Mike Schuster has a report and a warning. The following story contains some very rough language. [Excerpt from wiretap of telephone conversation in which organized crime figure John Gotti uses "fuck" or "fucking" 10 times in 7 sentences (110 words).]

Not Indecent. *Peter Branton*, 6 FCC Rcd 610 (1991) (subsequent history omitted). Explicit language was integral part of a bona fide news story concerning organized crime; the material aired was part of a wiretap recording used as evidence in Gotti's widely reported trial. The Commission explained that it did “not find the use of such [coarse] words in a legitimate news report to have been gratuitous, pandering, titillating or otherwise “patently offensive” as that term is used in our indecency definition.” 6 FCC Rcd at 610.

**WPBN-TV, Traverse City, MI
WTOM-TV, Cheboygan, MI**

“Schindler’s List” Film

“Schindler’s List” is a film that depicted a historical view of World War II and wartime atrocities. The movie contained depictions of adult frontal nudity.

Not Indecent. *WPBN/WTOM License Subsidiary, Inc. (WPBN-TV and WTOM-TV)*, 15 FCC Rcd 1838 (2000). The Commission ruled that full frontal nudity is not *per se* indecent. Rather, the “full context” of the nudity is controlling. Looking at “the subject matter of the film, the

manner of its presentation, and the warnings that accompanied the broadcast,” the Commission held that the nudity in “Schindler’s List” was not actionably indecent.

WFLA(AM), Tampa, FL

Announcer Comments

Announcers allegedly referred to complainant, Chuck Harder, as “Suck Harder,” “Suck,” and “Suckie” throughout the broadcast and called the complainant a “useless piece of crap.” Also referred to complainant’s network, the Sun Radio Network as “Suck Harder Radio Network.”

Not Indecent. *Jacor Broadcasting of Tampa Bay, Inc., Renewal of License of Station WFLA(AM), 7 FCC Rcd 1826 (ASD, MMB 1992).* Cited language was used in the context of a discussion of a radio network that provided programming to a station competitor and was found, in context, not actionably indecent.

22. Compare the following cases where licensees unsuccessfully claimed that, because of the context of the broadcasts (*i.e.*, alleged news stories), the broadcasts were not pandering.

KSD-FM, St. Louis, MO

“The Breakfast Club”

I’ve got this Jessica Hahn interview here in Playboy. I just want to read one little segment . . . the good part.

“[Jim Bakker] has managed to completely undress me and he’s sitting on my chest. He’s really pushing himself, I mean the guy was forcing himself. He put his penis in my mouth . . . I’m crying, tears are coming, and he is letting go. The guy came in my mouth. My neck hurts, my throat hurts, my head feels like it’s going to explode, but he’s frustrated and determined, determined enough that within minutes he’s inside me and he’s on top and he’s holding my arms. He’s just into this, he’s inside me now. Saying, when you help the shepherd, you’re helping the sheep.”

(followed by air personality making sheep sounds) This was rape. Yeah, don’t you ever come around here Jim Bakker or we’re going to cut that thing off.

Indecent – NAL Issued. *Pacific and Southern Company, Inc. (KSD-FM), 6 FCC Rcd 3689 (MMB 1990) (forfeiture paid).* The broadcast contained excerpts from a *Playboy* magazine account of the alleged rape of Jessica Hahn by the Rev. Jim Bakker. The licensee explained the broadcast was newsworthy “banter by two on-air personalities reflecting public concern, criticism, and curiosity about a public figure whose reputedly notorious behavior was a widespread media issue at the time.” Responding to the licensee’s argument, the Mass Media Bureau stated that “although the program . . . arguably concerned an incident that was at the time ‘in the news,’ the particular material broadcast was not only exceptionally explicit and vulgar, it was . . . presented in a pandering manner. In short, the rendition of the details of the alleged rape was, in context, patently offensive.” 6 FCC Rcd at 3689.

KNON(FM), Dallas, TX

“I Want to Be a Homosexual” Song

But if you really want to give me a blowjob, I guess I’ll let you as long as you respect me in the morning. Suck it baby. Oh yeah, suck it real good. . . . Are you sure this is your first rim job? . . . Stick it up your punk rock ass. You rub your little thing, when you see phony

dikes in Penthouse magazine. . . . Call me a faggot, call me a butt-loving fudge-packing queer. . . . You rub your puny thing, when you see something (?) pass you on the street.

Indecent – NAL Issued. *Agape Broadcasting Foundation, Inc. (KNON(FM)), 9 FCC Rcd 1679 (MMB 1994), forfeiture reduced 13 FCC Rcd 9262 (MMB 1998) (forfeiture paid).* Licensee claimed that “‘the words and the song constitute political speech’ aired in a good faith attempt to present meaningful public affairs programming . . . to challenge those who would use such language to stigmatize . . . members of the gay community.” 13 FCC Rcd at 9263. The Mass Media Bureau responded that the licensee has “considerable discretion as to the times of the day . . . when it may broadcast indecent material. . . . Consequently, we find unavailing Agape’s argument that, in essence, its duty to air public affairs programming required a mid-afternoon presentation of lyrics containing repeated, explicit, and vulgar descriptions of sexual activities and organs.” *Id.*

KSJO(FM), San Jose, California

Lamont & Tonelli Show

“...she should go up and down the shaft about five times, licking and sucking and on the fifth swirl her tongue around the head before going back down....”

“Show us how its done” (evidently the guest had some sort of a prop).

*“Well, if this was a real penis, it would have a ****ridge, I would like (sic) around the ridge like this...”*

[laughter, comments such as ‘oh yeah, baby’].

Indecent – NAL Issued. *Citicasters Co., licensee of Station KSJO(FM), San Jose, California, 15 FCC Rcd 19095 (EB 2000) (forfeiture paid).* The licensee claimed that the program was a clinical discussion of oral sex. The Enforcement Bureau rejected this argument on the grounds that the disc jockeys’ comments on her material showed that the material was offered in a pandering and titillating manner. “The disc jockeys’ invitation to have Dr. Terry use a prop on a radio program, and their laughter and statements (such as “oh yeah, baby”) while she conducted that demonstration shown that the material was intended to be pandering and titillating as opposed to a clinical discussion of sex.”

23. The absence of a pandering or titillating nature, however, will not necessarily prevent an indecency determination, as illustrated by the following case.

WIOD(AM), Miami, FL

“Penis Envy” Song

If I had a penis, ... I'd stretch it and stroke it and shove it at smarties ... I'd stuff it in turkeys on Thanksgiving day. ... If I had a penis, I'd run to my mother, Comb out the hair and compare it to brother. I'd lance her, I'd knight her, my hands would indulge. Pants would seem tighter and buckle and bulge. (Refrain) A penis to plunder, a penis to push, 'Cause one in the hand is worth one in the bush. A penis to love me, a penis to share, To pick up and play with when nobody's there. ... If I had a penis, ... I'd force it on females, I'd pee like a fountain. If I had a penis, I'd still be a girl, but I'd make much more money and conquer the world.

Indecent – NAL Issued. *WIOD, Inc. (WIOD(AM))*, 6 FCC Rcd 3704 (MMB 1989) (forfeiture paid). The Mass Media Bureau found the material to be patently offensive. In response to the licensee's assertion that this song was not pandering or titillating and therefore should not be considered indecent, the Bureau stated: "We believe . . . that it is not necessary to find that the material is pandering or titillating in order to find that its references to sexual activities and organs are patently offensive. (Citations omitted.) Moreover, humor is no more an absolute defense to indecency . . . than is music or any other one component of communication." 6 FCC Rcd at 3704.

IV. ENFORCEMENT PROCESS

24. The Commission does not independently monitor broadcasts for indecent material. Its enforcement actions are based on documented complaints of indecent broadcasting received from the public. Given the sensitive nature of these cases and the critical role of context in an indecency determination, it is important that the Commission be afforded as full a record as possible to evaluate allegations of indecent programming. In order for a complaint to be considered, our practice is that it must generally include: (1) a full or partial tape or transcript or significant excerpts of the program;²⁰ (2) the date and time of the broadcast; and (3) the call sign of the station involved. Any tapes or other documentation of the programming supplied by the complainant, of necessity, become part of the Commission's records and cannot be returned. Documented complaints should be directed to the FCC, Investigations and Hearings Division, Enforcement Bureau, 445 Twelfth Street, S.W., Washington, D.C. 20554.

25. If a complaint does not contain the supporting material described above, or if it indicates that a broadcast occurred during "safe harbor" hours or the material cited does not fall within the subject matter scope of our indecency definition, it is usually dismissed by a letter to the complainant advising of the deficiency. In many of these cases, the station may not be aware that a complaint has been filed.

26. If, however, the staff determines that a documented complaint meets the subject matter requirements of the indecency definition and the material complained of was aired outside "safe harbor" hours, then the broadcast at issue is evaluated for patent offensiveness. Where the staff determines that the broadcast is not patently offensive, the complaint will be denied. If, however, the staff determines that further enforcement action might be warranted,²¹ the Enforcement Bureau, in conjunction with other Commission offices, examines the material and decides upon an appropriate disposition, which might include any of the following: (1) denial of the complaint by staff letter based upon a finding that the material, in context, is not patently offensive and therefore not indecent; (2) issuance of a Letter of Inquiry (LOI) to the licensee seeking further information concerning or an explanation of the circumstances surrounding the broadcast; (3) issuance of a Notice of Apparent Liability (NAL) for monetary forfeiture; and (4) formal referral of the case to the full Commission for its consideration and action.²² Generally, the

²⁰ See *Citicasters Co., licensee of Station KSJO(FM), San Jose, California*, 15 FCC Rcd 19095 (EB 2000) (forfeiture paid) ("While the complainant did not provide us with an exact transcript of the broadcast, we find that she has provided us with sufficient context to make the determination that the broadcast was indecent.").

²¹ In *Act IV*, the court rejected a facial challenge to the Commission's procedures for imposing forfeitures for the broadcast of indecent materials. *Action for Children's Television v. FCC*, 59 F.3d 1249 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 773 (1996) ("*Act IV*").

²² This section discusses the typical process. The Commission also has authority to send forfeiture cases to a hearing, in which case the procedures discussed here differ. See 47 U.S.C. § 503(b)(3). See also 47 U.S.C. § 312(b) (revocation hearing for violation of 18 U.S.C. § 1464).

last of these alternatives is taken in cases where issues beyond straightforward indecency violations may be involved or where the potential sanction for the indecent programming exceeds the Bureau's delegated forfeiture authority of \$25,000 (47 C.F.R. § 0.311).

27. Where an LOI is issued, the licensee's comments are generally sought concerning the allegedly indecent broadcast to assist in determining whether the material is actionable and whether a sanction is warranted. If it is determined that no further action is warranted, the licensee and the complainant will be so advised. Where a *preliminary* determination is made that the material was aired and was indecent, an NAL is issued. If the Commission previously determined that the broadcast of the same material was indecent, the subsequent broadcast constitutes egregious misconduct and a higher forfeiture amount is warranted. *KGB, Inc. (KGB-FM)*, 13 FCC Rcd 16396 (1998) (“higher degree of culpability for the subsequent broadcast of material previously determined by the Commission to be indecent”).

28. The licensee is afforded an opportunity to respond to the NAL, a step which is required by statute. 47 U.S.C. § 503(b). Once the Commission or its staff has considered any response by the licensee, it may order payment of a monetary penalty by issuing a Forfeiture Order. Alternatively, if the preliminary finding of violation in the NAL is successfully rebutted by the licensee, the NAL may be rescinded. If a Forfeiture Order is issued, the monetary penalty assessed may either be the same as specified in the NAL or it may be a lesser amount if the licensee has demonstrated that mitigating factors warrant a reduction in forfeiture.

29. A Forfeiture Order may be appealed by the licensee through the administrative process under several different provisions of the Commission's rules. The licensee also has the legal right to refuse to pay the fine. In such a case, the Commission may refer the matter to the U.S. Department of Justice, which can initiate a trial *de novo* in a U.S. District Court. The trial court may start anew to evaluate the allegations of indecency.

V. CONCLUSION

30. The Commission issues this Policy Statement to provide guidance to broadcast licensees regarding compliance with the Commission's indecency regulations.²³ By summarizing the regulations and explaining the Commission's analytical approach to reviewing allegedly indecent material, the Commission provides a framework by which broadcast licensees can assess the legality of airing potentially indecent material. Numerous examples are provided in this document in an effort to assist broadcast licensees. However, this document is not intended to be an all-inclusive summary of every indecency finding issued by the Commission and it should not be relied upon as such. There are many additional cases that could have been cited. Further, as discussed above, the excerpts from broadcasts quoted in this document are

²³ This Policy Statement addresses the February 22, 1994, Agreement for Settlement and Dismissal with Prejudice between the United States of America, by and through the Department of Justice and Federal Communications Commission, and Evergreen Media Corporation of Chicago, AM, Licensee of Radio Station WLUP(AM). Specifically, in paragraph 2(b) of the settlement agreement, the Commission agreed to “publish industry guidance relating to its caselaw interpreting 18 U.S.C. § 1464 and the FCC's enforcement policies with respect to broadcast indecency.” *United States v. Evergreen Media Corp.*, Civ. No. 92 C 5600 (N.D. Ill., E. Div. 1994). The settlement agreement also provides that the forfeiture order imposed in *Evergreen Media Corporation of Chicago AM WLUP(AM)*, 6 FCC Rcd 502 (MMB 1991), is null and void and expunged from the record. It further specifies that the Notice of Apparent Liability issued to WLUP on February 25, 1993, *Evergreen Media Corporation of Chicago AM (WLUP(AM))*, 8 FCC Rcd 1266 (1993), became null and void and expunged from the record six months from the date of the agreement. Accordingly, those decisions are officially vacated.

intended only as a research tool. A complete understanding of the material, and the Commission's analysis thereof, requires review of the tapes or transcripts and the Commission's rulings thereon.

VI. ORDERING CLAUSE

31. Accordingly, it is ORDERED that this Policy Statement is ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

Separate Statement of Commissioner Susan Ness***In Re: Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. 1464 and Enforcement Policies Regarding Broadcast Indecency***

Our enforcement of the broadcast indecency statute compels the FCC to reconcile two competing fundamental obligations: (1) to ensure that the airwaves are free of indecent programming material during prescribed hours when children are most likely to be in the audience; and (2) to respect the First Amendment rights of broadcasters regarding program content.

Understandably, the public is outraged by the increasingly coarse content aired on radio and television at all hours of the day, including times when children are likely to be listening or watching. The flood of letters and e-mails we receive reflect a high degree of anger. As a parent, I share the public's frustration. Many parents feel that they cannot enjoy watching daytime or primetime television with their children for fear that their youngsters will be exposed to indecent material – content that just a few years ago would have been unimaginable on broadcast television.

Despite an onslaught of on-air smut, the Commission necessarily walks a delicate line when addressing content issues, and must be careful not to tread on the First Amendment -- the constitutional bulwark of our free society. Even words that might be construed as indecent are subject to some constitutional protection against government regulation.¹

That said, the Supreme Court has seen fit, despite declining broadcast audience shares, to reaffirm the FCC's broadcast indecency enforcement role, given the "pervasive" and "invasive" characteristics of the free over the air broadcast medium.² Our Policy Statement on indecency reconciles our statutory mandate and constitutional obligation by providing helpful guidance to broadcasters and the public alike. The guidance we offer – a restatement of existing statutory, regulatory, and judicial law – establishes a measure of clarity in an inherently subjective area.

Recommended Procedural Improvements

We should strive to make our complaint procedures as user-friendly as possible.³ I believe that our complaint process could be improved if, prior to acting on an indecency complaint, the Commission routinely forwarded the complaint to the licensee in question. The Policy Statement concedes that in "many [indecency] cases, the station may not be aware that a complaint has been filed."⁴ Moreover, many consumers feel that the Commission mechanically dismisses their

¹ *FCC v. Pacifica Foundation*, 438 U.S. 726, 746 (1978) (while offensive words might "ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment), *cf. id.* at 745 ("obscenity may be wholly prohibited").

² See, *Reno v. ACLU*, 521 U.S. 844, 868 (1997).

³ The Policy Statement is careful to point out that complaints need not be letter perfect, *see, e.g.*, n. 20 (citing Bureau decision that an inexact transcript may be sufficient to meet procedural requirements).

⁴ Policy Statement at para. 24.

complaints. I do not believe that broadcasters' First Amendment rights would be threatened if we were to send broadcasters a courtesy copy of complaints filed with the FCC. Indeed, most broadcasters *want* to be made aware of audience complaints. And consumers would be reassured that their views were being treated seriously.

Broadcasters Are Part of a National Community

Release of this Policy Statement alone will not solve the festering problem of indecency on the airwaves. However, it is entirely within the power of broadcasters to address it -- and to do so *without government intrusion*. It is not a violation of the First Amendment for broadcasters on their own to take responsibility for the programming they air, and to exercise that power in a manner that celebrates rather than debases humankind.

It is time for broadcasters to consider reinstating a voluntary code of conduct. I encourage broadcasters, the Bush Administration, and Congress swiftly to resolve any antitrust impediments to such action and move ahead.

We all are part of a National Community. As stewards of the airwaves, broadcasters play a vital leadership role in setting the cultural tone of our society. They can choose to raise the standard or to lower it. I hope that broadcasters will rise to the occasion by reaffirming the unique role of broadcasting as a family friendly medium. The public deserves no less.

Separate Statement of Commissioner Harold W. Furchtgott-Roth**In the Matter of Guidance on the Commission's Case Law Interpreting
18 U.S.C. Section 1464 and Enforcement Policies Regarding Broadcast Indecency**

The Commission is obliged, under a settlement agreement, to issue guidance on its broadcast indecency policies. As the courts have noted, there is a certain "vagueness inherent in [this] subject matter."¹ I find that the policy statement establishes necessary boundaries for this elusive and highly subjective area of the law.

I must note, however, that Commission action to enforce the indecency guidelines would set the stage for a new constitutional challenge regarding our authority to regulate content. To be sure, *Red Lion v. FCC*² and its progeny, *FCC v. Pacifica*,³ have not yet been overruled. Nevertheless, their continuing validity is highly doubtful from both an empirical and jurisprudential point of view.⁴

If rules regulating broadcast content were ever a justifiable infringement of speech, it was because of the relative dominance of that medium in the communications marketplace of the past.⁵ As the Commission has long recognized, the facts underlying this justification are no longer true.⁶ Today, the video marketplace is rife with an abundance of programming,⁷ distributed by several

¹*Action for Children's Television v. FCC*, 852 F.2d 1332, 1338 (1998) (internal quotation and citation omitted).

²395 U.S. 367 (1969).

³438 U.S. 726 (1978).

⁴Since *Pacifica*, the Courts have repeatedly struck down indecency regulations and other content-based restrictions. See, e.g., *United States v. Playboy Entertainment Group, Inc.*, 120 S.Ct. 1878 (2000) (striking down statutory adult cable channel scrambling requirements); *Greater New Orleans Broadcasting Ass'n v. U.S.*, 527 U.S. 173 (1999) (striking down the statutory and regulatory bans on casino advertising for broadcast stations); *Reno v. ACLU*, 117 S.Ct. 2329 (1997) (striking down statutory internet indecency requirements); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (striking down certain statutory indecency requirements for commercial leased access and public access channels on cable television systems); and *Sable Communications v. FCC*, 492 U.S. 115 (1989) (striking down a ban on indecent telephone messages). See also, *Time Warner Entertainment Co. v. FCC*, ___ F.3d. ___ (D.C. Cir. 2001) (striking down FCC cable ownership cap and channel occupancy limits); and *Charter Communications v. County of Santa Cruz*, ___ F.Supp. ___ (N.D. Cal. 2001) (striking down local cable franchise transfer requirements).

⁵See, e.g., *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940) (ownership rules justified by "a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination"); see also *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (justifying, at that point in history, a "less rigorous standard of First Amendment scrutiny" on the basis of "spectrum scarcity").

⁶See 1985 *Fairness Report*, 102 FCC 2d 145, 198-221 (1985); *Syracuse Peace Council*, 2 FCC Rcd 5043, 5053 (1985).

⁷There are well over two hundred channels of video programming developed by the cable and broadcast industries. In addition, hyper-localized programming, produced by public, educational and governmental entities, is now available on cable systems throughout the United States. Also, dozens of pay-per-view (continued....)

types of content providers.⁸ A competitive radio marketplace is evolving as well, with dynamic new outlets for speech on the horizon.⁹ Because of these market transformations, the ability of the broadcast industry to corral content and control information flow has greatly diminished.¹⁰ In my judgment, as alternative sources of programming and distribution increase, broadcast content restrictions must be eliminated.

(Continued from previous page) _____
programming options exist for cable and satellite subscribers. Finally, internet users have access to tens of thousands of audio programming sources and streaming video technology will soon advance to the point that broadcast quality television will be available to anyone connected to the world wide web.

⁸Cable operators, cable overbuilders, OVS operators, internet service providers, wireless video systems, SMATV, common carriers, and satellite carriers are just some of the possible outlets for distributing video content. The promise of multiplexed digital television signals, available to everyone over-the-air, adds even more video programming choices for the American public.

⁹Satellite radio will debut soon and digital audio broadcasting holds out much promise for the future of terrestrial radio transmission. Both types of services will offer listeners more channels of programming at higher quality levels than is available today. Moreover, hundreds of radio stations are currently streaming content over the internet, with thousands of more to follow.

¹⁰See Joint Statement of Commissioners Powell and Furchtgott-Roth, *In re Personal Attack and Political Editorial Rules*, FCC Gen. Docket No. 83-484, at 5 and n. 15 (citing statistics on boom in communications outlets).

For these reasons, I believe that the lenient constitutional standard for reviewing broadcast speech, formally announced in *Red Lion*, rests on a shaky empirical foundation.¹¹ Technology, especially digital communications, has advanced to the point where broadcast deregulation is not only warranted, but long overdue. In my view, the bases for challenging broadcast indecency has been well laid, and the issue is ripe for court review.¹²

I must note my amazement that it has taken over seven years for the Commission to fulfill its obligation to issue this item. While broadcast indecency is a delicate issue to discuss, it has not benefited the industry or the Commission to ignore the matter. I commend the Chairman for taking the initiative to move this item. Norm Goldstein and others staff members deserve special credit for crafting a document that makes the best of a difficult situation for the Commission.

With these observations in mind, I vote to adopt this policy statement.

¹¹It is ironic that streaming video or audio content from a television or radio station would likely receive more constitutional protection, *see Reno*, than would the same exact content broadcast over-the-air. A more interesting First Amendment question will soon arise when digital television stations begin offering subscription services over-the-air. Will intermediate scrutiny apply because the pay service is akin to cable television or will a lesser standard apply because it is available over-the-air? The same inquiries attach to radio signals delivered to listeners on a subscription basis via satellite.

¹²Dissenting Statement of Commissioner Harold W. Furchtgott-Roth, *In the Matter of 1998 Biennial Regulatory Review: Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Communications Act* (rel. June 20, 2000).

Dissenting Statement of Commissioner Gloria Tristani

IN THE MATTER OF INDUSTRY GUIDANCE ON THE COMMISSION'S CASE LAW INTERPRETING
18 U.S.C. §1464 AND ENFORCEMENT POLICIES REGARDING BROADCAST INDECENCY, EB
FILE NO. 00-IH-0089

I dissent from the issuance of this "Policy Statement" (hereinafter "Statement") for three reasons. First, the Statement creates a false impression that it satisfies an obligation assumed by the Commission in 1994. Second, the Statement perpetuates the myth that broadcast indecency standards are too vague and compliance so difficult that a Policy Statement is necessary to provide further guidance. Most importantly, this Statement diverts this Agency's attention and resources away from the ongoing problem of lax enforcement, which is a pressing concern of America's citizens.

The Statement notes that on February 22, 1994 the Commission entered into a Settlement Agreement with Evergreen Media Corporation (hereinafter "Agreement").¹ At fn 23 the Statement cites the terms of the Agreement as the source of our obligation to produce this Statement:

Specifically, in paragraph 2(b) of the settlement agreement, the Commission agreed to "publish industry guidance relating to its caselaw interpreting 18 U.S.C. § 1464 and the FCC's enforcement policies with respect to broadcast indecency."²

The Agreement actually imposed a significantly more restricted obligation.

*Within nine months of the date of this Agreement, the FCC shall publish industry guidance relating to its caselaw interpreting 18 U.S.C. § 1464 and the FCC's enforcement policies with respect to broadcast indecency.*³

Six and one half years later, it is clear the FCC did not observe the terms of the Agreement. While I cannot support the FCC's failure to comply with the timeline set forth in the original Agreement, the record does not disclose a single effort by Evergreen to seek specific performance under the Agreement. It is well settled that "equity aids the vigilant, not those who slumber on their rights," and doctrines such as laches are designed to promote diligence and prevent enforcement of stale claims.⁴ The public interest is not served by permitting Evergreen to sit silently on the sidelines while Commission after Commission failed to act. Even if the FCC shirked its duty under the Agreement, as long as Evergreen retained the benefit of dismissal of indecency cases against it as set out in the Agreement, a strong case exists that Evergreen ratified this agency's inaction for

¹ See *United States v. Evergreen Media Corp.*, Civ. No. 92 C 5600 (N.D. Ill., E. Div. 1994).

² See *Policy Statement* at p. 17-18, n.23.

³ See *Settlement Agreement* at p. 3.

⁴ See e.g. *Powell v. Zuckert*, 366 F.2d 634, 636 (D.C.Cir.1966).

almost 7 years.⁵ If Evergreen Media Corporation had an enforceable interest in the Agreement, it has long since been waived.

Moreover, the obligation to issue the Statement was subject to several conditions precedent that bound Evergreen Media.⁶ The Statement itself does not disclose whether Evergreen complied with its obligations, and with the exception of noting payment of \$10,000 forfeiture, the record on file at the Commission is silent on the same point. FCC Mass Media Bureau records disclose that Evergreen Media no longer owns the license to which the Agreement's terms attached. Finally, the Agreement does not bind the Commission to provide to Evergreen's assigns the relief set forth in the Agreement.⁷ In the absence of the party executing the Agreement, and no successor to accede to those interests, it appears there is no extant legal duty or enforceable right upon which the issuance of the Statement can be based.

I turn next to the underpinnings of the need for this statement. The Statement provides:

The Commission issues this Policy Statement to provide guidance to the broadcast industry regarding our case law interpreting 18 U.S.C. § 1464 and our enforcement policies with respect to broadcast indecency.⁸

First, settlement of a case involving a single licensee should not compel the FCC to adopt our most significant industry-wide Policy Statement on this subject, particularly when doing so does not serve the public interest. Second, there is nothing in the record demonstrating that Evergreen Media failed to understand the FCC's, or the U.S. Supreme Court's, cases on broadcast indecency. In fact Evergreen agreed to issue to its employees a "policy statement" that was to be based upon "the FCC's definition of broadcast indecency."⁹ It is difficult to understand how Evergreen could both issue a policy statement containing the FCC's definition of indecency to its employees *and* simultaneously be unable to understand the FCC's definition. But leaving that quirk aside, there is simply no proof that broadcast licensees are in need of this Policy Statement. No factual basis exists for concluding that confusion about the standards or overreaching enforcement by the FCC requires this Statement.

Moreover, I am aware of no rush of inquiries by broadcast licensees seeking to learn whether their programs comply with our indecency caselaw. In the absence of such

⁵ See e.g., *Buffum v. Peter Barceloux Co.*, 289 U.S. 227, 234 (1933).

⁶ The Agreement provides the parties exchanged "consideration and mutual promises hereinafter stated." See *Settlement Agreement* at p. 2. The Agreement describes, at Para. 3, several actions to be undertaken by Evergreen. The Agreement is a form of an executory contract the terms of which require timely satisfaction to constitute compliance. Failure by either party to perform would make the Agreement voidable or unenforceable.

⁷ See *Settlement Agreement* at p. 4.

⁸ See *Statement* at p.1.

⁹ See *Settlement Agreement*, at p. 3.

requests, this Policy Statement will likely become instead a “how-to” manual for those licensees who wish to tread the line drawn by our cases. It likely may lead to responses to future enforcement actions that cite the Statement as establishing false safe harbors. In the absence of proof that the Statement addresses concerns supported by the FCC’s history of enforcement, or the record of the Evergreen case, the Statement is nothing more than a remedy in search of a problem. It would better serve the public if the FCC got serious about enforcing the broadcast indecency standards. For these reasons, I dissent.