109TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { 109–5

BROADCAST DECENCY ENFORCEMENT ACT OF 2005

FEBRUARY 14, 2005.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BARTON of Texas, from the Committee on Energy and Commerce, submitted the following

R E P O R T

[To accompany H.R. 310]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 310) to increase the penalties for violations by television and radio broadcasters of the prohibitions against transmission of obscene, indecent, and profane material, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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PURPOSE AND SUMMARY

The purpose of H.R. 310, the "Broadcast Decency Enforcement Act of 2005," is to provide the Federal Communications Commis-

sion (FCC) with enhanced authority to deal with obscenity, indecency and profanity on broadcast television.

BACKGROUND AND NEED FOR LEGISLATION

In 1961, then-FCC Chairman Newton Minow called television a "vast wasteland." Today, over 40 years later, similar complaints continue to be made against broadcast television and radio stations. Increasingly, parents, educators, and families are concerned about the material that is broadcast on television and radio, and the effect the material has on America's children.

Nielsen Media Research shows the average American watches 3 hours and 43 minutes of television each day—the equivalent of 56 days of nonstop television watching every year. Such viewing habits, particularly for children, have the potential to significantly shape their development, their education, and their outlook on the world. In a study on foul language on television, the Parents Television Council found that such language increased overall during every timeslot between 1998 and 2002. Foul language during the "family hour" increased by 94.8 percent between 1998 and 2002 and by 109.1 percent during the 9 p.m. time slot.

Studies also show that parents are increasingly concerned. According to the Kaiser Family Foundation, more than four out of five parents are concerned that their children are being exposed to too much sex on television. A 1996 U.S. News and World Report survey found that 88% of Americans thought incivility was a serious problem. When asked about the consequences of this decline in civility, respondents cited divided communities and eroding moral values.

These concerns about programming content were exacerbated when, on Sunday, February 1, 2004, CBS broadcast the National Football League's Super Bowl XXXVIII, viewed nationally and internationally by over 100 million people. The halftime show, which was produced by MTV, featured a performance by, among others, singers Janet Jackson and Justin Timberlake that ended in the exposure of Ms. Jackson's breast. Many Americans complained that much of the halftime broadcast show, which is generally considered a "family friendly" event, was inappropriate for family viewing, particularly given that so many children were apt to be watching it on television. The Super Bowl halftime show generated over 542,000 complaints to the FCC—an unprecedented number of complaints for the FCC. The Super Bowl incident garnered attention on its own, but was preceded by other television incidents, such as NBC's live broadcast of the 2003 Golden Globe Awards where the singer Bono used an expletive, and Fox's live broadcast of the 2003 Billboard Awards where actress Nicole Richie uttered a string of expletives. Broadcast radio is no better, and is arguably worse than broadcast television, with ample examples of indecent broadcasts by various "shock jocks." For instance, on August 15, 2002, the "Opie & Anthony Show" broadcast descriptions of a couple having sexual intercourse in St. Patrick's Cathedral. The "Bubba, The Love Sponge Show" has also been the subject of numerous complaints for, among other things, graphic and explicit discussions of oral sex, masturbation, and other sexual activities. All of these examples have highlighted the need for stronger penalties for broadcast obscenity, indecency and profanity.

The outpouring of interest regarding these incidents is symptomatic of a larger feeling among many Americans that some television and radio broadcasters are engaged in a "race to the bottom" in order to distinguish themselves in an increasingly crowded entertainment field. In addition, some individual performers and on-air talent seem to be perpetually pushing the envelope.

Congress has taken some steps to help parents steer their children to appropriate programming. For instance, Congress passed legislation requiring "V-chip" technology, which reads information encoded in the rated program and blocks programs from the set based upon the rating selected by the parent. Since 2000, all television sets with picture screens 13 inches or larger must be equipped with features to block the display of television programming based upon its rating. Congress also gave the broadcasting industry the first opportunity to establish voluntary ratings. The rating system, also known as "TV Parental Guidelines," rates programming that contains sexual, violent or other material parents may deem inappropriate. These ratings are displayed on the television screen for the first 15 seconds of rated programming and, in conjunction with the V-Chip, permit parents to block programming with a certain rating from coming into their home, in addition to other independent ratings systems that are available. Additionally, in 1990, Congress enacted the Children's Television Act (CTA) to increase the amount of educational and informational programming available to children on television. CTA requires each broadcast television station to air at least three hours per week of core educational programming and limits the amount of time broadcasters may devote to commercial matter during children's programming.

Despite these good efforts, more needs to be done. American families should be able to rely on the fact that, at times when their children are likely to be tuning in, broadcast television and radio programming will be free of indecency, obscenity, and profanity. Congress has given the FCC the responsibility to help protect American families in this regard. In light of recent television and radio events, it is evident that the FCC needs additional and enhanced authority to pursue bad actors. H.R. 310 provides the FCC with that authority.

Although the FCC is prohibited from reviewing or prescreening television or radio programming for content, the FCC currently has the authority to enforce rules and laws restricting the broadcast of obscenity, indecency, and profanity. Federal law specifically prohibits the utterance of "any obscene, indecent or profane language by means of radio communication" (18 U.S.C. 1464) and the FCC is charged with enforcing this statute (47 U.S.C. 503). By regulation, the FCC prohibits the broadcast of obscene material at any time, and indecent material during the hours of 6 a.m. to 10 p.m. (47 C.F.R. 73.3999), the time period when children are most likely to be watching television and listening to the radio.

Existing law gives the FCC the ability to pursue forfeiture penalties against licensees or permittees for broadcasting obscenity, indecency, or profanity. The increased attention of the indecency issue has resulted in the FCC taking a more active approach to radio and television complaints. The FCC recently entered into two of its largest indecency consent decrees. On November 9, 2004, Viacom agreed to pay the FCC $3.5 million to settle all of its out-

standing indecency claims, except the Super Bowl incident that Viacom continues to litigate. On June 4, 2004, Clear Channel agreed to pay the FCC $1.75 million to resolve all of its outstanding indecency violations. Despite these large consent decrees, broadcast complaints continue to be sent to the FCC. The Committee believes that a significant problem is the current forfeiture penalty cap, at only $32,500 for each violation, is hardly a deterrent. (47 U.S.C. 503(2)(A)).

The FCC also has the authority to assess forfeiture penalties against nonlicensees, but only after first citing an offender, then waiting for a second offense to issue a forfeiture order (47 U.S.C. 503(b)(5)), which makes it virtually impossible for the FCC to effectively enforce its indecency rules against nonlicensees. The current cap on fines for nonlicensees is only $11,000, which, even if the FCC could invoke the two-step process necessary to fine nonlicensees, is hardly a deterrent to those entertainment performers who make more than ten times that amount for each performance. In addition to forfeiture penalties, the FCC has the power to revoke any station license or construction permit for violations of the law or its regulations. (47 U.S.C. 312(a)(6)). License revocation, however, has never been utilized by the FCC for an obscenity, indecency or profanity violation.

H.R. 310 mirrors H.R. 3717, which, in the 108th Congress, passed the House of Representatives with an overwhelming bipartisan vote of 391 yeas to 22 nays.

HEARINGS

No hearings were held in the 109th Congress. During the 108th Congress, however, the Subcommittee on Telecommunications and the Internet held one oversight hearing on indecency and two legislative hearings on H.R. 3717, a bill nearly identical to H.R. 310. On January 28, 2004, the Subcommittee received testimony from: David Solomon, Chief of the Enforcement Bureau, FCC; Brent Bozell, President, Parent's Television Council; Robert Corn-Revere, Partner, Davis Wright Tremaine, LLP; and William Wertz, Executive Vice President, Fairfield Broadcasting Company. The second hearing was on February 11, 2004, and the Subcommittee received testimony from: Paul Tagliabue, Commissioner, National Football League; Mel Karmazin, President and Chief Operating Officer, Viacom, Inc.; and the five FCC Commissioners, Chairman Michael Powell, and Commissioners Kathleen Abernathy, Michael Copps, Kevin Martin, and Jonathan Adelstein. On February 26, 2004, the Subcommittee held a third hearing and received testimony from: Alex Wallau, President, ABC Television Network; Gail Berman, President of Entertainment, Fox Broadcasting Company; Dr. Alan Wurtzel, President of Research and Media Development, National Broadcasting Company; Lowell "Bud" Paxson, Chairman and Chief Executive Officer, Paxson Communications Corporation; John Hogan, President and Chief Executive Officer, Clear Channel Radio; and Harry J. Pappas, Chairman and Chief Executive Officer, Pappas Telecasting Companies.

COMMITTEE CONSIDERATION

On Wednesday, February 9, 2005, the Full Committee met in open markup session and ordered H.R. 310 favorably reported to the House by a recorded vote of 46 yeas and 2 nays, a quorum being present.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto. A motion by Chairman Barton to order H.R. 310 reported to the House was agreed to by a recorded vote of 46 ayes to 2 nays. Chairman Barton asked for and received unanimous consent to make technical and conforming changes to the bill.

COMMITTEE ON ENERGY AND COMMERCE -- 109TH CONGRESS
ROLL CALL VOTE # 2

RESOLUTION: H.R. 310, Broadcast Decency Enforcement Act of 2005.

MOTION: Motion by Mr. Barton to order H.R. 310 reported to the House.

DISPOSITION: **AGREED TO**, by a roll call vote of 46 yeas to 2 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Barton	X			Mr. Dingell	X		
Mr. Hall	X			Mr. Waxman		X	
Mr. Bilirakis	X			Mr. Markey			
Mr. Upton	X			Mr. Boucher			
Mr. Stearns	X			Mr. Towns	X		
Mr. Gillmor	X			Mr. Pallone	X		
Mr. Deal	X			Mr. Brown			
Mr. Whitfield	X			Mr. Gordon			
Mr. Norwood	X			Mr. Rush	X		
Ms. Cubin	X			Ms. Eshoo			
Mr. Shimkus	X			Mr. Stupak			
Ms. Wilson	X			Mr. Engel	X		
Mr. Shadegg	X			Mr. Wynn	X		
Mr. Pickering	X			Mr. Green	X		
Mr. Fossella	X			Mr. Strickland	X		
Mr. Blunt				Ms. DeGette			
Mr. Buyer	X			Ms. Capps	X		
Mr. Radanovich	X			Mr. Doyle	X		
Mr. Bass	X			Mr. Allen	X		
Mr. Pitts	X			Mr. Davis	X		
Ms. Bono	X			Ms. Schakowsky		X	
Mr. Walden	X			Ms. Solis	X		
Mr. Terry	X			Mr. Gonzalez	X		
Mr. Ferguson	X			Mr. Inslee	X		
Mr. Rogers	X			Ms. Baldwin	X		
Mr. Otter	X			Mr. Ross	X		
Ms. Myrick							
Mr. Sullivan	X						
Mr. Murphy	X						
Mr. Burgess	X						
Ms. Blackburn	X						

2/09/2005

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee did not hold any hearings in the 109th Congress.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

The goal of H.R. 310 is to increase the penalties for violations by television and radio broadcasters and nonlicensees of the prohibitions against transmission of obscene, indecent, and profane material, and for other purposes.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee finds that H.R. 310, the "Broadcast Decency Enforcement Act of 2005," would result in changes to budget authority, entitlement authority, and tax expenditures and revenues to the extent stated below in the Committee Cost Estimate.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 14, 2005.

Hon. JOE BARTON,
Chairman, Committee on Energy and Commerce,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 310, the Broadcast Decency Enforcement Act of 2005.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Melissa E. Zimmerman.

Sincerely,

ELIZABETH M. ROBINSON
(For Douglas Holtz-Eakin, Director).

Enclosure.

H.R. 310—Broadcast Decency Enforcement Act of 2005

H.R. 310 would increase the maximum civil penalty for broadcasting obscene, indecent, or profane material. (Such penalties are recorded in the budget as revenues.) Under the bill, CBO estimates that revenues resulting from those penalties would increase by less

than $500,000 in 2005 and by around $10 million over the 2006–2015 period. CBO estimates that implementing H.R. 310 would not have a significant effect on spending subject to appropriation and would not affect direct spending.

H.R. 310 would increase the monetary penalties assessed by the Federal Communications Commission (FCC) for broadcasting obscene, indecent, or profane material. For broadcast licensees, the maximum penalty for each violation would increase from about $25,000 to $500,000. The maximum penalty for individuals would increase from about $10,000 to $500,000. According to the FCC, prior assessments for each violation have been around $50,000 per year recently—however, annual collections have varied widely. For example, the FCC did not collect any penalties for indecency violations in 2003, collected $2.5 million in 2004, and has not collected any penalties in the first four months of 2005.

CBO estimates that under H.R. 310, collections of penalties for broadcasting obscene, indecent, or profane material would increase by less than $500,000 in 2005 and by around $1 million per year over the 2006–2015 period. The increase in collections could be much higher or lower considering that the number of penalties varies widely from year to year.

H.R. 310 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would be unlikely to impose costs on state, local, and tribal governments.

The CBO contact for this estimate is Melissa E. Zimmerman. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds that the Constitutional authority for this legislation is provided in Article I, section 8, clause 3, which grants Congress the power to regulate commerce with foreign nations, among the several States, and with the Indian tribes.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

Section 1 establishes the short title of the bill, the "Broadcast Decency Enforcement Act of 2005."

Section 2. Increase in penalties for obscene, indecent, and profane broadcasts

Section 2 of the bill amends section 503(b)(2) of the Communications Act of 1934 (47 U.S.C. 503(b)(2)) by increasing the existing forfeiture penalty cap for broadcast station licensees or permittees (hereinafter "licensee") for broadcasting obscene, indecent, or profane materials from $32,500 per violation to $500,000 per violation. Additionally, section 2 increases the existing forfeiture penalty cap for other persons (nonlicensees) for uttering obscene, indecent, or profane material from $11,000 per violation to $500,000 per violation.

It should be noted that the $500,000 figure, while a significant increase from the current statutory penalties, is a ceiling, not a floor. The Committee expects that each complaint filed with the FCC will present different and unique facts that will justify a diverse range of penalties. This increased fining authority provides the FCC with the necessary discretion to adequately penalize a full range of violations, from, for example, particularly egregious offenses by large corporate actors to minor offenses by small companies or private individuals. Moreover, if the Commission opts to assess forfeiture penalties on a "per utterance" basis, then the Committee expects the Commission to take into account the multiplying effect of finding numerous violations when determining the level of penalty per utterance, particularly with small businesses and private individuals.

In setting the penalties for licensees and nonlicensees, the Committee was particularly careful to set a strong but appropriate penalty cap. The figure of $500,000 is not so high as to be disproportionate to a particularly egregious offense. Conversely, the amended penalty cap is high enough to provide a real deterrent to licensees and nonlicensees who may be tempted to push the envelope of decency for higher ratings, bigger advertising revenues, or increased popularity. Additionally, the Committee intentionally set the same forfeiture penalty cap for licensees as it did for nonlicensees.

Finally, it is the Committee's hope that these increased fines will provide an additional incentive for the Department of Justice to institute recovery proceedings to collect the outstanding penalties under section 504(a). Unfortunately, today's forfeiture penalties are so inconsequential that it hardly justifies using the Department's scarce resources. The revised penalty scheme in section 2 reverses that. In light of this change, it is anticipated that the Department will be more diligent in collecting FCC forfeiture penalties.

Section 3. Additional factors in indecency penalties; exception

Section 3 amends section 503(b)(2) of the Communications Act of 1934 (47 U.S.C. 503(b)(2)) by expanding the current factors the FCC is required to consider when levying a forfeiture penalty for violations of obscenity, indecency, or profanity. Under current law,

the FCC must, with respect to the violator, take into account "the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." (47 U.S.C. 503(b)(3)(D)). Because this bill increases the forfeiture authority of the FCC, the Committee found it necessary to provide the Commission with more direction in exercising its discretion to set appropriate penalties for indecency violations. Specifically, section 3 expands upon two factors: degree of culpability and ability to pay.

With respect to "degree of culpability," section 2 requires the FCC to consider factors such as (1) whether the material uttered by the violator was live or recorded, scripted or unscripted; (2) whether the violator had a reasonable opportunity to review recorded or scripted programming or had a reasonable basis to believe live or unscripted programming would contain obscene, indecent, or profane material; (3) if the violator originated live or unscripted programming, whether a time delay blocking mechanism was implemented for the programming; (4) the size of the viewing or listening audience; and, (5) whether the programming was part of a children's television program under the Commission's children's television programming policy (47 C.F.R. 73.4050(c)).

The Committee views these factors as the best way to provide the FCC the necessary guidance to assess appropriate penalties. Whether the material was live or recorded, scripted or unscripted is relevant to the issue of intent of the violator who uttered the message. For instance, whether the violator had the reasonable opportunity to review programming will be a particularly meaningful factor in determining the level of culpability. If a licensee had a reasonable basis to believe live programming would contain obscene, indecent, or profane content, perhaps based on previous violations by an artist for similar programming, then that is a factor the FCC should weigh to determine the culpability of the licensee.

The decision by an originator of content to institute a time delay of live or unscripted programming is also a relevant factor in setting the amount of any penalty as it speaks to the attempts taken by the network or broadcaster to protect its audience. The size of the listening or viewing audience is relevant to the scope of the harm. Finally, whether the programming was aired as part of a children's television program under the Commission's children's television programming policy is particularly important since the notion underlying the Act's prohibition of indecency is to protect children.

With respect to "ability to pay," section 3 requires the FCC to consider factors such as (1) whether the violator is a company or individual, and (2) if the violator is a company, the size of the company and the size of the market served. Generally, it is envisioned that a company will be subject to higher penalties than individuals, although certainly that will not always be the case. Additionally, the FCC should weigh and consider the relative size of a company, including such factors as revenues and number of employees, and should further examine the geographic size and population density of the market in setting any penalty. The FCC should consider whether the licensee incurring a fine has a contractual arrangement by which it passes the fine along to any individual. In such circumstances, the FCC should evaluate all available penalties against the licensee. Additionally, the Committee encourages the

FCC, when considering an individual's ability to pay, to consider whether an individual is contractually obligated to indemnify the licensee, which essentially punishes the individual twice for the same incident. Finally, the Committee expects that personal financial information submitted to the FCC regarding an individual's ability to pay, such as tax returns, will be kept confidential.

Section 3 also creates a new section 503(b)(2)(G) in the Communications Act of 1934 that exempts from forfeiture penalties a broadcast station licensee that receives programming from a network organization, but is not owned or controlled, or under common ownership or control with, a network organization, for the broadcast of obscene, indecent, or profane material. This exemption only applies if: (1) the material was within live or recorded programming provided by the network organization to the licensee, and (2) the programming was recorded or scripted, and the licensee was not given a reasonable opportunity to review the programming in advance, or the programming was live or unscripted, and the licensee had no reasonable basis to believe the programming would contain obscene, indecent, or profane material.

Congress has given local station licensees special responsibilities to serve their local communities. The holder of a local station license, as a public trustee, is charged under section 73.658 of the Commission's regulations with the legal duty of accepting or rejecting network programs consistent with standards that are most appropriate for that community.

During its hearings in the 108th Congress, the Committee heard testimony indicating a tension between television networks and their non-network owned and operated broadcast station licensees regarding the licensees' unfettered right to reject programming for content reasons. Consistent with current law, a licensee should be able to preempt any network programming if it believes that such programming is not consistent with its local community standards. In order to properly reject programming, however, a local broadcaster must either be able to prescreen content or have some notice that inappropriate content may be included in live programming.

The new language in section 503(b)(2)(G) is designed to insulate local broadcasters from liability if they were not provided with a reasonable opportunity to review recorded or scripted programming, such as being given an advance copy of a show. Similarly, if the licensee has no reasonable basis to believe live or unscripted programming will contain inappropriate material, as would be suggested by programming with prior indecency violations, then fairness dictates that the licensee should not be held responsible for the broadcast of obscene, indecent, or profane material.

This provision also requires the FCC to define "network organization" for purposes of this subparagraph. The Committee expects the FCC to define this term to include all television networks. To the extent that business arrangements in other media, such as those involving radio networks or, perhaps, programming syndicators, similarly hinder the ability of licensees to reasonably determine whether programming will contain obscene, indecent, or profane material, then the Committee expects the Commission to determine whether the term should be expanded to include radio network or programming syndicators as well. The goal of this section is to shield non-network owned and operated affiliates from li-

ability in situations where they have no reasonable opportunity to review scripted or recorded programming, or no reasonable basis to believe live or unscripted programming will contain obscene, indecent, or profane material. The Committee expects that the Commission will develop a complete record and define the term "network organization" to effectuate that intent.

The Committee made the distinction between network owned-and-operated station licensees (O&O) and non-network O&O station licensees because of the unique relationship between the network and the O&O. The O&O licensee is part of the network's corporate family; therefore any forfeiture penalty from an obscene, indecent, or profane broadcast by an O&O would run to the corporate parent. In light of this relationship, it is not unreasonable to expect that O&Os could receive special or favorable treatment as compared to the non-O&O station licensees in receiving advance copies of programming or advance notice of controversial content. Given their proximity within the same corporate structure, it is reasonable to attribute knowledge about programming from the network to an O&O. For this reason, the Committee did not include O&Os within the liability shield contained in the new section 503(b)(2)(G).

Section 4. Indecency penalties for nonlicensees

Section 4 amends section 503(b)(5) of the Communications Act of 1934 (47 U.S.C. 503(b)(5)) to streamline the process governing how the FCC may apply the prohibition of broadcasting obscene, indecent, or profane material to nonlicensees, such as networks and individuals. Section 4 allows the FCC to pursue forfeiture penalties against nonlicensees upon a determination that a person uttered obscene, indecent, or profane material that was broadcast by a broadcast station licensee, if the person is determined to have "willfully or intentionally" made the utterance.

The FCC currently has the authority to assess forfeiture penalties upon nonlicensees, but unlike 503(b)(2)(A) which allows the FCC to seek a forfeiture penalty against licensees on the first violation, section 503(b)(5) requires a cumbersome, two-step process for nonlicensees that first requires the issuance of a citation, and then a subsequent similar violation before the FCC may issue a Notice of Apparent Liability. The current law is particularly unwieldy, making it difficult for the FCC to use section 503(b)(5) to enforce indecency laws against performers, who are increasingly using public broadcast airwaves in inappropriate ways, often in violation of the FCC's indecency rules. It is the hope of the Committee that amending section 503(b)(5) will make the application of obscenity, indecency, and profanity laws against networks and individuals less burdensome, thus increasing enforcement.

Under the plain meaning of current 503(b)(5), the language applies to both networks and individuals. Section 503(b)(1) provides that "any person" who violates 18 U.S.C. 1464 shall be liable for a forfeiture penalty. "Person" is defined in section 3(32) of the Communications Act as an "individual, partnership, association, joint-stock company, trust or corporation." Therefore, any person who under 18 U.S.C. 1464 "utters any obscene, indecent, or profane language by means of radio communication" can be found liable. Since the creation of 18 U.S.C. 1464, the FCC has used this authority to hold licensees responsible for obscene, indecent, or profane broad-

casts that they "uttered" using "radio communication." Networks can be considered to have "uttered" indecent material over "radio communication" in a similar way that a broadcast station does. Networks are originating material that comes into the home over-the-air. Accordingly, the Committee believes there is no obstacle that would prevent the application of section 503(b)(5) to network organizations.

There is also no bar from using section 503(b)(5) to hold individuals responsible for their intentional or willful speech on broadcast television or radio. The 2004 Super Bowl halftime show highlighted how the actions of individual performers can drastically alter the tenor of programming aimed at an audience filled with children. An individual can be held liable under this provision because it is clearly the individual who "utters" the offending language or material over "radio communication."

The Committee uses the phrase "willfully or intentionally" to protect nonlicensees, both networks and individuals, from being held liable for inadvertent or accidental speech, or speech not intended for broadcast. The willful or intentional standard is meant to capture those incidents where an individual intentionally utters material, consciously and deliberately, which they know will be broadcast. However, the standard is not so strict that a person must know that his or her speech is legally obscene, indecent, or profane. It is enough that he or she intentionally makes the utterance that he or she knows is being or will be broadcast.

There was some concern that the performer liability provisions in H.R. 310 could be used to fine artists that use offensive language when their recordings are played on the radio. The phrase "willfully or intentionally" is meant to include those situations where an individual intentionally utters material, consciously and deliberately, which he or she knows will be broadcast. For instance, a live interview of a player at a basketball game or Janet Jackson's performance at the Super Bowl are clear examples where the performer intentionally said or did something knowing it would be broadcast. Alternatively, when an artist records a song in a studio, he or she perhaps has a hope that song will be broadcast, but does not sing the lyrics with the intent to broadcast at that moment or even knowing that it will be broadcast in the future.

Similarly, if an athlete or coach in the heat of a sporting event (such as a baseball player being hit by a pitch) reflexively yells out an obscene, indecent, or profane utterance caught by a field microphone, this situation would also not be captured by the "willful or intentional" standard as his or her actions were not done intentionally and knowing they would be broadcast.

The Committee believes that the bill poses no danger to the First Amendment Constitutional rights of individuals or corporations. The underlying statute, 18 U.S.C. 1464, applies to "whoever utters any obscene, indecent, or profane language by means of radio communication." The FCC has interpreted this provision to apply to any over-the-air broadcast, whether by television or radio. The language of the statute, on its face, applies to the "utteror" of speech disseminated by radio communication, whether uttered by an individual or corporate entity. Courts have held that there is a significant societal interest in speech, which is distinct from the speaker. See *First Nat. Bank of Boston* v. *Bellotti*, 435 U.S. 765, 777 (1978).

"It is the type of speech indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." Id. (citations omitted).

The speech by any "person" is subject to a strict scrutiny analysis if a government regulation is a content-based one. Strict scrutiny requires a compelling government interest, and a regulation that achieves the goal using the least restrictive means. (*Sable Communications of California* v. *FCC*, 492 U.S. 115, 126 (1989)). The Supreme Court has already determined that there is a compelling government interest in protecting children from indecent speech disseminated by radio communication. Because broadcast media has a "uniquely pervasive presence" in the lives of all Americans and because broadcasting is "uniquely accessible to children," the government has the power to restrict the over-the-air broadcast of indecent language in certain circumstances. (*FCC* v. *Pacifica*, 438 U.S. 726, 749 (1978)). Additionally, the D.C. Circuit has found that restricting indecent speech in over-the-air broadcasts between the hours of 6 a.m. and 10 p.m. is the least restrictive means of achieving the goal of protecting children. (*Action for Children's Television* v. *FCC*, 58 F.3d 654, 666 (1995)). Since the D.C. Circuit has upheld reasonable restrictions on the broadcast of indecent programming by licensees, there is no reason why such reasonable restrictions would not also be Constitutional as applied to nonlicensees. As noted by the D.C. Circuit Court in the *Action for Children's Television* v. *FCC* case, "whatever chilling effect may be said to inhere in the regulation of indecent speech, these have existed ever since the Supreme Court first upheld the FCC's enforcement of section 1464 of the Radio Act." Id.

Section 5. Deadlines for action on complaints

Section 5 amends section 503(b) of the Communications Act of 1934 (47 U.S.C. 503(b)) by adding a new paragraph (7) which establishes deadlines for action by the FCC on obscenity, indecency, or profanity complaints. The language requires the FCC to, within 180 days after a complaint is filed, issue the required notice to the licensee, permittee, or person making the utterance under paragraphs (3) (which allows notice and hearing before the Commission or an administrative law judge) or (4) (which allows the Commission to issue a Notice of Apparent Liability), or notify the licensee, permittee, or person and complainant that the Commission has determined not to issue either notice. If the Commission issues a notice, it must either issue a forfeiture order or dismiss the complaint within 270 days after the complaint was filed, unless the penalty has been paid or the violator has entered into a settlement.

The Committee heard testimony during its hearings in the 108th Congress indicating there were delays in the FCC evaluating and pursuing obscenity, indecency, and profanity complaints. Indeed, according to the Commission, in 2002, 13,922 complaints were filed involving 345 programs. In 2003, 240,350 complaints were filed involving 318 programs. According to the FCC, there were 664 complaints pending at the end of 2002, and there were 239,982 complaints pending at the end of 2003 (although many are multiple

complaints about specific programs). Additionally, only seven Notices of Apparent Liability were issued in 2002 (although one was withdrawn) and three Notices of Apparent Liability were issued in 2003. Generally, these Notices of Apparent Liability are issued over a year from the date of complaint. The Committee is hopeful that this new paragraph will ensure that complaints do not languish at the FCC and are expeditiously brought to completion.

Section 6. Additional remedies for indecent broadcast

Section 6 adds a new subsection (c) to section 503 of the Communications Act of 1934 (47 U.S.C. 503) that provides the FCC additional remedies for obscene, indecent, or profane broadcasts. If the Commission determines that any broadcast station licensee has broadcast obscene, indecent, or profane material, the Commission may, in addition to any forfeiture penalty, require the violator to broadcast public service announcements (PSAs) that serve the educational and informational needs of children. These PSAs may be required to reach an audience that is up to five times the size of the audience that was estimated to have been reached by the offending broadcast. It is hoped that this remedial action will help to counter the negative effects brought on by the initial obscene, indecent or profane broadcast.

Section 7. License disqualification for violations of indecency prohibitions.

Section 7 adds a new subsection (d) to section 503 of the Communications Act of 1934 (47 U.S.C. 503) which requires the FCC to consider a violation of obscenity, indecency, or profanity prohibitions when examining whether the applicant lacks the character or other qualifications required to operate a station under sections 308(b) and 310(d) of the Communications Act of 1934. The FCC may only use the violation for such purposes if a forfeiture penalty has been paid or a forfeiture penalty has been determined by the Commission or an administrative law judge and such penalty is not under review, and has not been reversed, by a court of competent jurisdiction. This language only requires the FCC to consider a violation in its examinations under section 308(b) and 310(d), but does not require any particular outcome.

Section 308(b) states that all applications for station licenses, or modifications or renewals of licenses, must set forth facts that show the applicant has the character and other necessary qualifications to operate the station. Section 310(d) states that no station license may be transferred, assigned, or disposed of in any manner without an application to the FCC, but that any application shall be disposed of as if an application for a license was being made under section 308. Therefore, in any request for change of control, or modification of, a license, the FCC will now be required to consider the effect of an obscenity, indecency, or profanity violation to the issue of character. It is the Committee's intent that the character considerations under this section should be applicable to those persons attempting to purchase additional station licenses, or applying to modify their existing licenses.

Section 8. License renewal consideration of violations of indecency prohibitions

Section 8 amends section 309(k) of the Communications Act of 1934 (47 U.S.C. 309(k)) by adding a new paragraph (5). This language requires the FCC to treat any obscenity, indecency, or profanity violation of section 503(b) as a "serious violation" for purposes of license renewal. Such a violation may only be considered as a "serious violation" if the forfeiture penalty has been paid or a forfeiture penalty has been determined by the Commission or an administrative law judge and such penalty is not under review, and has not been reversed, by a court of competent jurisdiction.

Under the current section 309(k), a licensee has a presumption of renewal if: (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations by the licensee of the Act or the rules and regulations of the Commission; and, (3) there have been no other violations by the licensee of this Act or the rules and regulations of the Commission, which taken together, would constitute a pattern of abuse. The amendment to 309(k) removes the presumption for entities that violate the obscenity, indecency, and profanity restrictions by deeming an obscenity, indecency, or profanity offense to be a "serious violation."

To be clear, this language reverses the presumption that has only been in effect since 1996. Prior to 1996, even without a presumption of renewal, broadcast licenses were routinely and commonly renewed. This section is designed to add another factor to the decision to renew a license. Under the current language in section 309(k), the FCC must continue to examine mitigating factors and examine other less severe alternatives to non-renewal.

Finally, in the situation where one licensee holds the licenses for a number of different stations, it is not the intent of the Committee to hold each station responsible for the obscene, indecent, or profane conduct of other stations. Therefore, in the event of license renewal, the offenses of one station should only apply to the renewal or revocation of that particular station, and should not be imputed to the other stations held by that licensee.

Section 9. License revocation for violations of indecency prohibitions

Section 9 amends section 312 of the Communications Act of 1934 (47 U.S.C. 312) by adding a new subsection (h). The new language requires the FCC to commence a hearing to consider license revocation if, during the term of the license, a licensee accrues three or more obscenity, indecency, or profanity violations. The FCC may only use the violations for such purposes if a forfeiture penalty has been paid or a forfeiture penalty has been determined by the Commission or an administrative law judge and such penalty is not under review, and has not been reversed, by a court of competent jurisdiction.

Nothing in this provision requires the FCC to revoke a license upon three indecency violations, but only requires that the Commission hold a hearing to consider license revocation. Moreover, nothing in this section requires the FCC to wait until the third violation to revoke a license. If a first or second violation of the obscenity, indecency, or profanity laws was egregious enough to warrant holding a revocation hearing or actually revoking a license, nothing in the bill should be construed to prohibit that result.

Similar to license renewal discussed in section 8, where one licensee holds the licenses for a number of different stations, it is not the intent of the Committee to hold each station responsible for the obscene, indecent, or profane conduct of other stations. Therefore, in the event of license revocation, the offenses of one station should only apply to the renewal or revocation of that particular station license, and should not be imputed to the other stations held by that licensee.

Finally, in the FCC Memorandum Opinion and Order on the airing of the 2003 "Golden Globe Awards," the Commission indicated it may issue forfeitures for each indecent utterance in a particular broadcast. If the Commission opts to assess penalties on a "per utterance" basis, then the Committee urges the Commission use an abundance of caution. The FCC should carefully consider that assessing penalties on a "per utterance" basis could have the highly punitive effect of triggering a licensee to a revocation proceeding pursuant to section 9 on the basis of a single broadcast program.

Section 10. Required contents of annual reports of the commission

Section 10 requires the FCC to report to Congress annually on its action on obscenity, indecency, and profanity complaints. Specifically, the FCC must report on: (1) the number of annual obscenity, indecency, and profanity complaints received by the Commission, and the number of programs to which such complaints relate; (2) the number of dismissed or denied complaints; (3) the number of complaints pending at the end of the year; (4) the number of notices issued by the Commission under section 503(b)(3) and (4); (5) for each notice, a statement of the amount of the proposed penalty, the program, station, and corporate parent (or any non-corporate entity with control over the station) to which the notice was issued, the length of time between filing of the complaint and the date the notice was issued, and the status of the proceeding; (6) the number of forfeiture orders issued under section 503(b); and, (7) for each forfeiture order, a statement of the amount assessed by the order, the program, station and corporate parent (or any non-corporate entity with control over the station) to which it was issued, whether the licensee paid the order, the amount paid, and instances the licensee refused to pay, whether the Department of Justice brought an action for recovery to collect the penalty.

Section 11. Sense of the Congress

Section 11 is a sense of Congress that the broadcast television station licensees should reinstate a family viewing policy for broadcasters. The family viewing policy is a policy similar to the policy in the National Association of Broadcaster's code of conduct that was in effect from 1975 to 1983.

Empirical research shows that 71% of prime time television shows on the four major broadcast networks contain some form of sexual content, and that of children age 8–18 years, 86% of children have radios, and 65% of children have televisions, in their bedroom. Therefore, the Committee notes that the need for a voluntary industry family viewing policy is an appropriate response to the growing threat from indecent programming.

Section 12. Implementation

Section 12(a) requires the Commission to prescribe regulations to implement the amendments made by the act within 180 days after the date of enactment.

Section 12(b) makes the act and the amendments made by the act prospective in nature. Any material broadcast before the date of enactment of the act is not covered.

Section 12(c) makes clear that section 708 of the Communications Act of 1934 (47 U.S.C. 608) relating to separability applies to the act and the amendments made by the act. The inclusion of this separability clause in no way implies that any provision of the act is legally suspect or infirm. The Committee strongly believes that every section of H.R. 310 is constitutional and would withstand judicial scrutiny.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

COMMUNICATIONS ACT OF 1934

* * * * * * *

TITLE III—PROVISIONS RELATING TO RADIO

PART I—GENERAL PROVISIONS

* * * * * * *

SEC. 309. ACTION UPON APPLICATIONS; FORM OF AND CONDITIONS ATTACHED TO LICENSES.

(a) * * *

* * * * * * *

(k) BROADCAST STATION RENEWAL PROCEDURES.—

(1) * * *

* * * * * * *

(5) LICENSE RENEWAL CONSIDERATION OF VIOLATIONS OF INDECENCY PROHIBITIONS.—If the Commission has issued a notice under paragraph (3) or (4) of section 503(b) to a broadcast station licensee or permittee with respect to a broadcast station looking toward the imposition of a forfeiture penalty under this Act based on an allegation that such broadcast station broadcast obscene, indecent, or profane material, and—

(A) such forfeiture penalty has been paid, or

(B) a court of competent jurisdiction has ordered payment of such forfeiture penalty, and such order has become final,

then such violation shall be treated as a serious violation for purposes of paragraph (1)(B) of this subsection with respect to the renewal of the license or permit for such station.

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SEC. 312. ADMINISTRATIVE SANCTIONS.

(a) * * *

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(h) LICENSE REVOCATION FOR VIOLATIONS OF INDECENCY PROHIBITIONS.—

(1) CONSEQUENCES OF MULTIPLE VIOLATIONS.—If, in each of 3 or more proceedings during the term of any broadcast license, the Commission issues a notice under paragraph (3) or (4) of section 503(b) to a broadcast station licensee or permittee with respect to a broadcast station looking toward the imposition of a forfeiture penalty under this Act based on an allegation that such broadcast station broadcast obscene, indecent, or profane material, and in each such proceeding either—

(A) such forfeiture penalty has been paid, or

(B) a court of competent jurisdiction has ordered payment of such forfeiture penalty, and such order has become final, then the Commission shall commence a proceeding under subsection (a) of this section to consider whether the Commission should revoke the station license or construction permit of that licensee or permittee for such station.

(2) PRESERVATION OF AUTHORITY.—Nothing in this subsection shall be construed to limit the authority of the Commission to commence a proceeding under subsection (a).

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TITLE V—PENAL PROVISIONS—FORFEITURES

* * * * * * *

SEC. 503. FORFEITURES IN CASES OF REBATES AND OFFSETS.

(a) * * *

(b)(1) * * *

(2)(A) * * *

* * * * * * *

(C) Notwithstanding subparagraph (A), if the violator is (i) a broadcast station licensee or permittee, or (ii) an applicant for any broadcast license, permit, certificate, or other instrument or authorization issued by the Commission, and the violator is determined by the Commission under paragraph (1) to have broadcast obscene, indecent, or profane material, the amount of any forfeiture penalty determined under this section shall not exceed $500,000 for each violation.

[(C)**]** *(D)* In any case not covered in **[**subparagraph (A) or (B)**]** *subparagraph (A), (B), or (C)*, the amount of any forfeiture penalty determined under this subsection shall not exceed $10,000 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 $75,000 for any single act or failure to act described in paragraph (1) of this subsection. *Notwithstanding the preceding sentence, if the violator is determined by the Commission under paragraph (1) to have uttered obscene, indecent, or profane material (and the case is not covered by subparagraph (A), (B), or (C)), the amount of any forfeiture penalty determined under this section shall not exceed $500,000 for each violation.*

[(D)**]** *(E)* The amount of such forfeiture penalty shall be assessed by the Commission, or its designee, by written notice. In determining the amount of such a forfeiture penalty, the Commission or its designee shall take into account 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.

(F) In the case of a violation in which the violator is determined by the Commission under paragraph (1) to have uttered obscene, indecent, or profane material, the Commission shall take into account, in addition to the matters described in subparagraph (E), the following factors:

(i) With respect to the degree of culpability of the violator, the following:

(I) whether the material uttered by the violator was live or recorded, scripted or unscripted;

(II) whether the violator had a reasonable opportunity to review recorded or scripted programming or had a reasonable basis to believe live or unscripted programming may contain obscene, indecent, or profane material;

(III) if the violator originated live or unscripted programming, whether a time delay blocking mechanism was implemented for the programming;

(IV) the size of the viewing or listening audience of the programming; and

(V) whether the programming was part of a children's television program as described in the Commission's children's television programming policy (47 CFR 73.4050(c)).

(ii) With respect to the violator's ability to pay, the following:

(I) whether the violator is a company or individual; and

(II) if the violator is a company, the size of the company and the size of the market served.

(G) A broadcast station licensee or permittee that receives programming from a network organization, but that is not owned or controlled, or under common ownership or control with, such network organization, shall not be subject to a forfeiture penalty under this subsection for broadcasting obscene, indecent, or profane material, if—

(i) such material was within live or recorded programming provided by the network organization to the licensee or permittee; and

(ii)(I) the programming was recorded or scripted, and the licensee or permittee was not given a reasonable opportunity to review the programming in advance; or—

(II) the programming was live or unscripted, and the licensee or permittee had no reasonable basis to believe the programming would contain obscene, indecent, or profane material.

The Commission shall by rule define the term "network organization" for purposes of this subparagraph.

* * * * * * *

(5)*(A)* No forfeiture liability shall be determined under this subsection against any person, if such person does not hold a license, permit, certificate, or other authorization issued by the Commission, and if such person is not an applicant for a license, permit, certificate, or other authorization issued by the Commission, unless, prior to the notice required by paragraph (3) of this subsection or the notice of apparent liability required by paragraph (4) of this subsection, such person **[**(A)**]** *(i)* is sent a citation of the violation charged; **[**(B)**]** *(ii)* is given a reasonable opportunity for a personal interview with an official of the Commission, at the field office of the Commission which is nearest to such person's place of residence; and **[**(C)**]** *(iii)* subsequently engages in conduct of the type described in such citation. **[**The provisions of this paragraph shall not apply, however,**]** *(B) The provisions of subparagraph (A) shall not apply (i)* if the person involved is engaging in activities for which a license, permit, certificate, or other authorization is required, or is a cable television system **[**operator, if the person**]** *operator, (ii) if the person* involved is transmitting on frequencies assigned for use in a service in which individual station operation is authorized by rule pursuant to section 307(e), **[**or in the case of**]** *(iii) in the case of* violations of section 303(q), if the person involved is a nonlicensee tower owner who has previously received notice of the obligations imposed by section 303(q) from the Commission or the permittee or licensee who uses that tower*, or (iv) in the case of a determination that a person uttered obscene, indecent, or profane material that was broadcast by a broadcast station licensee or permittee, if the person is determined to have willfully or intentionally made the utterance*. *(C)* Whenever the requirements of this paragraph are satisfied with respect to a paricular person, such person shall not be entitled to receive any additional citation of the violation charged, with respect to any conduct of the type described in the citation sent under this paragraph.

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(7) In the case of an allegation concerning the utterance of obscene, indecent, or profane material that is broadcast by a station licensee or permittee—

(A) within 180 days after the date of the receipt of such allegation, the Commission shall—

(i) issue the required notice under paragraph (3) to such licensee or permittee or the person making such utterance;

(ii) issue a notice of apparent liability to such licensee or permittee or person in accordance with paragraph (4); or

(iii) notify such licensee, permittee, or person in writing, and any person submitting such allegation in writing or by general publication, that the Commission has determined not to issue either such notice; and

(B) if the Commission issues such notice and such licensee, permittee, or person has not paid a penalty or entered into a settlement with the Commission, within 270 days after the date of the receipt of such allegation, the Commission shall—

(i) issue an order imposing a forfeiture penalty; or

(ii) notify such licensee, permittee, or person in writing, and any person submitting such allegation in writing or by general publication, that the Commission has determined not to issue either such order.

(c) ADDITIONAL REMEDIES FOR INDECENT BROADCASTING.—In any proceeding under this section in which the Commission determines that any broadcast station licensee or permittee has broadcast obscene, indecent, or profane material, the Commission may, in addition to imposing a penalty under this section, require the licensee or permittee to broadcast public service announcements that serve the educational and informational needs of children. Such announcements may be required to reach an audience that is up to 5 times the size of the audience that is estimated to have been reached by the obscene, indecent, or profane material, as determined in accordance with regulations prescribed by the Commission.

(d) CONSIDERATION OF LICENSE DISQUALIFICATION FOR VIOLATIONS OF INDECENCY PROHIBITIONS.—If the Commission issues a notice under paragraph (3) or (4) of subsection (b) to a broadcast station licensee or permittee looking toward the imposition of a forfeiture penalty under this Act based on an allegation that the licensee or permittee broadcast obscene, indecent, or profane material, and either—

(1) such forfeiture penalty has been paid, or

(2) a court of competent jurisdiction has ordered payment of such forfeiture penalty, and such order has become final,

then the Commission shall, in any subsequent proceeding under section 308(b) or 310(d), take into consideration whether the broadcast of such material demonstrates a lack of character or other qualifications required to operate a station.

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