DUPLICATE

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	File No. EB-01-IH-0633
Infinity Broadcasting Operations, Inc.	)	NAL/Acct. No. 200432080013
	)	FRN 0003476074
Licensee of Station WKRK-FM	)	Facility ID # 9618
Detroit, Michigan	)	

To: The Commission

INFINITY BROADCASTING EAST INC.

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SUMMARY

As the Supreme Court's decision in *Reno v. ACLU* makes clear, the Commission's indecency standard is unconstitutionally vague and overbroad. Furthermore, as Infinity has previously argued, that standard is premised on the unproven presumption that indecent program material harms children. These constitutional infirmities fundamentally infect the Commission's indecency enforcement scheme, and by themselves require that the NAL be cancelled. But even if that enforcement scheme could somehow be deemed compliant with the First Amendment, it certainly cannot withstand constitutional scrutiny in the wake of the Commission's sweeping changes in substantive review and procedural approach over the past year.

Abruptly and without adequate justification, the Commission has issued a series of decisions acting on indecency complaints that, when viewed collectively, amount to a sweeping repudiation of the Commission's judicially-mandated obligation to regulate speech in a restrained and cautious manner. The Commission's new and undefined "serious violations" and "multiple utterances" standards, the establishment of an undefined category of *per se* indecent speech and the addition of profanity regulation, the muddling of the "contemporary community standard" element of the indecency definition, the rejection of significant FCC precedent, and the abandonment of procedural protections requiring complainants to provide a threshold showing regarding what was broadcast all undermine the constitutionality of the Commission's overall enforcement scheme. This new unrestrained approach to enforcement leaves broadcasters without adequate guidance on what the indecency standard is, or how it might be applied in a given circumstance. The inevitable result is a broad, unconstitutional, chill on speech in the broadcast media. For this reason, the new enforcement scheme must be abandoned, and all present enforcement actions based on this patently unconstitutional scheme, including the instant NAL, must be rescinded.

In any event, the broadcast cited in the NAL is not indecent under the Commission's indecency standard. The subject broadcast does not describe sexual or excretory activities or organs, as required, but rather consists largely of material that is mere innuendo or double entendre. The Commission also fails to address Infinity's arguments that the type of non-descriptive sexual discussion at issue is entirely consistent with contemporary community standards for the broadcast medium, and thus not patently offensive.

Finally, assuming that a forfeiture would be appropriate based on the material addressed in the NAL, the Commission's upward adjustment of the forfeiture amount to the statutory maximum is inadequately explained and wholly unjustified on the basis of the factual record.

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To: The Commission

RESPONSE TO NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Infinity Broadcasting East Inc. ("Infinity"),[1] licensee of Station WKRK-FM, Detroit, Michigan ("WKRK" or "Station"), hereby responds to the Notice of Apparent Liability for Forfeiture, FCC 04-49, released on March 18, 2004 by the Commission in the above-captioned matter ("NAL"). The NAL ordered Infinity, within thirty days of the NAL's release, either to pay $27,500 for allegedly broadcasting indecent language in violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999, or file a written statement seeking reduction or cancellation of the proposed forfeiture.[2] For the reasons set forth below, Infinity respectfully requests that the proposed forfeiture be cancelled.

The Commission regulates indecent speech using an indecency definition acknowledged by the U.S. Court of Appeals to be inherently vague. *See Action for Children's Television v. FCC,* 852 F.2d 1332, 1344 (1988) ("*ACT I*"). Infinity believes that *Reno v. ACLU,*

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[1] Infinity Broadcasting East Inc. is the successor to Infinity Broadcasting Operations Inc., which was the licensee of WKRK-FM at the time that the initial Inquiry Letter was issued.

[2] A copy of the NAL is attached hereto as Attachment A.

521 U.S. 844 (1997) ("*Reno*"), decided subsequent to both the Supreme Court decision in *Pacifica Foundation v. FCC*, 438 U.S. 726 (1978) ("*Pacifica*") and the *ACT I-IV* cases,[3] makes clear that the Commission's basic indecency standard is facially unconstitutional and that the subject forfeiture must be cancelled in light of the standard's vagueness and overbreadth. Furthermore, the lack of evidence demonstrating harm to children from indecent broadcasts vitiates the indecency standard, particularly given another Supreme Court decision, *Ashcroft v. Free Speech Coalition,* 535 U.S. 234 (2002) ("*Ashcroft*"), discussed *infra.*

But regardless of whether the indecency enforcement scheme narrowly upheld in *Pacifica* and in the *ACT* cases remains viable following *Reno*, it most certainly cannot withstand challenge on First Amendment grounds in the wake of the Commission's sweeping changes in substantive review and procedural approach over the past year. Infinity believes that the Commission's new and undefined "serious" violations standard, the new treatment of a single program as a source of multiple violations, the determination that certain words will be deemed indecent regardless of context, the announcement that profane speech will be punished in addition to indecent speech, the undecipherable and inconsistent rejection of significant Commission precedent, the muddling of the "contemporary community standard" element of the indecency definition, and the abandonment of procedural protections requiring complainants to provide a threshold showing regarding what was broadcast, all significantly exacerbate pre-existing constitutional infirmities. Individually, each one of these changes would cast substantial doubt on whether the Commission was being faithful to its stated goal of cautious enforcement

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[3] *See ACT I*, 852 F.2d 1332; *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 914 (1992) ("*ACT II*"); *Action for Children's Television v. FCC*, 58 F. 3d 654 (D.C. Cir. 1995) (en banc), *cert denied, sub nom. Pacifica Found. v. FCC*, 516 U.S. 1043 (1996) ("*ACT III*"); *Action for Children's Television v. FCC*, 59 F.3d 1249 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1072 ("*ACT IV*").

consistent with constitutional limits. Taken together, these changes obliterate any basis for believing that the Commission is acting with the restraint required by the First Amendment. The specter of revocation and multiple forfeitures in an environment where past Commission rulings and historical procedural protections suddenly can no longer be relied upon are already having a substantial chilling effect on the constitutionally protected speech of broadcasters in general. For the many reasons set forth below, the new enforcement scheme must be abandoned, and all present enforcement actions based on this patently unconstitutional scheme, including the instant NAL, must be rescinded.

I. The Commission's Indecency Standard is Vague and Overbroad, and Its Claimed Correlation To Preventing Harm to Children Has Never Been Properly Justified.

In the NAL, the Commission summarily rejects Infinity's constitutional challenge based on the Supreme Court's decision in *Reno*, which struck down as unconstitutional a virtually identical standard applied in the context of the Internet. For support, the Commission simply recites its decision last year rejecting a similar constitutional challenge, effectively bootstrapping itself to a conclusion as inappropriate as its prior holding. *See* NAL at 3 n.15 (citing *Infinity Broadcasting Operations, Inc. (WKRK-FM)*, 18 FCC Rcd 26360 (2003), *recon. denied.*, Memorandum Opinion and Order, FCC 04-34 (released March 5, 2004)) ("*WKRK-FM*"). The Commission offers no elaboration supporting its conclusion that the holding in *Reno* is inapposite to the virtually identical indecency definition applied in the NAL, and addresses neither Infinity's consistent claim that *Reno* cannot be construed to provide affirmative support for the broadcast indecency definition nor its compelling evidence that the "special justifications" for heightened regulation of broadcasters no longer justify affording broadcasters a reduced level of constitutional protection. *Reno* and industry developments over the last 25

years undermine the constitutional validity of the Commission's broadcast indecency definition, for the reasons set forth below.

A. To The Limited Extent That Courts Have Upheld The FCC's Indecency Standard, These Rulings Have Been Narrowly Written, And Emphatically And Unequivocally Premised On A Restrained Enforcement Approach.

The principal constitutional underpinning for the Commission's indecency enforcement regime begins with the Supreme Court's landmark decision in *Pacifica*, where the Court narrowly upheld the Commission's finding that a mid-day radio broadcast of George Carlin's "Filthy Words" monologue was "indecent as broadcast." *Pacifica*, 438 U.S. at 735. As courts applying that decision have subsequently emphasized, however, the holding in that case was an emphatically narrow one, addressing the question "whether the Federal Communications Commission has *any* power to regulate a radio broadcast that is indecent but not obscene." *Id.* at 729; *ACT I* at 1335 & 1336 (emphasis added).

Critical to the plurality in *Pacifica* was Justice Powell's opinion, joined by Justice Blackmun, concluding that Commission indecency enforcement would not unconstitutionally chill protected speech because the Commission could be expected to proceed in this delicate area of speech regulation only with appropriate caution and restraint. *See Pacifica*, 438 U.S. at 761 n.4 ("[S]ince the Commission *may be expected to proceed cautiously*, as it has in the past, I do not foresee an undue 'chilling' effect on broadcasters' exercise of their rights.") (Powell, J., concurring) (emphasis added; citation omitted). Nearly a decade later, future Supreme Court Justice Ruth Bader Ginsburg similarly relied in *ACT I* on direct assurances from the FCC that it would proceed with restraint. *ACT I* at 1340 n.14 ("[T]he FCC has assured this court, at oral argument, that it will *continue to give weight to reasonable licensee judgments* when deciding whether to impose sanctions in a particular case. Thus, the potential chilling

effect of the FCC's generic definition of indecency will be tempered by *the Commission's restrained enforcement policy*.") (emphasis added; citation omitted). Such deference to reasonable licensee judgment and restraint is necessary because of the inherent tension between the Commission's obligation to enforce 18 U.S.C. § 1464 while remaining faithful to the First Amendment and Section 326 of the Act.[4]

Although the Commission routinely states, as part of its boilerplate discussion of its Constitutional obligations in making indecency determinations, that it is proceeding "cautiously and with appropriate restraint" (*see* NAL at 3 (¶ 6)), its decisions increasingly and dramatically stray from such an approach, and amount to mere lip service, rather than fidelity, to the constraints imposed by the First Amendment. This is especially significant because judicial tolerance for the rather anomalous legal doctrine of relying largely on restrained enforcement to protect essential free speech values has eroded substantially since *Pacifica* and the *ACT* cases were decided. More recent cases have subjected the indecency rationale to less forgiving constitutional review, and confirmed that "indecent" speech is fully protected by the First Amendment.[5]

Beyond *Pacifica*, it is well-settled Supreme Court precedent that the First Amendment requires precision when a statute regulates the content of speech. *See, e.g., Reno*, 521 U.S. at 874 (finding that the Communications Decency Act's definition of indecency lacked the requisite precision to survive constitutional analysis). Imprecision leaves a regulated party in

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[4] The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The language of 47 U.S.C. § 326 is set forth at p.16 *supra*.

[5] Indeed, in contrast to the three Justices who suggested in a *Pacifica* plurality opinion that indecent speech was of "low value" and subject to lesser First Amendment scrutiny, more recent decisions have held that the government is not granted greater latitude to regulate based on an assumption that some "speech is not very important" or is "shabby, offensive, or even ugly." *United States v. Playboy Entmt. Group, Inc.*, 529 U.S. 803, 826 (2000) ("*Playboy*")

the dark as to whether or not its conduct will ultimately be held to be constitutionally protected. *See Kolender v. Lawson*, 461 U.S. 352, 358 (1983) ("*Kolender*") (observing that where law-making bodies fail to provide "minimal guidelines" governing a statute, that statute may permit a "standardless sweep" that allows those in power to enforce those laws "to pursue their personal predilections") (internal quotation marks omitted). *See also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) ("[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech..., a more stringent vagueness test should apply.") (citations omitted). In other words, at a minimum, when the FCC changes course, fundamental constitutional precedent mandates that broadcasters be given an adequately marked road map to compliance. The FCC has failed to do so.

B. Like The Internet Indecency Standard Struck Down By *Reno*, The Commission's Virtually Identical Indecency Standard Is Unconstitutional On Its Face.

The United States Court of Appeals for the District of Columbia Circuit in *ACT I* narrowly upheld the Commission's generic indecency definition, but only after acknowledging both that "the [Supreme] Court [in *Pacifica*] did not address, specifically, whether the FCC's definition was on its face unconstitutionally vague," 852 F.2d at 1338 (footnote omitted), and that "vagueness is inherent" in the definition. *Id.* at 1344. In ultimately finding that the plurality opinion in *Pacifica* implicitly rejected a vagueness challenge, the Court noted that "if acceptance of the FCC's generic definition of 'indecent' as capable of surviving a vagueness challenge is not implicit in *Pacifica*, we have misunderstood Higher Authority and *welcome* correction." *Id.* at 1339 (emphasis added).

While the inherently vague indecency definition has not yet been the subject of specific "correction" by the Supreme Court in the context of broadcast indecency regulation, the Supreme Court has invalidated government-imposed indecency restrictions on cable television access channels despite finding that they are "as 'accessible to children' as over-the-air broadcasting, if not more so."[6] Additionally, in *Reno*, the Court for the first time subjected the indecency definition (in the Internet context) to rigorous scrutiny and found it to be significantly overbroad. 521 U.S. at 871-881. These decisions address the core of the indecency standard, thus extending their significance beyond the broadcast-specific context. The factual underpinnings of *Pacifica* have been outmoded by significant changes as well, including the rise of cable television and the Internet as equally pervasive electronic media.

The Commission's indecency definition is as facially unconstitutional as the definition at issue in *Reno*, which was contained in the Communications Decency Act ("CDA"), Congress' attempt to regulate "indecent" material available on the Internet. The only difference between the definitions – the words "for the broadcast medium" in the FCC's definition – does nothing to cure the constitutional deficiencies noted by the Supreme Court in *Reno*.[7] Both standards are vague, which has an "obvious chilling effect on free speech," especially because

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[6] *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 717, 744 (1996) ("*Denver Area*"). The Court upheld a provision that permitted cable operators to adopt editorial policies for leased access channels, but rejected government-imposed restrictions on indecent programs on leased and public access channels.

[7] Indecency as defined in the legislation reviewed by the *Reno* Court consists of material that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." *Reno*, 521 U.S. at 871 (quoting Section 223(d) of the CDA). The only difference in the broadcast indecency standard is the inclusion of the words "for the broadcast medium" after the word "standards."

both involve criminal statutes. *Reno*, 521 U.S. at 872.[8] And unlike the test for obscenity established in *Miller v. California,* 413 U.S. 15 (1973) ("*Miller*"), neither the CDA nor the Commission's indecency definition allows for serious merit as an absolute defense.[9] Moreover, neither the CDA nor the indecency definition gives the term "patently offensive" constitutional boundaries by referencing relevant state law. *Reno,* 521 U.S. at 873. Consequently, "the 'community standards' criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message." *Id.* at 877-78. Likewise, the Commission's definition lacks such state law underpinning. The Commission instead applies what it deems to be a "one size fits all" national standard, which on its face ignores the standards of the locality in which the broadcast material in question was aired. Additionally, the CDA prohibition, like the Commission's indecency definition, extends beyond "sexual conduct" to encompass "(1) 'excretory activities' as well as (2) 'organs' of both a sexual and excretory nature." *Id.* at 873.

As noted above, the Commission has previously rejected attacks on the constitutionality of its generic indecency standard in light of the *Reno* decision, claiming that the

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[8] The fact that the Commission is here attempting to impose an administrative forfeiture does not change the fact that the underlying statute being interpreted is criminal in nature.

[9] As the *Reno* Court stated at 873-74: "Just because a definition including three limitations is not vague, it does not follow that one of those limitations, standing by itself, is not vague. Each of *Miller's* additional two prongs – (1) that, taken as a whole, the material appeals to the 'prurient' interest, and (2) that it 'lac[k] serious literary, artistic, political, or scientific value' – critically limits the uncertain sweep of the obscenity definition. The second requirement is particularly important because, unlike the 'patently offensive' and 'prurient interest' criteria, it is not judged by contemporary community standards. This 'societal value' requirement, absent in the CDA, allows appellate courts to impose some limitations and regularity on the definition by setting, as a matter of law, a national floor for socially redeeming value. The Government's contention that courts will be able to give such legal limitations to the CDA's standards is belied by *Miller's* own rationale for having juries determine whether material is 'patently offensive' according to community standards: that such questions are essentially ones of *fact*." *Id.* (emphasis and alteration in original, citation omitted).

Reno Court "indicated that our broadcast indecency regulations were justified" because of the "significant differences" between the Internet and broadcast medium and their respective indecency standards. *See WQAM License Limited Partnership (WQAM(AM))*, 15 FCC Rcd 2518, *aff'd* 15 FCC Rcd 13549 (2000) ("*WQAM*"); *see also Infinity Broadcasting Corporation of Los Angeles (KROQ-FM)*, 17 FCC Rcd 9892 (2002) ("*KROQ*"). *Reno*, however, contains no such approval – either explicit or implicit – of the Commission's indecency definition. The Court there merely noted that the reasoning of *Pacifica* and two other cases "surely do[es] not require us to uphold the CDA." *Reno*, 521 U.S. at 868. The Court cautioned that *Pacifica* was an "emphatically narrow" case and had "expressly refused to decide whether the indecent broadcast 'would justify a criminal prosecution.'" *Id.* at 867, 870 (citation omitted).[10] The Court had no occasion to uphold or strike down the *Commission's* generic indecency standard in *Reno*.

Indeed, the *Reno* Court only addressed the broadcast indecency standard because the Government had cited *Pacifica* in support of Internet regulation, and the Court noted that *Pacifica* had cited "special justifications for regulation of the broadcast media that are not applicable to other speakers." *Reno*, 521 U.S. at 868 (listing the "special justifications" as including the scarcity of available frequencies *at the broadcast medium's inception*, the "invasive" nature of broadcasting, and the history of extensive Government regulation of the

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[10] The *Reno* Court also did not point to any material differences between the Commission's indecency definition and the constitutionally-impaired CDA definition. Nor could it, because, as noted, the only textual distinction between the two is that the Commission's definition includes the phrase "for the broadcast medium" after the words "measured by contemporary community standards." The legislative history of the CDA makes clear that Section 223(d) of the CDA was intended to codify the *Pacifica* definition of broadcast indecency. In light of *Pacifica*, Congress considered the indecency definition to have a "solid constitutional pedigree." H.R. Conf. Rep. No. 104-458 at 189 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 203. Obviously, the Supreme Court strongly disagreed. In other contexts, the Supreme Court has noted the diminished importance of *Pacifica* on grounds that it was merely a plurality opinion. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 n.6 (1992) (*Pacifica* "did not command a majority of the Court").

medium). While these "special justifications" – which are the "significant differences" cited by the Commission in *WQAM* – may arguably at one time have validated differing levels of First Amendment treatment, any distinctions to be drawn between the broadcast and Internet media today are constitutionally *de minimis*. Moreover, whatever their current force or relevance, these differences do not render the Commission's indecency definition any less vague than the CDA's unconstitutionally vague definition.

1. Spectrum Scarcity Has Never Been Used To Justify Limitations On Speech And, In Any Event, Is Irrelevant In Today's Varied Media Marketplace.

Reno cites "the scarcity of available frequencies at [broadcasting's] *inception*" as one of the "special justifications" that separates the regulation of broadcasting from that of the Internet. 521 U.S. at 868 (emphasis added). Broadcasting has historically been accorded a particularized level of constitutional scrutiny because of the so-called "scarcity doctrine" articulated almost thirty-five years ago in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) ("*Red Lion*"), the Supreme Court decision upholding the erstwhile "Fairness Doctrine." The Court there reasoned that "[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." 395 U.S. at 388.

Yet, the manner in which the scarcity doctrine was applied by the *Red Lion* Court makes clear that the doctrine only justifies regulations that *expand voices* (as with the Fairness Doctrine), and not with those that, as in the instant case, *contract* them. *See id.* at 390 ("Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium."). Justice Brennan

later explained the critical constitutional distinction between voice expansion and voice contraction when, in his dissent in *Pacifica*, he noted that the majority "rightly refrain from relying on the notion of 'spectrum scarcity' to support their result" when upholding sanctions against a station that had broadcast indecent language. 438 U.S. at 770 n.4 (Brennan, J., dissenting). Quoting the lower court decision in the proceeding, Justice Brennan observed that "although scarcity has justified *increasing* the diversity of speakers and speech, it has never been held to justify censorship." *Id., quoting* Bazelon, J. at 556 F.2d 9, 29 (D.C. Cir. 1977) (emphasis in original).

Furthermore, the Supreme Court made clear in *Red Lion* that its reliance on the scarcity doctrine was a product of circumstances and technology as they existed at that time. 395 U.S. at 388 (citing the scarcity of broadcast licenses "in the present state of commercially acceptable technology"). As early as 1973, one prescient member of the Court was ready to predict the scarcity doctrine's obsolescence. *See Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee,* 412 U.S. 94, 158 n.8 (1973) (Douglas, J., concurring) ("Scarcity may soon be a constraint of the past, thus obviating the concerns expressed in *Red Lion.*"). By 1984, the Court itself indicated in *FCC v. League of Women Voters of California* that it had begun to question the presumption of scarcity in light of "the advent of cable and satellite television technology," and the growing criticism of the scarcity doctrine. 468 U.S. 364, 376 n.11 (1984) ("*League of Women Voters*").

Accordingly, even if spectrum scarcity could once have been used to justify upholding Commission action restraining speech, that rationale has today lost relevance, given the tremendous increase in the number of alternative media sources that a speaker can access compared to the number available at broadcasting's "inception." *Reno*, 521 U.S. at 868.

Without question, the relative dominance that broadcasting once enjoyed over other forms of media (including a once nascent Internet) no longer exists, and can no longer be posited as support for a differing level of constitutional scrutiny. Certainly, the wide array of media outlets available to the typical American consumer in the intervening twenty years since *League of Women Voters*, and the thirty-five years since *Red Lion* – including new and previously unimaginable technologies such as satellite radio, direct broadcast satellite, and the Internet – lends considerable support to the increasing chorus of skepticism directed at the doctrine by academic commentators,[11] by the bench,[12] and within the Commission itself.[13]

2. Broadcasting Is No Longer A Uniquely Pervasive Medium.

In addition to its relative scarcity, the "invasive" nature of broadcasting was cited by the *Reno* Court as a second "special justification" distinguishing it from the Internet. 521 U.S. at 868. *Pacifica* is the leading case to espouse this theory, in which the Court upheld Commission sanctions against a station for broadcasting the so-called "seven dirty words" for two reasons: (1) the broadcast medium's "uniquely pervasive presence in the lives of all

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[11] *See, e.g.* Rodney M. Smolla, Free Air Time For Candidates and the First Amendment, at 5 (Media Institute 1998) ("Scarcity no longer exists. There are now many voices and they are all being heard, through broadcast stations, cable channels, satellite television, Internet sources such as the World Wide Web and e-mail, videocassette recorders, compact disks, faxes – through a booming, buzzing electronic bazaar of wide-open and uninhibited free expression.").

[12] *See, e.g., Tribune Co. v. FCC*, 133 F.3d 61, 69 (D.C. Cir. 1998) ("We are stuck with the scarcity doctrine until the day that the Supreme Court tells us that *Red Lion* no longer rules the broadcast jungle.").

[13] *Industry Guidance On the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999, 8021 (2001) ("*Industry Guidance*")(Separate Statement of Commissioner Harold W. Furchtgott-Roth) ("I believe that the lenient constitutional standard for reviewing broadcast speech, formally announced in *Red Lion*, rests on a shaky empirical foundation. Technology, especially digital communications, has advanced to the point where broadcast deregulation is not only warranted, but long overdue.") (footnote omitted).

Americans," and (2) its "unique[] accessib[ility] to children." 438 U.S. at 748-49. In *Sable Communications of California, Inc. v. FCC* ("*Sable*"), the Court expounded on this idea, distinguishing broadcasting from "dial-a-porn" telephone services, in part, because of the element of surprise the former has over the latter: "Unlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so *invasive* or *surprising* that it prevents an unwilling listener from avoiding exposure to it." 492 U.S. 115, 128 (1989) (emphasis added).

By any objective measure, broadcasting can no longer be deemed an invasive or uniquely pervasive medium – especially in light of the nearly ubiquitous role both cable television and the Internet play in the lives of millions of Americans. In *Denver Area*, Justice Breyer, in his plurality opinion, rejected an attempt to distinguish cable television as not pervasive: "Cable television broadcasting, including access channel broadcasting, is as accessible to children as over-the-air broadcasting, if not more so. Cable television systems, including access channels, have established a uniquely pervasive presence in the lives of all Americans." 518 U.S. at 744-45 (internal quotation marks and citations omitted). In *Playboy*, the Court made clear that cable television, pervasive or not, merited full First Amendment protection. 529 U.S. at 814. Given the ever widening reach of cable,[14] the protection afforded broadcasting must at the very least match that given cable television, and not lag behind on the basis of an outdated notion of unique pervasiveness. *See Denver Area* at 740 ("The history of this Court's First Amendment jurisprudence . . . is one of continual development, as the Constitution's general

[14] As of June 2003, cable television reaches approximately 97.0 percent of American households. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Tenth Annual Report, 31 C.R. 700 at Table 1 (2004).

command . . . has been applied to new circumstances requiring differing adaptations of prior principles and precedents.").[15]

The growth of the Internet has also radically revamped the legal landscape. Children in particular, who have grown up with the Internet, are as comfortable "surfing the Web" as their peers were only a generation ago when "grazing" channels on a television or stations on a radio. So at ease with the medium are members of the "Internet generation" that one study has shown, when forced to choose one medium over any other, children aged 8 to 18 are nearly *three times* as likely to choose computers (the most common means of accessing the Internet) over television. Victoria J. Rideout et al., *Kids & Media @ The New Millennium: A Comprehensive National Analysis of Children's Media Use*, Henry J. Kaiser Family Foundation, Executive Summary, at 34 (November 1999).[16] Although the *Reno* Court recognized the "extraordinary growth" of the Internet, 521 U.S. at 850, it could not reasonably have forecast the unprecedented popularity of the medium, even a few years later. The Internet's universal

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[15] Indeed, Chairman Powell, when he was a minority-party Commissioner, explicitly noted that the days of distinct First Amendment treatment for broadcasters must necessarily be numbered due to the technological evolution of video program delivery. ("Convergence may even change the United States Constitution. The growing convergence of technology will not allow us to continue to maintain two First Amendment standards, one for broadcasting and one for every other communications medium. The 'sameness' that convergence does produce and the exponential increase in capacity that digital allows is making it impossible to maintain that broadcasting is uniquely undeserving of full First Amendment protection. It is just fantastic to maintain that the First Amendment changes as you click through the channels on your television set."). *See* Michael K. Powell, Speech Before the 42nd Annual MSTV Membership Meeting, Las Vegas, Nevada, at 2 (April 6, 1998) (as prepared for delivery).

[16] One study has found that eight times as many Americans choose the Internet over network television for breaking financial news, and six times as many Americans choose the Internet over radio in such circumstances. Pew Research Center for the People & the Press, *Internet Sapping Broadcast News Audience* (June 2000), *available at* people-press.org/reports/print.php3?ReportID=36 (last visited April 14, 2004).

presence soundly refutes any antiquated distinction that singles out the broadcast medium as invasive or uniquely pervasive.

Indeed, children can, under certain circumstances, obtain indecent content more readily over the Internet than through the broadcast medium. First, blocking software intended to prevent children from accessing objectionable content has been shown to be notoriously unreliable from a technical standpoint, and the software may lead parents to allow their children to use the Internet without supervision.[17] Second, children have ready access to the Internet in venues outside the home where broadcasting is traditionally not available, such as in public libraries. Third, it is much easier for a child with access to the Internet and a modicum of computer savvy to find indecent material on the Internet. Such material is available in abundance on the Internet at any time of day or night. Broadcasting, particularly radio, is a dynamic medium, predicated on extemporaneous creativity and variety and offers nothing resembling the Internet's "indecency on demand."

The idea that a child using a radio might happen upon indecent material "by surprise" provides no basis to distinguish broadcasting from the Internet. *See Sable*, 492 U.S. at 128; *Reno*, 521 U.S. at 869. After all, while television and radio both include an aural component, the Internet is primarily a visual medium, which allows its content, including

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[17] *See, e.g.*, Christopher D. Hunter, *Internet Filter Effectiveness: Testing Over and Underinclusiveness Blocking Decisions of Four Popular Filters* (1999), *available at* copacommission.org/papers/filter_effect.pdf (determining that one commercially available Internet filter blocked only 17 percent of objectionable content) (last visited April 14, 2004); Consumer Reports, *Digital Chaperones for Kids* (March 2001), *available at* consumerreports.org/main/detailv2.jsp?CONTENT%3C%3Ecnt_id=18867&FOLDER%3C%3Efolder_id=18151&bmUID=1054238669804 (determining that stand-alone software filters fail to block from 20 to 90 percent of objectionable content) (last visited April 14, 2004).

unsolicited "pop up" advertisements, to be viewed without any audible warning to parents of the possible presence of unsuitable material. The Internet essentially requires a parent to look over the shoulder of his or her child at all times to ensure that only content deemed appropriate by that parent is viewed. In any event, there is no constitutionally supportable distinction between "grazing" radio stations and "surfing" the Internet. A radio is no more invasive than a computer. In each case, someone has to turn the device on.

3. History Of Government Regulation Of Broadcasting Is Irrelevant In The Era Of Media Convergence.

The final "special justification" distinguishing the broadcast and Internet media noted by the *Reno* Court is "the history of extensive Government regulation" of the former relative to the latter. 521 U.S. at 868, *citing Red Lion*, 395 U.S. at 399-400. Regulation of broadcasting has been necessary since the medium's inception, this theory goes, because the limited spectrum has "more immediate and potential uses than can be accommodated, and for which wise planning is essential." *Red Lion* at 399. By parsing out authority to use segments of the broadcast spectrum through licensing, the Commission conveys a distinct benefit to a select group of speakers, the *quid pro quo* for which is government regulation of the medium. *See id.* at 400 (noting that the advantages enjoyed by broadcasters "are the fruit of a preferred position conferred by the Government."). The Internet avoids similar governmental oversight because it is not a "scarce" expressive commodity. *Reno,* 521 U.S. at 870.

It is entirely circular to justify government regulation of speech content on the basis that there has been a history of government regulation of various other aspects of the medium. "Regulation for regulation's sake" is a particularly unpersuasive argument when the principle of no censorship is firmly embedded in Section 326 of the Communications Act of 1934, as amended: "Nothing in this Act shall be understood or construed to give the

Commission power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." 47 U.S.C. § 326.

Furthermore, the history of broadcast regulation by the government is immaterial in the modern era of media convergence, where radio and television broadcast stations increasingly offer their programming over the Internet. As the line between what constitutes broadcast content and what constitutes Internet content has blurred, the concern voiced by the *Reno* Court that government licensing poses "a risk that members of the radio audience might infer some sort of official or societal approval of whatever was heard over the radio" will prove to be unfounded. *Reno*, 521 U.S. at 869 n.33 (citing *Pacifica Foundation v. FCC*, 556 F.2d 9, 37 n.18 (C.A.D.C. 1977). In any event, the Internet can hardly be deemed free of government regulation. The Children's Internet Protection Act, for example, conditioned the receipt by public libraries of "e-rate" discounts for Internet access under Section 254 of the Communications Act on the use of filters to block "visual depictions" that are "obscene," "child pornography," or in the case of minors, "harmful to minors." 47 U.S.C. § 254(h)(6)(B) & (C).

C. The Commission Has Never Established The Required Showing Of Harm To Children From Indecent Broadcasts.

The sole purpose of indecency enforcement is to further the Government's compelling interest in protecting the welfare of children, and particularly to assist parents in this effort. *See ACT III,* 58 F.3d at 663. Because the Commission has never established a nexus between broadcast indecency and actual harm to children, however, Infinity believes that the Commission cannot impose the subject forfeiture consistent with constitutional requirements. In the NAL, the Commission rejected this argument, and Infinity's reliance on *Ashcroft, supra*, but

without providing any basis for its rejection, other than citation to a previous summary rejection of these arguments, thereby once again bootstrapping to a conclusion based upon a prior erroneous conclusion. *See* NAL at 3 n.15, *citing WKRK-FM*, 18 FCC Rcd at 26360.

Indeed, the Commission has never adduced any connection between indecent broadcasts and harm to children, but has merely assumed harm, without any scientific proof. *See ACT III*, 58 F.3d at 662 (noting that the *Ginsberg* Court "observed that . . . it was very doubtful that the legislative finding that [indecent] literature impaired the ethical and moral development of our youth was based on accepted scientific fact.") (internal quotation marks omitted). The Commission, however, cannot reconcile the absence of *any* record demonstrating harm to children from indecent speech with the clear judicial precedent requiring, where the First Amendment is concerned, that the Government offer more than the mere presumption of injury as a "compelling state interest." "When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured." *Turner Broadcasting System Inc. v. FCC*, 512 U.S. 622, 664 (1994) ("*TBS*") (noting the lack of any findings concerning the actual effects of the Commission's must-carry provisions on the protected speech of cable operators and cable programmers) (plurality opinion) (internal quotation marks omitted). It must demonstrate that the "recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) ("*Edenfield*"); *see also Playboy*, 529 U.S. at 822 ("[I]n acting to address a real problem, the Government must present more than anecdote and supposition."); *Denver Area*, 518 U.S. at 766 ("In the absence of a factual basis substantiating the harm and the efficacy of its proposed cure, we cannot assume that the harm exists or that the regulation redresses it."); *City of Los Angeles v.*

Preferred Communications, Inc., 476 U.S. 488, 496 (1986) ("This Court may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity.") (internal quotation marks omitted). Just last year in *Interactive Digital Software Assoc. v. St. Louis County*, 329 F.3d 954, 958-59 (8th Cir. 2003) ("*Interactive Digital*"), the Court found: "Before the County may constitutionally restrict the speech at issue here [graphically violent video games available to minors], the County must come forward with empirical support for its belief that 'violent' video games cause psychological harm to minors."[18] The Supreme Court itself has recently reaffirmed the requirement to demonstrate actual harm in the First Amendment context in *Ashcroft*, when it struck down as unconstitutional the ban on "virtual" child pornography in significant part because the speech was not proximately linked to any harm to children. 535 U.S. at 250 ("Virtual child pornography is not 'intrinsically related' to the sexual abuse of children . . . the causal link is contingent and indirect.").[19]

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[18] The *ACT III* Court's conclusion that the Government has an "independent and compelling interest in preventing minors from being exposed to indecent broadcasts" does not permit the Commission necessarily to presume the existence of harm to children. *See* 58 F.3d at 663. The Court's reliance on *Ginsberg v. New York*, 390 U.S. 629 (1968) ("*Ginsberg*"), was misplaced because, as the 8th Circuit very recently observed, that case dealt not with indecency but with obscenity, which is unprotected speech requiring only a rational basis to justify regulation. *Interactive Digital*, 329 F.3d at 959. Furthermore, the *ACT III* Court's reliance on *Pacifica* ignored the fact that the Supreme Court's "emphatically narrow" decision there did not address the specific question of harm to children. *See ACT III*, 58 F.3d at 681 (Edwards, J., dissenting).

[19] In view of the multiple Supreme Court decisions stating clearly that there must be some established link between the abridgment of free expression and the compelling government interest sought to be served by such abridgement, the *ACT III* court's statement that "the Supreme Court has never suggested that a scientific demonstration of psychological harm is required to establish the constitutionality of measures protecting minors from exposure to indecent speech" must yield, to the extent of any conflict, to the Supreme Court's superseding view that there must be "a factual basis substantiating the harm and the efficacy of [the] proposed cure." *Denver Area*, 518 U.S. at 766.

In the history of FCC indecency enforcement, even a "contingent and indirect" causal link establishing that children are harmed in any way by indecent speech on the radio has *never* been demonstrated. Instead, and improperly, harm has merely been presumed. *See, e.g., Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 8 FCC Rcd 704, 706 (1993) ("[I]t is well established that harm to children from exposure to [indecent] material may be presumed as a matter of law."). In light of *TBS*, *Edenfield*, *Interactive Digital*, and *Ashcroft*, a proximate link between broadcast indecency and harm to children must be shown in order to establish a constitutional foundation for the FCC's regulatory scheme. No such link has been established.

To the contrary, to the extent that Commission proceedings have elicited evidence on the issue of possible harm to children, this evidence demonstrates that children are not harmed by the type of oblique and fleeting references included in the material subject to the NAL, which might be understood as sexually-oriented by some adults, but would not register as such for children, or even many teens. Even to the extent that some children might perceive some sexual meaning in certain words or phrases broadcast on the radio, "studies generally show no statistically significant effects for exposure to sexual content in the mass media (even for the potentially more powerful forms of media such as television) on subsequent sexual attitudes and behaviors."[20]

The Commission also cannot reasonably ignore the question whether there are actually children in the audience of a particular program that is alleged to have contained indecent material. In the case of the programming at issue in the NAL, there would have been

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[20] Daniel Linz and Edward Donnerstein, "Report Concerning Certain Sexually Oriented Remarks Made on the Howard Stern Show," at 7 (1994) ("Linz and Donnerstein") (copy attached hereto as Attachment B).

very few minors in the listening audience, and virtually no children under the age of 12. Social science studies have consistently indicated that "few children listen to the radio for informational purposes, and virtually no children listen to the Howard Stern Show."[21]

In *Pacifica*, the Supreme Court noted that the general content of a program and the composition of its audience are relevant factors in the indecency analysis, *i.e.*, as in consideration of a nuisance, indecency may be the right thing in the wrong place – "a pig in the parlor instead of the barnyard." Thus, while some broadcast programs may well be the on-air equivalent of the parlor or the family room, other programs might reasonably be thought of as – indeed, expected to be – areas appropriate for less refined discussion. Acknowledgement of such a diffuse array of listening and viewing "quarters" is only appropriate given the current atomized media marketplace that increasingly promises niche programming for almost any audience.

Chairman Powell himself has recently opined that what really upset certain people about Janet Jackson's halftime performance at the Super Bowl was "that such material would appear on <u>that</u> program at <u>that</u> time, without warning, and without any reasonable expectation that they would see such a thing."[22] Powell went on to comment that "the debate is not best understood as one about what you can do or cannot do on radio or television. Rather, it is more

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[21] *See* Linz and Donnerstein at 1, *citing* Linz, Wilson and Donnerstein, "Review of Social Science Research on Children's Exposure to and Comprehension of Sexually-oriented Remarks Made on the Howard Stern Show (1993).

[22] Remarks of FCC Chairman Michael Powell at the NAB Summit on Responsible Programming, the Renaissance Hotel, Washington, D.C., March 31, 2004, at 2 (emphasis in original).

about whether consumers can rely on reasonable expectations about the range of what they will see on *a given program at a given time*."[23]

Certainly, with respect to the program at issue in the NAL, there is no expectation by listeners that the Howard Stern Show is directed at a child or family audience. The program typically includes adult discussion of political issues, popular culture, and current news. Listeners know what they are getting, and this is reflected in the composition of the show's audience.

II. The Broadcast At Issue Should Have Been Considered Under The Restrained Enforcement Approach Mandated By The Constitution.

Prior to its recent dramatic changes in its Section 1464 enforcement scheme, the FCC applied the generic indecency definition in a variety of specific contexts, consistently finding no more than one violation on any given day in a particular program carried by a particular station and generally assessing during the period from 1997 to 2003 a standard base forfeiture of $7,000 per violation.[24]

In 2001, the Commission released a document summarizing its approach to indecency enforcement. As the title of that document – *Industry Guidance On the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency* – indicates, it was the expressed intent of this document "to provide guidance to the

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[23] *Id.* (emphasis supplied). Chairman Powell's observation notwithstanding, Infinity does not believe that the less than one second exposure during the Super Bowl halftime show was legally indecent. *See Letter from Robert Corn-Revere to Willam D. Freedman, Enforcement Bureau, Federal Communications Commission,* EB-04-IH-0011 (dated February 10, 2004.)

[24] *See, e.g., Emmis Radio License Corp.*, 17 FCC Rcd 21697 (EB 2002) (the two broadcasts found to be indecent aired for 46 minutes each); *Citicasters Co.*, 16 FCC Rcd 7546 (EB 2001) (the transcripts of two broadcasts found to be indecent extend for more than four pages each); *Communicast Consultants, Inc.*, 15 FCC Rcd 18730, *aff'd* 15 FCC Rcd 1969 (EB 2000) (transcript of broadcast found indecent extends for more than four pages).

broadcast industry regarding [FCC] case law interpreting" the statutory provision, as well as FCC "enforcement policies with respect to broadcast indecency."[25] Given the document's reliance on past FCC decisions, both published orders and unpublished letter rulings, and its historical procedural approaches, it constituted the most definitive source available detailing the manner in which the FCC had sought to meet competing Constitutional and statutory concerns regarding indecency consistent with Justice Powell's concern in *Pacifica* that the FCC enforce speech restrictions cautiously.

In Section III of *Industry Guidance*, the Commission outlined the essential substantive elements of its indecency analysis. At the outset, it noted that a finding that broadcast material is indecent involves "at least two fundamental determinations." *Industry Guidance* at 8002 (¶ 7). First, the material alleged to be indecent must be determined to "describe or depict sexual or excretory organs or activities." *Id.* Second, any material meeting the first prong must also be adjudged to be "*patently offensive* as measured by contemporary community standards for the broadcast medium." *Id.* (¶ 8). In making this second determination, the Commission emphasized that "the *full context* in which the material appeared is critically important." *Id.* (¶ 9).

Moving from the general analytical outlines of its policies to the specific implementation aspects, the Commission also provided brief descriptions of a number of previously decided indecency cases, including both those found to be indecent and those found not indecent, as illustrations of how its generic definition applied in practice. Nearly three dozen

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[25] *Industry Guidance,* 16 FCC Rcd. at 7999 (¶ 1). Notably, although the title made reference to interpreting 18 U.S.C. § 1464 generally, the Commission limited its discussion solely to indecency, noting in passing that, "Obscene and profane language and depictions are not within the scope of this Policy Statement." *Id.* at n.1.

separate indecency findings were cited and explained in this section, including two unpublished letter rulings that found different television broadcasts containing significant explicit sexual discussion not indecent. The use of all of these decisions in explaining the parameters of the FCC's indecency enforcement scheme indicated that there was a significant body of case law to which the Commission would adhere under the principle of *stare decisis*, and to which broadcasters could therefore look for direction in shaping programming policies and instructing on-air talent on what types of material can and cannot be aired. Among the settled principles that were delineated in *Industry Guidance* were the following:

1. "Subject matter alone does not render material indecent." The Commission cited a letter ruling concerning an episode of the "Oprah Winfrey Show" in which there was lengthy and explicit discussion of sexual fantasies and techniques, as well as a second letter ruling concerning an installment of the "Geraldo Rivera Show" that covered similar topics. In both instances, the Commission noted that material that may be offensive to some may not, considering the context, be actionably indecent. These determinations were fundamentally in accord with the earlier Commission declaration that with respect to "masturbation, ejaculation, breast size, penis size, sexual intercourse, nudity, urination, oral-genital contact, erections, sodomy, bestiality, menstruation and testicles[,] [n]one of these subjects is *perse* [sic] beyond the realm of the acceptable broadcast discussion."[26]

2. Fleeting and isolated indecent utterances, particularly within the context of live and spontaneous programming, do not warrant Commission sanction. The Commission cited two Mass Media Bureau decisions finding that a single, isolated use of an expletive – even one included in the *Pacifica* list of seven "dirty words" – would not be subject to enforcement

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[26] *Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705, 2706 (1987).

action.[27] These cases were consistent with earlier Commission precedent finding that "speech that is indecent *must involve* more than an isolated use of an offensive word."[28]

3. Material consisting of double entendre or innuendo will not be found indecent unless the sexual or excretory import is inescapable and understandable to children. In this connection, the Commission cited a pair of segments that included the phrases "the King ate mega-Dick under the table," and "See Big Peter crush and enter a Volvo," which it concluded were not actionable "because the surrounding contexts do not appear to provide a background against which a sexual import is inescapable."[29]

The *stare decisis* represented by this body of case law, coupled with the FCC's forfeiture policies, was an affirmative manifestation of the Commission's representation in oral argument in the *ACT I* case that it would "continue to give weight to reasonable licensee judgments when deciding whether to impose sanctions in a particular case," thus ameliorating at least somewhat very real concerns that overzealous enforcement could chill protected speech. *ACT I*, 852 F.2d at 1340 n.14.

In Section IV of *Industry Guidance*, the Commission set forth its historical procedural approach to handling indecency complaints. There the Commission declared that "[i]ts enforcement actions are based on documented complaints of indecent broadcasting received from the public." *Industry Guidance* at 8015 (¶ 24). The meaning of this statement was

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[27] *See Industry Guidance* at 8009 (¶ 18), *citing L.M. Communications of South Carolina, Inc.* (WYBB(FM)), 7 FCC Rcd 1595 (MMB 1992) and *Lincoln Dellar, Renewal of License for Stations KPRL(AM) and KDDB(FM)*, 8 FCC Rcd 2582, 2585 (ASD/MMB 1993).

[28] *Pacifica Foundation Inc.*, 2 FCC Rcd 2698, 2699 (¶ 13) (1987), citing *Pacifica Foundation*, 95 FCC 2d 750, 760 (1983) (emphasis added).

[29] *Industry Guidance* at 8007 (¶ 15), *citing Great American Television and Radio Company, Inc. (WFBQ(FM)/WNDE(AM))*, 6 FCC Rcd 3692 (MMB 1990).

two-fold based on then-established practice. First, the Commission did not pursue action against a station in the absence of a complaint from the public about content on that station. Second, when such complaints were received, they were required to include some documentation, in the form of a tape or a transcript or significant excerpts of the broadcast that could be used to evaluate the complaint. The Commission stated that "[g]iven 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." *Id.* Thus, the Commission made plain that "[I]f a complaint does not contain the supporting material . . . it is usually dismissed by a letter to the complainant advising of the deficiency." *Id.* (¶ 25).

To the extent that an initial complaint did contain the requisite information and documentation, the Commission explained, "then the broadcast at issue is evaluated for patent offensiveness." *Id.* (¶ 26). While not spelled out in *Industry Guidance*, the limitation of the inquiry to the broadcast placed "at issue" by the complainant typically meant that the FCC would not launch inquiries involving multiple stations that aired a syndicated program in response to a single complaint referencing one station. In this connection, the Commission appropriately declined to infer that material objected to on one station broadcasting a syndicated program was also carried on other stations airing a version of the same program. *See Eagle Radio, Inc.*, 9 FCC Rcd 1294 (1994) ("*Eagle Radio*"). In *Eagle Radio*, the Commission summarily denied a complainant's informal objection against Station KEGL(FM) because there was no basis for assuming that material in a syndicated program as aired on another station was included in the

version of the same program broadcast on KEGL, which had acted as an "independent editorial entity." *Id.*[30]

Industry Guidance is of particular relevance with respect to the current NAL in that the ruling was issued on April 6, 2001, *less than four months prior to the July 26, 2001 Stern Show broadcast for which the Commission now proposes to impose a $27,500 forfeiture.* Given the fact that *Industry Guidance* was seven years in the making,[31] and summarized fourteen years of FCC decisions, it should have been reasonable for broadcasters to presume that the principles set forth in the document would endure for many years to come. Certainly, when the Stern Show at issue here aired, there would have been no reason for Infinity or any other broadcaster to believe that the specific guidance provided was in any way unreliable or uncertain. And yet, the indecency enforcement scheme as applied to the Stern Show in the NAL on March 18, 2004 bears scant resemblance to that which was in effect when the show was broadcast on the morning of July 26, 2001.

III. Recent Changes In the FCC's Enforcement Scheme Render It Constitutionally Untenable, As Applied.

Beginning just over a year ago, the Commission has issued a series of decisions acting on indecency complaints that, viewed collectively, amount to a sweeping repudiation of the Commission's judicially-mandated obligation to regulate protected speech in a restrained and

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[30] *See also Sagittarius Broadcasting Corp.*, 18 FCC Rcd 22551, 22552 & n.4 and 22554-55 (¶ 7) (2003) (rejecting a petition to deny renewal of the license of Station WXRK(FM), New York City, on grounds that the complainant did not have standing to challenge the renewal because he was not a local listener, but heard a version of WXRK-originated programming that aired on a distant affiliate "which does not reflect the WXRK-unique editing of the program that is heard only in New York.")

[31] *Industry Guidance* was produced pursuant to a 1994 settlement agreement by and through the Commission, the Department of Justice, and Evergreen Media Corporation of Chicago AM, licensee of WLUP(AM). *See United States v. Evergreen Media Corp.*, Civ. No. 92 C 5600 (N.D. Ill. E. Div. 1994).

cautious manner. In these decisions, the Commission has threatened for the first time to initiate license revocation proceedings based on a single "serious" violation of the standard; announced that it may impose more than one forfeiture against a single broadcast based on identification of multiple indecent "utterances"; established that some terms are *per se* indecent, regardless of context; added a new definition of "profanity" to its content regulation arsenal; asserted without explanation that it is no longer bound by staff precedent with which it may now disagree for unspecified reasons; muddled the meaning and application of "contemporary community standards" that underpin the indecency standard; and abandoned critical procedural protections. As a result of these numerous, radical changes, restrained enforcement has been replaced by an aggressive, and, Infinity respectfully submits, grossly overreaching assault against the First Amendment rights of broadcasters and listeners. Regardless of whether the Commission might have been permitted, within constitutional bounds, to continue enforcing the indecency regime upheld in *Pacifica* and the *ACT* cases, the Commission has now discarded that approach, and the limited judicial tolerance of that former regime cannot be relied upon to justify the patently unconstitutional approach that the agency is now pursuing.

A. The New "Serious" Violation Standard.

Last year, the Commission abruptly announced the addition of a significant new "serious" violation concept to the generic indecency standard, effectively creating a significant substantive modification to the indecency definition, which was not before the *Pacifica* or *ACT I* Courts.[32] Since that time, the Commission has repeated similar language in several other orders, including the NAL, asserting that one or more "serious" indecency violations can trigger a revocation hearing: "We reiterate . . . that additional serious violations by Infinity may well lead

[32] *See Infinity Broadcasting Operations, Inc. (WKRK-FM)*, 18 FCC Rcd at 6919 (¶ 13).

to a license revocation proceeding." NAL at 7 (¶ 15). This warning represents a continuing, dramatic – and ill-advised – departure from Commission precedent.[33]

Infinity recognizes that the Commission enjoys broad powers to revoke licenses. Section 312(a) of the Communications Act of 1934, as amended (the "Act"), on its face, empowers the Commission to revoke a broadcast authorization for virtually any violation of the Act or the FCC's rules.[34] But the Commission has historically exercised its license revocation power judiciously and with due regard for the limitations placed on the regulation of licensee program content.[35] Over the past several decades, the ultimate sanction – the "death penalty" to a broadcaster – has been appropriately reserved to address only a limited group of offenses, including: deceit in the form of deliberate misrepresentation or lack of candor to the Commission, fraudulent practices, or felony convictions;[36] failure to obtain Commission authorization for an action for which authorization is required;[37] or some combination of multiple violations.[38] These offenses all strike at the heart of the regulatory scheme.

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[33] To the extent that the warning concerning "additional" violations is premised on the agency's improper consideration of non-final, still pending Infinity indecency NALs, Infinity notes that Section 504(c) of the Communications Act precludes the Commission from using non-final, unpaid forfeiture notices "to the prejudice of the person to whom such notice was issued ..." 47 U.S.C. § 504(c).

[34] *See* 47 U.S.C. § 312(a) (*e.g.*, a license may be revoked for any willful violation of a Commission rule).

[35] Of course, the FCC may not revoke a license for violations of an unconstitutionally vague indecency standard.

[36] *See, e.g., Sea Island Broadcasting Corp. of S.C.*, 60 FCC 2d 146 (1976), *recon. denied*, 64 FCC 2d 721 (1977), *aff'd*, 627 F.2d 240 (D.C. Cir. 1980), *cert. denied*, 101 S. Ct. 105 (1980) (lack of candor and fraudulent billing practices).

[37] *See, e.g., Weiner Broadcasting Company*, 7 FCC Rcd 832 (1992).

[38] *See, e.g., Radio Moultrie, Inc.*, 18 FCC Rcd 22950 (EB 2003).

By contrast, revocation is particularly ill-suited for use as a routine enforcement tool in a sensitive area involving protected speech. The broadcast of programming the Commission deems indecent should not be equated with lying to the Commission or failure to obtain proper authority for a transmitting facility. This is especially the case given the fact that the entire indecency regulatory scheme is not defined by clear boundaries, but is instead applied on an *ad hoc* basis to protect children from presumed harm, not to shield adults from speech they may find offensive. Moreover, in this instance, where the licensee has employed an editor to make fast-paced program editing decisions during a contemporaneous broadcast, a good faith effort has been made to try to achieve compliance with an indecency definition long recognized as inherently vague. *ACT I*, 852 F.2d at 1338 and 1334 (citations omitted).

Initiating revocation proceedings against broadcast licensees based upon subjective determinations regarding the acceptability of program content would represent a dramatic escalation of the Commission's intrusion into licensee programming decisions, veering away from the appropriate restraint that the courts have held essential. In the absence of evidence of a catastrophic failure of the forfeiture approach which, whether constitutional or not, has heretofore been used as the constitutionality required[39] less restrictive means of regulating protected speech outside the 10:00 pm to 6:00 am "safe harbor," First Amendment jurisprudence precludes the Commission from suddenly leaping to the *most restrictive* means of enforcement available to it. *See Playboy*, 529 U.S. at 816 ("Where a plausible, less restrictive alternative is

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[39] *Sable*, 492 U.S. at 126 ("The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest").

offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals.").[40]

Finally, and even assuming that the Commission had adequately defined and provided ascertainable certainty with respect to the contours of the new "serious" violations standard, this new qualitative "sliding scale" of indecency, effectively establishing two new sub-categories of indecent speech, the "serious" and the "non-serious," is unconstitutional for another reason. The Commission casually and without proper constitutional analysis has made the protection afforded indecency vary with the specific content of the speech, with more profound consequences reserved for what the Government deems a more "serious" category of violations. The FCC thereby contravenes a fundamental principle: "'Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.'" *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board,* 502 U.S. 105, 116 (1991), *quoting Regan v. Time, Inc.,* 468 U.S. 641, 648-49 (1984); *Playboy*, 529 U.S. at 813; *Leathers v. Medlock,* 499 U.S. 439, 448, (1991); *League of Women Voters,* 468 U.S. at 383-384; *Consolidated Edison Co. v. Pub. Serv. Comm'n of New York,* 447 U.S. 530, 536 (1980). All indecent speech is protected under the Constitution and, if some instances of this protected speech are to be treated disparately, this must be done pursuant to a rigorous "compelling interest/least restrictive means" analysis. *Simon & Schuster,* 502 U.S. at 118; *Sable*, 492 U.S. at 126. The Commission has abruptly created a new content-based category of speech to which it has attached the most severe and restrictive consequences, with

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[40] Even outside the safe harbor, indecent speech remains constitutionally protected speech. *Sable,* 492 U.S. at 126 ("Sexual expression which is indecent but not obscene is protected by the First Amendment."). Although it may be *restricted* outside of the "safe harbor" by constitutionally permissible means, indecent speech has never been deemed the constitutional equivalent of obscene speech – that is, speech devoid of First Amendment protection at any time.

nary a nod in the direction of the Constitution. *See Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 231-32 (1987).

B. Multiple Violations For Multiple Utterances In The Same Program.

In the same case in which it announced a new category of "serious" violations, the Commission also announced that it might impose in the future multiple forfeitures for a single program's various utterances.[41] The Commission provided no notice of what circumstances may trigger a multiple offense finding, again leaving broadcasters at the mercy of the Commission's vaguely articulated enforcement predilections. Licensees have no way of knowing when or how they may cross the line from single to multiple offenses, or how many violations they may have committed.

This vague new standard raises many questions, including but not limited to: When are circumstances ripe for a multiple utterances finding? Is such a finding related to the length of a segment or its continuity? Are multiple phone calls or multiple speakers required, even where the same topic is being discussed? Should a spontaneous call-in show be more vulnerable than a scripted show? How will the broadcast's context – which has always been a key element of indecency findings and a unified concept – be determined? Where multiple violations are found, will each separate violation need to have its own context or will there be *shared* context? Taken to its extreme, a violation for each utterance could have meant many separate violations in the George Carlin "Filthy Words" monologue at issue in *Pacifica* (one for each "dirty word"?). Does the Commission intend to assess forfeitures on this scale?

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[41] *See Infinity Broadcasting Operations, Inc. (WKRK-FM)*, 18 FCC Rcd at 6919 (¶ 12) and 6939 (Separate Statement of Commissioner Kevin J. Martin).

The lack of guidance makes practical implementation of an inherently vague definition impossible as a practical matter. Permitting the Commission, without "minimal guidelines," to determine whether an individual utterance is a separate violation both chills the protected speech of broadcasters and opens the door to possible retaliatory and punitive agency action. *See Kolender*, 461 U.S. at 358. Just eleven days ago, the Commission proceeded to apply this "multiple utterance" approach for the first time, and rather than answering the critical questions implicated by this enforcement mechanism, it created additional ones. In its decision, the Commission bases its calculation of multiple offenses not on specifically identified utterances, but upon allegedly indecent speech by multiple "utterers." Even then, it fails to identify precisely why the particular speakers are being cited as indecent utterers, except to assert generally that, for example, "the host and guest made repeated references to oral sex and to the olfactory aspects of excretory activity."[42]

The Commission merely declares in its recent decision that "under the specific circumstances at issue here, it is appropriate to treat the statements by each of the individuals as two separate utterances and therefore two separate violations."[43] There is no elaboration as to what particular circumstances of the case at hand prompted the Commission to focus on the number of individuals involved in the discussion, as opposed to actual utterances deemed to be indecent. At the same time, the Commission notes in a footnote that in other instances, "depending on the facts in specific cases, we may also treat some of the specific words or phrases spoken by one individual to be separate utterances themselves and therefore separate

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[42] *Clear Channel Broadcasting Licenses, Inc. et al.*, FCC 04-88, slip op. at 6 (¶ 13) (released April 8, 2004)("*Clear Channel*").

[43] *Id.* at 7 (¶ 15).

violations."[44] Under either approach, however, it would not appear to be unduly difficult for the Commission to identify with particularity the specific statements made which are found to violate the law, yet the Commission conspicuously declines to do so, thereby generating a singularly vague, confusing and chilling result. Broadcasters are left without any guidelines as to when and why the agency will focus on utterers, or alternatively, when and why it may focus, with the potential for substantially higher penalties, on individual utterances, as it initially indicated it might in 2003.

C. Abandonment of *Stare Decisis*

Both the NAL in this proceeding and the *Clear Channel* decision discussed in the foregoing section include sweeping repudiations of FCC precedent on indecency matters in a manner that prejudices the speech rights of broadcasters and renders impossible any reasoned approach to determining whether specific material may be judged indecent. The Commission declares in the NAL that "unpublished [indecency] decisions are not binding on the Commission," and cites several such decisions without stating whether it is ignoring these decisions or repudiating them entirely, without specifying which ones may no longer reliable, and without explaining why cases being ignored are inapposite and/or cases being overruled are no longer good law. NAL at 6 (¶ 12). This ambiguous rejection of precedent is a radical departure from the approach taken just three years ago in *Industry Guidance*, where unpublished decisions are offered as definitive examples of acceptable programming. *See Industry Guidance* at 8011-12 (discussing excerpts from the "Oprah Winfrey Show" and "Geraldo Rivera Show" deemed not to be indecent in unpublished letter opinions from the Chief, Complaints and Investigations Branch, Enforcement Division, Mass Media Bureau). In the wake of the NAL, broadcasters have no idea whether any particular unpublished decisions, including but not limited to those in *Industry Guidance*, are still

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[44] *Id.* at 7 n.50.

good law. Indeed, given the critical importance of unpublished decisions to *Industry Guidance*, *Industry Guidance* itself would appear to be no longer viable.

Moreover, the Commission appears not to have examined too closely some of the judgments it now questions.[45] Multiple indecency decisions referenced in one of the sources cited, while unpublished, were not "staff decisions," as they are characterized in the NAL, but cases where particular material was found not actionably indecent "by a majority of the Commissioners."[46] These determinations therefore cannot be dismissed vaguely as instances where "the staff may have erred."[47]

The Commission's departure from its past decisions fatally undermines the policy of *stare decisis* as it applies to indecency enforcement. Rather than being permitted to rely on the "expert" Enforcement Bureau's application of indecency law to various sets of facts over a period of many years, the broadcast industry, already struggling to comply with an inherently vague standard, is left to guess at its own peril as to the applicability of specific FCC precedent. This approach is particularly inequitable and confusing in the area of indecency law, where the Commission routinely elects to *publish* decisions involving material found to be indecent but almost always chooses *not to publish* those involving material found to be acceptable. Furthermore, with one stroke, the Commission has radically and incomprehensibly slashed the already limited amount of decisional guidance that does exist in this confusing area of law. By selectively "cherry picking" the precedent it decides to publish, and now distancing itself from "unpublished decisions," "to the extent that the staff...may have erred by determining that the

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[45] *See* NAL at 6 (¶ 12) & n.39.

[46] *Letter from FCC Commissioner James H. Quello to The Honorable Senator Alfonse M. D'Amato* at 2 and Appendix at 6 & 7-8 (April 29, 1994) (attaching transcripts from broadcasts which the Commission found to be non-actionable, including segments on anal insertion of gerbils and feeding semen-stained tissues to domestic pets).

[47] NAL at 6 (¶ 12).

material in those cases was not indecent," NAL 6 at (¶ 12) and *Clear Channel* at 5-6 (¶ 12), the Commission departs from the fundamental *stare decisis* principle that informs the rule of law, thereby fatally unsettling an area of law that could ill afford it.

D. Establishment of An Undefined Category of *Per Se* Indecent Speech, Regardless of Context, and Addition of Profanity Regulation.

In another decision issued on the same day as the NAL, the Commission unilaterally and substantially expanded the scope of speech prohibited by the Commission's Section 1464 enforcement scheme in a manner that unconstitutionally reaches a wide range of protected speech. *See Complaints Against Various Broadcast Licensees Regarding Their Airing Of The "Golden Globe Awards" Program*, FCC 04-43 (March 18, 2004) ("*Golden Globe Awards*"). By this one *sua sponte* action,[48] the Commission effectively replaced its established indecency regulation scheme with a new regime of profanity regulation, with profanity broadly defined in at least four different ways:

- "personally reviling epithets naturally tending to provoke violent resentment;"
- "language so grossly offensive to members of the public who actually hear it as to amount to a nuisance," with nuisance defined from a 1969 law dictionary to a be "a condition of things which is prejudicial to the . . . sense of decency or morals of the citizens at large;"
- blasphemy; and
- divine imprecation.

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[48] In its Application for Review that prompted the *Golden Globe Awards* decision, the Parents Television Council couched its appeal exclusively in indecency terms, with no mention of profanity. *See* Application for Review, EB-03-IH-0110 (filed November 3, 2003). Finding that the "f-word" is statutorily proscribed *profanity* under 18 U.S.C. § 1464 is solely the work of the Commission. The Commissioners themselves presaged this dramatic expansion into profanity regulation in their recent Congressional testimony concerning legislation pending before Congress that proposes to sharply escalate the penalties for indecent speech on broadcast stations. *See, e.g.*, Written Statement of Michael J. Copps, Commissioner, Federal Communications Commission, Before the Committee on Commerce, Science, and Transportation, United States Senate at 1 (February 11, 2004); Written Statement of Kevin J. Martin, Commissioner, Federal Communications Commission, Before the Committee on Commerce, Science and Transportation, United States Senate at 3 (February 11, 2004).

Golden Globe Awards at ¶¶ 13-14 and n. 36.[49]

None of these profanity prongs can survive constitutional scrutiny, as each suffers from obvious vagueness and overbreadth. The range of statements encompassed by blasphemy and divine imprecation, both religiously based, is far removed from the sphere of indecency that the Commission had heretofore sought to regulate. *Golden Globe Awards* on its face prohibits a broadcast station from airing such blasphemy as an individual's claim to be God or statements that disrespect the divine ("God is dead" (to any believer in God) or "Allah is not God" (to a Muslim) or "Jesus is not God" (to a Christian)). The most commonplace of divine imprecations such as "Go to Hell" and "God Damn It" are now outlawed by *Golden Globe Awards*.[50] By encompassing such protected speech, the profanity standard's blasphemous and divine imprecation components are impermissibly and unconstitutionally vague and overbroad. By bringing its suddenly heavy hand down into this area of religiously oriented speech, the Commission has also impermissibly crossed the constitutional line that separates Church and State, and thereby violated on grounds independent of free speech the First Amendment to the Constitution.

The "nuisance" and "personally reviling epithet" prongs fare no better. "Nuisance" is so broadly written – restricting "grossly offensive" language that is "prejudicial" to the citizenry's "sense of decency or morals" – that it unavoidably subsumes, indeed swallows whole, language heretofore regulated under the Commission's less expansively drawn (but still

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[49] Additional (and equally infirm) profanity definitions one could extract from *Golden Globe Awards* include "vulgar, irreverent, or coarse language" (¶ 13) and "the 'F-word' and those words (or variants thereof) that are as highly offensive as the 'F-word'" (¶ 14). The Commission also warns that "[w]e will analyze other potentially profane words or phrases on a case-by-case basis." *Id.*

[50] *Cf. Gagliardo v. U.S.*, 366 F.2d 720, 725 (9th Cir. 1966) ("Since the only words attributed to appellant which could even remotely be considered as being 'profane' were 'God damn it,' which were also uttered in anger, there is no basis for holding that the language was 'profane' within the meaning of [Section 1464].").

unconstitutionally vague) indecency definition. This is clearly an impermissible result, given the Supreme Court's observation in *Pacifica*, acknowledged in *Golden Globe Awards* (n. 38), that "the words 'obscene, indecent, or profane' are written in the disjunctive, implying that each has a separate meaning [under 18 U.S.C. § 1464]." *Pacifica*, 438 U.S. at 739-740. Furthermore, the "nuisance" definition on its face ranges far beyond indecency to include "grossly offensive" words that do not have a sexual or excretory meaning. Examples are constrained only by the decisionmakers' subjective interpretation of the citizenry's sense of propriety. The vagueness and overbreadth of the "nuisance" prong are fatal.

"Personally reviling epithets" naturally tending to provoke, are the constitutional equivalent of "fighting words." *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (finding that there are "fighting words" that ordinary citizens know are "likely to cause a fight" or "are threatening, profane or obscene revilings"). This prong too suffers from fatal vagueness and overbreadth, opening up broadcasters to an entire new range of prohibitions on speech that have nothing to do with sexual or excretory organs and activities. The Supreme Court has also repeatedly held that "fighting words" regulations must be carefully drawn so as to avoid application to protected expression. *See, e.g., Gooding v. Wilson*, 405 U.S. 518, 523 (1972); *Cohen v. California*, 403 U.S. 15, 20 (1971). See also *Lewis v. New Orleans*, 415 U.S. 130, 134 (1974). An essential element of "fighting words" is that they be uttered face-to-face, *i.e.*, in a manner likely to provoke confrontation, which is obviously impossible in the typical broadcast setting. By any measure, the "personally reviling epithet" prong offered by the Commission is legally infirm, and must be discarded.

Finally, *Golden Globe Awards* also explicitly overrules existing indecency precedent, cited with approval in *Industry Guidance,* that fleeting and isolated indecent utterances, particularly within the context of live and spontaneous programming, do not warrant

Commission sanction. This reasonable restraint from punishing *de minimis* utterances of arguably indecent speech, which was followed by the Enforcement Bureau in the underlying decision,[51] has now been replaced with the broad declaration that "*any use* of [the F-word] or a variation, *in any context*, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition."[52] This is not only diametrically at odds with the Commission's own guidance issued less than three years ago that "the full context in which the material appeared is critically important," but flies in the face of the Supreme Court's consistent instruction, stated in *Pacifica,* that "both the content and context of speech are critical elements of First Amendment analysis...."[53] Thus, the Commission's arbitrary decision to read context entirely out of its indecency analysis with respect to the F-word cannot withstand even the most cursory First Amendment scrutiny.

E. The Muddling of the Commission's Approach to Applying Contemporary Community Standards.

Yet another decision released the same day as the NAL, *Infinity Radio License Inc.*, FCC 04-48 (March 18, 2004) ("*Infinity Radio License*"), addressed, *inter alia*, an area of critical importance in indecency regulation – how the Commission reliably and objectively ascertains contemporary community standards – and sought to clarify for the first time that the Commission relies on its "collective experience and knowledge, developed through *constant interaction* with lawmakers, courts, broadcasters, public interest groups and ordinary citizens, to keep abreast of contemporary community standards for the broadcast medium." *Infinity Radio License* at ¶ 12

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[51] *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards,"* 18 FCC Rcd 19859 (EB 2003).

[52] *Golden Globe Awards* at 4 (¶ 8) (emphasis added).

[53] *Pacifica*, 438 U.S. at 744, *citing Schenk v. United States*, 249 U.S. 47, 52 ("the character of every act depends upon the circumstances in which it is done . . . ").

(emphasis added). This dubious explanation of the methodology employed in assessing contemporary community standards further compounds the confusion that attends the Commission's indecency enforcement scheme.

Infinity is not aware of any evidence of "constant interaction" by the Commission with the courts on the subject of indecency. In fact, the last time a court opined on the Commission's indecency enforcement scheme was nearly a decade ago, and that was at the behest of broadcasters. *See ACT IV,* 59 F.3d 1249. To the extremely limited extent courts have interacted with the Commission on this subject, they have expressly relied on FCC commitments to exercise restraint and caution when regulating indecent material. *See* page 4 and note 3 *supra.* More significantly, such interactions have been in the context of facial constitutional challenges in which the definition and application of community standards are not at issue. Indeed, the Commission has *never* been involved in a case that resulted in a judicial application of "community standards" as currently defined by the FCC. The only case that came close to doing so was a decade ago, and it resulted in a settlement that produced (after years of unwarranted delay) the Commission's *Industry Guidance*, that now has been so eviscerated that it appears to be of limited utility.[54]

The Commission's interaction with public interest groups and ordinary citizens is generally one-sided, and clearly tends to reflect the interests and orchestrated e-mail campaigns of those who choose to complain about broadcast material, while ignoring the vast majority of listeners and viewers, who cannot reasonably be expected to contact the Commission in support of their favorite stations and programming. Individual complaints and group campaigns are a poor substitute for the objective measurement of contemporary community standards, through such means as polling or analysis of ratings results, the latter of which the Commission irrationally discounts. *See Infinity Broadcasting Operations, Inc. (WNEW(FM))*, 17 FCC Rcd 27711, 27715

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[54] *See United States v. Evergreen Media Corp.* (agreeing to publish guidelines as to the meaning of the term "indecency" within 9 months).

(EB 2002). The Commission also has steadfastly refused to conduct a broad-based rule making or notice of inquiry open to the public and intended to systematically examine the factors that determine contemporary community standards. To truly assess contemporary community standards, the Commission must gather evidence of those standards systematically, comprehensively, and objectively.

F. Abandonment of Critical Procedural Safeguards

The independent Constitutional concerns implicated by these cases are heightened when viewed against the evisceration of important procedural safeguards – the repeated departures from the prior complaint-based manner of indecency enforcement, including the complete abandonment of the tape/transcript/significant excerpt requirement and the abrupt reversal of the Commission's past refusal to impute broadcasts of syndicated programming on one station to other stations carrying the same program. Under the approach followed in several recent cases, in the absence of a specific denial by a broadcaster, the FCC will now take enforcement action against material that is *deemed* to have been broadcast whether or not it *actually* aired.

As explained above, Commission practice for many years required that a full or partial tape or transcript or significant excerpts of the program be submitted with the complaint of indecency because of the sensitive nature of indecency cases and the "critical" role of context in an indecency determination. *See Industry Guidance* at 8015. In the absence of a specific denial by the broadcaster, the FCC now has now made clear that it will take enforcement action against material that is *deemed* to have been broadcast, solely on the basis of a complainant's recollection, even if uncorroborated. *See, e.g., Letter From Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau to Mindy Pierce*, EB-01-IH-0331/GDJ at 4 (dated February 12, 2002) ("[C]omplaints need not be letter perfect and . . . even

an inexact transcript may be sufficient to meet procedural requirements.") (internal quotation marks omitted) ("*Mindy Pierce*"); *Emmis Radio License Corporation*, 17 FCC Rcd 18343, 18345 (EB 2002), *rev. denied*, FCC 04-62, slip op. (released April 8, 2004) ("*Emmis*") ("[W]here . . . the licensee does not or cannot counter a complainant's allegations, and those allegations, standing alone, are sufficient to support a finding of an indecency violation, we will not hesitate to impose an appropriate sanction."); *KROQ*, 17 FCC Rcd at 9895 ("The provision of a tape or transcript is not required in support of an indecency complaint."). These decisions unreasonably put broadcasters in the position of having to prove their own innocence, without even an opportunity to test the recollection of the complainant. Therefore, in a worst case scenario, a station could now find its license threatened by a complaint about "material" that might *never* have been broadcast.

For example, in a decision released the same day as the NAL, the Commission found a Florida licensee apparently liable for a $55,000 forfeiture for the broadcast of allegedly indecent material based solely on the unsupported recollections of a complainant *who conceded in her complaint that she may not have accurately remembered the words alleged to have been broadcast. See* Enclosure to *Letter from Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau to Capstar TX Limited Partnership*, EB-02-IH-0564/DJB (dated July 22, 2002) (qualifying certain language complained of with "I think those were the words they said").[55] Ten days ago, in denying review in *Emmis*, the Commission affirmed the staff's indecency determination despite acknowledging in a footnote "that the complainant did not quote

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[55] *Golden Globe Awards* provides a further example of how imprecise and unreliable undocumented complaints can be. In note 4 of that decision, the Commission acknowledges that even with respect to the very brief utterance at issue in that case, involving a prominent national television broadcast – where viewers had the opportunity to both see and hear the statement as it was made – certain complainants inaccurately recollected or reported what was said.

the word or words that the Station broadcast which *led him to conclude* that what was 'spit or swallowed' was sperm."[56] The Commission found only that, absent such evidence, the language was neither "explicit or graphic," but that it nonetheless "repeatedly described a sexual activity . . . in a pandering or titillating manner."[57] The Commission simply accepted the opinion of the complainant as to what was broadcast because the licensee was unable to provide its own evidence in the absence of a recording or "a denial from the air personalities, program's producers or Station management."[58] Thus, the station's inability to prove a negative – that the broadcast was *not* consistent with the complainant's subjective conclusion – was sufficient to uphold the forfeiture. *Capstar* and *Emmis* thus officially strip away the procedural protections of the erstwhile "tape or transcript" requirement, which formerly limited the Commission to acting on indecency complaints only if the *actual words* used in the subject broadcast were corroborated by a tape, transcript or significant excerpt of that broadcast. *See Emmis Radio License Corporation*, 17 FCC Rcd 14733, 14736 (EB 2002), *citing Industry Guidance.*[59] As these cases illustrate, the Commission has now made clear that it will take enforcement action against material that it *deems* to have been broadcast, solely on the basis of a complainant's sketchy, unsupported, and possibly inaccurate recollection. Moreover, the Commission will act on the basis of the alleged recollections of a complainant whom the Commission allows to remain anonymous and whom the Commission always shields from cross-examination. Dire consequences can now flow from what *might* have been said on the radio. This approach to indecency enforcement places upon licensees the

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[56] *Emmis*, FCC 04-62, slip op. at 5 n.30 (emphasis added).

[57] *Id.*

[58] *Id.* at 5 (¶ 11) & 6 (¶ 12).

[59] The "tape or transcript" requirement itself had been one of the tangible manifestations of FCC fidelity to its bedrock obligation, embedded in the governing judicial precedent, to proceed cautiously and with restraint in this area of protected speech. See page 4 *supra*.

obligation to prove that any broadcast subject to an unverified complaint is *not* indecent. But such an approach "raises serious constitutional difficulties" when the government seeks "to impose on [a speaker] the burden of proving his speech is not unlawful." *Ashcroft*, 535 U.S. at 255; *ACLU v. Ashcroft*, 322 F.3d 240, 260 (3d Cir. 2003).[60]

G. Coupled With the Threat of License Revocation, Each of the Dramatic Departures From Existing Precedent Poses Substantial Due Process Concerns.

As the Commission has conceded in another context, "the denial of a broadcast license triggers due process protection." *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) ("*Trinity*"). "Due process requires that parties receive fair notice before being deprived of property." *Id.* (internal quotation marks and citation omitted). In the absence of fair notice – "for example, where the regulation is not sufficiently clear to warn a party about what is expected of it" – an agency may not impose civil or criminal liability on the party. *General Electric Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995) ("*GE*"); *see also Satellite Broadcasting Co., Inc. v. FCC*, 824 F.2d 1, 7 (D.C. Cir. 1987) ("Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule."). Fair notice is provided only where, "by reviewing the regulations and other public statements

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[60] The harm to broadcasters following the loss of the former "tape or transcript" requirement is greatly compounded by the Commission's aggressive new approach to indecency enforcement. The Commission now routinely requires licensees, on the basis of the sketchiest, undocumented complaints, to not only supply any extant recordings of the material complained of, but to submit "buffer zones" of additional program material (e.g., 15 minutes, 30 minutes, or more) on either side of that material, as well as numerous internal documents with little, if any, apparent relevance to a complainant's allegations. It also as a matter of course now demands material from editorially independent stations that are not themselves the subject of a complaint but that may have broadcast syndicated programming subject to an indecency complaint against a different station. These new approaches, coupled with abandonment of the "tape or transcript" requirement, are the inverse of the restraint required by the cases cited in note 3 *supra*.

issued by the agency, a regulated party acting in good faith would be able to identify, *with ascertainable certainty*, the standards with which the agency expects parties to conform . . . ." *GE*, 53 F.3d at 1329 (internal quotation marks omitted and emphasis added); *see also Trinity*, 211 F. 3d at 628.

In *Trinity*, the D.C. Circuit followed this fundamental tenet in overturning the Commission's denial of a Miami, Florida full power television station's license renewal. The Court found that the FCC had failed to adequately explain that preferences awarded to "minority-controlled" licensees required actual control by minorities of a non-stock company Board of Directors, and not just a majority of directors being minorities. In the absence of the requisite "ascertainable certainty," the Commission's action was reversed.

Here, broadcasters cannot discern the inherently subjective meanings of "serious" violations, multiple utterances, or the Commission's multi-layered characterization of "profanity," much less identify with "ascertainable certainty" what the relevant enforcement standards might be. Broadcasters now know only that to protect their licenses, they must avoid substantial categories of constitutionally-protected speech, with no more notice of what is included in these categories than the Commission's recent fact-specific applications of two of these terms. Broadcasters seeking to steer clear of indecent and profane program material have no road map to guide them. In this regard, it is significant that *Industry Guidance*, released only three years ago as the "framework by which broadcast licensees can assess the legality of airing potentially indecent material," is silent on all three of these issues. *Industry Guidance*, 16 FCC

Rcd at 8016.[61] The broadcast industry cannot be deemed, as the Commission apparently believes, to have been put on fair notice as to what the standards for "serious" violations are, as the agency has offered no explanation whatsoever. *See Graynard v. City of Rockford*, 408 U.S. 104, 108-09 (1972) ("Vague laws may trap the innocent by not providing fair warning. If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them."). Similarly, as explained more fully above, the new definitions of profanity are so overbroad and vague as to potentially capture a staggering amount of clearly protected speech. And the new multiple utterances test constitutes nothing more than the vaguest of tools to be applied variously in the FCC's unbridled discretion to escalate forfeiture amounts to painfully punitive levels and thus chill protected speech.

These same defects attend the other radical changes the Commission has recently implemented in its Section 1464 enforcement scheme. The imprecise overruling of its own "unpublished" precedent leaves nothing but confusion in its wake. And the contours of the methodology by which contemporary community standards are established have been blurred beyond recognition. Together, these changes leave broadcasters totally in the dark, imperiled and stifled.

IV. The Commission's New Unrestrained Approach To Indecency Enforcement Chills Speech, Providing Real World Evidence of Its Constitutional Infirmities.

The indecency definition's constitutional infirmities and inherent vagueness are greatly exacerbated by the approach taken in this and the other recent cases discussed above.

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[61] It is difficult to identify – and the Commission certainly does not attempt to identify – the developments within the broadcast industry in the three years since the release of *Industry Guidance* that have prompted the Commission to so radically revise its indecency enforcement scheme. Indeed, as exemplified by the *Golden Globe Awards* reversal, the Commission has encountered considerable difficulty in consistently applying its own standard since release of *Industry Guidance*.

Due to the inconsistent and overreaching enforcement tactics that the Commission has embarked upon over the past year, no broadcaster can now state with any confidence what the broadcast indecency standard is, or how it might be applied in a given circumstance. The inevitable result is a broad, unconstitutional, chill on speech in the broadcast media.

As regulated licensees whose continued operation depends on the authority granted to them by the Commission, broadcasters rationally can be expected to react (indeed, overreact) in the face of threats of both large monetary forfeitures or the ultimate sanction of license revocation with "safe" programming intended to avoid the pitfalls of indecency enforcement. *See ACT III, 58* F.3d at 685 n.1 ("As broadcasters learn of the Commission's more aggressive stance, their prophylactic measures are bound to increase.") (J. Wald dissenting). This regrettable chilling effect may have a marginal impact of keeping children from seeing or hearing certain types of programming their parents find offensive, but not without an unnecessarily broad suppression of fully protected, non-indecent speech intended for adults – a tradeoff prohibited by the First Amendment. *See Reno*, 521 U.S. at 875 (the Government cannot, consistent with the First Amendment, "reduc[e] the adult population . . . to . . . only what is fit for children"), citing *Denver Area,* 518 U.S. at 759, (quoting *Sable*, 492 U.S. at 128)).

Infinity can confirm from its own experience, including the experience of other radio stations that it and its affiliated companies own and operate, that the proposal of any forfeiture for broadcast of indecent material has an immediate real world impact on programming content. When an NAL, or even an inquiry letter, is received, it triggers review of the programming in question, as well as any changes necessary to guard against possible future liability. Furthermore, when Infinity stations employ highly expressive on-air personalities who can be expected to regularly address topics encompassed by *Industry Guidance*, these stations

typically employ delays and editors in a good faith attempt to self-censor in order to comply with the Commission's requirements.

The Commission's new approach to indecency and profanity enforcement is already prompting increased speech suppression across the board in the broadcast industry. In response to the stern warning in *Golden Globe Awards* concerning the responsibility of broadcasters for the utterance of even fleeting "dirty words" during a live broadcast, broadcasters are eliminating or cutting back on much of their live programming.

Broadcasters have felt compelled to terminate a variety of on-air talent in the new environment the FCC has fostered. This upsurge in unemployment has resulted in the much-publicized purging of Howard Stern from stations in six markets, the termination of Todd Clem (either of which is troublesome enough from a constitutional perspective),[62] and more recently, the firing of Larry Wachs and Eric Von Haessler, "The Regular Guys" from Atlanta's WKLS-FM, as a result of an attempt at political criticism of the FCC, consisting of "banned" words being broadcast backwards unintelligibly, which apparently went awry because they inadvertently left an on-air microphone live when forward-recording the commentary.[63] Nor has the impact been limited to commercial broadcasters, as it has also included the firing of long-time commentator Sandra Tsing Loh from non-commercial educational station KCRW(FM), Santa Monica, California as "a precautionary measure to show the station had distanced itself ... in case the FCC investigates" following the inadvertent broadcast of a Loh

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[62] *See, e.g.*, Sarah McBride, *Clear Channel Dumps Stern After Big Fine*, WALL ST. J., Apr. 9, 2004, at B1; Jube Shiver, Jr., *Radio Chain Boots Stern Off Stations; Clear Channel Makes the Temporary Move Permanent After FCC Proposes Fining it for Airing the Shock Jock*, L.A. TIMES, Apr. 9, 2004, at C1; *Clear Channel Fires Fla Radio DJ Bubba The Love Sponge*, DOW JONES INT'L NEWS, Feb. 24, 2004. *Cf.* W. Scott Bailey, *Union Calling Clear-Channel's Zero-Tolerance Plan Indecent*, SAN ANTONIO BUS. J., Mat. 12, 2004.

[63] Rodney Ho, *Deejays Fired for Porn Stunt*, ATLANTA CONST., April 10, 2004, at A1.

monologue that included a single expletive that was intended to have been "bleeped" prior to broadcast.[64]

Fearing possible sanction, radio stations also have found themselves constrained to drop entirely from their playlists, or at least to edit, numerous songs that are considered classics of middle-of-the road album formats and which previously aired in unexpurgated form. One station has dropped The Who's "Who Are You," Pink Floyd's "Money," Lou Reed's "Walk on the Wild Side," Steve Miller's "Rock 'n Me" and "Jet Airliner," Walter Zevon's "Lawyers, Guns & Money," and Steppenwolf's "The Pusher."[65] Stations also have been forced to drop or edit more recent songs by such critically acclaimed artists as Pearl Jam ("Jeremy" and "Why Go"), Alice in Chains ("Man in the Box" and "Heaven Beside You"), Guns 'n' Roses ("Its So Easy" and "Mr. Brownstone") and Outkast ("Roses"). Even pop songs generally thought innocuous, such as John Mellencamp's "Jack and Diane" or "Play Guitar" and Sheryl Crow's "A Change Would Do You Good" have been edited for radio, or in some cases, dropped altogether.

The Commission's recent actions undermine previous attempts by the Bureau to moderate the censorial effects of a vague indecency policy,[66] and are totally inconsistent with the Commission's bedrock constitutional obligation to provide a wide berth for controversial speech.

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[64] Greg Braxton, *KCRW Fires Loh Over Obscenity*, L.A. TIMES, March 4, 2004, at B1. The station later offered to reinstate Ms. Loh, but she declined, citing a "toxic environment" at the station. Scott Collins, *et al.*, *The Decency Debate*, L.A. TIMES, March 28, 2004, at E26.

[65] Songs such as the Rolling Stones' "Bitch," Nazareth's "Hair of the Dog," and Elton John's "The Bitch is Back" also have been dropped or edited due to use of the word "bitch" (which involves neither sexual nor excretory references, but could potentially be reached under the Commission's new overbroad definition of "profane").

[66] *Compare The KBOO Foundation*, 16 FCC Rcd. 10731 (EB 2001) (issuing $7,000 forfeiture for broadcast of "Your Revolution"), with *The KBOO Foundation*, DA 03-469 (Enforcement Bureau, Feb. 20, 2003). In the current environment, it is no longer safe to assume that the Bureau's latest analysis remains operative.

V. The Broadcast Cited In The NAL Is Not Indecent Under The FCC's Generic Indecency Standard.

A. The Material That Is The Subject of the NAL Does Not Describe Sexual or Excretory Activities or Organs.

Under the FCC's generic indecency definition, the threshold element for an indecency finding is a determination that "the material must describe or depict sexual or excretory organs or activities." NAL at 3-4 (¶ 7). It is not sufficient to sustain an indecency finding that broadcast material merely mentions or references in some way sexual or excretory activities or organs, but rather, the material must "depict" or "describe" such activities or organs. As noted in Infinity's initial response to the Inquiry Letter, Webster's New World Dictionary, Second College Edition, defines the word "describe," in relevant part, as follows:

> **de · scribe** (di skrīb´) *vt.* **-scribed´**, **-scrib´ing** [M.E. *descriven* < OFr. *descrivre* < L. *descibere*, to copy down, transcribe < *de-* , from + *scribere*, to write: see SCRIBE] 1. to tell or write about; give a detailed account of 2. to picture in words

Under this definition, any sexual or excretory references must rise to the level of providing "a detailed account of" the relevant activities or organs or must create a "picture in words." Consistent with this terminology, the Commission has specifically found that explicit or graphic description is a central element of an indecency finding, such that material that may be "offensive" will not be found indecent if "it does not describe sexual or excretory organs or activities *in explicit or graphic terms*." *Letter from Charles W. Kelly, Chief, Investigations and Hearings Division, to Gail and Frank Cox,* File No. EB-02-IH-0243/RBP, dated June 28, 2002 (emphasis added) (dismissing as non-actionable a complaint concerning the ABC Television

Network Program "Philly," in which a character had yelled, "There's no way I'm gonna stand up in open court with my dick in my hand while your [client] walks out the door!").[67]

Instead of providing some reasoned analysis under this prong of the actual words and phrases that were part of the July 26, 2001 Stern Show, the Commission simply asserts in the NAL that certain material in this broadcast was "clearly" descriptive of "named sexual practices" and the "features of an excretory organ." NAL at 4 (¶ 8). No basis is provided for these conclusions. With respect to the "named sexual practices," the Commission indicates in a footnote that these are "blumpkin" and "David Copperfield." *Id.* at n.22. To the extent that other words and phrases were associated with these terms in the broadcast, this additional material was limited to simple declarative statements that were not suggestive of the qualitative or quantitative characteristics necessary to be descriptive.

With respect to the alleged description of the "features of an excretory organ," this assertion apparently refers to the phrase "balloon knot." *See* NAL, Attachment A at 10. At most, this term constitutes an oblique reference that is devoid of any descriptive element. The phrase is not descriptive because, in the context in which it was said, a listener could ascribe the meaning advanced by the Commission only if he or she had a prior visual frame of reference to apply to the term.[68] This pairing of words does not have intrinsic descriptive value by itself that would prompt a particular image for someone. It is thus difficult to postulate any inescapable meaning that children could take away from hearing the phrase "balloon knot" as uttered on the

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[67] *See also Letter from Charles W. Kelley, Chief, Investigations and Hearings Division, to W.T. Schmid and underlying Complaint of W.T. Schmid*, File No. EB-00-IH-0277/RBP, released March 27, 2001 (dismissing a complaint concerning the statements, "So then I dropped my pants and showed Stacy my penis . . . That was it. We were showing off our genitalia").

[68] The Commission states that the language broadcast described "a 'balloon knot' as an anal opening," yet *nowhere* does such a specific statement appear in the transcript attached to the NAL. *See* NAL at 4 n.23 & Attachment A.

Stern Show. To a child, "balloon knot" is most likely to be interpreted as a knot in the throat of a balloon used to prevent air from escaping.

Indeed, programs that arguably contain actual, sometimes graphic, description of sexual activities or organs have been found by the FCC staff to be not actionably indecent. *See Letter from Edythe Wise, Chief, Complaints and Investigations Branch, to Gerald P. McAtee*, Ref. No. 8210-EJS (October 26, 1989). In the program at issue in *McAtee*, entitled "Unlocking the Great Mysteries of Sex," a guest described at great length techniques that couples might use to improve their sexual enjoyment, including the following passages:

> [I]t's important that a man learn to use that penis the way an artist uses a – a master artist uses a paintbrush, with style, with varied techniques, with texture and totally connected to it.
>
> [W]hen a man squeezes, relaxes, squeezes, relax, it's bouncing up and down inside the woman's vagina in a wonderful way, touching up against one of her most sensitive parts of the vagina . . . .
>
> [Y]ou might take his penis in your hand and just rub it on your vagina a little bit on the outside and 'I love you, honey, and I love how you feel and I can't wait 'til you get home from work today.'[69]

As recently as two years ago, the Commission cited this segment in its *Industry Guidance* on indecency enforcement. *Industry Guidance* at 8012. The Commission noted that "[w]hile offensive to some, the material was not found to be indecent." *Id.* In another 1989 decision, FCC staff dismissed a complaint that focused on a colloquy about genital size and the sexual

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[69] Excerpt taken from the transcript of the *Geraldo Rivera Show*, "Unlocking the Mysteries of Great Sex," produced by Journal Graphics, Inc.

prowess of African-American men, and which included a reference to a man's penis as "a massively constructed rod."[70]

Given the Commission's past acceptance of such extensive and frank discussions of sexual techniques and practices, including substantial graphic description, as outside the realm of indecent speech, the Commission cannot reasonably punish Infinity for any of the three brief, non-descriptive references to sexual practices that appear in the material cited in the NAL. At most, this material references only non-specific clinical terms such as "evacuating" and "oral sex" or entirely oblique expressions such as "up the wazoo" and "goin' like a dog." *See* NAL, Attachment A at 9 & 10. Although Infinity pointed out in its initial response that these references are substantially less explicit than the material cross-referenced in *Industry Guidance*, the Commission did not even address this argument in the NAL. It is difficult to ascertain why the Commission would find objectionable terms lacking descriptive content such as "balloon knot, "up the wazoo," or "goin' like a dog" after having raised no quarrel with discussion that includes at least some element of description, including "a massively-constructed rod" or a "penis . . . bouncing up and down in inside the woman's vagina in a wonderful way." Even within the four corners of the NAL, the Commission *affirms* prior staff rulings that use of the phrases "giving head" and "finger banging your boyfriend" are *not* actionable. *See* NAL at 5-6 (¶ 12). The Commission has totally failed to explicate the distinction between "giving head" and "goin' like a dog" or "finger banging" and "up the wazoo." Instead of consistent application of some sort of principle, there is instead chaos.

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[70] *See also Letter from Edythe Wise, Chief, Complaints and Investigations Branch, to Mr. A. Casa*, Ref. No. 8210-EJS (October 26, 1989).

It is an important aspect of the First Amendment balance that must guide indecency determinations that the Commission has never countenanced a decisional distinction between sexual discussions that are presented clinically, or as guides to self-improvement, and those that are humorously or satirically rendered. Such a dichotomy would render the Commission's critical contextual analysis entirely superfluous. The merit or seriousness of a particular broadcast is just one of the contextual factors that must be considered by the Commission. *WPBN/WTOM License Subsidiary, Inc.*, 15 FCC Rcd at 1841. And just as the seriousness of a broadcast cannot insulate it from a finding of indecency, *Pacifica Foundation (KPFK-FM)*, 2 FCC Rcd 2698 (1987), the lack of seriousness does not render a broadcast patently offensive. *See IBC of Pennsylvania*, 3 FCC Rcd at 931; *Butler v. Michigan*, 352 U.S. 380, 383 (1956); *Hustler Magazine v. Falwell,* 485 U.S. 46, 54-55 (1988).

B. The Material Broadcast By Station WKRK Was Not Patently Offensive

Similar to its handling of the threshold description inquiry, the Commission's contextual analysis under the "patently offensive" prong also lacks coherence. The segments addressed in the NAL consist largely of material that is mere innuendo or double entendre, which, since 1987, the Commission has consistently ruled is not subject to indecency enforcement unless the specific sexual or excretory meaning is inescapable to children. *See Infinity Broadcasting Corporation of Pennsylvania,* 3 FCC Rcd 930, 932-33 (1987) ("*IBC of Pennsylvania*") (subsequent history omitted). The Commission has continuously stressed that because the sole purpose of indecency enforcement is to "'shelter children from exposure to words and phrases their parents regard as inappropriate for them to hear,' . . . the salient question in examining a broadcast is whether the sexual or excretory import was inescapable and understandable, not only to adults but especially to children." *Sagittarius Broadcasting Corp.*, 7

FCC Rcd 6873, 6874 (Mass Med. Bur. 1992) (subsequent history omitted), *quoting ACT* I, 852 F.2d at 1340.

As it noted in its initial response, WKRK respectfully submits that the material cited in the NAL is not merely non-descriptive, but is devoid of content having an "inescapable and understandable" sexual or excretory import as to children. Rather, to the extent that these segments can be interpreted to address sexual or excretory matters, at most the material consists only of oblique references to sexual topics that might be understood by many adults, but would either be interpreted differently by a child, or would simply pass beyond the child's understanding.

One example of such an oblique phrase is "[w]hen you're going like a dog," which a child could reasonably understand to mean merely behaving as a dog would. NAL, Attachment A at 10. The only additional phrases that relate to this same discussion are "spit on her" and "then you go," which are far from being explicit or graphic, but instead are deliberately vague and elliptical. Taken together, these statements would have no sexual import to a child, as a child would not grasp the significance of the word "go" in this context.[71]

The Commission nonetheless finds that this speech "actionably indecent because the sexual import . . . was 'unmistakable'" and "there is no non-sexual meaning that *a listener* could possibly have attributed to the colloquial terms." NAL at 5 (¶ 10). Infinity respectfully disagrees. The Commission's meager analysis ignores entirely that the only potential constitutionally acceptable basis for indecency regulation is the protection of children. The Commission's discussion makes no mention of this limitation, and fails to explain how the words

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[71] *See* Linz and Donnerstein at 4 ("... it is not expected that children would understand metaphorical uses of sexual terms until they had acquired the domain specific knowledge about sex.")

and phrases used would be understood to have a particular sexual meaning by a *child listener*, the only type of listener relevant to the Commission's analysis.[72] In doing so, it ignores entirely plausible non-sexual meanings that children might derive from these statements.

The Commission must also be mindful that it has previously found that material comparable to the discussion of "blumpkin" presented in comparable contexts is not actionably indecent. *See IBC of Pennsylvania,* 3 FCC Rcd at 934 (holding that no sanction for airing indecent matter was appropriate because "prior rulings could have led the licensees reasonably to conclude that the broadcasts were permissible"). Indeed, as Infinity observed in its initial response, there are a wealth of decisions issued both publicly and informally in which material that is very similar to the broadcasts at issue here was found *nonactionable.*

For example, in numerous cases the Commission has found non-actionable broadcasts referencing, in a non-clinical manner, topics such as masturbation, and anal and oral sex. *See, e.g., Letter from Norman Goldstein to Mrs. Barbara Onisko*, 8310-TRW, 94060521 (May 15, 1997) (dismissing complaint containing explicit joke about how cheese makes performing oral sex easier for a woman). *See also Memo from Thom Winkler to WIOD(AM) Complaint File No. 97010196 and Attached Transcript,* dated April 21, 1997 (dismissing complaint where complained of material included the phrase "fuck you both in the ass and have you for dinner"); *Letter from FCC Commissioner James H. Quello to The Honorable Senator Alfonse M. D'Amato*, Appendix at 6 & 7-8 (April 29, 1994) (attaching transcripts from broadcasts which the Commission found to be non-actionable, including segments on anal insertion of gerbils and feeding semen-stained tissues to domestic pets). As noted above, rather

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[72] Indeed, the only mention of children in the entire NAL comes in the boilerplate recitation that there is a reasonable risk that children are in the radio audience generally between the hours of 6:00 a.m. and 10:00 p.m. *See* NAL at 6 (¶ 14).

than discuss these cases, the Commission chooses to ignore them, asserting that it may do so because the rulings have not been officially published, and therefore "are not binding on the Commission." NAL at 6 (¶ 12). Nonetheless, the Commission's discussion, as explained in greater detail above, does not make clear for what reason these cases are being rejected.

The Commission also inexplicably finds irrelevant, but on distinct grounds, other informal rulings in which the Commission has declined to take enforcement action in cases involving sexually-oriented phrases such as "giving head" and "finger banging your boyfriend." *Mindy Pierce* ("finger banging"); *Letter from Charles W. Kelley, Chief, Investigations and Hearings Division, to Charles Giacona*, EB-01-IH-0407/WK, dated April 22, 2002 ("*Charles Giacona*") ("head"). The Commission simply asserts that "the material at issue here is more graphic and explicit than the language cited from these complaints, and that the particular reference to "'finger banging' was brief and fleeting." NAL at 6 (¶ 12). Infinity has already noted that the material subject to the NAL was in fact less explicit than other broadcasts found not indecent, and with respect to the relative brevity of the discussion, Infinity notes that the transcript included with the NAL is only a little more than two pages long, and thus represents only a minute or two of a more than four hour program.

Infinity submits that there simply is no rational, principled distinction for purposes of enforcing the indecency standard between the past broadcasts that have been found non-actionable and any of the material cited in the NAL. Infinity's good faith understanding of and reliance on this precedent therefore warrants dismissal of the Complaint under *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732 (D.C. Cir. 1965) (similarly situated cases may not be treated in a disparate manner).

C. The Bureau Must Consider *Contemporary* Community Standards In Evaluating Whether Material Is Patently Offensive Under Its Indecency Analysis.

Finally, the Commission notes, but fails to address, Infinity's argument that the type of straightforward, non-descriptive sexual discussion at issue here is entirely consistent with contemporary community standards for the broadcast medium and is therefore not patently offensive. The mere fact that a single complainant may have been offended, or believes that certain subject matter generally is inappropriate for broadcast, does not justify a finding that the material cited in the NAL is actionably indecent. *Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705, 2706 (1987); *see also Letter From Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau to Ms. Cherie Degnan*, EB-01-IH-0105/RBP, at 1, dated May 22, 2001.[73]

The Commission has never explained the methodology by which it ascertains such "contemporary" standards, but it is evident that the "contemporary standards" concept is not a static one and that such standards may not merely reflect the personal tastes and predilections of individual FCC Staff or Commissioners. *See Hamling*, 418 U.S. at 107. Although the Commission acknowledges that "community standards may change over time," it makes no effort to explain why the broadcast at issue here is inconsistent with community standards other than to state that the material is "similar to other material that has been found to be patently offensive." The Commission must view the material subject to the NAL in light of the current

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[73] The Commission's reliance on gauging the conformity of particular material with "contemporary community standards" is intended to ensure that specific broadcasts are judged neither on the basis of a decisionmaker's personal opinion, nor by their effect on a particularly sensitive or insensitive person -- such as the complainant -- or group. *See IBC of Pennsylvania*, 3 FCC Rcd at 933, *citing Hamling v. United States*, 418 U.S. 87, 107 (1974), *reh'g denied*, 419 U.S. 885 (1974)("*Hamling*").

level of sexual discourse in all national and local media,[74] and not based upon subjective notions of individual taste.

Indeed, recent public statements by both Chairman Powell and Commissioner Copps suggest a substantially different understanding than is advanced in the Commission's recent decisions. In his speech to the recent NAB Summit on Responsible Programming, Chairman Powell remarked that he was "of the view that competitive pressures much more than consolidation are what account for more programming that tests the limits of indecency and violence."[75] In a similar vein in his speech that same day, Commissioner Copps noted that "the unforgiving expectations of the marketplace have more influence than they once did in driving media behavior."[76] These statements are fundamentally at odds with the notion that the speech that the Commission is attempting to suppress in its recent indecency determinations is at odds with contemporary community standards. If "edgy" programming is a market-driven response to competitive pressures, then it can only be concluded that there is demand for such programming. And if such demand from the public exists, how can the programming delivered in response to such demand be inconsistent with contemporary community standards? Are the many individuals that are regular listeners of these programs not part of the community?

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[74] While WKRK believes that a local, rather than a national, standard should be used in assessing indecency complaints, it should be pointed out that because these shows are distributed nationally, they help to establish both a national indecency standard and a local one in Detroit. Under *Miller* and *Hamling,* indecency and obscenity determinations must be based upon varying local standards, not a monolithic, inflexible national standard. Listeners in Detroit should not have their programming choices limited or otherwise affected by the standards of listeners in Salt Lake City or Oklahoma City, nor should Detroit's standards be imposed upon Salt Lake City or other communities.

[75] Remarks of FCC Chairman Michael Powell at the NAB Summit on Responsible Programming, the Renaissance Hotel, Washington, D.C., March 31, 2004, at 1.

[76] Remarks of FCC Commissioner Michael Copps, NAB Indecency Summit, Washington, D.C., March 31, 2004, at 2.

Public acceptance simply cannot be ignored in addressing the issue of community standards. Howard Stern is not a fringe personality, who has suddenly emerged from the shadows to offend public decorum. Mr. Stern has been a radio broadcaster for more than a quarter century. On any given morning during the Winter of 2003, more than 1,000,000 adult listeners tuned in to the Howard Stern Show.[77] Based on a recent accounting of indecency enforcement provided to Chairman Powell to Rep. John Dingell, this figure substantially exceeds the total number indecency complaints filed with the FCC during the past *decade*.[78] The disparity in these numbers, particularly where the number of complaints is dramatically inflated by the more than half-million submitted in early February in response to the Super Bowl halftime show,[79] begs the question which group of listeners merits recognition as representative of contemporary community standards.

D. The Commission's Upward Adjustment of the Forfeiture Amount To The Statutory Maximum Is Inappropriate.

Assuming, *arguendo*, that a forfeiture would be appropriate based on the material addressed in the NAL, the Commission's finding "that an upward adjustment of the forfeiture amount to the statutory maximum of $27,500.00 is warranted" is both inadequately explained and wholly unjustified on the basis of the factual record. According to the Commission, this

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[77] Arbitron, Howard Stern Show Ratings in 41 Markets (Fall 2003). These numbers, which are based on Average Quarter-Hour Persons listening, *i.e.*, the average number of persons listening for at least five minutes during each quarter hour, actually understate the total number of people that listen to the Stern Show on a given morning as it represents the average number of listeners, rather than the Arbitron Cume, *i.e.*, the total number of *different* persons that listen during the program for at least five minutes.

[78] *See Letter from Michael K. Powell, Chairman, FCC, to John D. Dingell, Ranking Member, House Committee on Energy and Commerce*, Attachment, Exhibit 1 (listing the number of indecency complaints filed with the FCC between 1994 and 2004, which total 839,399).

[79] *Id.* (The number of complaints listed for 2004, 530,885, "includes 530,828 complaints regarding the Super Bowl XXXVIII halftime show").

increase in the proposed forfeiture is based on "Infinity's recent history of indecent or apparently indecent broadcasts." NAL at 7 (¶ 15).

As a matter of simple due process, the Commission's finding is deficient in that it fails to identify any specific instance in the licensee's recent history that would merit WKRK's treatment as a repeat offender. Although there are today other ongoing indecency proceedings involving the Station, at the time of the broadcast, which is the only relevant time for determining the licensee's prior history, WKRK had an unblemished record with respect to indecency.[80] An upward adjustment based upon FCC conclusions regarding broadcasts that *post-dated* the conduct at issue here is unwarranted, as the Station had received no notice that it had ever broadcast *any* arguably indecent material at the time of broadcast. Disciplinary action with respect to the material broadcast by WKRK on July 26, 2001, even if appropriate, cannot be magnified *based on subsequent events* simply because the Commission itself has taken longer to consider the complaint against the 2001 broadcast than it has to evaluate other complaints. Indeed, the fact that the Commission waited for nearly two years before even initiating an inquiry in this matter strongly suggests that the Station's conduct was not so serious as to provoke maximum penalties.[81]

To the extent that Infinity's forfeiture may have been adjusted upward in response to the compliance history of *other stations* licensed to its parent company, Infinity Broadcasting

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[80] At the time of the broadcast, WKRK was the subject of a single inquiry letter concerning alleged indecency, which was initiated two days prior to the broadcast subject to the NAL. The Enforcement Bureau dismissed this complaint on the merits on April 22, 2002. *See Charles Giacona.*

[81] The inquiry letter in this matter was dated June 3, 2003, six hundred and seventy-seven (677) days after the July 26, 2001 broadcast. *See* Letter from Maureen F. Del Duca, Chief, Investigations and Hearing Division, Enforcement Bureau, to Infinity Broadcasting Operations, Inc., dated June 3, 2003.

Corporation ("IBC"), any such adjustment is plainly inappropriate. IBC has *not one* cognizable indecency forfeiture in its history, as no such pending matter has been fully adjudicated.[82] Moreover, at the time of the broadcast, IBC's affiliated radio licensees had only a single indecency forfeiture pending at the Commission, with respect to Station WLLD(FM), Holmes Beach, Florida (in which the standard $7,000 forfeiture amount was assessed).[83] In prior instances where the Commission has determined it appropriate to consider violations committed by other stations controlled by a parent company, it has nonetheless imposed only the base forfeiture amount without an upward adjustment.[84] In light of these facts and precedent, the Commission's imposition of the statutory maximum forfeiture on Infinity should be reconsidered and reversed.

VI. Conclusion

Prior to 2003, the Commission's enforcement approach was highly suspect because it was premised on an unconstitutionally vague and overbroad indecency definition and an unproven assumption that indecent program material harms children. Despite the limited Supreme Court approval for FCC regulation of indecent speech in the 1978 *Pacifica* decision, the application of the First Amendment both to indecency regulation generally and the broadcast medium specifically has changed markedly in the intervening quarter century due to changes in both technology and corollary changes in the media marketplace.

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[82] *See* 47 U.S.C. § 504(c).

[83] The Commission's decision denying an Application for Review in this proceeding is discussed above in Section III.(E).

[84] *See Capstar TX Limited Partnership, Licensee of Station KTXQ(FM)*, 15 FCC Rcd 19615, 19617 (EB 2000) (imposing a $7,000 forfeiture for the alleged broadcast of indecent programming on KTXQ despite "stations controlled by [parent] Clear Channel hav[ing] recently committed indecency violations, as well as violations of the rule regarding broadcast of telephone conversations and the rule regarding licensee-conducted contests").

In this already fluid environment, the Commission has abruptly and systematically altered almost every aspect of indecency enforcement in ways that dramatically undermine the lawfulness of the overall scheme. Judicially-mandated caution and restraint have been abandoned, critical procedural protections have been discarded, the new concepts of "serious violations" and "multiple utterances," subject to enhanced penalties, have been introduced, the Commission has improperly attempted to free itself from the bounds of its own precedent, confusion has been introduced as to the methodology employed by the Commission in ascertaining contemporary community standards for the broadcast medium, and indecency regulation has been effectively supplanted by the regulation of profanity, with profanity defined in a patently unconstitutional manner.

The Commission cannot claim to have made a lawful indecency determination on the facts of any particular case, including this one, when it employs standards that are both substantively and procedurally infirm.[85] Any possible need to review and sanction particular programming carried on a particular station between 6:30 a.m. and 7:30 p.m. in Detroit, Michigan on July 26, 2001 is now dwarfed by the importance of rectifying the multiple, debilitating infirmities of the Commission's enforcement scheme, which are unconstitutionally suppressing

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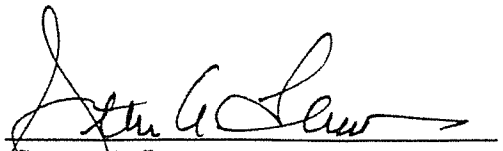
[85] *Cf. Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 562 (1975) ("Whatever the reasons may have been for the board's exclusion of the musical, it could not escape the obligation to afford appropriate procedural safeguards. We need not decide whether the . . . production is in fact obscene."); *Smith v. California*, 361 U.S. 147, 149 n. 4 (1960) (in light of the unconstitutional nature of the state procedures, the "obscene character" of the books at issue is irrelevant). With the announcement of a new enforcement standard implicating broadcasters' First Amendment rights, the Commission has a concomitant responsibility to examine carefully the constitutionality of its actions in all respects. *See Meredith Corp. v. FCC*, 809 F.2d 863, 874 (D.C. Cir. 1987).

protected speech in this country every single day. For all of these reasons, Infinity respectfully requests that the forfeiture proposed in the NAL be cancelled.

Respectfully submitted,

INFINITY BROADCASTING EAST INC.

By: 

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April 19, 2004

Its Attorneys

ATTACHMENT A

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

In the Matter of	)	
	)	
Infinity Broadcasting Operations, Inc.	)	File No. EB-01-IH-0633
	)	NAL/Acct. No. 200432080013
Licensee of Station WKRK-FM	)	FRN 0003476074
Detroit, Michigan	)	Facility ID No. 9618
	)	
	)	
	)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 8, 2004 **Released:** March 18, 2004

By the Commission: Commissioner Martin concurring and issuing a statement; Commissioner Adelstein issuing a statement; and Commission Copps dissenting and issuing a statement.

I. INTRODUCTION

1. In this *Notice of Apparent Liability For Forfeiture* ("*NAL*"), issued pursuant to section 503(b) of the Communications Act of 1934, as amended (the "Act") and section 1.80 of the Commission's rules,[1] we find that Infinity Broadcasting Operations, Inc., licensee of Station WKRK-FM, Detroit, Michigan, aired program material during the "Howard Stern Show" on July 26, 2001, that apparently violates the federal restrictions regarding the broadcast of indecent material.[2] Based upon our review of the facts and circumstances of this case, we conclude that Infinity is apparently liable for a monetary forfeiture in the amount of Twenty-Seven Thousand Five Hundred Dollars ($27,500.00), the statutory maximum in this context, for broadcasting indecent material in apparent violation of 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.

II. BACKGROUND

2. The Enforcement Bureau received a complaint alleging that Station WKRK-FM aired indecent material during the "Howard Stern Show," on July 26, 2001, between 6:30 and 7:30 a.m. The complainant submitted an audio tape of this broadcast.[3]

3. The Enforcement Bureau sent Infinity a letter of inquiry,[4] and attached a transcript of a portion of the material included in the audio tape.[5] In its response, Infinity states that "The Howard Stern

[1] 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

[2] *See* 18 U.S.C. § 1464, 47 C.F.R. § 73.3999 and 47 U.S.C. § 503(b).

[3] Letter from complainant to Federal Communications Commission, dated October 11, 2001.

[4] Letter from the Chief, Investigations and Hearings Division, Enforcement Bureau, to Infinity Broadcasting Operations, Inc., dated June 3, 2003.

[5] *See* Program Transcript, Attachment A.

Show" was aired on WKRK(FM) on July 26, 2001, and that it "has no knowledge at this time that the transcripts are materially different from what was actually broadcast by WKRK on July 26, 2001," but because the station did not retain a tape or transcript of the actual broadcast, it cannot state conclusively whether the material reproduced in the complainant's tape and in the transcript were broadcast over the station.[6] Infinity maintains, however, that the aired material was not actionably indecent and did not contain any description or depiction of sexual or excretory organs or activities in a patently offensive manner.[7] In addition, Infinity argues that the Commission's generic indecency definition is unconstitutional.

III. DISCUSSION

4. The Federal Communications Commission is authorized to license radio and television broadcast stations and is responsible for enforcing the Commission's rules and applicable statutory provisions concerning the operation of those stations. The Commission's role in overseeing program content is very limited. The First Amendment to the United States Constitution and section 326 of the Act prohibit the Commission from censoring program material and from interfering with broadcasters' freedom of expression.[8] The Commission does, however, have the authority to enforce statutory and regulatory provisions restricting indecency and obscenity. Specifically, it is a violation of federal law to broadcast obscene or indecent programming. Title 18 of the United States Code, section 1464 prohibits the utterance of "any obscene, indecent or profane language by means of radio communication."[9] In addition, section 73.3999 of the Commission's rules provides that radio and television stations shall not broadcast obscene material at any time, and shall not broadcast indecent material during the period 6 a.m. through 10 p.m.

5. Under section 503(b)(1) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.[10] In order to impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.[11] The Commission will then issue a forfeiture

[6] *See* Letter from Steven A. Lerman, Dennis P. Corbett, and David S. Keir, Counsel to Infinity Broadcasting Operations, Inc., to the Investigations and Hearings Division, Enforcement Bureau, dated July 17, 2003 ("*Infinity Response*"), at 5. As part of its response, Infinity indicated that it did not know whether other Infinity stations broadcast the language alleged by the complainant. Because the only evidence in the record relates to WKRK-FM, we limit our action here to that station.

[7] *Id.* at 8-9.

[8] *See* 47 U.S.C. § 326.

[9] 18 U.S.C. § 1464.

[10] 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1); *see also* 47 U.S.C. § 503(b)(1)(D)(forfeitures for violation of 18 U.S.C. § 1464). Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1). The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the section 503(b) context. *See, e.g., Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) ("*Southern California Broadcasting Co.*"). The Commission may also assess a forfeiture for violations that are merely repeated, and not willful. *See, e.g., Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359 (2001) (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator's repeated signal leakage). "Repeated" merely means that the act was committed or omitted more than once, or lasts more than one day. *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, ¶ 9.

[11] 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.[12] As we set forth in greater detail below, we conclude under this standard that Infinity is apparently liable for a forfeiture for its apparent willful violation of 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.

A. Indecency Analysis

6. Any consideration of government action against allegedly indecent programming must take into account the fact that such speech is protected under the First Amendment.[13] The federal courts consistently have upheld Congress's authority to regulate the broadcast of indecent material, as well the Commission's interpretation and implementation of the governing statute.[14] Nevertheless, the First Amendment is a critical constitutional limitation that demands that, in indecency determinations, we proceed cautiously and with appropriate restraint.[15]

7. The Commission defines indecent speech as language 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.[16]

> Indecency findings involve at least two fundamental determinations. First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition—that is, the material must describe or depict sexual or excretory organs or activities. . . . Second,

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[12] *See, e.g., SBC Communications, Inc.*, Apparent Liability for Forfeiture, Forfeiture Order, 17 FCC Rcd 7589, 7591, ¶ 4 (2002) (forfeiture paid).

[13] U.S. CONST., amend. I; *See Action for Children's Television v. FCC*, 852 F.2d 1332, 1344 (D.C. Cir. 1988) ("*ACT I*").

[14] 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." *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). *See also ACT I*, 852 F.2d at 1339; *Action for Children's Television v. FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 914 (1992) ("*ACT II*"); *Action for Children's Television v. FCC*, 58 F. 3d 654 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1043 (1996) *("ACT III")*. Moreover, we have previously rejected Infinity's constitutional challenges of the Commission's indecency definition. *See, e.g., Infinity Broadcasting Operations, Inc.(WKRK-FM)*, Apparent Liability for Forfeiture, Forfeiture Order, 18 FCC Rcd 26360 (2003), *recon. denied*, Memorandum Opinion and Order, FCC 04-34 (rel. Mar. 5, 2004) (rejecting argument the indecency definition is vague and overbroad based upon *Reno v. ACLU*, 521 U.S. 844 (1997) and rejecting argument that the indecency definition is constitutionally invalid because no causal link has been demonstrated between indecency and harm to children based upon *Ashcroft v. Free Speech Coalition*, 122 S.Ct. 1389 (2002) a case invalidating provision of the Child Pornography Prevention Act of 1996). We also reject Infinity's citation to *Interactive Digital Software Association v. St. Louis County, Missouri*, 329 F.3d 954 (8th Cir. 2003) in support of its argument that no causal link has been established between indecency and harm to children. This case invalidated an ordinance prohibiting certain sales, rental and provision of access to minors to graphically violent video games because there was no support that there was a strong likelihood of harm to the psychological well being of minors as a result of playing violent video games.

[15] *ACT I*, 852 F.2d at 1344 ("Broadcast material that is indecent but not obscene is protected by the First Amendment; the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what people may say and hear."). *See id.* at 1340 n.14 (" . . . the potential chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy.").

[16] *Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987)(subsequent history omitted), citing *Pacifica Foundation*, 56 FCC 2d 94, 98 (1975), *aff'd sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

> the broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast medium.[17]

8. As an initial matter, Infinity disputes that it aired material describing or depicting sexual and excretory activities and organs.[18] Specifically, Infinity argues that the material contains "brief and non-descriptive references to sexual practices that employ only clinical terms such as "evacuating" and "oral sex."[19] We disagree. Infinity's argument cites only one of the sexual practices described in the complained-of material.[20] In any event, the material at issue clearly describes named sexual practices[21] and also describes features of an excretory organ.[22] The material, therefore, warrants further scrutiny to determine whether or not it was patently offensive as measured by contemporary community standards for the broadcast medium.[23]

9. In our assessment of whether broadcast material is patently offensive, "the *full context* in which the material appeared is critically important."[24] 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 descriptions of sexual or excretory organs or activities; and (3) whether the material appears to pander or is used to titillate or shock.[25] 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."[26] In particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent,[27] or, alternatively, removing the broadcast material from the realm of indecency.[28] In this case, we note that the complained-of material is similar to material broadcast by the same station that we previously found to be patently offensive as measured by contemporary community standards for the broadcast medium.[29] This finding was based upon an examination of all

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[17] *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency ("Indecency Policy Statement")*, 16 FCC Rcd 7999, 8002, ¶¶ 7-8 (2001) (emphasis in original).

[18] *Infinity Response* at 9-10.

[19] *Infinity Response* at 10.

[20] *Id.* Infinity claims that discussion of a "blumpkin" involves only "brief and non-descriptive references to sexual practices that employ only clinical terms such as 'evacuating' and 'oral sex.'"

[21] *See* Program Transcript, Attachment A, at 9-10, describing a "blumpkin" and at 10-11, describing the "David Copperfield." *See also,* note 30, *infra.*

[22] *See* Program Transcript, Attachment A at 9-10, describing a "balloon knot" as the anal opening.

[23] The "contemporary standards for the broadcast medium" criterion is that of an average broadcast listener and with respect to Commission decisions, does not encompass any particular geographic area. *See Indecency Policy Statement* at 8002, ¶ 8 and n. 15.

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

[25] *Id.* at 8002-15, ¶¶ 8-23.

[26] *Id.* at 8003, ¶ 10.

[27] *Id.* at 8009, ¶ 19 (*citing Tempe Radio, Inc (KUPD-FM)*, 12 FCC Rcd 21828 (MMB 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))*, 12 FCC Rcd 4147 (MMB 1997) (forfeiture paid) (same).

[28] *Id.* 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").

three factors and a finding that each weighed in favor of a determination that the broadcast material was patently offensive. We find no reason to conclude that our analysis of the three principal factors should yield a different result with respect to the other material broadcast over Station WKRK-FM that is at issue here.

10. First, contrary to Infinity's argument, in context, the description of the sexual and excretory organs and activities in the complained-of material is graphic and explicit. There are descriptions of how specifically named sexual practices are performed, including references to an oral sexual practice that also involves excretory activity.[30] To the extent that the colloquial terms used, in part, to describe sexual activity involved in one of the sexual practices could be described as innuendo, they are nonetheless sufficient to render the material actionably indecent because the sexual import of the reference was "unmistakable."[31] Given the detailed and explicit manner in which the broadcast described the sexual and excretory organs and activities, there is no non-sexual meaning that a listener could possibly have attributed to the colloquial terms.[32]

11. Second, the broadcast contained repeated descriptions of sexual and excretory organs and activities.[33] Moreover, contrary to Infinity's argument that some of the descriptions used clinical terms,[34] the overall context in which the material was presented was used to pander, titillate and shock. The tone of the material is vulgar and lewd, not clinical.

12. We also reject Infinity's contention that this material cannot be found indecent because there are other cases referencing topics such as masturbation, and anal and oral sex in which no enforcement action was taken. In support of this argument, Infinity cites two unpublished Enforcement Bureau staff decisions, in which there were references to "giving head"[35] and "finger banging your

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(...continued from previous page)

[29] *See Infinity Broadcasting Operations, Inc., (WKRK-FM),* Apparent Liability for Forfeiture, Forfeiture Order, 18 FCC Rcd 26360 (2003), *recon. denied,* Memorandum Opinion and Order, FCC 04-34 (rel. Mar. 5, 2004) (broadcast on Station WKRK on January 9, 2002 during the "Deminski & Doyle Show" that "described in detail how specifically named sexual acts are performed" and that "included explicit and graphic sexual references to anal and oral sex, as well as explicit and graphic references to sexual practices that involve excretory activities"). The complained-of material at issue here was broadcast on an earlier date, but includes similar descriptions of a "blumpkin," and the "David Copperfield," sexual practices among those at issue in the January 9, 2002, broadcast over Station WKRK-FM.

[30] *See* Program Transcript, Attachment A at 9-11.

[31] *Indecency Policy Statement,* 16 FCC Rcd at 8002-04, ¶¶ 9-12 (2001). *See also, Emmis Radio License Corporation (WKQX(FM))*, Notice of Apparent Liability for Monetary Forfeiture, 17 FCC Rcd 5263 (EB 2002); Apparent Liability for Forfeiture, Forfeiture Order, 17 FCC Rcd 21697 (EB 2002), *recon. denied,,* Memorandum Opinion and Order, 19 FCC Rcd 2697 (EB 2004)(where innuendo's "unmistakably sexual" meanings and contexts were established by lengthy surrounding discussion, the material was found to be actionably indecent). In this regard, "when you're goin' like a dog..." referred to the position employed during the "David Copperfield" sexual practice. Program transcript, Attachment A at 10.

[32] *See Sagittarius Broadcast Corporation*, Memorandum Opinion and Order, 7 FCC Rcd 6873, 6874 (1992) (subsequent history omitted).

[33] *See, e.g., Emmis Radio License Corporation (WKQX(FM))*, Notice of Apparent Liability for Monetary Forfeiture, 17 FCC Rcd 5263, 5266 ¶¶ 10-11; Forfeiture Order, 17 FCC Rcd at 21699 ¶ 9.

[34] *Infinity Response* at 9-10.

[35] *See Infinity Response* at 12 citing Letter from Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, dated April 22, 2002, EB-01-IH-0407.

boyfriend."[36] However, the material at issue here is more graphic and explicit than the language cited from these complaints. Moreover, the use of the term "finger banging" was brief and fleeting, which is not the case with the material at issue here.[37] Infinity also cites material at issue in an unpublished internal staff memorandum and unpublished staff decisions where the Mass Media Bureau, the predecessor to the Media Bureau, found that certain material was not actionably indecent.[38] To the extent that the staff may have erred by determining that the material in those cases was not indecent, these unpublished decisions are not binding on the Commission.[39] That is particularly the case here, where published decisions, including those cited in the Commission's *Indecency Policy Statement*, provide guidance indicating that material such as that contained in this case is indecent.

13. Infinity argues that due to profound changes in social mores, the range of acceptable topics and words for broadcast discussion has changed dramatically, especially in light of widespread media coverage of sex scandals involving President Clinton and the Roman Catholic Church. Although contemporary community standards may change over time, the material at issue here is nevertheless patently offensive as measured by current contemporary community standards for the broadcast medium and is similar to other material that has been found to be patently offensive. We thus reject Infinity's argument that the material broadcast over Station WKRK-FM on July 26, 2001, is consistent with contemporary community standards for the broadcast medium.

14. It is undisputed that the complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under section 73.3999 of the Commission's rules. Thus, because there was a reasonable risk that children may have been in the audience at the time that the material at issue was broadcast on July 26, 2001, the material broadcast is legally actionable.[40] By broadcasting this material, Infinity apparently violated the prohibitions in 18 U.S.C. § 1464 and the Commission's rules against broadcast indecency.

B. Proposed Forfeiture

15. Based upon our review of the record in this case, we conclude that Infinity is apparently liable for the willful violation of our rules. The Commission's *Forfeiture Policy Statement* sets a base forfeiture amount of $7,000 for transmission of indecent or obscene materials.[41] The *Forfeiture Policy Statement* also specifies that the Commission shall adjust a forfeiture based upon consideration of the

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[36] *See Infinity Response* at 12 citing Letter from Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, dated February 12, 2002, EB-01-IH-0331.

[37] *Id.* at 4-5.

[38] *See* Memo from Thom Winkler to WIOD Complaint File, dated April 21, 1997, FCC Ref. No. 97010196; Letter from Norman Goldstein, Chief, Complaints and Political Programming Branch, Enforcement Division, Mass Media Bureau, dated May 15, 1997, FCC Ref. No. 94069521; Letter and Appendix from FCC Commissioner James H. Quello to The Honorable Senator Alfonse M. D'Amato, dated April 29, 1994.

[39] *See, e.g., Amor Family Broadcasting Group v. FCC*, 918 F. 2d 960, 962 (D.C. Cir. 1990), *citing Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 413 (7th Cir. 1987). *See also Lorenzo Jelks v. FCC*, 146 F.3d 878, 881 (D.C. Cir. 1998).

[40] *See ACT III*, 58 F.3d at 660-63.

[41] *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17113 (1997), *recon. denied* 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*"); 47 C.F.R. § 1.80(b). The Commission amended its rules to increase the maximum penalties to account for inflation since the last adjustment of the penalty rates. The new rates apply to violations that occur or continue after November 13, 2000. *See Order, In the Matter of Amendment of Section 1.80(b) of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 15 FCC Rcd 18221 (2000).

factors enumerated in section 503(b)(2)(D) of the Act, 47 U.S.C. § 503(b)(2)(D), such as "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[42] In this case, taking all of these factors into consideration, we find that an upward adjustment of the forfeiture amount to the statutory maximum of $27,500.00 is warranted. Infinity's recent history of indecent or apparently indecent broadcasts justifies the upward adjustment. We reiterate our previous statements that we may sanction a broadcaster for apparent, repeated violations of the indecency rules for separate utterances within one program[43] and that "additional serious violations by Infinity may well lead to a license revocation proceeding."[44]

IV. ORDERING CLAUSES

16. ACCORDINGLY, IT IS ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, and section 1.80 of the Commission's rules,[45] that Infinity Broadcasting Operations, Inc. is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of Twenty-Seven Thousand Five Hundred Dollars ($27,500.00) for willfully violating 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.

17. IT IS FURTHER ORDERED, pursuant to section 1.80 of the Commission's rules, that within thirty (30) days of the release of this *NAL*, Infinity SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture. .

18. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment MUST INCLUDE the FCC Registration Number ("FRN") referenced above and also should note the NAL/Account Number referenced above.

19. The response, if any, must be mailed to William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W, Room 3-B443, Washington D.C. 20554 and MUST INCLUDE the NAL/Acct. No. referenced above.

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

21. Requests for payment of the full amount of this *NAL* under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C.

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[42] *Forfeiture Policy Statement*, 12 FCC Rcd at 17100-01, ¶ 27.

[43] *Infinity Broadcasting Operations, Inc., (WKRK-FM)*, Notice of Apparent Liability for Monetary Forfeiture, 18 FCC Rcd 6915, 6918-19, ¶ 12 (2003), *Apparent Liability for Forfeiture*, Forfeiture Order, 18 FCC 26360 (2003), *recon. denied*, Memorandum Opinion and Order, FCC 04-34 (rel. Mar. 5, 2004).

[44] *Id.* at 6919, ¶ 13. We note that the broadcast at issue here took place prior to the release of the WKRK-FM *NAL* in which this statement appeared.

[45] 47 C.F.R. § 1.80.

20554.[46]

22. Under the Small Business Paperwork Relief Act of 2002, Pub L. No. 107-198, 116 Stat. 729 (June 28, 2002), the FCC is engaged in a two-year tracking process regarding the size of entities involved in forfeitures. If Infinity qualifies as a small entity and if it wishes to be treated as a small entity for tracking purposes, it should so certify to us within thirty (30) days of this *NAL*, either in its response to the *NAL* or in a separate filing to be sent to the Investigations and Hearings Division. The certification should indicate whether Infinity, including its parent entity and its subsidiaries, meet one of the definitions set forth in the list provided by the FCC's Office of Communications Business Opportunities ("OCBO") set forth in Attachment B of this Notice of Apparent Liability. This information will be used for tracking purposes only. Infinity's response or failure to respond to this question will have no effect on its rights and responsibilities pursuant to Section 503(b) of the Communications Act. If Infinity has questions regarding any of the information contained in Attachment B, it should contact OCBO at (202) 418-0990.

23. Accordingly, IT IS ORDERED, that the complaint filed against Station WKRK-FM's broadcast of the "Howard Stern Show" on July 26, 2001, IS GRANTED to the extent indicated herein, AND IS OTHERWISE DENIED, and the complaint proceeding IS HEREBY TERMINATED.[47]

24. IT IS FURTHER ORDERED, that a copy of this *NAL* shall be sent by Certified Mail Return Receipt Requested to Stephen A. Hildebrandt, Vice President, Infinity Broadcasting Operations, Inc., 2000 K Street, N.W., Suite 725, Washington, D.C. 20006; to Infinity's counsel, Steven A. Lerman, Esq., Dennis P. Corbett, Esq., and David S. Keir, Esq., Leventhal, Senter and Lerman P.L.L.C., 2000 K Street, N.W., Suite 600, Washington, D.C. 20006-1809, and to the complainant.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[46] *See* 47 C.F.R. § 1.1914.

[47] Consistent with section 503(b) of the Act and consistent Commission practice, for the purposes of the forfeiture proceeding initiated by this *NAL*, Infinity shall be the only party to this proceeding.

ATTACHMENT A
Program Transcript

Radio Station: WKRK-FM, Detroit, MI
Date/Time of Broadcast: July 26, 2001, 6:30 a.m. to 7:30 a.m.
Material Broadcast: The Howard Stern Show

HS: Howard Stern
RQ: Robin Quivers
MV: Male Cast Member

HS: I said to Mark Wahlberg yesterday, had he ever gotten a blumpkin from a girl and everyone around here is acting like they don't know what it is.

RQ: You're the only nutcase who does.

MV: I said "blumpkin" on the "Norm Show" and the network censor, we told him we just made the word up. He goes, "that's definitely not a real word right?" We go, no,no,no. And I said it, I yelled out at a hooker in a cab.

HS: What do you say to her, "how about a blumpkin?"

MV: I go "honey, how much for a blumpkin?"

HS: Right.

MV: And uh the network censor never heard of it. And he goes if you just made it up it's fine but if it's a real thing we can't have it. So it's aired, it's been on ABC, it's like the dirtiest thing ever on television.

HS: Yeah, but nobody knows what it is. A blumpkin... I can explain it cleanly.

RQ: There's nothing clean about a blumpkin.

HS: Well, a blumpkin is receiving oral sex while you're sitting on a toilet bowl if you are a man. You're sitting on a toilet bowl and uh, while you're evacuating you receive your oral.

RQ: Ick.

HS: And uh, then, what did I say yesterday too you didn't understand? Balloon knot?

RQ: Yes, I don't know what that is. Somebody said to me "is that the funniest thing ever?" and I was like "what is that?"

HS: A balloon knot...

RQ: I didn't want to show my ignorance, I laughed too.

HS: A balloon knot... I'm gonna post these on a web site...

RQ: Yeah, we need a dictionary for this show.

HS: A balloon knot is when you bend over and I can see up right up your old…

RQ: Up the wazoo?

HS: Up the wazoo and uh, you know that's a balloon knot that you see. That's called a "balloon knot."

RQ: Really, I did not know that.

HS: Think about it, it looks like a balloon knot.

RQ: I don't know. Oh… you know what…

HS: Tie up a balloon.

RQ: I'm just thinking of a balloon knot…

MV: It all makes sense, Robin, come on.

HS: And uh, what else did I say? "Nasty Sanchez," you didn't know what that was.

RQ: Oh, I don't even want to know half the time what these things are…

HS: That I'd have to post on the internet.

RQ: 'Cause there've been a number of terms used lately. Would you do… 'cause KC's always blurtin' them out.

HS: "Strawberry shortcake"

RQ: "Strawberry shortcake" I've never heard of. "Dirty Sanchez"

HS: "Nasty Sanchez."

RQ: What is the others KC?

MV: I heard a new one the other day. It was the "David Copperfield."

HS/RQ: That's right.

MV: Okay, do you want to explain it, since I... When you're goin' like a dog…

HS: Right.

MV: …and you're about to finish and instead you don't finish, you spit on her and then you turn around and when she turns her face around then you go… So it's kind of like an illusion…

HS: Right.

MV: to David Copperfield.

RQ: Sleight of hand.

HS: Misdirection.

MV: Classic misdirection.

HS: You trick her. There's a million of them, but uh, I'll post them on the web.

RQ: Yes, because people need to know. These aren't in the regular dictionary.

*** ***

October 2002

ATTACHMENT B

FCC List of Small Entities

As described below, a "small entity" may be a small organization, a small governmental jurisdiction, or a small business.

(1) Small Organization

Any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

(2) Small Governmental Jurisdiction

Governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.

(3) Small Business

Any business concern that is independently owned and operated and is not dominant in its field, *and* meets the pertinent size criterion described below.

Industry Type	Description of Small Business Size Standard
Cable Services or Systems	
Cable Systems	Special Size Standard – **Small Cable Company** has 400,000 Subscribers Nationwide or Fewer
Cable and Other Program Distribution	\$12.5 Million in Annual Receipts or Less
Open Video Systems	
Common Carrier Services and Related Entities	
Wireline Carriers and Service providers	1,500 Employees or Fewer
Local Exchange Carriers, Competitive Access Providers, Interexchange Carriers, Operator Service Providers, Payphone Providers, and Resellers	

Note: With the exception of Cable Systems, all size standards are expressed in either millions of dollars or number of employees and are generally the average annual receipts or the average employment of a firm. Directions for calculating average annual receipts and average employment of a firm can be found in 13 CFR 121.104 and 13 CFR 121.106, respectively.

International Services	
International Broadcast Stations	

International Public Fixed Radio (Public and Control Stations)	$12.5 Million in Annual Receipts or Less
Fixed Satellite Transmit/Receive Earth Stations	
Fixed Satellite Very Small Aperture Terminal Systems	
Mobile Satellite Earth Stations	
Radio Determination Satellite Earth Stations	
Geostationary Space Stations	
Non-Geostationary Space Stations	
Direct Broadcast Satellites	
Home Satellite Dish Service	
Mass Media Services	
Television Services	$12 Million in Annual Receipts or Less
Low Power Television Services and Television Translator Stations	
TV Auxiliary, Special Broadcast and Other Program Distribution Services	
Radio Services	$6 Million in Annual Receipts or Less
Radio Auxiliary, Special Broadcast and Other Program Distribution Services	
Multipoint Distribution Service	Auction Special Size Standard – **Small Business** is less than $40M in annual gross revenues for three preceding years
Wireless and Commercial Mobile Services	
Cellular Licensees	1,500 Employees or Fewer
220 MHz Radio Service – Phase I Licensees	
220 MHz Radio Service – Phase II Licensees	Auction special size standard - **Small Business** is average gross revenues of $15M or less for the preceding three years (includes affiliates and controlling principals) **Very Small Business** is average gross revenues of $3M or less for the preceding three years (includes affiliates and controlling principals)
700 MHZ Guard Band Licensees	
Private and Common Carrier Paging	
Broadband Personal Communications Services (Blocks A, B, D, and E)	1,500 Employees or Fewer
Broadband Personal Communications Services (Block C)	Auction special size standard - **Small Business** is $40M or less in annual gross revenues for three previous calendar years **Very Small Business** is average gross revenues of $15M or less for the preceding three calendar years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Broadband Personal Communications Services (Block F)	
Narrowband Personal Communications Services	
Rural Radiotelephone Service	1,500 Employees or Fewer
Air-Ground Radiotelephone Service	
800 MHz Specialized Mobile Radio	Auction special size standard - **Small Business** is $15M or less average annual gross revenues for three preceding calendar years
900 MHz Specialized Mobile Radio	
Private Land Mobile Radio	1,500 Employees or Fewer
Amateur Radio Service	N/A
Aviation and Marine Radio Service	1,500 Employees or Fewer
Fixed Microwave Services	

Public Safety Radio Services	**Small Business** is 1,500 employees or less **Small Government Entities** has population of less than 50,000 persons
Wireless Telephony and Paging and Messaging	1,500 Employees or Fewer
Personal Radio Services	N/A
Offshore Radiotelephone Service	1,500 Employees or Fewer
Wireless Communications Services	**Small Business** is $40M or less average annual gross revenues for three preceding years **Very Small Business** is average gross revenues of $15M or less for the preceding three years
39 GHz Service	
Multipoint Distribution Service	Auction special size standard (1996) – **Small Business** is $40M or less average annual gross revenues for three preceding calendar years Prior to Auction – **Small Business** has annual revenue of $12.5M or less
Multichannel Multipoint Distribution Service	$12.5 Million in Annual Receipts or Less
Instructional Television Fixed Service	
Local Multipoint Distribution Service	Auction special size standard (1998) – **Small Business** is $40M or less average annual gross revenues for three preceding years **Very Small Business** is average gross revenues of $15M or less for the preceding three years
218-219 MHZ Service	First Auction special size standard (1994) – **Small Business** is an entity that, together with its affiliates, has no more than a $6M net worth and, after federal income taxes (excluding carryover losses) has no more than $2M in annual profits each year for the previous two years New Standard – **Small Business** is average gross revenues of $15M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) **Very Small Business** is average gross revenues of $3M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Satellite Master Antenna Television Systems	$12.5 Million in Annual Receipts or Less
24 GHz – Incumbent Licensees	1,500 Employees or Fewer
24 GHz – Future Licensees	**Small Business** is average gross revenues of $15M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) **Very Small Business** is average gross revenues of $3M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Miscellaneous	
On-Line Information Services	$18 Million in Annual Receipts or Less
Radio and Television Broadcasting and Wireless Communications Equipment Manufacturers	750 Employees or Fewer
Audio and Video Equipment Manufacturers	
Telephone Apparatus Manufacturers (Except Cellular)	1,000 Employees or Fewer
Medical Implant Device Manufacturers	500 Employees or Fewer

Hospitals	$29 Million in Annual Receipts or Less
Nursing Homes	$11.5 Million in Annual Receipts or Less
Hotels and Motels	$6 Million in Annual Receipts or Less
Tower Owners	(See Lessee's Type of Business)

DISSENTING STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: Infinity Broadcasting Operations Inc., licensee of WKRK-FM, Detroit Michigan, Notice of Apparent Liability for Forfeiture

I dissent from the Commission's decision today to provide a slap on the wrist rather than take serious action to address the indecency on our airwaves. In this decision, the Commission proposes a fine of $27,500 against this multi-billion dollar media conglomerate.

I am troubled by several aspects of this decision that demonstrate the Commission is not yet taking a strong stand against indecency on the airwaves. First, the Commission fined this very same station last year for airing some of the most vulgar and disgusting material I have had the misfortune to examine since I joined the Commission. In both that decision and this Order, the Commission warned Infinity that additional violations may well lead to the initiation of a license revocation proceeding. Some may argue that the program at issue today pre-dated the broadcast addressed last year, which only serves to demonstrate the need to consider complaints in a more timely manner. Moreover, the statute does not require notice to begin a license revocation hearing.

Second, the Commission recently reaffirmed that its indecency enforcement will address not only the station that is the subject of a complaint, but also any other station that aired the same programming. Yet here, the Commission proposes a fine against only WKRK-FM in Detroit notwithstanding that this program airs on numerous stations across the country.

The time has come for the Commission to send a message that it is serious about enforcing its indecency rules.

CONCURRING STATEMENT OF COMMISSIONER KEVIN J. MARTIN,

Re: *Infinity Broadcasting Operations, Inc., Licensee of Station WKRK(FM), Detroit, MI, Notice of Apparent Liability for Forfeiture*

This Order emphasizes the importance of the Commissioner responding to complaints in a more timely fashion. This is the same licensee that we have previously fined for "egregious" indecency violations and warned against future violations.[1] This broadcast, however, actually pre-dates the broadcast that incurred those warnings.

[1] *Infinity Broadcasting Operations, Inc., Licensee of Station WKRK-FM, Detroit, Michigan*, Notice of Apparent Liability, 18 FCC Rcd. 6915, 6919 (2003).

STATEMENT OF COMMISSIONER JONATHAN S. ADELSTEIN

Re: Infinity Broadcasting Operations, Inc., Licensee of Station WKRK-FM, Detroit, Michigan; Notice of Apparent Liability for Forfeiture

I support this Notice of Apparent Liability for the broadcast of indecent material at a time when children may be in the audience. This NAL furthers our responsibility to enforce statutory and regulatory provisions restricting broadcast indecency. While this case predates another case in which this station aired some of the most egregious broadcast indecency that I have yet encountered, we impose the statutory maximum fine here and remind broadcasters that the Commission can and will avail itself of a range of enforcement sanctions. I am also concerned that the Commission did not take more steps to address other stations which likely aired the same programming.

Since I arrived at the Commission, we have greatly stepped up our enforcement against indecent broadcasts. I expect that these stepped-up actions will convince broadcasters that they cannot ignore their responsibility to serve the public interest and to avoid the broadcast of indecent material over the public airwaves.

ATTACHMENT B

Report Concerning Certain Sexually Oriented Remarks Made on the Howard Stern Show

Prepared for Infinity Broadcast Corporation

July 14, 1994

by

Daniel Linz, Ph.D

Edward Donnerstein, Ph.D

(University of California, Santa Barbara)

Infinity Broadcasting Corporation has asked us to analyze transcripts of the tapes submitted with the March 4, 1994 complaint filed with the Federal Communication Commission under the pseudonym Susan Jones concerning the Howard Stern radio program. We have carefully examined the contents of the transcript prepared from the tapes which accompanied the complaint and present the results of our review and other comments below.

First, we note that the Federal Communication Commission, in the course of its various indecency rulings, has emphasized the importance of the "obliqueness" of the material in question. In its 1987 Memorandum Opinion and Order, paragraph 20 focused on the Howard Stern material and found that much of the material was not indecent because it "involved innuendo and double entendre -- that is, it was oblique or susceptible to varying interpretations -- and therefore did not constitute indecency..." To a similar effect is an October 23, 1992 Memorandum Opinion and Order relating to Infinity which, at paragraph 9, noted that since "the purpose of indecency enforcement is to 'shelter children from exposure to words and phrases their parents regard as inappropriate for them to hear,' .... the salient question in examining a broadcast is whether the sexual or excretory import was inescapable and understandable not only to adults but especially to children."

In a previous report prepared for Infinity Broadcasting Corporation we reviewed the social science research on children's exposure and comprehension of sexually-oriented remarks made on the Howard Stern Show (See Review of Social Science Research on Children's Exposure to and Comprehension of Sexually-oriented Remarks Made on the Howard Stern Show, February 19, 1993, by Linz, Wilson and Donnerstein). In that report we came to the following conclusions regarding children's ability to understand Howard Stern's remarks:

> Our review of the currently available evidence suggests that few children listen to the radio for informational purposes, and virtually no children listen to the Howard Stern Show. Research suggests that children and teens under the age of at least 15 years would have great difficulty comprehending nonliteral language such as metaphors and innuendos such as that used by Stern. Our conclusions are that the transcript of remarks made by Stern do not contain material that would be understandable to children...

In addition we concluded:

> ...that even assuming that some of the material could be understood, there is no evidence that such material would be harmful. Finally, we conclude that the evidence that has been cited by the FCC for harmful effects is either irrelevant to the issue or not scientifically sound.

Assuming Children Listened to the Howard Stern Transcripts at Issue Here, Would They Understand What Was Said?

There is no study specifically addressing the issue of children's comprehension of the language used on the Stern show. However, there are studies of children's ability to comprehend nonliteral or indirect utterances including sexual innuendo and metaphors. This research is relevant to the question of whether children would understand the content of the Stern program.

Children's comprehension of sexual innuendo. We have been able to locate only one investigation of the comprehension of sexual innuendo per se (hints or sly remarks indirectly referring to sex, usually derogatory). In this study, teens between the ages of 12 -16 years were exposed to a series of 24 television excerpts which contained sexual innuendos that varied in explicitness (Silverman-Watkins & Sprafkin, 1983). These innuendos included references to physical /sexual attributes, intercourse, and socially discouraged sexual practices such as homosexuality, rape, transvestism, fetishism, striptease and prostitution. In general, teens aged 14 and 16 had higher comprehension of these ideas than did the 12-year-olds. However, even the 16 year-olds had difficulty with some of the innuendos. In general all three age groups' average comprehension scores reflected "some understanding, but missing parts of the criterion (correct) answer." There have been no additional studies conducted since our last report.

There are often allusions to sex and sexual innuendos in the Stern transcripts. Two examples are listed below.

HS: Howard Stern
RQ: Robin Quivers

MV: Male Voice

December 6, 1993

HS: Don't you...
MV: Take a little precaution?
HS: Right.
MV: You know.
RQ: What's the precaution?
MV: A Dixie cup, alright? What do you mean?
RQ: (Laughs)
HS: Takes a Dixie cup.
MV: Some things you don't have to discuss.
HS: He uses his sock. He has a sock.
MV: Then I discard it, I don't put it in the wash.
HS: Right, right, that's good, you bury it in the back yard with Jessica Hahn's lingerie. (Laughter)...

January 19th, 1994

MV: The next day, as I recall, I kind of remember as it was happening that there was gagging going on, but this can happen ...
HS: Right.
MV: in such a thing (laughter) and the next, you know what I'm saying? I mean.
RQ: Oh, I know what you're saying, okay?
HS: And she was gagging, right' Okay, yeah, she was gagging ...
MV: So she must have left that night.

Because research indicates that 9- to 12-year-olds have difficulty understanding sexual innuendos per se as well as nonliteral sexual references in song lyrics, and even 14- and 16-year-olds evidence some problems comprehending such veiled references, it is unlikely that older elementary school children and teens would understand the innuendo phrases indirectly referring to sex in the Stern transcript listed above. In fact, even to many adults, the sexual import of these phrases is not inescapable.

Children's comprehension of sexual metaphors. Understanding of metaphors reflects the development of a sophisticated conceptual system by the listener. The task of comprehending metaphor involves three logical steps: 1) Detection of nonliteral intent--the listener must realize that the speaker does not mean what he/she says, and that he means something very different from

what is said. 2) Detection of relation between sentence and speaker meanings--the hearer must recognize that the stated proposition bears a relation of similarity to the implied proposition. 3) Detection of speaker meaning--the listener must infer the message the speaker intends to convey, and the listener does this on the basis of the relation that he/she perceives between what is said and what is meant. Most of children's errors in comprehending metaphor occur at steps 2 and 3.

Metaphors themselves come in a variety of forms and some forms are more difficult for children to understand than others (Gentner, 1988; Waggoner & Palermo, 1989). Extensions of physical terms to people (psychological.physical metaphors) are hardest for children to understand. For example, descriptions of a person as "smooth" presents great difficulties for those under 12 years of age. Research studies consistently reveal errors in understanding this type of metaphor. Young children will often say that a "smooth" person is someone who has just shaved. Older children may be able to grasp the idea that two different domains (physical and psychological) are involved but not understand exactly how the domains are connected, offering responses such as a "smooth" person is "nice."

These errors occur primarily because of lack of domain knowledge (Cicone, Gardner & Winner, 1981). One reason children may fail to understand metaphors of the "smooth person" type is because they do not make fine enough distinctions among personality traits or because they do not have a reasonable notion of personality traits at all.

Understanding of metaphors emerges on a domain-by-domain basis (Winner, 1988). As soon as the child has knowledge of a particular domain he or she is capable of understanding the metaphor. Errors in understanding may occur anytime children lack domain specific knowledge.

From the above research, it is not expected that children would understand metaphorical uses of sexual terms until they had acquired the domain specific knowledge about sex. Studies strongly suggest that knowledge and experience in this domain may occur at a later age than with the use of other forms of social knowledge. Many studies have revealed findings of sexual naivete on the part of younger children, which is further reflected in studies of children's knowledge of

clinical sexual terms (i.e., vagina, penis). In a review of the literature, Hyde (1990), a noted sex education expert, asserted that those between the ages of 5-15 in America are "sexual illiterates" (p. 646). For example, Goldman and Goldman (1982), found 0% of 9-year-olds knew the meaning of the term "uterus."

The transcript of the Howard Stern broadcasts focused upon in this complaint contains examples of metaphors concerning the topic of sex that require sophisticated knowledge of several domains. For example, Howard Stern and a male guest engage in the following exchanges:

December 6, 1993

HS: We're allowed to masturbate. What is this? Suddenly I have to wither up and die, be Ward Cleaver.
MV: Friday and Saturday night if it makes you feel better.

January 19th, 1994

HS: and that's because you're such a monster.
MV: Well, of course.
HS: Yeah, right, I've seen you. Nobody's gagging on anything.

A sophisticated knowledge of several domains is required for a child to understand what Stern and the others are referring to in this conversation. A child must have sufficient knowledge of the sexual domain to understand the meaning of the word "masturbate." A child must also possess sufficient knowledge of the social and psychological world to understand the metaphorical phrase "wither up and die" as it is intended--not as literally dying but as losing one's sexual desire. Even the reference to "Ward Cleaver" may not be understandable to younger children who have never seen the 50's television series "Leave It To Beaver." Similarly, it is unlikely children will know what Stern is referring to when he metaphorically compares the male guest to a "monster." Errors in understanding are likely to occur because children lack knowledge in these specific domains.

Assuming that Children Listened to the Howard Stern Remarks at Issue Here Would Harm be

Inflicted?

A key assumption underlying the FCC's scheme of indecency enforcement is that such exposure is harmful to children. Policy makers have speculated on possibly harmful effects of exposure to indecency. These effects have included greater acceptance of sexual promiscuity, greater awareness of "deviant" sexual behaviors such as homosexuality, and the promotion of sexism or the reduction of women to sexual objects.

In spite of decades of debate about the influence of mass media on young people's sexual attitudes and behavior, relatively few empirical studies exist on these topics (Roberts, 1993). However, a few of the harm effects suggested by policy makers have been examined by researchers--specifically greater acceptance of sexual promiscuity and so-called deviant sexual behaviors. The results of these studies generally show no statistically significant effects for exposure to sexual content in the mass media (even for the potentially more powerful forms of media such as television) on subsequent sexual attitudes and behaviors. The major problem with nearly all of these studies is that they use adults rather than children as subjects. In addition, most of the studies suffer from the fact that they are correlational in nature rather than experiments. Even among those that use experimental methods and employ children (i.e., high school age subjects), few effects have been found.

No experimental studies in which the researcher controls children's exposure to sexually-oriented remarks have been undertaken. A few correlational studies have examined the relationship between general radio use and beliefs about others' and listeners' own attitudes toward sexual behavior. These studies suggest that radio listening may be related to estimates about others' sexual behaviors but radio use does not predict students' own attitudes about sex or sexual behaviors. A major drawback to all of this research is that it has been conducted solely with college age subjects.

There are several investigations of the effects of exposure to sexual images and references currently found on television. These studies have a bearing on the issue of sexually oriented radio

broadcasts because they serve as an indication of the threshold for effects of this type of content. Children would be expected to comprehend and learn more from television than from nonvisual media. If studies of television fail to substantiate harmful effects of sexual materials, then radio is dramatically less likely to produce such an impact. Indeed, as we show below, the research suggests no negative effects for exposure to televised sexual depictions. Given the negligible effects for this presumably more powerful audiovisual medium, we would reason that exposure to sexual information via the audio channel only (radio) would have virtually no impact.

The strongest study in this area, methodologically speaking, is one in which children were queried about their exposure to TV programs containing sexual content, first in 1976 when the children were 10-11 years old and then again 5 years later (1981) when they were teens, 16 years of age (Peterson, Moore, & Furstenburg, 1984). In addition, at the later time the teens were asked to report about their sexual experiences. Thus, the researchers were able to correlate early exposure to TV sex with later sexual activities. The results showed no statistically significant effects for self-reported exposure to sexual content at age 10-11 on sexual activities at age 16. This study suggests that early exposure to sexual content on television produces no effects on subsequent sexual behavior. Although these results are correlational and thus preclude a definitive statement about cause and effect, this study stands on much stronger methodological footing than most correlational research. The authors chose to follow a "panel" of individuals over a five-year period rather than having them report on their viewing behavior and sexual practices at the same time. Because viewing is measured well before sexual practices, the validity of the results of the study is strengthened.

A few studies have also examined exposure to sexual images that would be found on television (e.g., MTV). The findings suggest that exposure to these images has a limited effect. Specifically, increased knowledge regarding sexual terms may occur. However, there is no evidence for changes in beliefs, attitudes, or values regarding sexual practices. Nor is there evidence for changes in actual behavior following exposure. If studies of television fail to

substantiate harmful effects of sexual materials, then there is reason to believe that radio broadcasts dealing with sex are even less likely to produce such an impact. As we noted above, the references to sex in the radio broadcast The Howard Stern Show are very difficult for children to understand because of Stern's reliance on nonliteral language. Children's language comprehension is further impeded by the lack of visual aids in radio. The nonliteral language used by Stern in the transcripts we have studied coupled with the lack of visual cues in any radio broadcast make it extremely unlikely that children will understand these messages, and there is no reasonable basis for one to conclude that the sexual or excretory import of these messages is inescapable to children. Further, it is our opinion that no harmful effect will occur when children are exposed to the messages in the Stern transcripts reviewed herein.

Submitted July 14, 1994

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Daniel Linz

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Edward Donnerstein