

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

In the Matter of	)	
	)	
WDBJ Television, Inc.	)	File Nos.: EB-IHD-14-00016819
	)	EB-12-IH-1363
License of Station WDBJ(DT)	)	NAL/Acct. No.: 201532080010
Roanoke, Virginia	)	FRN: 0002061737
	)	Facility ID No.: 71329

**NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

**Adopted: March 20, 2015**

**Released: March 23, 2015**

By the Commission:

**I. INTRODUCTION**

1. The Commission is charged with enforcing federal laws prohibiting the broadcast of obscene or indecent programming. Consistent with that responsibility, in this action, we propose the maximum available forfeiture, \$325,000, against WDBJ Television, Inc., for apparently broadcasting extremely graphic and explicit sexual material, specifically, a video image of a hand stroking an erect penis. The broadcast at issue occurred during a news program on Station WDBJ(DT), Roanoke, Virginia, at approximately 6:00 p.m., a time at which children were likely to be in the viewing audience. Our action today advances the Commission's goal of protecting children – and the public in general – from the broadcast of clearly indecent sexual material.

2. In this Notice of Apparent Liability for Forfeiture, we find that WDBJ Television, Inc. (WDBJ or Licensee), licensee of Station WDBJ(DT) (Station), Roanoke, Virginia, aired graphic and sexually explicit material over the Station on July 12, 2012, at approximately 6:00 p.m., in apparent willful violation of federal restrictions on the broadcast of indecent material set forth in 18 U.S.C. § 1464 and Section 73.3999 of the Commission's rules (Rules).<sup>1</sup> For the reasons discussed below, we conclude that WDBJ is apparently liable for a forfeiture in the amount of three hundred twenty-five thousand dollars (\$325,000).

**II. BACKGROUND**

3. Complainants allege that on July 12, 2012, at approximately 6:00 p.m., the Station broadcast an image of sexual activity involving the graphic display of an erect penis being stroked during a news report about a former adult film star who had joined a local volunteer rescue squad.<sup>2</sup> The

<sup>1</sup> 18 U.S.C. § 1464; 47 C.F.R. § 73.3999.

<sup>2</sup> See, e.g., Complaint, No. 12-WB1500043 (July 15, 2012) (on file in EB-12-IH-1363 and EB-IHD-14-00016819) (“During the news story they showed what appeared to be a website and to the right of the screen in a small window box which showed a penis being manipulated by a hand. WDBJ has since removed the video from their site and did not show it at a [later] time.”); Complaint, No. 12-WB14998395 (July 13, 2012) (on file in EB-12-IH-1363 and EB-IHD-14-00016819) (“in that program they showed [the former adult film star] on a web sit[e] on the far right hand side you can see a male body part being handled... with this story my family saw the [w]hole thing.”); Complaint, No. 12-WB14998157 (July 12, 2012) (on file in EB-12-IH-1363 and EB-IHD-14-00016819) (“There is an unobscured penis in the clip on story about a former porn star. ... and with this type of material I can't believe they didn't catch the penis before it went to air.”); Complaint, Nos. 12-WB14998131 & 12-WB14998136 (July 12, 2012) (on file in EB-12-IH-1363 and EB-IHD-14-00016819) (“WDBJ was doing a story on an ex-porn star that recently

(continued....)

Enforcement Bureau issued a Letter of Inquiry (LOI) to WDBJ, directing the Licensee to state whether the Station aired the complained-of material and to provide a recording and written transcript of the broadcast.<sup>3</sup>

4. The materials submitted by WDBJ confirm that it broadcast a naked, erect penis and sexual manipulation thereof during an early evening news broadcast. Specifically, WDBJ submits a recording and transcript of the report at issue in the Complaints, which it acknowledges aired on its evening news, “WDBJ7 at Six” on July 12, 2012, at approximately 6:00 p.m.<sup>4</sup> The Station anchor introduces the report as the Station’s “top story [concerning] an ex-porn star” volunteer for the local rescue squad.<sup>5</sup> The news report is approximately three minutes and 20 seconds in length.<sup>6</sup> The recording submitted by WDBJ shows that the broadcast included images of the former adult film star. The first image is video in which only her face and shoulders can be seen. In the video, she has her finger in her mouth, moving it up and down on her tongue, with her lips partially open and then closing as she appears to suck on her finger.<sup>7</sup> Just before this image appears, a reporter states: “[t]he Cave Spring rescue squad has been around for more than 60 years. In that time, it’s probably never had a volunteer like [the woman].”<sup>8</sup> At the time that the image is displayed, a reporter goes on to state: “[s]he’s a former porn star.”<sup>9</sup> The Licensee obtained the video image online from the website of a distributor of the woman’s adult films.<sup>10</sup> The website, which was partially displayed along with the video image, is bordered on the right side by boxes showing video clips from other films that do not appear to show the woman who is the subject of the news report.

5. One of these video clips, displayed in a box, contains the image of sexual activity involving manipulation of an erect penis. Although the box does not show the entire body or face of the apparently nude male depicted, the image shows a hand moving up and down the length of the shaft of the erect penis.<sup>11</sup> WDBJ asserts that this image was displayed for less than three seconds.<sup>12</sup> There are also

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joined the local volunteer rescue squad. They showed a non-obs[c]ene picture of [the woman] from the computer screen. HOWEVER, on the right hand side, middle of the screen, there was a video playing of someone stroking a large penis...”; Complaint, No. 12-WB14998155 (July 12, 2012) (on file in EB-12-IH-1363 and EB-IHD-14-00016819) (“Showed pornographic video as part of a story about an ex porn star joining a local rescue squad. There was a scene from a pornographic film on the right side of the screen that had not been masked from view by any means whatsoever. Appalling.”) (collectively, Complaints).

<sup>3</sup> Letter from Jeffrey J. Gee, Deputy Chief, Investigations and Hearings Division, FCC Enforcement Bureau, to WDBJ Television, Inc. (Mar. 8, 2013) (on file in EB-12-IH-1363 and EB-IHD-14-00016819) (LOI).

<sup>4</sup> Letter from Jack N. Goodman, Esquire, Law Offices of Jack N. Goodman, Counsel for WDBJ Television, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission at 1–2 (Apr. 26, 2013) (on file in EB-12-IH-1363 and EB-IHD-14-00016819) (LOI Response). The Bureau granted WDBJ an extension of time until April 26, 2013 to respond to the LOI. See E-mail from Jeffrey J. Gee, Deputy Chief, Investigations and Hearings Division, FCC Enforcement Bureau, to Jack N. Goodman, Esquire, Counsel for WDBJ Television, Inc. (Mar. 15, 2013, 15:18 EDT) (on file in EB-12-IH-1363 and EB-IHD-14-00016819).

<sup>5</sup> See LOI Response, Transcript and Recording.

<sup>6</sup> See LOI Response, Recording.

<sup>7</sup> *Id.* at approximately 1:15–19.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> LOI Response at 2.

<sup>11</sup> See LOI Response, Recording at approximately 1:15–18.

<sup>12</sup> LOI Response at 2.

other images of the woman who is the subject of the story displayed at various times during the report, including one in which she appears to be sitting on a bed, wearing a bra.<sup>13</sup>

6. The Licensee claims that the smaller boxes, including the image of the penis, were not visible on the monitors in the Station's editing bay, and therefore, the Station's News Director and other management personnel who had reviewed the story did not see the indecent material prior to the broadcast.<sup>14</sup> However, a photojournalist on the Station's staff, who prepared the report, obtained the screen shots from the adult video distributor's website used in the broadcast.<sup>15</sup> The photojournalist asserts: "When I recorded the screen shots off of a computer, I did not notice the small 'boxes' at the right of screen showing other films available from the distributor," one of which showed the sexually explicit image at issue here.<sup>16</sup> The photojournalist does not claim that those boxes were not visible when he downloaded the material from the adult website, but rather simply that he did not notice them. WDBJ further states that it received complaints from viewers after the news report was broadcast, which alerted it to the image of the penis.<sup>17</sup> The Licensee states that the Station immediately decided not to rebroadcast the report in the same form in any later news program that day, and also removed it from the Station's website.<sup>18</sup>

7. The Licensee argues that the broadcast of this "extremely fleeting and partial image of a penis during a news story" does not violate the Rules and does not provide any basis for enforcement action.<sup>19</sup> First, WDBJ argues that it lacked notice that the Commission could find such material indecent, especially in the context of a news broadcast of a story of interest to the community.<sup>20</sup> In this regard, WDBJ contends that the Commission issued a Public Notice in 2013 seeking comment on its indecency policies without clearly articulating the standards that would apply to indecency enforcement or whether the indecency policies would or would not apply during the pendency of the comment period.<sup>21</sup> Further, WDBJ notes the brevity of the image and asserts that the image was therefore not actionably indecent under judicial precedent.<sup>22</sup> Finally, WDBJ summarily asserts that the Commission's indecency laws are unconstitutional.<sup>23</sup>

### III. DISCUSSION

#### A. Indecency Laws Generally Preclude the Patently Offensive Broadcast of Sexual Material.

8. Section 1464 of Title 18, United States Code, prohibits the broadcast of obscene, indecent, or profane programming.<sup>24</sup> In addition, Section 73.3999 of the Rules bans the broadcast of obscene material at any time and, consistent with a subsequent statute and court case, prohibits radio and

<sup>13</sup> LOI Response, Recording at approximately 1:37–40; 1:45–49; and 3:00–02.

<sup>14</sup> LOI Response at 2 and at Declaration of WDBJ Photojournalist (Photojournalist Declaration).

<sup>15</sup> See *id.* at Photojournalist Declaration.

<sup>16</sup> *Id.*

<sup>17</sup> See LOI Response at 3.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 3–5.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 5–6.

<sup>23</sup> *Id.* at 6.

<sup>24</sup> 18 U.S.C. § 1464.

television broadcasts of indecent material between the hours of 6:00 a.m. and 10:00 p.m.<sup>25</sup> Enforcing the statute and Rule restricting indecent, obscene, or profane broadcasts is an important part of the Commission's overall responsibility for regulating broadcast radio and television operations. A broadcast licensee "is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations."<sup>26</sup> One of those "enforceable public obligations" is compliance with the prohibition against broadcasting indecent material between the hours of 6:00 a.m. and 10:00 p.m.<sup>27</sup>

9. The Commission defines indecent speech as material that, in context, depicts or describes sexual or excretory organs or activities in terms *patently offensive* as measured by contemporary community standards for the broadcast medium.<sup>28</sup> Thus, indecency findings require 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.<sup>29</sup> Second, the broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast medium.<sup>30</sup> The Commission's application of this context-based indecency definition was upheld in *FCC v. Pacifica Foundation*.<sup>31</sup>

10. In assessing whether broadcast material is patently offensive, "the *full context* in which the material appeared is critically important."<sup>32</sup> Three principal factors are significant to this contextual analysis: (1) the explicitness or graphic nature of the description or depiction; (2) whether the material dwells on or repeats at length descriptions or depictions of sexual or excretory organs or activities; and (3) whether the material panders to, titillates, or shocks the audience.<sup>33</sup> 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."<sup>34</sup> In

<sup>25</sup> 47 C.F.R. § 73.3999. See Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949 (1992) (setting safe harbor of 10:00 p.m. to 6:00 a.m. for the broadcast of indecent material); *Action for Children's Television v. FCC*, 58 F. 3d 654 (D.C. Cir. 1995) (*en banc*) (affirming restrictions prohibiting the broadcast of indecent material between the hours of 6:00 a.m. and 10:00 p.m.), *cert. denied*, 516 U.S. 1072 (1996).

<sup>26</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 506 (2009) (*Fox I*) (quoting *CBS Inc. v. FCC*, 453 U.S. 367, 395 (1981)). See 47 U.S.C. § 301 (prohibiting broadcasting "except under and in accordance with [the Communications Act of 1934, as amended] and with a license").

<sup>27</sup> *Id.*

<sup>28</sup> *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999, 8002, paras. 7–8 (2001) (*Indecency Policy Statement*); see *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order, 21 FCC Rcd 2664, 2667–68, paras. 12–15 (2006) (*2006 Indecency Omnibus Order*) (explaining the Commission's interpretation of the term "contemporary community standards for the broadcast medium"), *recons. granted in part and denied in part*, Order, 21 FCC Rcd 13299 (2006) (*2006 Indecency Omnibus Remand Order*), *review granted and vacated on other grounds*, *FCC v. Fox Television Stations, Inc.*, 567 U.S. \_\_\_, 132 S.Ct. 2307 (2012) (*Fox II*).

<sup>29</sup> *Indecency Policy Statement*, 16 FCC Rcd at 8002, para. 7.

<sup>30</sup> *Id.* at 8002, para. 8.

<sup>31</sup> See 438 U.S. 726 (1978). *Pacifica* has not been modified or overruled. See *Fox II*, 132 S.Ct. at 2320 (in light of holding that Commission failed to provide fair notice that fleeting expletives and momentary nudity could be found actionably indecent, Court finds it unnecessary to reconsider *Pacifica*, adhering to its normal practice of declining to decide cases not before it).

<sup>32</sup> *Indecency Policy Statement*, 16 FCC Rcd at 8002, para. 9 (emphasis in original).

<sup>33</sup> See *id.* at 8002–15, paras. 8–23.

<sup>34</sup> *Id.* at 8003, para. 10.

particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent,<sup>35</sup> or, alternatively, removing the broadcast material from the universe of actionable indecency.<sup>36</sup>

11. Considering the contextual analysis above, however, the Commission also recognizes that the First Amendment to the United States Constitution and Section 326 of the Communications Act of 1934, as amended (Act), prohibit the Commission from censoring program material or infringing broadcasters' free-speech rights.<sup>37</sup> Accordingly, we proceed cautiously and with appropriate restraint when determining whether broadcast material is indecent or not. The Commission has also "recognize[d] the need for caution with respect to complaints implicating the editorial judgment of broadcast licensees in presenting news and public affairs programming, as these matters are at the core of the First Amendment's free press guarantee."<sup>38</sup> Nevertheless, the Commission also has declined to exclude news programming from indecency enforcement, stating that "there is no outright news exemption from our indecency [Rule]."<sup>39</sup>

**B. WDBJ Broadcast Material in Apparent Violation of the Indecency Laws.**

**1. WDBJ's Broadcast Depicts Sexual Activity and Violates Contemporary Community Standards.**

12. Applying the two-pronged contextual analysis to the Station's July 12, 2012, news report concerning the ex-adult film star volunteer, we find the material indecent. First, the material satisfies the threshold prong of our analysis because it depicts, in context, a sexual organ and sexual activity. WDBJ concedes and we find that the video clip includes a nude sexual organ, i.e., a penis, and we also find that the broadcast depicts sexual activity, i.e., a hand stroking an erect penis. Several of the Complaints refer to sexual activity depicted in the clip, evidencing that viewers noticed the sexual activity shown in the broadcast.<sup>40</sup>

13. Having determined that this material satisfies the first prong of our analysis, we assess whether the material satisfies the second prong of our contextual analysis — that is, whether the material is patently offensive as measured by contemporary community standards for the broadcast medium. Our analysis of patent offensiveness requires assessment of: (1) the explicitness or graphic nature of the material; (2) whether the material is repeated or dwelled upon; and (3) whether it panders, titillates, or

<sup>35</sup> See *id.* at 8009, para. 19 (citing *Tempe Radio, Inc.*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 21828 (Mass Media Bur. 1997) (forfeiture paid) (finding that extremely graphic or explicit nature of references to sex with children outweighed the fleeting nature of the references); *EZ New Orleans, Inc.*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 4147 (Mass Media Bur. 1997) (forfeiture paid) (same)).

<sup>36</sup> See *Indecency Policy Statement*, 16 FCC Rcd at 8010, para. 20 ("[T]he 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.").

<sup>37</sup> See *Action for Children's Television v. FCC*, 852 F.2d 1332, 1344 & n.14 (D.C. Cir. 1988) ("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," and any "potential chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy").

<sup>38</sup> *2006 Indecency Omnibus Order*, 21 FCC Rcd at 2668, para. 15. See *2006 Indecency Omnibus Remand Order*, 21 FCC Rcd at 13327, para. 71 ("[I]n light of the important First Amendment interests at stake as well as the crucial role that context plays in our indecency determinations, it is imperative that we proceed with the utmost restraint when it comes to news programming.").

<sup>39</sup> *2006 Indecency Omnibus Remand Order*, 21 FCC Rcd at 13327, para. 71 (internal citations omitted).

<sup>40</sup> See, e.g., Complaint, No. 12-WB15000043; Complaint, Nos. 12-WB14998131 & 12-WB14998136.

shocks. There is no requirement that particular broadcast material satisfy all three contextual factors in order to be actionably indecent.<sup>41</sup>

14. Under the first factor, we find that, in context, the depiction of the sexual manipulation of an erect penis was extremely graphic and explicit. The *Indecency Policy Statement* explains that “[t]he more explicit or graphic the ... depiction, the greater the likelihood that the material will be considered patently offensive.”<sup>42</sup> We apply this factor and note that the inclusion of the extremely graphic and explicit sexual material from an adult film in the Station’s broadcast weighs heavily in our assessment of the factors concerning whether the material is patently offensive. This is especially the case here, where the video of the penis and manipulation thereof was shot at close range.<sup>43</sup>

15. Under the second factor, we find that, although the material did not extensively dwell on or contain repetitions of sexual material, the clip aired for approximately three seconds and thus its duration was not so brief as to preclude an indecency finding. Moreover, we find that the duration of the material was sufficient to attract and hold viewers’ attention; several complainants note that they viewed the material perfectly well.<sup>44</sup> Even relatively brief material can be indecent where other factors contribute to a finding of patent offensiveness.<sup>45</sup>

16. The third factor, whether the material panders to, titillates, or shocks the audience, requires consideration of the manner and purpose of a presentation.<sup>46</sup> “In evaluating whether material is indecent, we examine the material itself and the manner in which it is presented, not the subjective state of mind of the broadcaster.”<sup>47</sup> After considering the nature of the material and the context in which it was presented, we find, under the third factor, that the material at issue pandered to, titillated, or shocked the audience. We also find, and it seems self-evident, that the stroking of an erect penis on a broadcast program is shocking. WDBJ included in the broadcast images from the adult film website that distributes films featuring the former star of such films. As a direct consequence of that action, in conjunction with its failure to monitor the full content of the broadcast, the Licensee aired the sexually explicit images. Moreover, we note that the material indeed shocked the audience, as reflected in the complainants’ disbelief that the Station aired an image of an erect penis being stroked during the lead story of a newscast aired during the dinner hour, when children were likely to be viewing.<sup>48</sup>

17. For these reasons, and proceeding with the “utmost restraint” that the First Amendment requires for news programming, we find that the graphic and explicit sexual material aired on WDBJ’s

<sup>41</sup> See *Indecency Policy Statement*, 16 FCC Rcd at 8003, para. 10.

<sup>42</sup> *Id.* at 8003–04, para. 12.

<sup>43</sup> We contrast this to precedent concerning a broadcast of a penis that was not considered indecent because of various factors, including that the image was not at close range. See *infra* note 57.

<sup>44</sup> See *supra* note 2.

<sup>45</sup> *Indecency Policy Statement*, 16 FCC Rcd at 8009, para. 19.

<sup>46</sup> *Id.* at 8010, para. 20.

<sup>47</sup> See *Omnibus Indecency Remand Order*, 21 FCC Rcd at 13305, para. 17 & n. 43 (quoting *Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Half-Time Show*, Order on Reconsideration, 21 FCC Rcd 6653, 6657–58, para. 12 (2006), vacated on other grounds *sub nom.* *CBS Corp. v. FCC*, 663 F.3d 122 (3d Cir. 2011)). See also *Young Broad. of San Francisco, Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 1751, 1757, para. 14 (2004) (*Young Broadcasting of San Francisco*) (“[T]he manner of presentation of the complained-of material ... for which the licensee failed to take adequate precautions, was pandering, titillating and shocking.”).

<sup>48</sup> See *supra* note 2 (Complaint, No. 12-WB14998157 (“I can’t believe they didn’t catch the penis before it went to air.”); Complaint, Nos. 12-WB14998131 & 12-WB14998136 (“They also made the suggestion to viewers, including my 4 year old daughter and 10 year old [nephew] that were in the room with me, to GOOGLE™ the name [of the ex-film star] and 100’s of pornographic videos come up.”)).

news broadcast is patently offensive as measured by contemporary community standards for the broadcast medium.<sup>49</sup> WDBJ and all broadcasters are free to exercise their discretion to gather and present news, including news related to former adult film stars. However, the sexually explicit image at issue here was unrelated to the news story, and WDBJ does not claim otherwise. Having made the choice to gather and display images from an adult film website as part of its newscast, WDBJ is subject to sanction for its broadcast of actionably indecent sexual material without taking adequate precautions to avoid such result.<sup>50</sup> Any other application of the three principal factors of our contextual analysis in this case would permit a broadcaster to air graphic and explicit sexual material, including the sexually explicit film clip at issue here, during news aired when there is a reasonable risk that children are in the audience—the 6:00 a.m. to 10:00 p.m. time period—as long as such material was displayed for three seconds or less.<sup>51</sup>

## 2. The Commission Supplied Sufficient Notice that It Prohibits the Broadcast of Indecent Material During the Evening News.

18. WDBJ asserts lack of sufficient notice that the Commission would fine broadcasts such as this one for violating the indecency laws.<sup>52</sup> In particular, WDBJ argues that it lacked notice that the sexually explicit material aired in its news broadcast would be subject to sanction.<sup>53</sup> WDBJ asserts that the Commission has not sufficiently articulated guidance about what news programming may be punished under the indecency rules following the Supreme Court’s decision in *Fox I*, and also argues that the Commission’s 2013 Public Notice<sup>54</sup> concerning its indecency policies did not provide adequate notice of the factors that would be used to determine whether broadcast material is indecent.<sup>55</sup> We categorically reject these assertions. The Commission has repeatedly held that there is no exception from indecency laws for news broadcasts<sup>56</sup> and has found indecent material that was far less graphic than that at issue here, notwithstanding the news context in which the licensee presented it.<sup>57</sup>

<sup>49</sup> See *2006 Indecency Omnibus Remand Order*, 21 FCC Rcd at 13327, para. 71.

<sup>50</sup> See *2006 Indecency Omnibus Order*, 21 FCC Rcd at 2670, para. 20 (“We emphasize that every licensee is responsible for the decision to air particular programming and will be held accountable for violating federal restrictions on the willful or repeated broadcast of obscene, indecent, or profane material.”).

<sup>51</sup> As noted, here, the record reflects that the audience did not just *potentially* include children; children viewed this sexually explicit material. See *supra* note 48.

<sup>52</sup> See LOI Response at 3–6.

<sup>53</sup> *Id.* at 4–5.

<sup>54</sup> See *FCC Reduces Backlog Of Broadcast Indecency Complaints By 70% (More Than One Million Complaints); Seeks Comment On Adopting Egregious Cases Policy Pleading Cycle Established*, Public Notice, 28 FCC Rcd 4082 (2013) (2013 Public Notice).

<sup>55</sup> See LOI Response at 3–5.

<sup>56</sup> See *2006 Indecency Omnibus Remand Order*, 21 FCC Rcd at 13327, para. 71; *NPR Phoenix, L.L.C.*, Memorandum Opinion and Order, 13 FCC Rcd 14070, 14071, para. 7 (Mass Media Bur. 1998) (“[W]e do not have a ‘news exception’ for indecency cases...”). See generally *Indecency Policy Statement*, 16 FCC Rcd at 8013, para. 22 (citing *Pac. and S. Co., Inc.*, Notice of Apparent Liability for Forfeiture, 6 FCC Rcd 3689 (Mass Media Bur. 1990) (forfeiture paid) (example of case in which licensee unsuccessfully claimed that, because of the context of the broadcast (i.e., alleged news story), the broadcast was not pandering)).

<sup>57</sup> See *Young Broadcasting of San Francisco*, 19 FCC Rcd at 1751, para. 1 (exposure of a performer’s penis for less than a second during a news interview was patently offensive and actionably indecent). *But see 2006 Indecency Omnibus Order*, 21 FCC Rcd at 2716–17, paras. 213–18 (2006) (exposure of a man’s penis as he is rescued from floodwater wearing only a shirt was not indecent because the material was not patently offensive). The exposure of a man’s penis during a live news segment on “The Today Show” involving the man’s rescue is distinguishable from the context at issue in *Young Broadcasting of San Francisco*. As the man, clothed only in a shirt, is hauled from water level to the boat, his penis is briefly exposed. Although “The Today Show” segment depicted a sexual organ, none of the factors of patent offensiveness were present. The shot of the man’s penis was not at close range, and is a  
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19. For example, in *Young Broadcasting of San Francisco*, the Commission in 2004 ruled that an even briefer exposure of a penis (less than a second) during a news broadcast, in the context presented, was indecent.<sup>58</sup> During the news interview on KRON-TV, the hosts interviewed two male performers about their show, “Puppetry of the Penis,” in which they manipulated their genitalia as puppets.<sup>59</sup> One of the performers exposed his penis for less than a second while he prepared to demonstrate their “genital origami.”<sup>60</sup> The material was considered patently offensive because it was pandering and titillating.<sup>61</sup> However, in *Young Broadcasting of San Francisco*, there was only depiction of a sexual organ, not, as in the WDBJ broadcast, sexual activity as well as nudity. Moreover, unlike the live news broadcast at issue in *Young Broadcasting of San Francisco*, WDBJ pre-recorded the broadcast and selected material from an adult website, giving it ample opportunity to screen the material before it was broadcast.

20. Similarly, WDBJ’s citation to a Commission decision to reverse an indecency finding based on the use of an isolated expletive during the CBS’s “The Early Show” does not support its argument that the Commission has not provided sufficient notice and guidance about the factors that will be considered in evaluating indecency complaints on the news.<sup>62</sup> “The Early Show” reversal was grounded in the licensee’s argument that the Commission had not adequately considered the context in which the isolated expletive aired, but the Commission explicitly ruled that there is no news exemption from the indecency law or Rule.<sup>63</sup> In contrast, we have analyzed the context of the explicit sexual material broadcast by WDBJ as set forth above. We recognize that the material at issue here was aired during a bona fide news program, but we nevertheless find that the graphic and explicit depiction of an erect sexual organ and activity in a pandering, titillating, and shocking manner is patently offensive. The fact that the video of sexual activity happened to appear during a news program does not insulate the licensee from enforcement sanctions, particularly in this case where the sexual material is unrelated to the subject of the news report.<sup>64</sup> Certainly, broadcasters cannot show news and sexually explicit images on a split screen and take the position that the latter is not indecent simply because it shares the screen with a

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distant image in footage that displays rescue efforts, and thus is not graphic and explicit. In addition, the segment did not dwell on or repeat the image of the victim’s penis. The principal component of the indecency analysis, and the most important in the particular context of the news story, was the finding that the material does not pander to, titillate, or shock the viewing audience. To the extent that there is shock value, it derives from the rescue effort, and not from the report’s minimal sexual content. *See id.* at 2716–17, paras. 215–17. By contrast, as discussed below, *Young Broadcasting of San Francisco* aired material that was patently offensive because it involved depiction of genitalia in a manner that was pandering, titillating, and shocking due to the sexual content of the overall report. *See Young Broadcasting of San Francisco*, 19 FCC Rcd at 1755–57, paras. 13–14; discussion, *infra*, para. 19.

<sup>58</sup> *See Young Broadcasting of San Francisco*, 19 FCC Rcd at 1754–55, paras. 10, 12.

<sup>59</sup> *See id.* at 1751–52, para. 2.

<sup>60</sup> *See id.* at 1751–52, 1755, paras. 2, 12.

<sup>61</sup> *Id.* at 1756–57, para. 14.

<sup>62</sup> *See* LOI Response at 4. During a live interview on CBS’s “The Early Show,” a contestant on “Survivor Vanuatu” described a fellow contestant as “a bullshitter.” *See 2006 Indecency Omnibus Order*, 21 FCC Rcd at 2698–99, para. 137. The Commission initially found this material actionably indecent despite the fact that it was not repeated or dwelled on at length because in context, it was vulgar, graphic and explicit as well as shocking and gratuitous. *Id.* at 2699, paras. 139–42. On remand, the Commission considered the context of the material as news as it had not done before. In so doing, the Commission concluded that the material, which did not involve nudity or sexual activity, was not actionably indecent in the context presented, yet held that there is no outright indecency news exemption. *2006 Indecency Omnibus Remand Order*, 21 FCC Rcd at 13327, para. 71 (“To be sure, there is no outright news exemption from our indecency rules.”) (internal citations omitted).

<sup>63</sup> *Id.*

<sup>64</sup> *See supra* at paras. 12–17.



news program. Moreover, contrary to the Licensee's contention, at the time WDBJ aired its news report about the former adult film star, it was clear from Commission precedent that even brief displays of nudity could be actionably indecent.<sup>65</sup> Therefore, we reject WDBJ's assertion that it did not have notice that a broadcast involving brief nudity during a news program could result in an indecency finding. We further emphasize that WDBJ's argument overlooks the fact that its broadcast contained not only nudity, but also graphic sexual activity.

### 3. The Commission's 2013 Public Notice Regarding Indecency Policy Does Not Bar Enforcement Action for WDBJ's 2012 Apparent Violation.

21. WDBJ claims that the Commission's 2013 Public Notice bars enforcement action for WDBJ's apparent violation of the indecency laws and failed to provide broadcasters an articulable standard by which the Commission will determine speech that is indecent and subject to sanction and speech that is not indecent.<sup>66</sup> We reject WDBJ's assertion that the 2013 Public Notice bars the imposition of a sanction against WDBJ for airing the clip from a sexually explicit film on its evening news program on July 12, 2012. First, the 2013 Public Notice was issued on April 1, 2013, almost nine months *after* the WDBJ broadcast at issue here. Thus, it could have had no effect on WDBJ's exposure to enforcement action for broadcasts before that date. Moreover, the 2013 Public Notice explicitly states that the Commission's substantive indecency policies, including the definition and contextual analysis set forth herein, remain in effect unaltered, "and the Commission and/or [Enforcement] Bureau may take enforcement actions during the pendency of this Public Notice."<sup>67</sup> Accordingly, there is no merit in WDBJ's argument.

### C. The Commission's Indecency Policy Is Constitutional.

22. Consistent with almost forty years of precedent and the Supreme Court's recent review of our indecency authority,<sup>68</sup> we reject WDBJ's contention that our indecency policy is unconstitutional. WDBJ invites us to reconsider the viability of the Supreme Court's decision in *Pacifica*, contending that *Pacifica* can no longer sustain regulation of indecent speech on broadcast stations "because the rationale of that case has been overtaken by technological change and the wide availability of multiple other choices for listeners and viewers."<sup>69</sup> WDBJ summarily adopts and incorporates arguments of ABC, Inc., and others in litigation unrelated to the broadcast at issue here.<sup>70</sup> We note that, in resolving that litigation, the Supreme Court specifically declined to address the arguments WDBJ now advances or to overrule its *Pacifica* decision.<sup>71</sup> Thus, *Pacifica* remains valid and supporting authority for the Commission's indecency enforcement. Moreover, the direct impact of WDBJ's broadcast on audience members, including children, belies WDBJ's assertion that technological advances and the existence of other media

<sup>65</sup> See generally *FCC v. CBS Corp.*, 132 S. Ct. 2677, 2678 (2012) (Roberts, Chief J., concurring in the denial of certiorari) ("Even if the Third Circuit is wrong that sanctioning the Super Bowl broadcast constituted an unexplained departure from the FCC's prior indecency policy, that error has been rendered moot going forward. ... It is now clear that the brevity of an indecent broadcast—be it word or image—cannot immunize [a licensee] from FCC censure" (citing *Young Broadcasting of San Francisco, Inc.*, 19 FCC Rcd at 1751)).

<sup>66</sup> See LOI Response at 3.

<sup>67</sup> 2013 Public Notice, 28 FCC Rcd at 4083.

<sup>68</sup> See *Fox I*, 556 U.S. at 505–08; *Fox II*, 132 S.Ct. at 2312–14.

<sup>69</sup> LOI Response at 6, citing *Fox II*, 132 S.Ct. at 2320.

<sup>70</sup> See *id.* citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 530–35 (Thomas, J., concurring), 544–46 (Ginsburg, J., dissenting); *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 325–27 (2d Cir. 2010); *Fox Television Stations, Inc. v. FCC*, 489 F. 3d 444, 462–66 (2d Cir. 2007), *rev'd on other grounds*, 556 U.S. 502 (2009); Brief for Respondents ABC, Inc.; KTRK Television, Inc.; and WLS Television Inc., *FCC v. Fox Television Stations, Inc.*, 132 U.S. 2307 (2012) (No. 10-1293).

<sup>71</sup> See *Fox II*, 132 S.Ct. at 2320.

have rendered our indecency restrictions invalid and obsolete. Broadcasters are trustees of the public air waves, and we believe that parents should be able to tune into an early evening broadcast without fear that it will expose their children to sexually explicit or other indecent material. We therefore decline WDBJ's invitation to invalidate our indecency policies on constitutional grounds.

#### IV. PROPOSED FORFEITURE

23. Section 503(b)(1) of the Act authorizes the Commission to impose a forfeiture penalty on any person who willfully fails to comply substantially with the terms and conditions of any license, or willfully fails to comply with any provisions of the Act or of any Rule, regulation, or Commission order.<sup>72</sup> 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.<sup>73</sup> 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,<sup>74</sup> and the Commission has so interpreted the term in the Section 503(b) context.<sup>75</sup> To impose such a forfeiture penalty, the Commission must issue a notice of apparent liability 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.<sup>76</sup> The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has willfully violated the Act or a Rule.<sup>77</sup>

24. Based upon the evidence before us, we find that WDBJ apparently willfully violated 18 U.S.C. § 1464 and Section 73.3999 of the Rules. The record here establishes that the Station employee who prepared and edited the news report for broadcast obtained material concerning the former adult film star from the website of a distributor of her sexually explicit films for inclusion in the broadcast news story.<sup>78</sup> Though he claims he did not notice the indecent material, he should have been more alert to what he was downloading for broadcast from a sexually explicit website, and we cannot absolve the Licensee of responsibility because its employee failed to notice what he was downloading and preparing for broadcast.<sup>79</sup> Moreover the source of the material should have alerted the Licensee – via its employees, the News Director, and other management personnel who reviewed the edited news report – that the Station was accessing potentially sexually explicit material. Furthermore, the Station knowingly used editing equipment whose viewing capability did not permit the editing staff to view the same content as the audience, and thus, the Licensee omitted appropriate safeguards to assist it in making sure that its audience was not subjected to material such as the indecent material broadcast here. Thus, the risk of airing of the indecent material on the Station's 6:00 p.m. news was clearly foreseeable, and the Station

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<sup>72</sup> 47 U.S.C. § 503(b)(1)(B).

<sup>73</sup> 47 U.S.C. § 312(f)(1).

<sup>74</sup> H.R. Rep. No. 97-765, 97<sup>th</sup> Cong. 2d Sess. 51 (1982), reprinted in 1982 U.S.C.C.A.N. 2294-95 ("This provision [inserted in Section 312] defines the term[s] 'willful' ... for purposes of section 312, and for any other relevant section of the act (e.g., Section 503) ... As defined ... 'willful' means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law.... The definitions are intended primarily to clarify the language in Section 312 and 503, and are consistent with the Commission's application of those terms ....").

<sup>75</sup> See, e.g., *S. Cal. Broad. Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388, para. 5 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

<sup>76</sup> 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

<sup>77</sup> See, e.g., *SBC Commc'ns, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591, para. 4 (2002) (forfeiture paid).

<sup>78</sup> See LOI Response, Photojournalist Declaration.

<sup>79</sup> See *Eure Family Ltd P'ship*, Memorandum Opinion and Order, 17 FCC Rcd 21861, 21863-64, para. 7 (2002) ("[L]icensees and other Commission regulatees are responsible for the acts and omissions of their employees and independent contractors.").

failed to take adequate precautions to ensure that no graphic or explicit sexual material was aired.<sup>80</sup> Such actions amount to an apparent willful violation of the federal restrictions on the broadcast of indecent material. At the very least, the Station acted with reckless disregard for the content of its broadcast and must be held responsible for its actions.<sup>81</sup>

25. The Commission's *Forfeiture Policy Statement* and Section 1.80 of the Rules set a base forfeiture amount of seven thousand dollars (\$7,000) for an indecency violation.<sup>82</sup> In assessing the monetary forfeiture amount, we must take into account the statutory factors set forth in Section 503(b)(2)(E) of the Act and Section 1.80(b)(8) of the Rules, which include "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."<sup>83</sup> In the Broadcast Decency Enforcement Act of 2005 (Broadcast Decency Enforcement Act), Congress increased the maximum forfeiture amount for obscene, indecent, or profane broadcasts to \$325,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed \$3,000,000 for any single act or failure to act.<sup>84</sup> The Commission amended its Rules in 2007 to implement the Broadcast Decency Enforcement Act.<sup>85</sup> This is the Commission's first occasion to consider the application of the Broadcast Decency Enforcement Act's statutory maximum forfeiture to an apparent indecency violation.<sup>86</sup>

<sup>80</sup> See *Young Broadcasting of San Francisco*, 19 FCC Rcd at 1755–56, para. 13.

<sup>81</sup> See generally *CBS Corp. v. FCC*, 535 F.3d 167, 206 (3d Cir. 2008) ("Recklessness would appear to suffice as the appropriate scienter threshold for the broadcast indecency regime."), *vacated and remanded*, *FCC v. CBS Corp.*, 556 U.S. 1218 (2009). On remand, the new majority of the court found that the court's earlier discussion of the scienter required for a violation was unnecessary and declined to readopt it. *CBS Corp. v. FCC*, 663 F.3d 122, 134 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2677 (2012). See also *Farmer v. Brennan*, 511 U.S. 825, 836 (1994).

<sup>82</sup> See 47 C.F.R. § 1.80; *Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113 (1997), *recons. denied*, 15 FCC Rcd 303 (1999) (*Forfeiture Policy Statement*).

<sup>83</sup> 47 U.S.C. § 503(b)(2)(E). See 47 C.F.R. § 1.80(b)(8).

<sup>84</sup> Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109–235, 120 Stat. 491. See also 47 U.S.C. § 503(b)(2)(A), (b)(2)(C).

<sup>85</sup> *Amendment of Section 1.80(b)(1) of the Commission's Rules Increase of Forfeiture Maxima for Obscene, Indecent, and Profane Broadcasts to Implement the Broadcast Decency Enforcement Act of 2005*, Order, 22 FCC Rcd 10418 (2007) (*2007 Inflation Adjustment Order*). The Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No 101–410, 104 Stat. 890, as amended by the Debt Collection Improvement Act of 1996, Pub. L. No. 104–134, Sec. 31001, 110 Stat. 1321 (DCIA), requires the Commission to adjust its forfeiture penalties periodically for inflation. See *Amendment of Section 1.80(b) of the Commission's Rules, Adjustment of Civil Monetary Penalties to Reflect Inflation*, Order, 28 FCC Rcd 10785 (Enf. Bur. 2013) (*2013 Inflation Adjustment Order*); see also *Inflation Adjustment of Monetary Penalties*, 78 Fed. Reg. 49,370–01 (Aug. 14, 2013) (setting Sept. 13, 2013, as the effective date for increases).

<sup>86</sup> We note that at the time of the broadcast at issue here, the statutory maximum forfeiture for a violation of the indecency laws was \$325,000. The current statutory maximum is \$350,000. See 47 C.F.R. § 1.80(b)(1) ("[I]f the violator is a broadcast station licensee . . . , and if the violator is determined by the Commission to have broadcast obscene, indecent, or profane material, the forfeiture penalty under this section shall not exceed \$350,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$3,300,000 for any single act or failure to act described in paragraph (a) of this section."). The *2013 Inflation Adjustment Order* increased the maximum forfeiture amount for obscene, indecent, or profane broadcasts aired after September 13, 2013, to \$350,000. See 28 FCC Rcd at 10787, n.16. However, because the DCIA specifies that any inflationary adjustment "shall apply only to violations which occur after the date the increase takes effect," we apply the forfeiture penalties in effect at the time that violation took place. 28 U.S.C. § 2461 note (6). Here, because the violation at issue occurred before September 13, 2013, the applicable maximum penalty is \$325,000, based on the Commission's *2007 Inflation Adjustment Order*. See 22 FCC Rcd at 10420; see (continued....)

26. Based upon our review of the entire record, we find that WDBJ's broadcast of the complained-of material warrants a significant increase from the base forfeiture amount. Here, we find that the nature of the violation, and the Licensee's degree of culpability and ability to pay justify a significant upward adjustment of the \$7,000 base forfeiture amount. Based on our consideration of all the applicable factors set forth in Section 503(b)(2)(E) and Section 1.80(b)(8), as described below, we propose the statutory maximum of \$325,000.

27. As detailed herein, the nature of WDBJ's apparent violation—the patently offensive depiction of graphic and explicit sexual material obtained by the Station from an adult film website—is extreme and grave enough to warrant a significant increase from the \$7,000 base forfeiture amount. The material that WDBJ broadcast was extremely graphic, lewd, and offensive, and this action heightens the gravity of the violation and justifies a higher forfeiture. The video clip that accompanied the screen shots of the former adult film star depicted not only nudity but also graphic sexual activity during a program that was broadcast when there was a reasonable risk that children were likely to be in the audience, and, as set forth in one Complaint, were in fact in the audience.<sup>87</sup>

28. With respect to the Licensee's ability to pay, we note that WDBJ's parent, Schurz Communications, Inc. (Schurz), is a diversified privately-owned, nationwide communications company.<sup>88</sup> In addition to publishing a number of daily and weekly newspapers with a combined circulation of nearly 225,000, Schurz has, among other holdings, 10 television stations, is the licensee of 13 radio stations, and owns three cable companies.<sup>89</sup> Schurz had reported annual sales revenues of \$127,700,000 in 2013.<sup>90</sup> As the Commission made clear in the Forfeiture Policy Statement, large or highly profitable communications entities such as Schurz may expect the imposition of forfeitures well above the base amounts in order to deter behavior that violates the Act, the Rules, and other statutory provisions, such as 18 U.S.C. §1464, over which the Commission has civil enforcement authority.<sup>91</sup>

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also 2013 Inflation Adjustment Order, 28 FCC Rcd at 10786–87, para. 4 & nn. 12 & 16 (noting that the maximum forfeiture penalty for obscene, indecent, and profane broadcasts was set in 2007 and has not been adjusted since).

<sup>87</sup> See *supra* note 48, Complaint, Nos. 12-WB14998131 & 12-WB14998136 (Complainant states that viewers of the sexually explicit material aired by WDBJ “included my 4 year old daughter and 10 year old nephew [who] were in the room with me”).

<sup>88</sup> See Schurz Communications, Inc., About, available at <http://www.schurz.com/about/> (last visited Feb. 25, 2015).

<sup>89</sup> *Id.*

<sup>90</sup> Dun & Bradstreet WorldBase, DUNS® Number 00-521-3269 (Dec. 17, 2013).

<sup>91</sup> Specifically, the Commission found:

[O]n the other end of the spectrum of potential violators, we recognize that for large or highly profitable communications entities, the base forfeiture amounts . . . are generally low. In this regard, we are mindful that, as Congress has stated, for a forfeiture to be an effective deterrent against these entities, the forfeiture must be issued at a high level. For this reason, we caution all entities and individuals that, independent from the uniform base forfeiture amounts . . . we intend to take into account the subject violator's ability to pay in determining the amount of a forfeiture to guarantee that forfeitures issued against large or highly profitable entities are not considered merely an affordable cost of doing business. Such large or highly profitable entities should expect in this regard that the forfeiture amount set out in a Notice of Apparent Liability against them may in many cases be above, or even well above, the relevant base amount.

*Forfeiture Policy Statement*, 12 FCC Rcd at 17099–100, para. 24. See *Journal Broad. Corp.*, Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 10251, 10254–55, para. 12 & n.30 (Enf. Bur. 2009) (upward adjustment based in part on size and ability to pay because target is “a leading television and radio station operator with 35 radio stations and 12 television stations” with net yearly sales of \$112,900,000); *Kyocera Commc'ns, Inc.*, Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 5987, 5991, para. 10 & n.30 (Enf. Bur. 2013) (finding that target has  
(continued....)

29. We also consider WDBJ to be sufficiently culpable to support a forfeiture. As discussed above, WDBJ broadcast material obtained from an online video distributor of adult films but failed to take adequate precautions to prevent the broadcast of indecent material when it knew, or should have known, that its editing equipment at the time of the apparent violation did not permit full screen review of material intended for broadcast. In addition, the indecent material was plainly visible to the Station employee who downloaded it; he simply didn't notice it and transmitted it to Station editors who reviewed the story before it was broadcast.<sup>92</sup>

30. In calculating the appropriate forfeiture, we also consider the Licensee's past compliance record and find, on balance, that we should not reduce or aggravate on that basis. We found nothing in the record or in the Licensee's prior history of violations or compliance<sup>93</sup> sufficient to reduce the proposed forfeiture amount based on this factor.<sup>94</sup>

31. Similarly, we also consider whether the Licensee's allegedly remedial measures should reduce the forfeiture amount.<sup>95</sup> Based on the totality of the circumstances, we determine that no such reduction is warranted. WDBJ asserts that it "has reviewed story editing procedures with newsroom staff and has instituted controls to make sure that all parts of the visible picture in news stories including potentially offensive material are reviewed in advance of broadcast to make sure that inappropriate images are not unintentionally included in a news story."<sup>96</sup> WDBJ was unclear on whether it took such measures before or after our investigation, the nature of the "controls" it instituted, and whether it continues to rely on staff or upgraded its equipment. Regardless, we determine that the listed measures are insufficient to warrant a reduction of the forfeiture amount.<sup>97</sup>

32. Finally, we recognize that Congress in the Broadcast Decency Enforcement Act increased the maximum forfeiture for violation of the indecency laws in order to increase and strengthen the Commission's enforcement authority in light of concerns that the statutory maximum formerly in effect was not a sufficient deterrent to broadcasting indecent material.<sup>98</sup> We have taken these congressional

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significant gross revenues based on its reported net sales for fiscal year ending March 2012), Consent Decree, 29 FCC Rcd 3494 (Enf. Bur. 2014) (terminating investigation but not vacating or otherwise overruling findings in underlying Notice of Apparent Liability for Forfeiture). *See also Turner Broad. Sys., Inc.*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 752, 758, para. 15 (2014) (forfeiture paid).

<sup>92</sup> See LOI Response at Photojournalist Declaration.

<sup>93</sup> *WAGT Television, Inc.*, Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 5179 (proposed \$10,000 forfeiture against a station of an affiliated licensee of which Schurz is also the parent for its apparent willful and/or repeated violation Section 73.3526(e)(11)(iii) of the Rules, by failing to publicize the existence and location of the station's Children's Television Programming Reports (Form 398)), *request for partial remission or reduction in forfeiture dismissed*, Letter, 28 FCC Rcd 10936 (Media Bur. 2013).

<sup>94</sup> See *Radio License Holding XI, LLC*, Forfeiture Order, 29 FCC Rcd 1623, 1630, para. 16 & n.61 (2014) (*Radio License Holding XI*) (forfeiture paid) (finding that based on specific facts and the totality of the circumstances of case, including nature, extent and gravity of violations, and in the absence of any creditable mitigating factors, record as a whole did not support downward adjustment of forfeiture penalty). *See also TV Max, Inc.*, Forfeiture Order, 29 FCC Rcd 8648, 8660, para. 24 (2014) (claimed record of compliance may be outweighed by application of other factors under Section 503(b)).

<sup>95</sup> See *Radio License Holding XI*, 29 FCC Rcd at 1629–30, para. 15.

<sup>96</sup> LOI Response at 3.

<sup>97</sup> See *Radio License Holding XI*, 29 FCC Rcd at 1629, para. 15–16 & n.61 (mitigation for remedial measures taken prior to investigation is not automatic and depends on other Section 503(b)(2)(E) and Section 1.80(b)(8) factors; a downward adjustment of the forfeiture amount for violation of the sponsorship identification Rule is not warranted where the licensee failed to report violations to the Commission or to ameliorate the effects of its prior violations).

<sup>98</sup> See H.R. Rep. No. 109-5, 109<sup>th</sup> Cong. 1st Sess. 51 (2005), reprinted in 2005 U.S.C.A.N. 1–22.

concerns into account in determining the level of forfeiture to propose against WDBJ here. Therefore, while we recognize and affirm the Commission's overall restrained approach to indecency enforcement,<sup>99</sup> for the reasons stated above, including the gravity of the violation, WDBJ's ability to pay and culpability, and other factors described herein, we find that a proposed forfeiture in the amount of three hundred twenty-five thousand dollars (\$325,000) is appropriate.

#### V. ORDERING CLAUSES

33. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act and Section 1.80 of the Rules, WDBJ Television, Inc. is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of three hundred twenty-five thousand dollars (\$325,000) for its apparent willful violation of 18 U.S.C. § 1464 and Section 73.3999 of the Rules.<sup>100</sup>

34. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Rules within thirty days of the release date of this Notice of Apparent Liability for Forfeiture, WDBJ Television, Inc. **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.<sup>101</sup>

35. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account Number and FRN referenced above. WDBJ Television, Inc. shall send electronic notification of the payment to Jeffrey.Gee@fcc.gov, Kenneth.Scheibel@fcc.gov, and Melanie.Godschall@fcc.gov on the date said payment is made. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.<sup>102</sup> When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

36. Any request for making full payment over time under an installment plan should be sent to: Chief Financial Officer — Financial Operations, Federal Communications Commission, 445 12<sup>th</sup> Street, S.W., Room 1-A625, Washington, D.C. 20554.<sup>103</sup> If you have questions regarding payment

<sup>99</sup> See *Pacifica*, 438 U.S. at 761; *Action for Children's Television*, 852 F.2d at 1340, 1344.

<sup>100</sup> 18 U.S.C. § 1464; 47 U.S.C. § 503(b); 47 C.F.R. §§ 1.80, 73.3999.

<sup>101</sup> 47 C.F.R. § 1.80.

<sup>102</sup> An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

<sup>103</sup> See 47 C.F.R. § 1.1914.

procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

37. The written statement seeking reduction or cancellation of the proposed forfeiture if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.16 and 1.80(f)(3) of the Rules.<sup>104</sup> Mail the written statement to Jeffrey J. Gee, Acting Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12<sup>th</sup> Street, S.W., Room 4C-330, Washington, D.C. 20554, and include the NAL/Acct. No. referenced in the caption. The statement should also be sent electronically to Jeffrey.Gee@fcc.gov, Kenneth.Scheibel@fcc.gov, and Melanie.Godschall@fcc.gov.

38. The Commission will not consider reducing or canceling the 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.

39. **IT IS FURTHER ORDERED** that the Complaints **ARE GRANTED** to the extent indicated herein and **ARE OTHERWISE DENIED**, and the proceeding addressing the Complaints **IS HEREBY TERMINATED**.<sup>105</sup>

40. **IT IS FURTHER ORDERED** that a copy of this **Notice of Apparent Liability for Forfeiture** shall be sent by both Certified Mail, Return Receipt Requested, and first class mail, to WDBJ Television, Inc., 2807 Hershberger Road, Roanoke, Virginia 24017, and to its counsel, Jack N. Goodman, Esquire, Law Offices of Jack N. Goodman, 1200 New Hampshire Avenue, N.W., Suite 800, Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

<sup>104</sup> 47 C.F.R. §§ 1.16, 1.80(f)(3).

<sup>105</sup> WDBJ shall be the only party to a forfeiture proceeding initiated by this Notice of Apparent Liability for Forfeiture.