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July 29, 2015

Tom Wheeler  
Chairman  
Federal Communications Commission  
445 12th Street SW  
Washington, DC 20554

Dear Chairman Wheeler,

I write regarding an issue that has been brought to my attention by WDBJ Television, Inc. (WDBJ), a local television station which broadcasts into my district. I appreciate your attention to this matter and ask that you keep me updated about the situation.

As you are aware, the Federal Communications Commission (FCC) has issued a Notice of Apparent Liability to WDBJ and proposed a fine of \$325,000 for violating the FCC's indecency policies. I understand that WDBJ is contesting the findings of liability and monetary forfeiture proposed by the FCC. WDBJ has provided our offices documentation asserting that the incident in question was inadvertent and that corrective measures have been taken to prevent a similar incident from occurring in the future. Enclosed with this letter are the documents WDBJ provided to my office.

While I do not condone what happened, I have lived in and served as an elected official in WDBJ's coverage area for decades. WDBJ has long been an outstanding member of my community.

Given the severity of the fine, which I understand from WDBJ to be the largest fine for indecency ever proposed by the FCC, I ask that the FCC take care in reviewing WDBJ's appeal. Additionally, please keep my office abreast of the FCC's decision in this case.

Sincerely,



H. MORGAN GRIFFITH  
Member of Congress

**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
Licensee of Station WDBJ(TV)	)	NAL/Acct. No. 201532080010
Roanoke, Virginia	)	FRN: 0002061737
	)	Facility ID No. 71329

**OPPOSITION OF WDBJ TELEVISION, INC.  
TO NOTICE OF APPARENT LIABILITY**

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Roanoke, Virginia	)	FRN: 0002061737
	)	Facility ID No. 71329

**OPPOSITION OF WDBJ TELEVISION, INC.  
TO NOTICE OF APPARENT LIABILITY**

WDBJ Television, Inc. (“WDBJ”), by counsel, hereby opposes the above-referenced Notice of Apparent Liability (“NAL”) issued by the Commission on March 23, 2015. WDBJ will show that (1) the Commission should not impose any forfeiture on WDBJ because the television program in question did not violate the FCC’s indecency policies; (2) the imposition of any forfeiture on WDBJ would violate the First Amendment; (3) WDBJ lacked the necessary scienter to justify a forfeiture; and (4) even if a forfeiture were warranted, the imposition of the maximum forfeiture in the Commission’s arsenal, as proposed in the NAL, is entirely unjustified and excessive.

**I. INTRODUCTION AND SUMMARY**

In this case, the Commission proposes to fine WDBJ \$325,000 – the highest amount permissible under the Broadcast Decency Enforcement Act (“BDEA”) – for an inadvertent and momentary display of sexual imagery that was incidental to a bona fide news story about a local controversy. The FCC is seeking to impose the highest fine in history for a single “indecent” broadcast on one station despite the fact that in 2013 it initiated a proceeding to review its

indecent policies “to ensure they are fully consistent with First Amendment principles,” and pledged in the interim to exercise the utmost restraint and to enforce its policy only in “egregious cases.” WDBJ opposes the proposed forfeiture because: (1) it is based on an erroneous understanding of the facts; (2) it misapplies the FCC’s current indecency test; (3) the Commission lacks a constitutional standard for enforcing its indecency rules; (4) the NAL’s application of the rules is unconstitutional as applied to WDBJ; (5) the NAL is based on an erroneous and unconstitutional standard of willfulness; and (6) the proposed forfeiture is wildly excessive.

**The NAL is Wrong on the Facts.** The NAL is based on a July 12, 2012 newscast on WDBJ that covered a controversy in the Roanoke County community of Cave Spring about a former adult film star who had joined the volunteer rescue squad. The situation provoked various reactions in the community, including a request by the Fire Chief to terminate the young woman’s employment. WDBJ’s story about these events explored the dispute and illustrated parts of the story with material drawn from internet sources. Due to equipment limitations, however, station personnel were unable to see the full screen of the online material, and the eventual broadcast briefly displayed a small image of an erect penis at the extreme margin of the screen. The image appeared for 2.7 seconds during a three minute and ten second story, covered only 1.7 percent of screen at the far right edge, and prompted an immediate corrective response from WDBJ once it became aware of the mishap.

The NAL rests on a series of erroneous factual assumptions, including the notion that the offending image was visible to the journalist who assembled the story, that WDBJ personnel had ample opportunity to screen the material on the equipment available before it was broadcast, that the transmission could have been prevented if station personnel had only been more attentive, and that the sexual material was “plainly visible.” None of these assumptions is correct. The

editing equipment at WDBJ, which in 2012 had yet to be upgraded following the digital transition, did not allow the journalist or his editors to view material taken from the internet at the far margin of the screen. The news story went through two levels of review before the story aired. Although station personnel took care to blur sensitive material from the web, including text links to pornographic websites, they were not able to see the image that prompted the NAL. Once WDBJ became aware of the problem, however, it removed the story from its website, obtained new editing equipment at a cost of nearly \$800,000, and adopted stationwide policies regarding the use of online material in news stories.

**The NAL Misapplies the FCC Test for Indecency.** The NAL purports to apply the test for indecency first articulated as “industry guidance” in the Commission’s 2001 *Indecency Policy Statement*. For material to be deemed indecent, two questions must be answered in the affirmative: (1) whether the material depicts or describes sexual or excretory organs or activities, and (2) whether the material is “patently offensive” as measured by contemporary community standards for the broadcast medium. In this case, WDBJ does not dispute that the answer to the first question is “yes,” because the news broadcast briefly and accidentally included the image of a penis. But the Commission misapplied its own test for determining when the material is “patently offensive” based on contemporary community standards for the broadcast medium.

Under the *Indecency Policy Statement*, the Commission determines patent offensiveness by analyzing three factors: (a) the explicitness or graphic nature of the depiction; (b) whether the material dwells on or repeats at length the depiction; and (c) whether the material appears to pander or is used to titillate or shock. In this case, the Commission incorrectly allowed a single fact to override its analysis, and inappropriately conflated the various factors. Moreover, the FCC’s treatment of each factor was inconsistent with its precedents. For example, the

Commission has previously held that the brief exposure of a penis in the course of presenting the news is not graphic or explicit where it was brief, unintentional, and not the focus of the newscast. The NAL glosses over the second factor, since there is no question that WDBJ did not “dwell on” or “repeat” the offending material. And the Commission rewrites the third factor, suggesting that the material was “pandering” as long as it is “explicit.” However, this conflates the third and first factors of the FCC’s indecency test and ignores agency precedent that pandering depends on a broadcaster’s intent in presenting the material. Contrary to the NAL, it is impossible to “pander” by accident.

**The FCC Lacks a Constitutionally-Sound Test for Indecency.** The NAL falsely assumes that the Commission can impose the maximum indecency fine on a newscast because of the Supreme Court’s decision in *FCC v. Pacifica Foundation, Inc.*, 438 U.S. 726 (1978). This ignores the facts that no court has ever upheld as constitutional the multi-factor test set forth in the *Indecency Policy Statement*, and that the only courts ever to assess the merits of that test have found it to be unconstitutionally vague. Indeed, in eight years of litigation between 2004 and 2012, the deficiencies of the FCC’s approach to indecency enforcement have been laid bare. *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 335 (2d Cir. 2010), *aff’d on other grounds*, 132 S. Ct. 2307 (2012) (“*Fox II*”); *ABC, Inc. v. FCC*, 404 F. App’x 530 (2d Cir. 2011), *aff’d on other grounds sub nom. Fox II*, 132 S. Ct. 2307 (2012). *See also CBS Corp. v. FCC*, 663 F.3d 122 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2677 (2012). These cases confirm that the FCC lacks a constitutionally-approved test for regulating indecency, as the Commission itself acknowledged in its 2013 Public Notice seeking comment on how to reform its indecency policies.

*Pacifica* upheld only a very restrained policy of indecency enforcement in which the FCC deferred to the good faith editorial judgments of licensees, and no action was taken against

fleeting, isolated, or inadvertent transmissions of potentially offending material. This restrained policy was required by the First Amendment, because the Commission's generic test for indecency otherwise lacked the necessary doctrinal rigor when the government seeks to regulate speech. But as the FCC departed from this policy of restraint, it never articulated a new standard that could survive constitutional scrutiny. As recent cases attest, the multi-factor test the FCC says it applied in the NAL fails to satisfy basic First Amendment requirements, and the Commission has not met its constitutional and statutory obligations to devise a new test. What it cannot do is simply continue to apply its discredited policies, even if the NAL had correctly applied them.

**The NAL Violates the First Amendment as Applied to WDBJ.** The FCC's application of its indecency test to WDBJ highlights all of the constitutional flaws identified in recent cases. While *Pacifica* approved only "restrained" enforcement so as to stay within constitutional bounds, the NAL takes a draconian approach by imposing the largest fine ever for a single "indecent" broadcast on one station. The harshness of the proposed sanction is magnified by the fact that the penalty is proposed for material broadcast as part of a bona fide newscast – programming the FCC previously has accorded the highest degree of editorial deference – and because the transmission was fleeting, inadvertent, and isolated, which are all characteristics that previously warranted no sanction at all. The Commission's response that it has repeatedly said there is no "news exemption" is the problem, not the answer, given the agency's inability to articulate a discernible standard by which broadcasters can accurately predict what speech is prohibited.

**The NAL's Standard for Willfulness is Erroneous and Unconstitutional.** The NAL violates the Communications Act insofar as it proposes to penalize WDBJ for an alleged indecency violation that was neither "willful" nor "repeated," as required by Section 503(b)(1). The Act defines "willful" as "conscious and deliberate commission or omission of any act." In

this case, the offending material was not “repeated,” and the record confirms that WDBJ personnel were entirely unaware the image in question would be seen in the coverage as broadcast. Under established case law, the WDBJ newscast does not meet the standard for willfulness. This conclusion is also compelled by constitutional considerations. The First Amendment requires statutory provisions imposing penalties on speech to be interpreted to include a “guilty knowledge” requirement, and because speech restrictions must be applied narrowly, the constitutional validity of Section 1464 depends on a strict scienter standard. Neither “recklessness” nor even an extreme departure from professional standards would satisfy this standard. In this case, however, WDBJ followed reasonable precautions to screen offensive material from the newscast.

**The Proposed Forfeiture is Excessive.** Even if the Commission could justify its indecency finding in this case, proposing the maximum fine is grossly excessive. The FCC does not attempt to explain its decision to impose a fine more than forty-six times the base forfeiture in its guidelines for an infraction based on a fleeting, inadvertent, and isolated transmission. Both the factual bases and the policy assumptions underlying the proposed NAL are erroneous. The Commission also fails to give WDBJ credit for its immediate and extensive remedial measures undertaken prior to the FCC’s inquiry. If any forfeiture at all is warranted, it must be reduced substantially.

Instead of the careful legal reasoning required by the First Amendment when the Commission regulates protected speech, the NAL rests on “the mystical aphorisms of the fortune cookie.” *Obergefell v. Hodges*, No. 14-446, slip op. at 76 (U.S. June 26, 2015) (Scalia, J., dissenting). The NAL must be withdrawn.

## II. THE FACTS

### A. WDBJ Aired a Legitimate News Story on a Public Controversy

An actress who appeared in adult films retired from that career and settled in the Roanoke, Virginia area.<sup>1</sup> She volunteered to serve as an Emergency Medical Technician (“EMT”). She went through training and began to serve as an EMT in Cave Spring, Virginia, a suburb of Roanoke. Her background and previous profession became controversial and residents of the community raised questions about whether she should be permitted to serve as an EMT. One stated concern was whether the former actress was continuing to benefit from sales of her films and thus from her allegedly improper former career. The County Fire Chief was sufficiently motivated to write to the County Attorney to ask whether her services should be terminated.<sup>2</sup>

WDBJ, the CBS affiliate in the Roanoke television market, and the winner of numerous awards for news coverage,<sup>3</sup> determined that the story was of sufficient public interest to warrant coverage. It produced a story that included interviews with the actress’s colleagues on the EMT squad, people who had been assisted by her, and people who had questions about the propriety of her service. The story quoted the Fire Chief’s request to the County Attorney and his response. In order to demonstrate the scope of the actress’s adult film career, the story showed an image of a Google™ search of her name. The actual links shown on the search page were blurred out to avoid showing any active links to adult websites.<sup>4</sup> In addition, the photojournalist producing the

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<sup>1</sup> The actress, whose real name is Tracy Rollan, appeared under the name Harmony Rose.

<sup>2</sup> The factual statements in this Response are attested to by the Declaration of Jeffrey A. Marks, President and General Manager of WDBJ, attached hereto as Appendix A.

<sup>3</sup> A list of the awards WDBJ has received for quality news programming is attached hereto as Appendix B.

<sup>4</sup> Thus, although the Commission cites a complaint stating that links to “pornographic videos” came up on the screen (NAL ¶ 16 n.48) in support of its central conclusion that the

story went onto a website of the distributor of her films to obtain pictures to use in the story. In those pictures, as the NAL concedes, “only her face and shoulders can be seen.”<sup>5</sup>

The station’s editorial choice to show that a Google™ search would bring up a large number of “hits” on adult-oriented websites and to show that the actress’s films were currently available was a response to concerns expressed by some citizens that among the reasons the actress should not be allowed to serve as an EMT was that she continued to receive financial benefits from her previous career. Contrary to the implication in the NAL, the Station chose this material to illustrate the controversy, not to pander or titillate. The fact that the actress’s films could be readily identified in an internet search and that her films were available on a website showed that there was a factual basis underlying the public controversy. Decisions about how best to present an issue in a news story are, of course, central to the editorial process protected by the First Amendment, and are among the reasons that the Commission has, with almost no exceptions, refused to sanction the inclusion of allegedly indecent material in news programs.<sup>6</sup>

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WDBJ news story was pandering or titillating, that complaint was, as the Commission was aware, mistaken. No links to any site, pornographic or otherwise, could be seen in the WDBJ story.

<sup>5</sup> NAL ¶ 4. The NAL makes much of the fact that, in one of the images in the story, the actress placed a finger in her mouth “and appears to suck on her finger.” *Id.* The NAL also recites that in one image in the story, “she appears to be sitting on a bed, wearing a bra.” *Id.* ¶ 5. The relevance of these facts is obscure. None of these images involve either sexual or excretory organs or acts, and therefore are not remotely within the scope of the Commission’s indecency policy. To the extent the Commission included these references in an effort to characterize WDBJ’s news story as salacious, that characterization is both inaccurate insofar as the news story addressed an issue of public controversy in the Roanoke area, and irrelevant as the Commission neither purports to, nor constitutionally could, regulate “salacious” speech.

<sup>6</sup> Other media, including national websites for emergency professionals, also viewed the story as important and worthy of coverage. *See, e.g.,* [www.huffingtonpost.com/2012/07/14/harmony-rose-porn-star-volunteer-rescue-quad\\_n\\_1671830.html](http://www.huffingtonpost.com/2012/07/14/harmony-rose-porn-star-volunteer-rescue-quad_n_1671830.html); <http://www.foxnews.com/us/2012/07/16/former-porn-star-now-reportedly-working-as-emt-in-virginia/>; [www.ironfiremen.com/2012/06/27/porn-star-or-felon-which-do-you-want-in-your-](http://www.ironfiremen.com/2012/06/27/porn-star-or-felon-which-do-you-want-in-your-)

## **B. The Material That Triggered the NAL Was Included Unintentionally**

Like most stations in medium and small television markets, WDBJ converted its facilities to digital operation in several stages over a period of years. It first constructed digital transmission facilities, which included the construction of a new tower and acquisition of a new transmitter at its transmission site. In a second phase, it invested in an encoder to permit transmission of network programming in high definition. It then upgraded its master control facilities to permit full local control of high definition signals. Subsequently, the station invested in digital cameras and new sets to permit production of local programming and news in high definition. Upgrading its news production and editing equipment was among the last phases of its conversion to full digital operations. In 2012, when the story addressed in the NAL was produced, that final upgrade had not yet occurred. Production and review of news stories was undertaken on equipment that used monitors that displayed only a 4 by 6 image. That equipment did not allow users to adjust the monitor to view parts of a widescreen image that were outside of the area shown in the monitor. This equipment was used not only for final editing of news stories; it was also used to put news programming together, including obtaining any material the station used from internet websites. WDBJ's equipment, when used to access internet material, did not enable the operator to see material that was not in the center of a website.

The website used to illustrate the WDBJ news story about Ms. Rollan had clothed images of the actress that were the focus of the report, but also included along the edge of the screen "boxes" that displayed other films available from the distributor. Because they were at the far edge of the website, the "boxes" *could not be seen* by WDBJ's journalists when they downloaded images for use in the news story. However, these areas of the website became

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station/; [www.ems1.com/ems-education/articles/1315580-Porn-star-turned-EMT-could-be-in-trouble](http://www.ems1.com/ems-education/articles/1315580-Porn-star-turned-EMT-could-be-in-trouble).

visible when the story was viewed on a wide-screen television as it was broadcast. At one point during the story, video of the website briefly showed at the far right edge of the screen a portion of one of these “boxes” which included a male actor fondling his penis. That image, which as the Commission noted, was entirely unrelated to the news story,<sup>7</sup> was not viewable by the photojournalist when he downloaded the images from the website or when he put the story together. Nor was it visible to the story reporter, or to two newsroom managers who reviewed the story before it was broadcast, since editorial review at WDBJ took place on the same editing equipment. Thus, WDBJ personnel were entirely unaware that this image could be seen in the story as broadcast.

Part of that “box” did, however, appear for 2.7 seconds at the far right edge of the screen when the story was broadcast and viewed on a wide-screen television. The image on a wide-screen television occupied only 1.7 percent of the viewing area.<sup>8</sup> A few viewers nonetheless noticed the picture and complained to the station. WDBJ immediately investigated and found that this entirely unrelated picture inadvertently had been shown as part of its news program. It deleted the story from its online website, [www.wdbj7.com](http://www.wdbj7.com), decided that the story would not be shown again in any other newscasts, and issued apologies to complaining viewers for the brief and inadvertent inclusion of unrelated material in its newscast.

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<sup>7</sup> *E.g.*, NAL ¶ 17.

<sup>8</sup> A full-frame digital picture from a television station broadcasting, like WDBJ, a 1080i digital signal, occupies 1920 by 1080 pixels, or a total of 2,076,600 pixels. The “box” on the side of the screen where the allegedly offensive material could be seen, took up, as measured by WDBJ engineers, 111 by 328 pixels, for a total of 36,408 pixels, or 1.7 percent of the total screen area.

### **C. WDBJ Took Immediate Remedial Measures**

WDBJ took prompt steps to ensure that material taken from the internet could not and would not be inadvertently included in news programming. The Commission expressed some doubt as to whether the Station took remedial actions before it was notified of the Commission's investigation, NAL ¶ 31, but WDBJ in fact took these steps *immediately* after the incident and has continued to strengthen its internal controls to this day. These measures included:

- WDBJ replaced its entire news editing system, including the monitors that were incapable of displaying an entire 16 by 9 broadcast picture, at a cost of \$798,310. This system includes not only the editing function but also the systems used to download and review any material from internet sources.
- WDBJ conducted training sessions for all news personnel concerning the uses of internet material and the Commission's indecency policies.
- WDBJ subsequently conducted training for all employees about copyright issues and their impact on selection of material to be included in news programming.
- WDBJ instituted a formal policy requiring approval of two news managers before any material obtained from an internet source was placed on air or on the Station's website. That policy specifically requires that managers review any material "in its entirety" on a high-definition monitor in full-screen mode "so all parts of the screen are able to be seen." Producers and managers are specifically directed to "carefully review the visual material to make sure it complies with indecency rules." WDBJ's written policy further cautions employees that "the need to get a story on the air quickly in a breaking news situation does NOT supersede" these procedures.
- WDBJ since 2012 has conducted training sessions for news employees in small groups about the uses of material found on the internet and, in particular, the need for complete examination of all such material before it is used.

### **III. THE NAL RESTS ON INCORRECT FACTUAL PREMISES**

The NAL's description of the facts leading up to the July 12, 2012 broadcast is not supported by the record. These errors are fundamental, and go directly to the question of WDBJ's liability for the news broadcast. The factual misstatements alone require the Commission to withdraw the NAL and conclude that WDBJ did not violate the indecency policy.

*First*, the NAL states that WDBJ's "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." NAL ¶ 6. But as explained above, the website was accessed from the same equipment that was used to edit the story for broadcast. Not only was the screen on that equipment incapable of showing the website from edge to edge (as well as not being capable of viewing the entire broadcast image), the equipment did not allow users to manipulate the website to see areas that were not displayed on the editing screen. Thus, contrary to the Commission's understanding, the "boxes" containing the offensive material were invisible to the WDBJ photojournalist who assembled the story, and his equipment lacked the capability of displaying material at the far margin of the screen. Likewise, the material was not visible to either of the senior newsroom personnel who carefully reviewed the story before it was broadcast.

*Second*, the NAL states that "WDBJ pre-recorded the broadcast and selected material from an adult website, *giving it ample opportunity to screen the material before it was broadcast.*" NAL ¶ 19 (emphasis added). On this basis, the Commission concluded that WDBJ's violation was worse than the indecency at issue in *Young Broadcasting*.<sup>9</sup> WDBJ, however, did not have such an opportunity because the "box" containing the offensive material was not visible, and could not have been made reviewable, on any equipment WDBJ then had available to produce and review news stories.

*Third*, in discussing the factors that it believed supported imposition of the maximum forfeiture, the Commission said: "Though he claims he [the photojournalist] did not notice the indecent material, he should have been more alert to what he was downloading for broadcast

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<sup>9</sup> *Young Broad. of San Francisco, Inc.*, 19 FCC Rcd 1751 (2004). As discussed below, WDBJ objects to the Commission's reliance in any way on the NAL in *Young Broadcasting* since it amounts to only a charge which, on further reflection, the Commission determined was not appropriate to pursue. *See infra* 19-20.

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.” NAL ¶ 24. But WDBJ’s employees could not have been expected to notice that which they could not see on the equipment used to prepare and edit the story. Thus, the inadvertent inclusion of brief nudity in the news story was not, as the Commission appeared to believe, the result of negligence or inattention on the part of WDBJ and its award-winning journalists.

*Fourth*, in discussing the basis for holding WDBJ responsible for broadcast of the material, even if it was unintentional, the Commission stated, “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.” NAL ¶ 29 (emphasis added). But as WDBJ made clear, the material in question was not “plainly visible;” to the contrary, it was impossible to see on the equipment used by either the photojournalist who inadvertently downloaded the material and edited the story, or by the other newsroom personnel who reviewed the story before it was broadcast.

Overall, the NAL is based on the incorrect assumption that station personnel were either negligent or insufficiently careful in reviewing the material that was aired. But the brief and inadvertent inclusion of one partial “box” containing offensive material at the extreme edge of the screen was entirely unintended and was not knowingly transmitted by WDBJ. The material was broadcast solely because of a regrettable technical limitation that has since been corrected, and not because of any decision by the licensee to try to shock viewers, or to pander or titillate. That alone requires the Commission to withdraw the NAL.

#### IV. THE COMMISSION MISAPPLIED ITS INDECENCY STANDARD TO THE WDBJ NEWSCAST

The unintended transmission of a brief glimpse of sexually-oriented material does not satisfy the Commission's own test for indecency. The NAL purportedly applied the formula first articulated in *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999 (2001) ("*Indecency Policy Statement*"). NAL ¶¶ 9-17. The *Indecency Policy Statement* posits two fundamental determinations that must be made in any Section 1464 case: (1) whether the material depicts or describes sexual or excretory organs or activities, and (2) whether the material is "patently offensive" as measured by contemporary community standards for the broadcast medium. 16 FCC Rcd at 8002 ¶¶ 7-8. To determine "patent offensiveness" the Commission analyzes three factors: (a) the explicitness or graphic nature of the depiction; (b) whether the material dwells on or repeats at length the depictions; and (c) whether the material appears to pander or is used to titillate or shock. *Id.* at 8002-03 ¶¶ 9-10. Although WDBJ does not dispute that the broadcast met the threshold test for the Commission's standard – that it briefly depicted a small image of a sexual organ or activity – the NAL's analysis of the three "patent offensiveness" factors is fatally defective.

As explained in greater detail below, this multi-factor test for indecency has never been upheld by any court, is currently under review by the FCC, and cannot serve as a valid basis for imposing an NAL in this case.<sup>10</sup> Even if the current test were constitutionally defensible, however, the Commission has misapplied it here. The NAL fails to adhere to the requirement that "[n]o single factor generally provides the basis for an indecency finding." *Indecency Policy*

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<sup>10</sup> See *infra* §§ V.A & V.B.3. Both courts and the Commission have concluded that the current indecency test requires comprehensive review to ensure consistency with constitutional standards – a review that the Commission began but not concluded.

*Statement*, 16 FCC Rcd at 8003 ¶ 10. Instead, the NAL concludes that “one or two of the factors may outweigh the others.” NAL ¶ 10. This degree of arbitrariness regarding the application of the FCC’s own test invalidates it – there must be a basis to find that WDBJ’s broadcast implicated *at least* two of the three factors for determining “patent offensiveness.”

The Commission also failed to defer to good faith editorial judgments made in presenting news programming, as it historically had done in applying the indecency policy. *E.g.*, *Letter to Peter Branton*, 6 FCC Rcd 610 (1991) (“we traditionally have been reluctant to intervene in the editorial judgments of broadcast licensees on how best to present serious public affairs programming to their listeners”). In particular, the Commission must not second-guess decisions of reporters and editors in determining how to present news stories. Thus, in applying its “patent offensiveness” test, if there is any doubt about whether WDBJ’s news story violated the standards, the Commission must hold that it does not. Despite the Commission’s rote recitation of the “utmost restraint” policy, the NAL instead called every close question against the Station. That is entirely inconsistent with the Commission’s established precedents.

**A. The Newscast Was Not Graphic and Explicit Under Commission Precedent**

Although WDBJ’s newscast admittedly met the threshold requirement under the Commission’s indecency test as a technical matter, the brief and inadvertent depiction of a sexual organ should not be considered “graphic and explicit” based on FCC precedents defining “patent offensiveness.”<sup>11</sup> In analyzing this factor, the Commission has emphasized the “need for parti-

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<sup>11</sup> By concluding that a fleeting and incidental exposure of a sexual organ was explicit and graphic, the Commission conflated the first part of the “patently offensive” test with the foundational determination that a broadcast show a sexual organ or activity to even be analyzed under the indecency policy. The Commission in the NAL notes that some viewers apparently “noticed the sexual activity shown in the broadcast.” NAL ¶ 12. If the mere fact that a picture was “noticed” is sufficient to establish that it was “explicit and graphic,” then the first element of the “patently offensive” standard will have been deprived of any meaning.

cular caution with respect to complaints implicating the editorial judgment of broadcast licensees in presenting news and public affairs programming.” *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 2664, 2717 (2006) (“2006 Omnibus Indecency Order”), recon. granted in part and denied in part, 21 FCC Rcd 13299 (2006) (“Omnibus Indecency Remand Order”), rev’d sub nom. *Fox II*, 132 S. Ct. 2307.

The Commission has been particularly deferential to licensees’ editorial judgments because of the risk of inadvertent or accidental transmissions. Thus, the Commission held that an incidental broadcast of a man’s exposed penis on the *Today* show was not graphic and explicit, in large part because “the overall focus of the scene is on the rescue attempt, not on the man’s sexual organ.” *2006 Omnibus Indecency Order*, 21 FCC Rcd at 2716 ¶ 215. The Commission also stressed that the exposure in the *Today* show was “incidental to the coverage of a news event.” *Id.* In other words, the Commission held that the image was not “graphic and explicit” where the image was brief and unintentional, and the broadcaster did not seek to draw attention to it. It has applied the same analysis to non-news programming as well. *See id.* at 2709 (rejecting indecency complaint where image of ““Fuck Cops!” graffiti in *The Amazing Race 6* was “small, out of focus, and difficult to read”).<sup>12</sup>

The Commission failed to apply the same analysis to the WDBJ newscast. Here, the overall focus of the scene and over 98 percent of the screen was on the news story about the actress’s previous profession as contrasted with her current participation as an EMT volunteer. The “box” showing the sexual organ was inadvertently included and was entirely incidental to WDBJ’s coverage of a legitimate news story. The small, briefly visible image was at the very

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<sup>12</sup> It is also noteworthy that all of the examples offered by the Commission of programming that had been found to be “graphic and explicit” lasted far longer than the brief shot in the WDBJ news program, even when those images were the subject of the programs at issue. *See Indecency Policy Statement*, 16 FCC Rcd at 8004-06 ¶¶ 13-14.