"CAN YOU SAY THAT ON TV?": AN EXAMINATION OF THE FCC'S ENFORCEMENT WITH RESPECT TO BROADCAST INDECENCY

HEARING

BEFORE THE

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OF THE

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"CAN YOU SAY THAT ON TV?": AN EXAMINATION OF THE FCC'S ENFORCEMENT WITH RESPECT TO BROADCAST INDECENCY

WEDNESDAY, JANUARY 28, 2004

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON TELECOMMUNICATIONS
AND THE INTERNET,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:40 a.m., in room 2123, Rayburn House Office Building, Hon. Fred Upton (chairman) presiding.

Members present: Representatives Upton, Bilirakis, Barton, Gillmor, Deal, Whitfield, Shimkus, Wilson, Pickering, Bass, Walden, Terry, Tauzin (ex officio), Markey, Rush, McCarthy, Davis, Stupak, Engel, Wynn, Green, and Dingell (ex officio).

Also present: Representatives Pitts, Issa, Gonzalez, and Osborne.

Staff present: Kelly Zerzan, majority counsel; Will Nordwind, majority counsel and policy coordinator; Neil Fried, majority counsel; William Carty, legislative clerk; Gregg Rothschild, minority counsel; Peter Filon, minority counsel; and Ashley Groesbeck, staff assistant.

Mr. UPTON. Good morning, everyone.

To start, I would like to just say that we have three Members that are not on the subcommittee that would like to sit in. I am going to ask unanimous consent that they are allowed to sit at the dais and be able to ask questions at the end, following the members of the subcommittee. They would include Mr. Gonzalez, Mr. Pitts and Mr. Osborne.

Without objection, that will be ordered.

Good morning again. Today we will be examining the FCC's enforcement of broadcast indecency laws. This hearing is about protecting children from indecency over the public airwaves or, in other words, broadcast TV and radio.

This has nothing to do with the issue of censorship and the case of Lenny Bruce at the Cafe A-Go-Go, as some critics have highlighted. That case is simply irrelevant in today's debate. Nor does this have anything to do with things outside the scope of the public airwaves. In fact, the courts have upheld the constitutionality of our broadcast indecency laws, although they have limited the FCC's enforcement to only that content which is aired between the hours of 6 a.m. to 10 p.m., when children are most likely to be listening or viewing.

As a parent of two young children, I believe that America's families should be able to rely on the fact that at times when their kids are likely to be tuning in broadcast TV and radio programming will be free of indecency, obscenity and profanity; and Congress has given the FCC the responsibility to help protect American families in that regard.

I have received hundreds of constituent letters expressing astonishment and outrage over how the FCC's enforcement bureau could have found Bono's use of the "F-word" on TV not indecent in the Golden Globes case. I find the use of the "F-word" on TV to be highly objectionable, and I have called on the full Commission to reverse that decision, and reportedly Chairman Powell and the other commissioners are seeking to do just that.

However, I think that the outpouring of constituent mail regarding the Golden Globe case is symptomatic of a larger feeling amongst many Americans that some TV broadcasters are engaged in a race to the bottom, pushing the decency envelope in order to distinguish themselves in the increasingly crowded entertainment field. Why is it that there have been so few indecency actions against TV broadcasters? Is it a lack of FCC enforcement or is it something else?

My plea to broadcasters is that, regardless of how the law is settled in the Golden Globes case or the FCC's enforcement action, as stewards of the public airwaves you indeed have a responsibility to keep the "F-word" and other similar words off of our airwaves. Although it may be your right to say or do something on TV or radio, it does not make it the right thing to do.

I call on all of the networks and broadcasters to take to heart what we are discussing here today and to review their codes of conduct and, in the case of live broadcast, review their time-delay procedures and redouble their efforts to make sure that they work. The American people are paying attention, believe me, and they want action.

But this hearing is also about broadcast radio. Yesterday, as I flew back through the ice and snow from Michigan, I sat on the airplane and reviewed my briefing material for today's hearings. In that material there were notices of apparent liability issued by the FCC in but a few of its radio broadcast indecency cases.

Of course, each case had a transcript of the content that was at issue. Ladies and gentlemen, public decorum in this committee room precludes me from reading those transcripts out loud today. But what I will say is that what I read was disgusting, vile and has no place on our public airwaves. Simply put, it was awful.

These cases included descriptions of people having sex in St. Patrick's Cathedral, lewd scenes of a daughter having oral sex with her father, and the case in which a radio host interviewed high school girls about their sexual activities with crude sound effects to match. Sadly, I can go on and on.

I am not a lawyer. But I would hope that it would be beyond dispute, even to legal scholars, that such content is indecent under the law and does not belong on our public airwaves, particularly at times when kids are likely to be viewing or listening.

In many of these most egregious cases, the radio and TV stations are owned by huge media conglomerates. However, the maximum fine that the FCC can impose per violation is $27,500.

In recent remarks, Chairman Michael Powell called on Congress to dramatically increase penalties available to prosecute clear cases of violation. To quote Chairman Powell: Some of these fines are peanuts. They are peanuts because they haven't been touched in decades. They are just the cost of doing business. And that has to change.

Well, I am here to tell you, Chairman Powell, you asked for it, you got it. My friend, Ed Markey, and I, along with Chairman Tauzin and John Dingell and many members of the subcommittee, answered Chairman Powell's call by introducing H.R. 3717, the Broadcast Decency Enforcement Act. This legislation would increase by ten-fold, to $275,000, the maximum amount which the FCC can impose per violation.

I believe that broadcasters have a special place in our society, given that they are the stewards of the public airwaves. With that stewardship comes certain responsibilities, including an adherence to our Nation's indecency laws; and for those broadcasters who are less than responsible, the FCC needs to have sharper teeth to enforce the law.

We intend to put that legislation on a fast track. I am pleased to announce that the Bush administration has publicly backed our effort to increase the fines and has highlighted the need for the FCC to consider the highest fines when indecent content is contained in the programming when children are likely to be in that audience, and I will enter that administration letter of support into the record.

As I mentioned earlier, it is the FCC's responsibility to help protect American families from indecency over the public airwaves. While increasing the fines which the FCC can impose will go a long way toward cleaning up our airwaves, what I hope we hear today from the FCC is that it plans to move more aggressively and use its current enforcement authority on behalf of American families.

For instance, will the FCC assess fines on each utterance in a given case? Moreover, I would note that certain broadcasters and even certain broadcasters' shows are egregious and repeat offenders.

At some point, we have to ask the FCC: How much is enough? When will it revoke a license? Should we have a policy of three strikes and you are off, off the public airwaves?

I yield now to my friend and cosponsor of H.R. 3717, Mr. Markey, from Massachusetts.

Mr. MARKEY. Thank you, Mr. Chairman, very much; and thank you so much for having this very, very important hearing.

The public airwaves are licensed to a relatively precious few who have the honor, the opportunity and the obligation to use them as trustees of the public interests. There are those licensees, however, who are not treating those licenses as a public trust but as mere corporate commodities; and they air content replete with raunchy language, graphic violence and indecent fare.

The Federal Communications Commission is charged with ensuring that licensees serve the public interest and that stations do not

air obscene, indecent or profane content in violation of the law and the Commission rules. The FCC has many tools to enforce these important policy requirements, including the ability to revoke a station license. Yet it is increasingly clear that the paltry fines the FCC assesses have become nothing more than a joke. They have become simply a cost of doing business, for far too many stations regard the prospect of a fine as merely a potential slap on the wrist, and the few fines levied by the Commission have lost their deterrent effect.

If the CEO of a broadcast company came into your living room and personally said these words, you would be appalled. If the Members up here read the transcripts of some of these shows in the public domain today, as people are watching this hearing, they would be appalled. However, if the station airs it to the entire community any time of the day, with kids in the audience at best, at best right now, all they get is a slap on the wrist.

This is especially true of the multi-billion dollar media conglomerates who control a multitude of stations. What possible deterrent can $27,000 as a fine have on a company which reaps $27 billion in annual revenues? Moreover, the Federal Communications Commission has never invoked its right not to renew a license or to revoke a license for violations of indecency rules, even when such violations are repeated and apparently willful.

We need to have a public discussion about the failure to use this enforcement and deterrent tool, even in the most egregious cases, and what the FCC plans to do about this issue.

Clearly, many broadcasters need to clean up their act. Education is also needed to ensure that parents know and understand the TV ratings system and the tools they can use in conjunction with that system such as the V chip for protecting their children, which is why I authored that legislation 7 years ago.

Today's hearing will allow us to explore the FCC's lackluster enforcement record with respect to these violations. It will also permit us a glimpse at the conduct of broadcast licensees who air content that leads to a coarsening of our culture and directly undermines the efforts of parents in raising their kids. Parents are increasingly frustrated and have every right to be angry at both certain licensees and the Federal Communications Commission itself.

Finally, this hearing will also permit us to gain testimony on the legislation that Chairman Upton and I have introduced, along with many of our committee colleagues, to raise the fines available to the Federal Communications Commission tenfold over what they have historically been, ultimately to put some real bite in the punishment that these stations feel if they act contrary to the interests of the families of our country.

I want to thank the witnesses for their time in preparing for today's hearing. I want to thank you again, Mr. Chairman, for calling this very important session.

Mr. UPTON. Thank you.

I would like to recognize for an opening statement the chairman of the full committee, Mr. Tauzin.

Chairman TAUZIN. Thank you, Chairman Upton; and let me thank you for this very important hearing.

Indeed, in 1961, FCC Chairman Newt Minnow called television a vast wasteland. Do you remember? As we look back from 2004 through the prism of history, I suppose we have to marvel at how innocent television was in that day and how much we have seen television change, particularly when it comes to broadcast decency over these 40 years.

According to the Kaiser Family Foundation, more than four out of five parents are concerned today that their children are being exposed to too much sex and violence on television. We know that the television industry and others got together on a ratings system to help parents. There is a V chip in new television sets that parents can use today.

But the question is, what is the FCC's role? What is Congress's responsibility here when it comes to free use of the public spectrum by broadcasters and what is the FCC doing when it splits hairs as it did in the recent decision on singer Bono's use of an expletive during last year's Golden Globe awards?

All of us I am sure have heard, as I have, from parents in our districts concerned and confused about how such language can be used without any penalties during a show that is viewed by families across America, during a time when families get together and watch television. And for the FCC to split a hair as to whether the word is used as an adjective or a verb is rather ridiculous. I can tell you folks in my district, I am sure in yours, can't understand that, and they are confused.

Chairman Powell in a recent C-SPAN-covered event complained that the current fine schedule for finings that the FCC does occasionally make of violations of these rules are merely costs-of-doing-business-level fines. So what Mr. Upton and Mr. Markey have proposed to us and many of you have already signed on as cosponsors, I included, is that we end this business of having a fine schedule that is just a cost of doing business and have a real fine schedule, tenfold increases in this bill.

The next question then is, is the FCC going to enforce it vigorously? Is it going to be a strong message here that families expect the FCC to enforce this concern in a way that families feel comfortable sharing family hours with their children and watching television? And what are the networks going to do about it in terms of complying with, hopefully, a more vigorous enforcement by the FCC?

I want to thank Fox. I understand Fox has now announced that, in regard to future live award shows, that they are going to put in a 5-second delay. That is a good step. I have been on many radio shows where some delay is built in so that a caller, live caller who might use some very inappropriate language in calling into a radio show, can be deleted before it goes over the air. Networks like Fox obviously can take that route, and I am pleased at least one of them is announcing a plan to do that.

So this is a good hearing. We ought to get a good discussion, a good public airing of what are the limits that we as an American people would like to see enforced and what are the enforcement levels that are appropriate here. What is the responsibility of the FCC? Are they going to continue splitting hairs when they see a word used like singer Bono used in a Golden Globe award, or are

they going to literally say, no, that is off limits, and we are going to have some way of protecting against that becoming the rule on television in these family hours?

This is a good discussion. We ought to have it.

On the back side of it, we all have to be concerned about the first amendment and not go too far, obviously, that whatever we have to do has to respect the fact that our Founding Fathers very carefully told us in the Constitution as a government to be careful about the way we regulate or hem in or define the right of people to speak in our society.

There are some close questions here. But we ought to have a good discussion of it. I think the Upton-Markey approach of raising the fines, calling attention to it, calling on the FCC to be more aggressive in enforcement and calling upon the networks to hear that message and perhaps execute plans like Fox has announced to better avoid the conflict and avoid the contest between first amendment issues that might be posed here, instead of forcing us all into a conflict that requires us to define—in constitutionally questionable ways—what are those limits.

This is going to be a good hearing. I thank the chairman for it. I want to thank him and Mr. Markey for the legislation that they have filed and congratulate you for making sure that the American public will engage us in this discussion. Thank you.

Mr. UPTON. Recognize the gentleman from the great State of Michigan, Mr. Dingell.

Mr. DINGELL. Mr. Chairman, I thank you; and I commend you for holding this hearing. This has the potential to be a most useful and an interesting exercise; and, as such, I believe it should be pursued with vigor. I very much appreciate your interest and leadership in this matter.

Looking at the committee table and the roster of witnesses before us, I note there are several significant omissions in the attendees today to give us testimony on what is going on. I would note that the Chairman of the Federal Communications Commission and members of the Commission are not present. I would note that representatives of the networks and major broadcasting entities are not here with us today. I would like to hear what they have to say, both about the substance of the behavior that we inquire into and also about the public policy and also about how the different proposals that are before this committee would impact upon them.

I would note the very interesting phenomenon that a major network with income of tens of billions of dollars a year will be subject to penalties of $20 or maybe $200,000 in penalties, hardly more than a gnat bite in terms of its impact upon the policymaking of those companies and certainly not enough to stimulate any corrective behavior to address the concerns of the committee and the public with regard to proper use of the networks.

I would like to hear some discussion about whether or not licenses are being properly renewed to persons who have active disregard of the need for proper behavior and proper use of language and the licenses that they are given to use a public resource. But I don't see anybody at the committee table who can talk to us about this.

The penalties in the bill that we have sponsored, you under your leadership, Mr. Chairman, are good. They will be helpful. But they will again, I think, be regarded as little more than the cost of doing business. So I think that, while this is a useful hearing, it is both imperfect and incomplete.

We all know why we are here today. During the last year, 2 of the 4 major networks, NBC and Fox, during live programming broadcast a word beginning with the letter F into millions of American homes. The Federal Communications Commission determined that NBC's broadcast did not violate the agency's rule against broadcasting indecent speech, and the agency has not yet ruled on the Fox broadcast.

The fact that the FCC did not penalize the NBC network is curious at best, and I will discuss that in a minute. But the more pressing issue is how the networks permitted such speech to be aired into American homes. They have adequate mechanisms to address how matters escape into the airwaves and who have appropriate mechanisms for delay and other controls. Apparently, none was used here, and I see no signs of repentance on the part of the network that this was done. Nor do I see any signs of proper custody on the part of the Federal Communications Commission in looking to see that the outrage that is expressed by thousands of Americans is properly addressed.

The primary responsibility to ensure that network television does not contain profanity rests not with the FCC, although they are the ultimate arbiter, but with the networks themselves. The four major networks not only create the programming that a large segment of American viewers, including our children, watch every day, but they are the largest owners of broadcast television stations that profit handsomely from this, and it is good that they should. But this gives them a special responsibility to the citizens who have entrusted them with the public airwaves. They have a public trust which they are permitted to use for private profit. That is the system which has gone on for a long time, and it is perhaps a good one, but it doesn't seem to be working on matters of appropriate and important public concern.

It is certainly upsetting to me when this trust is as blatantly and repeatedly violated as it has been. I am sorry this panel, I note, does not include witnesses from the NBC and Fox, because I think the committee would have liked to have asked them about these broadcasts to again see how this comported with the policy of the broadcasters and to see how and what it is they propose to do to address their responsibilities to see that these networks use the assets which are given them by the taxpayers in a proper way.

I would like to have inquired what procedures or mechanisms were in place to prevent the airing of objectionable language. I would like to have asked what the network has changed in the way of its practices to ensure that families watching live network TV need not worry as to what language will suddenly be thrust into the living rooms for the children of this Nation.

I think the subcommittee would benefit to the answers to these questions. As yet, no network has chosen to appear.

I will note I have written the presidents of the four major networks to ask these and other questions. I have asked them to re-

spond in a timely manner. I have asked also, Mr. Chairman, to you at this moment, that the letters be entered into the hearing record and that the record remain open to include the answers to these questions that are posed by these letters.

As the head of the FCC Enforcement Bureau, I note, Mr. Solomon, that your decisions are constrained, as they should be, by legal boundaries, amongst them the Constitution and case law. I am not here to debate your decision in the FCC case as being either right or wrong. You have a solid reputation. I am sure that you can defend your legal reasoning.

The problem, however, is that the decision defies common sense. When an agency acts in this way, it loses credibility. I do not think that the American people will accept that we are powerless either to ensure that the FCC acts or has authority to act in a proper way or that those who hold licenses to use public resource are permitted to snap their fingers under the nose of those who make the networks able to use the airwaves, which are in fact a public trust for private benefit.

Like many members of the committee, I am concerned also about the amount of indecent content of broadcast over radio airwaves. Recent penalties leveled against radio broadcasters have simply been passed off as the cost of doing business and have proven inadequate to deter violators. I am, however, encouraged by yesterday's FCC decision to impose significantly increased penalties on indecent radio broadcasting.

I would like to know whether or not the FCC needs additional authority, however, to indeed increase significantly the levels of the penalties or whether their policies will include the lifting of licenses of licensees who use the airwaves in this fashion without regard to anything other than a modest penalty.

Whether the FCC's decision was motivated by recent public outcry or whether it was in anticipation of today's hearing does not matter, although I do find myself curious about this.

Fear is a useful motivator, and I am pleased with the decision, even though it appears to be less virtue than concern for the possibility of an appearance today. I look forward, by the way, Mr. Chairman, to having them before us so that we can check out this reasoning.

I hope that it signals a heightened seriousness on the part of the agency. I will be watching closely to see that the FCC does not backtrack on its new-found virtue on this issue.

I look forward to your testimony, gentlemen of the witness panel, and particularly I would like to learn more about what the Congress might do, consistent with the first amendment, to curtail the increasing amount of filth that permeates the public airwaves.

I thank you, Mr. Chairman.

Mr. UPTON. Thank you, Mr. Dingell.

The gentleman's letters to the broadcasters will be included as part of the record.

I recognize Mr. Bilirakis for an opening statement.

I would remind members that if they waive their opening statements they will get an extra 3 minutes on questions.

Mr. BILIRAKIS. Well, thank you, Mr. Chairman.

There is no question, Mr. Chairman, that indecency is on the rise in network programming; and I commend you and Mr. Markey for the legislation. Certainly it is timely.

I have cosponsored that legislation. But really I ask the question myself, to myself, and that is: Is it enough?

We also know that local broadcast licensees are placed in the position of having potential legal liability for airing network programming that is obscene or indecent; and so, you know, I think we should ask ourselves the questions.

Mr. Dingell has set out a number of questions that we should be asking ourselves: Can we restore the authority? Isn't that really maybe the foundational thing that we should be thinking about here, restoring the authority of the broadcast licensee to keep indecent material off of the airwaves?

If we are going to let the FCC fine a local licensee for airing indecent content, shouldn't we make sure that he has the ability to refrain from airing it?

Now I want to go to the Communications Act of 1934 as amended, which was intended to control the content that is disseminated to our viewers. That right which Congress delegated to local broadcasters in order to ensure their ability to program in a manner reflective of the tastes and mores of diverse local, underlined, local communities has eroded.

We don't have the networks here today to answer questions but I understand that there will be additional hearings. But the right-to-reject rule has eroded over time as networks, as I understand it, have deployed their vast bargaining power with their affiliates to require them to relinquish by contract—to relinquish by contract the very rights that Congress established by that 1934 statute and any amendments thereto.

So, you know, our network oligopolies today routinely are holding these rights hostage through the use of contractual provisions that explicitly threaten termination of the affiliation as a consequence of unauthorized preemption. I mean, we should have broadcasters here who are faced with that. We should have networks here who are faced with that. I think that is really foundational.

Because no matter what we maybe do here regarding particular language or particular pieces of particular words, if you will, there is always going to be something coming up, and we feel very strongly that we should go back to that concept originated in the 1930's to basically give the broadcasters, the local broadcasters the right to determine what should be the content insofar as their local communities are concerned.

What may fly in one particular area of the country is certainly not something that is going to fly equally in another part of the country. And should we basically feel that executives, network executives in New York and in Hollywood, et cetera, et cetera, have the right to determine what should be broadcast in Clearwater, Florida, my community, or your community in Michigan, or whatever the case may be? I honestly feel that that is foundational, and I would feel that we are not addressing this adequately if we don't also address that particular foundational—in my opinion—problem.

Thank you very much.

Mr. UPTON. Thank you, Mr. Bilirakis.

Recognize the gentleman from the great State of Michigan, Mr. Stupak.

Mr. STUPAK. Thank you, Mr. Chairman; and thanks for holding this hearing. I want to thank the witnesses for being here today.

This issue has struck a cord in my district since last year's Golden Globe awards. I have received more than 600 letters and e-mails from constituents demanding that something be done to control the graphic language used on television and radio programming. And I agree. How we do that and protect first amendment rights is the tricky part. Do we simply increase the fines on broadcasters? Do we try to better define what indecency is? Do we actually outright ban certain words from being broadcast at certain hours?

I am not sure, and I don't know if there is a perfect fix to this issue. I do know one thing, broadcasters and programmers can make this a lot easier on themselves. They have the privilege to use public airwaves; and with that privilege comes responsibility, including the obligation to air appropriate programming, especially when young people are likely to be in the audience.

So, again, this issue needs to be addressed. Television and radio has crossed the line too many times to ignore.

However, I believe there are other first amendment issues we also need to look into. Last year, Congress made its will known that a recently issued FCC ruling on media ownership went too far, and we pushed it back. I was disappointed to see in the final omnibus appropriation bill behind closed doors the will of Congress was defied as the administration pushed to loosen the media ownership rules. More limited ownership means less differing of opinions, a limitation on our first amendment rights.

I also believe we need to take a look at selective censorship by our television networks. For example, I saw today in the New York Times that CBS is refusing to run an ad during the Super Bowl by moveon.org. The ad merely talks about the $1 trillion deficit that America faces, who is going to pay for it. It is not mean. It is not indecent. This network refused to allow an opinion to be aired.

This is the same network that refused to air the drama documentary on President Reagan. Mr. Chairman, this all ties back to media ownership and our first amendment rights. When you have got just a few corporate executives controlling the majority of mainstream media, then you have got suppression of ideas and eventual censorship.

I ask that this committee hold a hearing on all first amendment rights and issues and censorship in this country.

With that, Mr. Chairman, thank you for the time. I yield back the balance of my time.

Mr. UPTON. Thank you.

The gentleman from Texas, Mr. Barton.

Mr. BARTON. Thank you, Mr. Chairman.

You can't play high school football as badly as I did in the 1960's and not have heard some of the words that we are trying to restrict the use of today. I might add that when they were used based on my performance, they were appropriately used.

But that is not why we are here. As a society, we have an obligation to the broader community to prevent the use of language over the public airwaves that is obscene, indecent or profane.

Now if you want to go to a movie that is rated R because of the language, you know, there is some discretion there. It is protected by the first amendment. If you want to watch a cable network that is airing material that is clearly labeled before the program is aired that this is adult material, there is discretion there.

But if you inadvertently go out of the room to pop some popcorn, your children are watching an award ceremony live, there is no discretion there. So this bill that Mr. Upton and Mr. Markey have propounded is long overdue, and I am proud to be an original cosponsor.

I am not a prude and I hope I am not hypocritical or sanctimonious, but there are times and places where you can express oneself very vigorously in a way that we would not want to in a public way, but there are also times and places where we have to conduct ourselves according to societal norms, and that is what this bill is all about.

I could not support it more strongly. I am very worried about our entertainment industry and our entertainment figures. They appear, more and more, to want to say and do things simply for the shock value. That demeans society. That demeans us. So I am very, very glad that Mr. Markey and Mr. Upton are sponsoring this bill; and I am very pleased by the comments on it, both by Mr. Tauzin, full committee chairman, and Mr. Dingell, the full committee ranking member.

I hope we can move this bill expeditiously, and I hope this is the start of regaining normalcy over the public airwaves.

With that, I would yield back my time.

Mr. UPTON. Thank you.

Mr. Green.

Mr. GREEN. Thank you, Mr. Chairman; and I appreciate you calling the hearing today.

As my colleagues have said, this is an issue that a number of us have been hearing about, and I am glad that our chairman and our ranking member have increased legislation for increasing penalties for indecent broadcast, of which I am an original cosponsor. But that does no good without aggressive enforcement, and many Americans believe that radio and television programming is crossing the line.

The FCC is trying to respond to public pressure for action in response to recent controversial uses of profanity during the live award show broadcast, but the testimony of our panelists today reveals we do not really know what the answer is to the title: Can that be said on TV.

In addition to vague and arbitrary definition of broadcast indecency, we often do not know how far decency regulations can go without running into the first amendment. The choice is to fight extensive cases in court against powerful companies that the government may lose and set a serious precedent, and it is likely that FCC seeks to reverse its Golden Globes decision. We would see this whole thing back in court, but somebody has to set a standard, and if the FCC cannot do it, it is up to Congress to do it.

Broadcasts often take a lot of abuse, but it is driven by advertising, and funding strictly follows those ratings. It is the dirty words we hear or the lowest level of broadcasting. I see in a lot of our networks it looks like a race to the bottom, but it is hard to explain that to your shareholders because they are willing to push the envelope while you are not.

Today's testimony from Mr. Wertz notes that the National Association of Broadcasters' code of ethics was struck down by the Department of Justice on antitrust grounds, and I believe it is time to look at the private sector for a collaborative solution. If broadcasters can make clear standards that they can understand and agree to abide by, perhaps we can avoid lengthy court challenge to the FCC enforcement actions. It would also reduce the pressure on broadcasters from advertisers to push that envelope.

Just 1 day before this hearing, the FCC announced a $755,000 fine against a large broadcaster based in my home State. I am not going to defend the behavior of those shows that they were cited for, and I believe that strong penalties were needed for the indecency, and again that is why I support this legislation.

But an interesting proposal was made to return to the days of a Code of Ethics. They suggested a private sector task force to be convened by the FCC to develop media guidelines that everyone can agree with would be in force. Such a private sector task force can also include other content providers like cable and satellite providers.

The current system is clearly not working to the satisfaction of the parents' groups or broadcasters, and if you listen to the opening statements also from Members of Congress it would likely be a lot easier to try a private sector solution first, rather than spending millions of taxpayers dollars on long court battles that the FCC may lose. But, again, you do not make those decisions until you go to the courthouse, so I do not think we should be afraid to make the courts do what the American people want.

But I am looking forward to hearing the panelists' ideas, Mr. Chairman. Again, thank you for this hearing.

Mr. UPTON. Thank you.

Mr. Whitfield.

Mr. WHITFIELD. Mr. Chairman, thank you very much; and I also want to thank you for holding this hearing and you and Mr. Markey for the legislation that you have introduced.

This is one of those issues that the American people are particularly frustrated about as far as their inability to have any impact. Many of them, in the letters I received, complain about their impotency in trying to curtail the use of indecent language on radio and on television, and so this legislation hopefully can help address that. But Mr. Bozell, in his testimony which I read earlier, pointed out something that I think contributes to this feeling of frustration on behalf of the American people, and that is the inaction of the FCC. I am hoping that this hearing will demonstrate and help us obtain some answers one way or the other from that agency.

He points out that, despite a $278 million annual budget, they do not have one person assigned to this issue. He points out that at the December 2002, Billboard Music Awards on Fox, the entertainer Cher used the very same word Bono used, only it was not

an adjective, it was a verb, and years have gone by and no action has been taken on that incident.

He points out, also, that if you file a complaint with the FCC that you are required to attach a transcript of the actual show in question, which is almost impossible for any person to do, to have access to the transcript, and if you look at the FCC Web site, according to Mr. Bozell, they instruct you to do that.

In addition, he points out that, in 2003, the FCC indicated that it had received in the second quarter of 2003 only 351 complaints, and yet the Parents Television Council members themselves filed 8,000 complaints. Then another allegation that he makes in his testimony is that E-mails from people filing complaints are being returned undeliverable and was told by someone at the FCC that these complaints were being deliberately blocked.

Now I do not know if this is true or not, but those are significant allegations, and it is easy to see, if they are true, why the American people feel that they are impotent in trying to deal with this issue or even get a response from the Federal agency responsible. So I am delighted that we are having this hearing, look forward to the testimony, and thank you, again, and I yield back the balance of my time.

Mr. UPTON. Mr. Davis.

Mr. DAVIS. Thank you, Mr. Chairman; and thank you for calling what I hope is the first of several hearings on this issue.

Let me start by saying I am acutely aware of my responsibility and our responsibility for dealing with the first amendment. At this time in our history I think it is heavily incumbent upon us that we not take any actions, particularly unintended actions, that would encroach upon people's ability to criticize the government, particularly the President or the Congress.

Having said that, it is perfectly clear that the courts have rightly ruled that obscene material is not protected by the first amendment and indecent material can be regulated by the first amendment.

I would like to focus for a couple minutes on the content of the Clear Channel broadcasts that are now the subject of the FCC proceeding, since they are broadcast from my community.

I believe Mr. Dingell referred to the content itself. I think that is a generous description. I, too, am disappointed that representatives of Clear Channel were not here today to read into the record the transcript of what was broadcast on their stations. I think it is important, Mr. Chairman, that they do appear in front of this committee. I would like to understand whether they think this material is indecent or obscene. I cannot tell from the record. It appears they may be contesting that it is indecent. If so, I think they should say why.

I am also concerned that the FCC does not have the adequate tools to address a situation like this. They have proposed a fine of $27,500 for each of the apparent 26 indecent violations. They have also suggested that serious multiple violations of this kind could at some point lead to the commencement of license revocation proceedings.

I think that the bill that you and Representative Markey have introduced is a first step, but perhaps further action by this sub-

committee will be necessary if, in fact, this is often about the bottom line of this particular company or others and the only way to effectively deal with this type of motivation behavior is to more aggressively tackle the bottom line.

I am also very concerned about what the FCC intends to undertake from an enforcement standpoint. With whatever tools Congress provides to them their enforcement should be more timely than it has been. It should be deliberate. It should be firm. It should be clear. So I hope that we will have further hearings on this, Mr. Chairman, as well as on your bill, and at the next hearing we can have the appropriate representatives of the FCC and these broadcasters, both radio and television, appear to describe what their position is on this content and what they intend to do about it in the future.

Thank you, Mr. Chairman.

Mr. UPTON. Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman. I will try to be brief.

Many members have said and raised the concerns and issues that I think all of us are concerned with.

I am reminded of the legislation we passed with your help and Chairman Markey and the leadership, the dot kids dot U.S. legislation, which is an attempt to protect kids, and wherein that legislation dot kids dot U.S. there is not any ability to have Web radio in that venue, rightly so, concerning the concerns we are addressing today.

The Chicago Tribune editorialized this on January 22 in opposition to the tenfold increase by stating: Remember this whole fuss is over a single word uttered once in the excitement of the moment.

They are wrong. What has occurred here is this is the proverbial straw that broke the camel's back. The public, since I have been a Member of Congress and going on my eighth year, has seen a decline in the decency standards over the public airwaves. So this whole revolt now has occurred by the public saying "enough's enough," and you can see it by the members here, our opening statements, and the fact that I think this legislation as proposed is going to move quite rapidly through the committee process.

You have got both chairmen on board, subcommittee chairmen, bipartisan. It is going to get passed and passed by the President in response to this whole issue.

Industries are starting to take notice. I know NBC deleted a 10-second delay for this year's Golden Globes telecast, which is a start. It is not perfect, but industry has got to step up to the plate and start doing a better job of policing this activity and the concern will be intent.

I remember when I was first elected on the local radio station and they did a trivia show and I had to guess the right word and they said some word for fertilizer. I should have said manure. I said something else. But, of course, that went over the public airwaves. So, you know, I—really, if you go by the letter of the law, I am telling you: Man, get my wallet out and pay the damn fine.

But I think there is a difference here. If you listen to the opening statements about intent, intent to degrade, intent to abuse, to appeal to the lowest sector of our—the evil part of our sinful nature and degrade. So intent is always—and that is always tough in leg-

islation, to evaluate what was the real intent, but I think in some of these broadcasts we can clearly understand what the intent is, and that is clearly to destroy the fabric of society.

Thank you, Mr. Chairman, for the time.

I look for quick passage.

Mr. UPTON. Mr. Rush.

Mr. RUSH. Thank you, Mr. Chairman, for holding this important hearing on indecent and obscene broadcasting or the appropriately titled hearing, "Can you say that on TV?".

We all know that it is a violation of Federal law to broadcast obscene or indecent programming. Along the same lines, the courts have continually held that indecent material is protected by the first amendment and cannot be banned entirely. Therefore, it may be restricted, but it cannot be banned.

Now, Mr. Chairman, other members of the committee, there, indeed, lies the problem. As TV and radio producers jockey for ratings, we are increasingly seeing the envelope pushed further and further into the zone of what I call over-the-top sensationalism. Congress has charged the FCC with enforcing indecency standards. Balancing the standard against the first amendment is not an easy task.

The central issue is whether the government should be allowed to regularly content our programming, but the issue is how do we determine what is acceptable when there are so many different types of people with different standards. Nevertheless, we must all be mindful of our responsibility, which is to protect the children at all costs from obscene and indecent materials on the airwaves.

On that note, I am pleased to see that the FCC is taking this responsibility more serious than it has in the past. Its decision to reverse the FCC's Enforcement Bureau October 2003, ruling regarding Bono's use of the "F-word" at the aforementioned Golden Globes awards is a step in the right direction. However, more work needs to be done, especially on how the FCC applies its indecency rule vis-a-vis the public. I believe that the requirement that viewers or listeners include a tape or a transcript of the program in question with their complaints is overly burdensome and totally unfair.

That said, Mr. Chairman, I am looking forward to this hearing and to the testimony of our distinguished panelists, including the FCC's views on how it plans to enforce its new broadcasting indecency standards.

Thank you, Mr. Chairman; and I yield back the balance of my time.

Mr. UPTON. Thank you.

Mr. Pickering.

Mr. PICKERING. Mr. Chairman, I thank you for having this hearing. I look forward to the testimony.

I commend the FCC for reversing its earlier decision concerning the use of what we all agree is a profane word but which all parents know and understand and even our children understand would be a profane word and language.

We are here today dealing with an age-old question. We think that this is somewhat new to the human condition, but it has actually always been with us. The question is: How do you create the

standards and maintain the standards in a modern age with modern technology and modern communication?

It is something that a member of parliament in Great Britain in the late 1700's tried to address. His name was William Wilberforce, and he combined with William Pitt, and at the time he had two objectives. One was the abolition of slavery, and the other was the reformation of manners in Great Britain, and, as you looked to that movement, they were successful. They had the success of seeing the eventual abolition of slavery in Great Britain. It spread over to the colonies and led to enlightenment, and the principles of our Founders, freedom and equality. But what they also had was a decent society.

A healthy democracy also requires a decent society, that we are honorable, generous, tolerant, good.

DeToqueville said, America is great because America is good.

Now our country had to struggle with the freedom and equality through the Civil War and the civil rights movement, but in the last generation the question is, are we still decent, are we still good and how do we maintain that healthy society? They are all, whether we like to admit it or not, interrelated. Do we have to have a culture that is profane, vulgar, crass, coarse, and do we want to uphold the examples that would hurt our culture, degrade our culture? With the public airwaves, we have a chance to hopefully affirm that we do want to be a good, decent people, a good, decent Nation, that they are all related to the health and well-being of our country. So we do need to continue with the FCC. We do need to set high standards.

I think the defines and enforcement will help. I do think the resolutions and the coming together—I have received probably over 5,000 E-mails on this. Parents and families—I happen to be the father of five sons. We get it. We need to make sure that our networks get it and our corporate leadership get it.

There is a corporate responsibility not only not to have fraud and abuse in a financial setting but also not to corrupt or degrade our culture. So I hope that not only can we act as a Congress to set our standard but our corporate leaders can voluntarily agree to set standards and to abide by them. It will take all of us working together to create a free equal decent country and culture, and I think that is why we are here.

Thank you, Mr. Chairman.

Mr. UPTON. Mr. Wynn, are you ready or would you like to defer?

Mr. WYNN. Thank you, Mr. Chairman. I will defer.

Mr. UPTON. Mr. Bass.

Mr. BASS. Thank you, Mr. Chairman.

These opening statements have been interesting and thoughtful. I support the legislation and co-sponsored it and commend the chairman for holding the hearing.

I recall back in the early days of my brother's and my business I used to do a lot of the delivery work, and I remember 1 day driving to South Boston with a truckload of product and backing up and this fellow was helping me unload.He used the same word that was under discussion here today about a dozen times in every sentence. It had absolutely nothing to do with the actual meaning of the word but simply it was the way he talked, and I remember fi-

nally I could not stop myself from laughing because it was almost like stuttering, and so it is an interesting problem.

I think it is a sad commentary on modern society that people who are well-known, well-educated, and in many instances very famous resort to this kind of language in order to describe enthusiasm, and I think it is entirely appropriate that the Federal Communications Commission stand as a judge of what is—what my friend from Mississippi described as what is good and decent in society.

Frankly, I find it difficult having my two children see much of what is on commercial television in the evening, not because there are these particular words, because there aren't, but the innuendos and interpretations of what is said, especially on some of the more inane sitcoms that are up on television, really are inappropriate for young people to listen to or see, so it is an interesting issue.

I look forward to hearing the testimony of our witnesses here today, and I yield back.

Mr. UPTON. Mr. Terry.

Mr. TERRY. Thank you, Mr. Chairman, and appreciate your bill and allowing me to be part of it.

Over our time home in December, this discussion here brings back a little memory of having some time with my children, three boys, ages 9, 6 and 3. The 6-year-old called the 3-year old stupid, and my wife turned and said, "watch your mouth," and the 6-year-old turned around to my wife and said, "I did not say the F word," which was then kind of cute.

But it is just interesting to me, looking at it in a social aspect, that my 6-year-old knows that word. Because, frankly, we really police what they are allowed to watch and what they say, and still in society they are able to pick up on that, and the 6-year-old is smart enough to use the phrase, "F word," instead of saying the word to my wife, which would have gotten his mouth washed out with soap.

But I want to comment and build on slightly with what John Shimkus said, and that is: I do not think the straw was necessarily Bono saying the word. As a U-2 fan, I will tell you what: I expect Bono to say that. What was disappointing was that the Golden Globes awards were not on a delay and were not ready for that. Because I am going to tell you what: Rock and roll stars and people say that word.

What is most disappointing, I think, what the basis of people's complaints to me in my office was the way the FCC approved that word in its use that Bono said. That is when people went ballistic. That is when we got the E-mails and the letters.

I will tell you, my observation from going around my community is parents in particular and people are sick and tired of the way that we, as the American society and government, have allowed this free reign of use of words and innuendos, particularly on over-the-air radio, which hasn't had much discussion here today, and TV. There are a lot of intellectual legal issues at stake, constitutional law, first amendment rights, but I got to tell you: I am a lawyer. I do not see too many first amendment issues of why we should allow someone over public airwaves to use that type of language.

It seems rather simple to me to be able to control that, but I think one of the reasons why over-the-air TV is broadcasting so edgy is that it has to compete with cable. Then we get into the private airwaves versus the public airwaves discussion and should there be a difference in the control over that.

Probably in a legal standard, yes. In a community, probably not.

But we have got to work through those type of issues, because I will tell you what: The people, at least in my district, are hungry for change. So I am anxious to hear our speakers here today, our panel, that were bold enough to show up and appreciate the efforts of Fred, our subcommittee chairman, and this committee, and I yield back.

Mr. UPTON. Mr. Walden.

Mr. WALDEN. Thank you, Mr. Chairman; and I appreciate you holding this hearing as well. Because, obviously, there is a problem out there on the airwaves, and it comes into our living rooms or bedrooms or wherever else we have televisions and radios.

I guess, as I was thinking about this coming out, I thought about how—it is sort of like being in an earthquake, standing in the doorway, holding the door from going sideways and yourself and realizing the whole building is collapsing around you. You think you have solved the problem, and you really haven't. This bill will send a very strong signal to broadcast, but certainly that takes care of the first six channels on my TV. What happens on the other 400? I think that is where the worst abuse is, if you are concerned about indecency and obscenity and vulgarity, is that what else there is out there outside.

I think, because of the laws that are in place, and then you figure, well, you have got 100, 300, whatever number of channels coming down from satellite, if you have that. Most people get their TV off of cable one way or another today.None of that is regulated to any measurable way and I guess would not be under this legislation.

If we define 7 dirty words or 14 dirty words, I will tell you now this culture of ours will create 14 new ones that will mean the same thing, and every kid over the age of nine will know what that means. Then you throw in the mix what is coming in over the Internet in terms of the music that is coming down legally and in most instances illegally, the video clips that any kid with broadband now can download.

It is a sad commentary I think on our culture that we have to go to those extremes with this vulgarity to entertain, and it does not need to be so, and so I commend you for this hearing.

I would like to see us—and I will, again, say I am in broadcast by trade and background and continue. I remember the days of the NAB Code of Conduct, and it seems to me maybe somebody on the panel can address it, that that got thrown out from some restriction of trade issue or something.

The industry—and I do not mean just broadcasters—but the communication industry out there should develop a standard so that, you know, one does not have the edge by being more vulgar you can attract a certain audience. That is what is happening today. I mean, look at some of the top-rated shows out there, are cable shows, and they are the ones using the foulest language. I am

not here to pick on them necessarily, but it is the way of the world, and this bill is not going to solve it necessarily.

What is going to solve it is when the country gets together and those providing this entertainment, quote, unquote, get together and live by a standard of conduct that is decent, that avoid unnecessary indecency and all those things.

So I appreciate the hearing. Hopefully, we can make progress.

Mr. UPTON. Thank you.

Mr. Pits.

Mr. PITTS. Thank you, Mr. Chairman, very much, for holding this important hearing and for allowing me to participate.

As you know, I am not a member of this subcommittee. However, I am gravely concerned about the language that has been permitted on network television and radio; and I agree with you that it is time that this committee take a close look at the FCC indecency standards.

I, too, was outraged when I learned that the FCC Enforcement Bureau decided that it was permissible for the "F-word" to be used on the Golden Globes awards on January 19, 2003. This decision I think sent a poor message to the entertainment industry about the FCC's willingness to enforce standards for broadcast decency.

News reports indicate that FCC chairman Michael Powell is circulating a draft order among the commissioners of the FCC to reverse the Enforcement Bureau's decision. If approved by the full FCC, this would be a significant step in the right direction. If this happens, the FCC will have done the right thing; and I will be the first to say that we should give credit where credit is due.

However, Mr. Chairman, I do not think that we should be satisfied with simply a reversal in the decision.

The FCC has been entrusted with enforcing our Federal decency laws and should be expected to do so. There are plenty of laws on the books regarding this matter, and the FCC just needs to enforce them. That is why I am pleased to be a cosponsor of your bill, Mr. Chairman, H.R. 3717, the Broadcast Agency Enforcement Act, which increases the amount of fines that can be levied by the FCC so that networks are not tempted to air indecent language and then pay a small fine as a cost of doing business.

I am also pleased to be a cosponsor of Mr. Pickering's bill, H.Res. 500, which calls upon the FCC to vigorously enforce the Federal decency laws, using all the Federal regulatory and statutory tools at its disposal; and such include levying fines for each utterance of obscene, indecent or profane material and instituting license revocation proceedings for multiple violations.

Mr. Chairman, families are tired of having to cover their children's eyes and ears every time they turn on television. They are frustrated that the media industry has seemingly been able to broadcast any type of behavior or speech that they feel will bring in advertising dollars.

Meanwhile, they feel that the Federal Government has sided with media elites and turned a blind eye to the concerns of ordinary moms and dads. Many parents' standards of common decency are repeatedly offended and their parenting is undermined by the onslaught of material on television and radio.

I think we must protect our children from such abuse of public airwaves. Broadcast airwaves belong to the American people, not to the networks. The privilege of conducting business over the airwaves should always be conditional on their willingness to adhere to certain standards of common decency.

So thank you, again, Mr. Chairman, for holding this important hearing; and I yield back the balance of my time.

Mr. UPTON. Mr. Gonzalez.

Mr. GONZALEZ. Thank you very much, Mr. Chairman, and to Ranking Member Markey for allowing me to be part of today's hearing.

I am the newest member of the committee but have not been assigned anything in the subcommittee level until this afternoon. I will attempt to be really brief and that is I think the proposed legislation is the right direction we should be taking.

The biggest concern that I have had since I arrived in Congress is that we allow things to reach a crisis stage and then we overreact legislatively and that can be a real danger, especially in this particular arena, when it could encroach on constitutional liberties and rights that have been part of the very foundation of our country.

The libertarian's dream of self-restraint and self-regulation is but a dream but one that we should aspire to. It is achievable only when you have proper governmental oversight by a regulatory agency that is willing to assume that type of responsibility with the appropriate tools.

The goal should be one standard. The goal should be that that standard is uniformly applied and that it is uniformly and fairly enforced by the regulatory agency.

I do believe that we must work in partnership with the industry, and there is a suggestion by Clear Channel that a local values task force—I am not so sure that is the best thing to call it—be formed.

In addressing another member's observation, this would include television, radio, cable, and satellite networks to make it a level playing field for everyone out there that brings in the signal into our homes that may have this kind of content.

Again, I wish to thank the chairman and the ranking member for this opportunity.

Mr. UPTON. Thank you.

All members have now completed their opening statements.

[Additional statements submitted for the record follow:]

PREPARED STATEMENT OF HON. PAUL E. GILLMOR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

I thank the Chairman for calling this timely hearing concerning the FCC's enforcement role with regard to broadcast indecency.

After two separate incidents over the past year, both involving 4-letter expletives during television network awards shows, I am glad to see that a firestorm of pubic criticism is currently serving as the primary impetus for bringing this important issue to the table. My district particularly mirrors my comments today, to the tune of numerous letters, telephone calls, and 500 constituent emails over the last two months.

I would also like to commend my colleagues' quick legislative action. Of note, I am an original cosponsor of a measure introduced by Chairman Upton and Ranking Member Markey that would increase the penalties ten-fold that the FCC may levy for obscene, indecent, or profane broadcasts, in addition to recently cosponsoring a resolution supporting vigorous enforcement of our nation's federal obscenity laws.

Furthermore, I must recognize the FCC for their willingness to brief our panel's committee staff regarding the issue of indecency last month in addition to Chairman Powell's attention and interest in overturning a recent FCC ruling and his support for a sharp increase in penalties for violators.

As radio and television programmers continue to push the envelope, I look forward to hearing from the well-balanced panel of witnesses regarding the clarification of pertinent rules and definitions as well as potential remedies to the current situation and their impact on the First Amendment. Again, I thank the Chairman and yield back the remainder of my time.

PREPARED STATEMENT OF HON. BARBARA CUBIN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WYOMING

Thank you, Mr. Chairman.

I would like to thank you for holding this hearing to examine the appropriateness of what is being broadcast over the public airwaves and whether our enforcement tools are adequate to curb and rollback the increasing instances of foul language on television and radio.

The event which, for all intents and purposes, has led to this hearing was a broadcast of the Golden Globes about this time last year where Bono B a rock singer, not to be confused with my esteemed colleague from California, Congresswoman Bono B uttered the following on live television: "This is F***ing brilliant!@ After review of this clearly inappropriate exclamation, the FCC initially declared that it did not constitute Aindecent" language. While I have heard the Commissioners are reconsidering this initial ruling, it has still called into question just what should or shouldn't be considered "indecent."

I understand the difficulties that have vexed the Commission in dealing with this, and I understand how valuable the First Amendment protections of our Constitution are B reconciling free speech matters is a very challenging prospect. Nevertheless, just as one cannot shout fire in a crowded theater, I can't imagine any instance when public broadcast of the F-word can be deemed appropriate.

Whether it is used in the context of an adjective, noun, adverb, verb B or even pronoun, its broadcast ought not be allowed. I am not certain how we achieve this, but I do know that if anyone in my house walked around expressing how "F***ing brilliant!" something was, they'd find themselves on my doormat in short order.

We have the opportunity in today's hearing to map out steps that can be taken by Congress, the FCC and broadcasters that will reverse the trend of "one-upmanship" that is leading the quality of our broadcast programming down the toilet. The Bono incident has focused a bright light on what has been a gradual slippage in the appropriateness of the content on our airwaves. If we don't address this in short order, a lot of folks may find themselves on the nation's collective doormats.

Thank you Mr. Chairman, I yield back the balance of my time.

Mr. UPTON. I appreciate all four witnesses being able to be here, particularly my constituent, Bill Wertz, who somehow managed, like I did, to get back from the mitten in ample time for today's hearing.

I also deeply appreciate all four of you being able to get your testimony in advance before the subcommittee. We were all able to review it last night.

Your testimony is made part of the record in its entirety, and at this point we would like you to summarize your testimony in a period not to exceed 5 minutes.

We are very happy to have Mr. David Solomon, Chief of the Enforcement Bureau of the Federal Communications Commission; Mr. Brent Bozell, President of Parents TV Council; Mr. Robert Corn-Revere, partner of Davis Wright Tremaine; and Mr. Bill Wertz, Executive Vice President of Fairfield Broadcasting Company in Kalamazoo.

I would note that the House is going into recess, subject to the call of the Chair, and when the last buzzer or two sounds we will begin with your 5 minutes. That should be it.

Mr. Solomon, welcome back to the subcommittee.

STATEMENTS OF DAVID SOLOMON, CHIEF, ENFORCEMENT BUREAU, FEDERAL COMMUNICATIONS COMMISSION; L. BRENT BOZELL, III, PRESIDENT, PARENTS TELEVISION COUNCIL; ROBERT CORN-REVERE, PARTNER, DAVIS WRIGHT TREMAINE LLP; AND WILLIAM J. WERTZ, EXECUTIVE VICE PRESIDENT, FAIRFIELD BROADCASTING COMPANY

Mr. SOLOMON. Thank you.

Good morning, Mr. Chairman and members of the subcommittee.

Mr. UPTON. You might just get the mike a little closer.

Mr. SOLOMON. I appreciate the opportunity to appear before you today to discuss the Commission's enforcement of broadcast indecency restrictions.

Many of us, particularly with children, are increasingly concerned about the quality of broadcast television. Broadcasters have a unique responsibility to act in the public interest and, in particular, to air appropriate programming when children are likely to be in the audience. When broadcasters fail, the Commission stands ready to enforce its indecency rules.

Chairman Powell has been outspoken on this issue. He recently indicated, for example, that "this growing coarseness is abhorrent and irresponsible."

Under Chairman Powell's leadership, the Commission has taken indecency enforcement very seriously. To that end, we have strengthened our indecency enforcement in several respects. Most prominently, the Commission has increased the dollar amount of its enforcement substantially. During the past 3 years, the Commission has proposed indecency enforcement actions that, in the aggregate, significantly exceed the amount proposed during the prior 7 years under the prior two Commissions. In addition, the chairman has proposed a tenfold increase in the maximum indecency forfeiture permitted by the Communications Act that several of the members have discussed already.

Before I go into further detail about our indecency enforcement efforts, I will provide some brief background about the legal landscape.

Section 1464 of the Criminal Code prohibits the broadcast of indecent language. A subsequent statute and court decision established an indecency safe harbor from 10 p.m. to 6 a.m. The Commission has authority to issue both monetary forfeitures of up to $27,500 for each indecency violation and to revoke broadcast licenses for indecency violations.

Since the 1970's, the Commission has defined indecency as follows: "language or material that, in context, depicts or describes terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual and excretory activities or organs." The courts have affirmed this definition as consistent with the first amendment.

As previously noted, we take our indecency enforcement very seriously; and we have taken strong action in this area under Chairman Powell's leadership. Here are some highlights of how we have stepped up our indecency enforcement:

First, including actions taken yesterday, since Chairman Powell took office in mid-January 2001, the Commission has issued 18 proposed indecency forfeitures, so-called notices of apparent liability,

for a total of about $1.4 million in proposed fines. This dollar amount significantly exceeds the $850,000 in indecency forfeitures proposed during the prior 7 years.

Second, starting last year, the Commission has increased the amount of its proposed forfeitures. Instead of routinely proposing indecency forfeitures at the $7,000 base amount provided in the Commission's Forfeiture Policy Statement, the Commission has begun proposing in appropriate cases the statutory maximum of $27,500 per incident. Applying this stepped-up approach to the incidents, the Commission proposed an indecency enforcement action last year of over $350,000 for multiple violations. Yesterday, it proposed an indecency forfeiture of $700,000, which is the highest single forfeiture for any violation in the history of the Commission.

Third, last year the Commission provided explicit notice to broadcasters that it may begin license revocation proceedings for serious indecency violations. The Commission now reviews indecency cases that occurred after that notice with the possibility of revocation being a very serious revocation.

Fourth, last year the Commission also provided explicit notice to broadcasters that it may treat multiple indecent utterances within a single program as constituting multiple indecency violations, rather than following its traditional per-program approach. Again, with respect to cases after that announcement, the Commission is reviewing the facts with this new approach in mind.

Fifth, also beginning last year, the Commission broadened its indecency investigations to cover not just the station that is the subject of the complaint but other co-owned or affiliated stations that may broadcast the same potentially indecent material. The Commission also began collecting more extensive information from broadcasters in the course of our indecency investigations.

Sixth, the Chairman recently proposed that the Commission reverse the Enforcement Bureau's October 2003, Golden Globes award ruling. The Bureau made this decision based on precedent stating that the broadcast of a single expletive, including the F word, was not indecent. The Chairman has now proposed to reverse the Bureau. If the Commission agrees to this approach, it would represent a significant strengthening of indecency enforcement. I can assure you the Enforcement Bureau will be fully committed to enforcing the law in the manner set forth in its decision.

We believe Congress can also assist us to enforce the indecency restrictions in a strong and effective manner. In this regard, Chairman Powell has supported increasing by 10 the maximum forfeiture amounts specified in the Communications Act for indecency; and we hope Congress will enact such legislation.

We appreciate the leadership of Chairman Upton, Congressman Markey and others on this issue.

In sum, I want to assure the subcommittee that the Commission is fully committed to vigorous enforcement of the broadcast indecency restrictions in order to protect the interests of America's children. We stand ready to work with you to support this important public interest objective.

Thank you, and I would be happy to answer any questions.

[The prepared statement of David Solomon follows:]

PREPARED STATEMENT OF DAVID SOLOMON, CHIEF, ENFORCEMENT BUREAU, FEDERAL COMMUNICATIONS COMMISSION

Good morning, Mr. Chairman and members of the Subcommittee. I appreciate the opportunity to appear before you today to discuss the Commission's enforcement of broadcast indecency restrictions.

Many Americans, particularly those of us with children, are increasingly concerned about the quality of broadcast television. Broadcasters have a unique responsibility to act in the public interest and, in particular, to air appropriate programming when children are likely to be in the audience. When broadcasters fail, the Commission stands ready to enforce its indecency rules.

Chairman Powell has been outspoken on this issue. He recently indicated that "this growing coarseness . . . is abhorrent and irresponsible. And it's irresponsible of our programmers to continue to try to push the envelope of a reasonable set of policies that tries to legitimately balance the interests of the First Amendment with the need to protect our kids."

Under Chairman Powell's leadership, the Commission has taken indecency enforcement very seriously. To that end, we have strengthened our indecency enforcement in several respects. Most prominently, the Commission has increased the dollar amount of indecency enforcement substantially. Including actions anticipated in the near future, during the past three years, this Commission will have proposed indecency enforcement actions that, in the aggregate, significantly exceed the amount proposed during the prior seven years combined under the prior two Commissions. In addition, the Chairman has supported a 10-fold increase in the maximum indecency forfeiture permitted by the Communications Act.

Each of the Commissioners has played an important role in our stepped-up indecency enforcement under Chairman Powell. Commissioner Copps has been out front in focusing on the importance of this critical issue. Commissioner Martin has successfully urged the Commission to count multiple indecent utterances within a program as multiple violations. Commissioner Abernathy has been a leader in the development of the "FCC Parents' Place" on our web site, which provides helpful information to parents on a host of family-related issues, including indecency. Commissioner Adelstein has also been a strong supporter of indecency enforcement.

Before I go into further detail about our indecency enforcement efforts, I will provide some brief background about the legal landscape.

LEGAL BACKGROUND

Section 1464 of the Criminal Code prohibits the broadcast of indecent language.[1] A subsequent statute and court decision established an indecency safe harbor from 10 p.m. to 6 a.m.[2] Thus, the Commission's indecency enforcement is limited by law to the hours between 6 a.m. and 10 p.m., and our indecency rule incorporates this limitation.[3] The Commission has authority both to issue monetary forfeitures of up to $27,500 for each indecency violation and to revoke broadcast licenses for indecency violations.[4]

The courts have held that, unlike obscene speech, indecent speech is protected by the First Amendment. The courts have upheld FCC regulation of broadcast indecency as a means to protect children. At the same time, the courts have warned the FCC to proceed cautiously in this area because of the important First Amendment rights at stake.[5]

The Commission has defined indecency since the 1970s as follows: "Language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual and excretory activities or organs."[6] The courts have affirmed this definition.[7]

In applying this definition, the Commission balances three key factors in order to determine whether, in context, the programming at issue is patently offensive: (1)

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[1] 18 U.S.C. § 1464

[2] The Public Telecommunications Act of 1992, Pub. L. No. 356, 102d Cong., 2d Sess., 106 Stat. 949 (1992), and *Action for Children's Television v. FCC,* 58 F.3d 654 (D.C. Cir. 1995).

[3] 47 C.F.R. § 73.3999.

[4] 47 U.S.C. §§ 312(a)(6); 503(b)(1)(D).

[5] *See, e.g., FCC v. Pacifica,* 438 U.S. 726, 761 n.4 (Powell, J. concurring) ("since the Commission may be expected to proceed cautiously, as it has in the past, I do not foresee any undue 'chilling' effect on broadcasters' exercise of their rights"); *Action for Children's Television,* 842 F. 2d at 1340 n. 14 (internal citations omitted) ("the potential chilling effect of the FCC's general definition of indecency will be tempered by the Commission's restrained enforcement policy").

[6] *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C.* § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd 7999 (*Indecency Policy Statement*).

[7] *See e.g., Pacifica; Action for Children's Television.*

the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for shock value.[8]

FCC INDECENCY ENFORCEMENT

As previously noted, the Commission takes its indecency enforcement responsibilities very seriously. We have taken strong enforcement action in this area under Chairman Powell's leadership and have stepped up our enforcement in significant ways. Here are some highlights:

First, including actions anticipated in the near future, since Chairman Powell took office in mid-January 2001, the Commission will have issued 18 proposed indecency forfeitures (so-called Notices of Apparent Liability), for a total of about $1.4 million in proposed fines. This dollar amount significantly exceeds the total amount of about $850,000 in indecency forfeitures proposed during the prior seven years under the two prior Commissions.

Second, starting last year, the Commission has increased the amount of its proposed indecency forfeitures. Instead of routinely proposing forfeitures at the $7,000 "base" amount provided in the Commission's *Forfeiture Policy Statement*,[9] the Commission has begun proposing in appropriate cases forfeitures for the statutory maximum of $27,500 per incident. Applying this stepped-up approach to enforcement, the Commission proposed an indecency forfeiture last year of over $350,000 for multiple violations.[10] Another proposed forfeiture against one licensee of over $700,000 for multiple violations is anticipated in the near future. This will be the highest single proposed forfeiture against a broadcaster for indecency or any other violation in the history of the Commission.

Third, last year, the Commission provided explicit notice to broadcasters that it may begin license revocation proceedings for serious indecency violations.[11] The Commission now reviews indecency cases with the possibility of revocation being a serious consideration.

Fourth, last year, the Commission also provided explicit notice to broadcasters that it may treat multiple indecent utterances within a single program as constituting multiple indecency violations, rather than following its traditional per program approach.[12] Again, the Commission now reviews indecency cases with this new approach in mind.

Fifth, also beginning last year, the Commission broadened its indecency investigations to cover not just the station that is the subject of a complaint but also coowned stations that broadcast the same potentially indecent material. The Commission also began collecting more extensive information from broadcasters in the course of our indecency investigations.

Sixth, the Chairman recently proposed that the Commission reverse the Enforcement Bureau's October 2003 ruling that the broadcast of a live statement by a Golden Globe award recipient that "this is really, really FXXX-ing brilliant" was not indecent because it was used in a non-sexual context and was fleeting and isolated.[13] The Bureau made this decision based on precedent stating that the broadcast of a single expletive, including the "F-Word," was not indecent.[14] The Chairman has now proposed that the Commission conclude that the precedents underlying the Bureau decision are no longer good law. If the Commission agrees to this approach, and does depart from these prior precedents and reverse the Bureau decision that we based on those precedents, it would represent a significant strengthening of indecency enforcement. I can assure you that the Enforcement Bureau will be fully com-

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[8] *See Indecency Policy Statement.*

[9] *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines,* 12 FCC Rcd 17087, *recon. denied,* 15 FCC Rcd 303 (1997); 47 C.F.R. § 1.180(b)(4) Note.

[10] *Infinity Broadcasting Operations, Inc.,* FCC 03-234 (rel. Oct. 2, 2003).

[11] *Infinity Broadcasting Operations, Inc.,* 18 FCC Rcd 6915 (2003).

[12] *Id.*

[13] *Complaints Against Various Broadcast Licensees Regarding their Airing of the "Golden Globe Awards" Program,* DA 03-3045 (EB rel. Oct. 3, 2003).

[14] *See, e.g., Pacifica Foundation,* 2 FCC Rcd 2698, 2699 (1987) (subsequent history omitted) ("If a complaint focuses solely on the use of expletives, we believe that . . . deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency."); *Lincoln Dellar, Renewal of License for Stations KPRL(AM) and KDDB(FM),* 8 FCC Rcd 2582, 2585 (MMB 1993) (live, fleeting use of the "F-Word" not indecent); *L.M. Communications of South Carolina, Inc.,* 7 FCC Rcd 1595 (MMB 1992) (live, fleeting use of a variant of the "F-Word" not indecent).

mitted to enforcing the law in the manner set forth by the Commission in its decision.

Seventh, the Commission has been successful in collecting indecency forfeitures.

CONCLUSION

We believe Congress can also assist us in our efforts to enforce the indecency restrictions in a strong and effective manner. In this regard, Chairman Powell has supported increasing by a factor of 10 the maximum statutory forfeiture amounts specified in the Communications Act for indecency and we hope Congress will enact such legislation. We appreciate the leadership Chairman Upton has provided on this issue.

In sum, I want to assure the Subcommittee that the Commission is fully committed to vigorous enforcement of the broadcast indecency restrictions in order to protect the interests of America's children. We stand ready to work with you to attain this important public interest objective.

I would be happy to answer any questions you may have. Thank you.

Mr. UPTON. Thank you very much.

Mr. Bozell.

STATEMENT OF L. BRENT BOZELL, III

Mr. BOZELL. Chairman Upton and members of the committee, I appreciate the opportunity to appear before you to testify on this issue.

I represent the Parents Television Council with 850,000 members. In the past 2 years, the FCC has literally—has received literally hundreds of thousands of complaints from our members and others over some 70 separate indecencies on television, yet the FCC hasn't seen to agree with a single complaint. In fact, in the entire history of the FCC, until yesterday afternoon, I might note, this agency had never, never fined a single television station in the continental United States for broadcast indecency. They found one in Puerto Rico.

Yet indecencies are now everywhere on broadcast TV. Sex on TV has become increasingly explicit, with children exposed to more direct references to genitalia, prostitution, pornography, kinky practices, oral sex, masturbation, and depictions of nudity during prime time viewing hours than they had just a few short years ago.

Foul language during the so-called family hour has increased 95 percent since 1998. The "F-word" alone—the "F-word" was used four times alone last year on broadcast television. The broadcast networks are laughing at the public and at everyone in this room because they know they can do or say whatever they want, because the FCC will not lift a finger to penalize them.

Consider the following, which aired on an NBC special this past May at 8 p.m., in the so-called family hour. In this scene, Dana Carvey appears as one of the old Saturday Night Live characters, Church Lady, a very funny character, to talk to former child star Macaulay Culkin about his sleepovers with Michael Jackson. Here is the transcript:

Church Lady: Did he ever dangle anything in front of you at the sleepovers?

Culkin: Dangle what?

Church Lady: Oh, I don't know. Say, his "happy man loaf?" When he moon-walked, he didn't moon you as he walked, did he? How about your friends you took to his sleepovers? Did he ever get into Billy's jeans?

The second guest says: Come on. You trying to tell me you're screwing your little jingle bells up against the King of Pop and shalonz never rose up to salute you? Come on, man. Side by side on a Sealy Posturepedic, you never played "hide the toast?" give me a break.

And it goes on from there, during the family hour in front of millions of children.

What child needed to be exposed to this? Is it now a laughing matter that we laugh about pedophilia? Would you want to explain to your youngsters what "hide the toast" means?

My libertarian instinct makes me uncomfortable coming before Congress asking for your help, but I do so now on behalf of tens of millions of parents simply because it is time that the Congress insert itself to halt its assault on the American family. The Congress, pure and simple, needs to insist that the FCC start doing its job correctly.

It begins with the need for the FCC to start monitoring what is on broadcast television. The FCC has a whopping $278 million plus annual subsidy from the Congress, yet somehow cannot find the time or the resources to monitor what it is supposed to be regulating. Nor, apparently, can the FCC afford to have a single person working full time on this issue. Not a one. That fact comes to us directly from the FCC.

Second, the FCC needs to stop playing games with the public. Thousands upon thousands of people filing complaints hear nothing back. I refer you to our report which you will get this week, Dereliction of Duty, which documents how the FCC has sat on thousands of complaints going back almost 2 years.

Here is an example, and it was mentioned by one of our Members of Congress earlier on. In December 2002, the singer Cher on Fox television, on another awards program, said, people have been telling me I am on the way out every year, right? So F 'em.

That is not what she said.

Now that was December 2002, and the FCC still has not figured out whether that was indecent.

More games.

The Chairman of the FCC assured me personally that it was absolutely false that it was requiring the public to attach a transcript of the actual show in question, something that is virtually impossible for a complainant to have handy at the moment. Yet if you look at the FCC Web site, that is what you will find.

More games.

The FCC reported that in the second quarter of 2003 it received only 351 complaints from broadcast indecency. That is not true. It is preposterous. In the same period our members alone filed over 8,000 complaints. We found out afterwards that all the complaints were being lumped into one.

More games.

The FCC must be told to stop blocking, yes blocking, complaints. Recently, we learned many of our supporters had their E-mail complaints returned as undeliverable. Then we were being told by somebody in the FCC they were being blocked.

Third, the FCC should start attaching meaningful fines to those that are violating the public trust. The $27,000 maximum fine is a joke, and I thank every Member of Congress who has said this.

Chairman Upton and also Congressman Markey, it is good that you are proposing that the fines be increased tenfold and that the fines be increased up to $3 million for continued offenses. Still the fact remains that all is for naught so long as the FCC refuses to levy fines.

Finally, the FCC must get serious about revoking station licenses for those who refuse to abide by standards of decency. The use of the public airwaves is not an entitlement. It is a privilege and a privilege to be honored. Rather than giving networks more stations as a reward for their irresponsible behavior, perhaps the Congress should begin steps to reduce the number of stations.

If the Congress takes the appropriate steps to force the FCC to do its job, the public will be protected, and this assault on decency will come to an end. Only Congress can do that, too; and if you do an entire generation of parents grandparents and children will thank you for it.

Thank you, Mr. Chairman.

[The prepared statement of L. Brent Bozell, III, follows:]

PREPARED STATEMENT OF L. BRENT BOZELL, III, PRESIDENT AND FOUNDER, THE PARENTS TELEVISION COUNCIL

Chairman Upton and Members of the Committee, I appreciate the opportunity to appear before you to testify on this important issue.

I represent the Parents Television Council's 850,000 members, along with untold millions of parents who, like me, are disgusted, revolted, fed up, horrified—I don't know how to underscore this enough—by the raw sewage, ultra violence, graphic sex, and raunchy language that is flooding into our living rooms night and day.

A major responsibility of the FCC is to ensure that those who use the public airwaves adhere to standards of decency. Yet, looking at the FCC's track record on indecency enforcement, it becomes painfully apparent that the FCC could care less about community standards of decency or about protecting the innocence of young children.

In the past two years, the FCC has received literally hundreds of thousands of complaints of broadcast indecency from fed-up, angry, frustrated parents, yet the FCC hasn't seen fit to agree with a single complaint. In fact, in the entire history of the FCC this agency has never—*never*—fined a single television station in the continental United States for broadcast indecency.

In the FCC's view, everything on broadcast TV is "and always has been" decent. This is ludicrous.

The FCC is a toothless lion and its non-actions are not only irresponsible, they're inexcusable. Either the FCC has no idea what it's doing, or it just doesn't care what the public thinks. There's no third explanation.

Indecencies and obscenities are now *everywhere* on broadcast TV. This past year, the Parents Television Council released a series of three Special Reports looking at the State of the Television Industry. Sex on TV has become increasingly explicit, with children exposed to more direct references to genitalia, prostitution, pornography, oral sex, kinky practices, masturbation, and depictions of nudity during prime time viewing hours—and yes, that includes the so-called "Family Hour"—than they would have been just a few short years ago. Foul language during the family viewing hour alone increased by 95% between 1998 and 2002

Thanks to some envelope-pushing shows you can now hear words like "asshole" and "bullshit" on primetime broadcast TV. Live awards shows are pushing the boundaries of acceptable language for broadcast TV by "accidentally" allowing the "f" and "s" words to slip past network censors. The "f" word has been used on broadcast television four times in the last year alone.

The broadcast networks are laughing at the public because they know they can do or say whatever they want to over the broadcast airwaves and the FCC won't lift a finger to penalize them.

And it's not just the late night dramas that are pushing standards downward.

Consider the following, which aired on an NBC special this past May at 8:00—during the so-called Family Hour. In this scene, Dana Carvey appears as one of his old *Saturday Night Live* characters, "Church Lady," to talk to former child star Macaulay Culkin about his sleepovers with Michael Jackson.

Church Lady: "Did he ever dangle anything in front of you at the sleepovers?"

Culkin: "Dangle what?"

Church Lady: "Oh, I don't know. Say, his 'happy man loaf'?...When he moon-walked, he didn't moon you as he walked, did he?...How about your friends you took to the sleepovers. Did he ever get into Billy's jeans?"

Second guest, Michael Imperioli: "I mean come on, you trying to tell me you're screwing your little jingle bells up against the King of Pop and his shalonz never rose up to salute you? Come on, man. Side by side on the Sealy Posturepedic, you never played 'hide the toast'? Give me a break."Church Lady: "Alrighty, well, I think it's time to 'Beat It.'"

What child needs to be exposed to this? Is pedophilia now a laughing matter? Would you want to have to explain to your youngster what "hide the toast" means? Nevertheless, this was broadcast over the public airwaves—the *public's* airwaves—right into the family home, "the one place," according to the Supreme Court, "where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds."

My libertarian instinct makes me uncomfortable with the notion of coming before Congress to ask for your help, but I do so now, on behalf of tens of millions of parents, simply because it's time that Congress inserted itself to halt this growing problem. The Congress, pure and simple, needs to insist that the FCC do its job correctly.

What should the FCC be doing that it's not doing presently?

It begins with the need for the FCC to start monitoring what's on broadcast television. The FCC has a whopping $278 million + annual subsidy from the Congress, yet somehow can't find the time or the resources to monitor what's on broadcast television. (Parenthetically, let me point out that with a budget of approximately two percent of the FCC's, the Parents Television Council manages to do it.)

It shouldn't be up to the public to point out the violations on the airwaves. It should be up to the FCC to find them.

How disinterested is the FCC in its responsibility to monitor indecency on television? Even with that $278 million annual subsidy. The FCC apparently still can't afford to have a single person working full time on this issue. Not a one. That fact comes to us from the FCC directly.

Second, the FCC needs to start responding to complaints instead of playing games with the public. I have been promised personally by Chairman Powell that every complaint would get a response, and yet on a regular basis, thousands upon thousands of people filing complaints hear nothing. I refer you to our report, *Dereliction of Duty,* which documents how the FCC has sat on thousands of complaints going back almost two years.

While accepting an award during the December 2002 *Billboard Music Awards* on Fox, pop-star Cher said, "People have been telling me I'm on the way out every year, right? So f*ck 'em." How long should it have taken the FCC to decide if this was indecent? The answer is: quite a while, apparently. It's been over a year and the FCC has yet to act on it.

The FCC must also be told to stop playing games with the public when it comes to filing complaints. The Chairman of the FCC assured me personally that it was absolutely false that the FCC was requiring the public to attach a transcript of the actual show in question, something that is virtually impossible for a complainant to have handy at the moment. And yet if you look at the FCC website, that's exactly what it instructs the public to do.

The FCC must be told to stop playing games with numbers. The FCC reported that claimed that in the second quarter of 2003 it received only 351 complaints about broadcast indecency. That was preposterous, simply untrue. In that same period, PTC members alone filed over 8,000 complaints. The FCC in turn lumped all of them in one basket and called it one complaint.

The FCC must be told to stop blocking—yes, *blocking*—complaints, too! Recently we were told by many of our supporters that their e-mailed complaints were being returned as "undeliverable." When we looked into this we were told by a source within the FCC that they were being blocked deliberately.

Third, the FCC must be told to start enforcing the law by attaching meaningful fines to those who are violating the public trust with deliberate indecencies on broadcast television. The $27,000 maximum fine is a joke, and everyone knows it. It is most welcome news, Chairman Upton, that you are proposing that fine be in-

creased tenfold and that the fines be increased up to $3 million for continued offenses. But the fact remains that all is for naught so long as the FCC refuses to levy fines when appropriate. The FCC must be told in no uncertain terms that it has the obligation to do that to protect the public airwaves. Moreover, Congress should insist that the FCC fine stations for each violation. If a shock-jock uses the "s" word ten times on his show, his station should receive ten fines, not one.

Finally, the FCC must get serious about revoking station licenses for those who refuse to abide by standards of decency. The use of the public airwaves is not an entitlement, a right. It is a privilege, and a privilege to be honored. Rather than giving networks more stations as a reward for their irresponsible behavior, perhaps the Congress ought to consider steps to reduce the number of stations allowed for those continuously spitting in the public's face.

I am a father of five who has spent twenty five years trying to shield my children from offensive messages coming across the airwaves I own. God willing, I'll be a grandfather some day. Wouldn't it be wonderful if my grandchildren didn't have to endure such abuse? If the Congress takes the appropriate steps to force the FCC to do its job, the public trust will be protected and this assault on decency will come to an end. Only Congress can do that, too.

And if you do, an entire generation of grandparents, parents, and their children will thank you for it.

Mr. UPTON. Thank you.

Mr. Corn-Revere.

STATEMENT OF ROBERT CORN-REVERE

Mr. CORN-REVERE. Mr. Chairman, members of the committee, thank you for inviting me to testify about FCC enforcement of the broadcast indecency standard.

I will address some of the constitutional issues that arise from the FCC broadcast content and will explore some of the changes in the Commission's report.

Although I actively represent clients with respect to these issues, my testimony today represents my personal views and should not necessarily be attributed to my clients or other parties.

This hearing and the FCC's recent indecency actions, including those mentioned yesterday, appear to be a significant change in the FCC approach toward content regulation. In addition, various proposals to bolster the FCC's policies are pending, such as H.R. 3717 to increase the level of indecency fines by tenfold, are pending and H.R. 3687, which would amend Section 1464 of the Criminal Code to create a list of eight words and phrases that would have been indecent per se evidently, regardless of the context in which they were used.

The purpose of my testimony today is not to assess any particular action or proposed action in this area. I have not been asked to do so. My principal point is this. Whatever action the Congress or FCC must take, it must be accompanied by a comprehensive and good-faith review of the FCC's policies.

Chairman Powell has said, as government pushes the limits of its authority to regulate content of speech, the more its action should be constitutionally scrutinized, not less. Now, admittedly, he hasn't said this recently, but it remains true, nonetheless.

My prepared testimony provides a fairly detailed explanation for my conclusion, so I will summarize my views with the following three points:

First, the Supreme Court five to four decision in FCC v. Pacifica Foundation did not give the FCC carte blanche authority to decide whatever it thinks broadcasters put on is indecent or to impose unlimited penalties.

It is important to bear in mind the ability to regulate indecent speech is a limited constitutional exception, not the general rule. The Supreme Court has even validated efforts to restrict indecency in print, on film, in the mails, in the public forum, on public television, and on the Internet.

In Pacifica, the so-called seven dirty words case, the court has described its action as an emphatically very narrow holding and the justices stressed that they were reaching a decision in light of the fact that no penalties were assessed against Pacifica in that case. Four justices dissented in Pacifica; and Justice Powell, who provided the crucial vote, stressed this is not to say that the Commission has an unrestricted license to decide what speech protected in other media may be banned from the airwaves. He added that the decision does not apply to cases involving the isolated use of a potential offensive word in the course of a broadcast, such as the Golden Globes's broadcast, and in Justice Powell's words the FCC was to proceed cautiously.

The real question to be answered is whether Pacifica would be reaffirmed today even if there is no change in the FCC policy.

Second, the FCC indecency standard represents a constitutional paradox. It purports to regulate speech that the courts agree is constitutionally protected.

The indecency standard is the current manifestation of the test for obscenity as existed in Victorian England in the 19th Century. It was imported to this country as the test for obscenity in the days of Anthony Comstock. But as the first amendment doctrine evolved and let courts to fashion a more precise test obscenity, the law of indecency failed to keep up.

Indecency law remains just as Justice Potter Stewart said of the early attempts to define obscenity: I may not be able to intelligently define it, he said, but I know it when I see it.

Unfortunately, given the imprecise contours, the FCC cannot say the same thing, that it knows it when it sees it. It is continually trying to revise its views and provide scant guidance either for those who must comport with the law or for those who must comply with it.

Third, there are no quick fixes here. It really is not that easy. For one thing, under such a rule, certain passages in the Bible would be banned from the air. Isaiah, Chapter 36, Verse 12, would be out, as would Samuel, Chapter 25, Verse 22. So would certain newscasts.

In 1991, the FCC dismissed an indecency complaint against National Public Radio for a newscast which included an excerpt of a wiretap from the mob trial of mob boss, John Gotti. The same word or variations thereof that appeared in the Golden Globes telecast was repeated 10 times in the course of any 30-second segment. Nevertheless, the Commission found that, given the surrounding circumstances, the use of expletives during the Gotti segment does not meet its determination of broadcast indecency.

Under a per-se indecency rule the FCC would not be able to show the same flexibility during the course of a newscast or a political speech, for example. Similarly, in 1987, the Mass Media Bureau reluctantly and kind of obliquely gave a green light to an on-air reading of James Joyce' Ulysses, saying the licensee could make an in-

formed editorial choice based on the fact that Federal courts had refused to uphold a ban of Ulysses in 1933.

Under a per-se rule, the FCC would be returned to its pre-1933 standard, so the only point that I am making is that such easy and reflexive solutions are not necessarily the right course to go, the right course to take and would face significant opposition in case of a court challenge.

The point of my testimony really is just that whatever action the Congress or the FCC takes, it needs to be accompanied by rigorous first amendment review.

[The prepared statement of Robert Corn-Revere follows:]

PREPARED STATEMENT OF ROBERT CORN-REVERE, PARTNER, DAVIS WRIGHT TREMAINE LLP

Mr. Chairman, and Members of the Committee. Thank you for inviting me to testify about Federal Communications Commission ("FCC") enforcement of the broadcast indecency standard.[1] I will address some of the constitutional issues that arise from the FCC's regulation of broadcast content, and will explore the potential implications of changes in the Commission's approach to indecency. Based on my analysis, I suggest that any changes in the policy should be accompanied by a comprehensive rulemaking proceeding that examines fully the First Amendment implications of the FCC's rules. Such review should take place regardless of whether changes are initiated at the FCC or directed by Congress.

I. RECENT DEVELOPMENTS WITH ENFORCEMENT OF THE FCC'S INDECENCY POLICY

The FCC and the enforcement of its indecency rules has received a great deal of attention lately. Much of it—though by no means all—centers on a recent staff decision declining to impose a penalty on broadcast of one particular expletive[2] during a live broadcast of the Golden Globe Awards last January.[3] That decision currently is under review by the full Commission, and Chairman Powell has stated publicly that he intends for the agency to overrule the Bureau order.[4] According to press reports, the Chairman proposed a rule "that would nearly guarantee an FCC fine if [the profanity is] uttered between 6 a.m. and 10 p.m. on radio and broadcast television." One possible exception to a per se indecency rule would be when a profane word is uttered "in a political situation."[5] Other Commissioners have expressed similar views,[6] as have various members of Congress.[7]

Much of the adverse reaction to the staff Golden Globes Order centers on its observation that the word "'f**king' may be crude and offensive, but, in the context

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[1] This testimony represents my personal views and should not be attributed to any clients or other parties.

[2] During the unscripted broadcast, Bono of the band U-2 accepted an award with the comment, "This is really, really f**king brilliant." At the request of Committee staff for purposes of decorum, specific references to expletives in my testimony will be altered with the use of asterisks (as above), including when such words appear in congressional proposals and Supreme Court opinions.

[3] *In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program,* DA 03-3045 (Enforcement Bureau, released Oct. 3, 2003) ("*Golden Globes Order*"). The staff ruling denied 234 complaints the Commission received about the Golden Globes broadcast, of which 93 percent (217 complaints) came from persons associated with the Parent's Television Council. By contrast, about 27 million viewers tune in to the annual Golden Globes broadcast. *See* Lisa de Moraes, *The Golden Globes, More Glittery Than Ever,* WASHINGTON POST, January 27, 2004 at C7.

[4] It is unusual to see a Chairman and other Commissioners publicly lobby to change a staff ruling, since any agency orders issued on delegated authority may be reversed by the Commissioners as a routine matter. Moreover, full Commission review already has been sought in this case.

[5] *See* Frank Ahrens, *Powell Seeks Reversal of Profanity Ruling,* WASHINGTON POST, January 14, 2004 at E1.

[6] *See, e.g.,* Remarks of Commissioner Kevin J. Martin, 21st Annual Institute on Telecommunications Policy & Regulation, December 5, 2003; Letter from Commissioner Michael J. Copps to L. Brent Bozell, III, October 27, 2003 ("The Commission has arguably come to put more emphasis in recent years on the contextual presentation of indecency. I am concerned that we may be too narrow in our interpretation of the statute.").

[7] *See* Letter from Rep. Chip Pickering to Chairman Michael Powell, November 21, 2003; Letter from Rep. Joseph Pitts to Chairman Michael Powell, November 21, 2003 (with 30 additional signatories).

presented here," may not be actionably indecent when used "as an adjective or expletive to emphasize an exclamation." [8] In a less discussed part of the Order, however, the Bureau also found that "fleeting and isolated remarks of this nature do not warrant Commission action,"[9] a proposition for which there is ample precedent.[10] In fact, the initial FCC orders that preceeded Supreme Court review in FCC v. *Pacifica Foundation, 438 U.S. 726 (1978) stressed that it would be inequitable to hold a licensee responsible for indecent language when "public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing."*[11] Justice Powell, who supplied the crucial swing vote for Pacifica's slim majority, stressed that "[t]he Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word."[12] But whether or not the *Golden Globes Order* is defensible on other grounds, it may be fairly safe to assume given the present climate that the days of the Bureau decision are numbered.

The official responses spawned by the current controversy would seem to ensure this outcome. Both the House of Representatives and the Senate introduced resolutions condemning the *Golden Globes Order,* and have urged the FCC generally to take a more activist role in indecency enforcement.[13] In addition, Congressman Ose introduced H.R. 3687 to address directly the Bureau's reasoning regarding the contextual use of expletives. It proposes to amend 18 U.S.C. § 1464 to specify that the term "'profane', used with respect to language, includes the words 'sh*t', 'pi*s', 'f**k', 'cu*t', 'a**hole', and the phrases 'c**k sucker', 'mother f**ker', and 'a** hole', compound use (including hyphenated compounds) of such words and phrases with each other or with other words and phrases, and other grammatical forms of such words and phrases (including verb, adjective, gerund, participle, and infinitive forms)."[14]

Chairman Upton also has urged the Commission to reverse the *Golden Globes Order* and on January 21 introduced H.R. 3717 to increase substantially the financial penalties the Commission may impose for violations of its indecency rules.[15] Chairman Powell has endorsed the imposition of vastly higher fines, and has called for a ten-fold increase in forfeiture levels in order to create more of a deterrent effect on broadcast programmers.[16] These actions have come after the Commission announced its intention to impose a number of significant fines under existing rules,

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[8] *Golden Globes Order,* ¶ 5. In point of fact, the word "f**king" in the context of the complaint was used as an adverb. But it is doubtful the grammatical difference would mollify those most upset with the ruling. *See, e.g.,* H.R. 3687, 108th Cong., 1st Sess. (introduced Dec. 8, 2003) (proposing to specify words that are indecent per se, including all "grammatical forms of such words and phrases (including verb, adjective, gerund, participle, and infinitive forms)").

[9] *Id.* ¶ 6.

[10] *See Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency,* 16 FCC Rcd. 7999, 8008-09 (2001) ("*Industry Guidance*"); *Lincoln Dellar, Renewal of License for Stations KPRL(AM) and KDDB(FM),* 8 FCC Rcd. 2582, 2585 (Mass Media Bureau 1993); *L.M. Communications of South Carolina, Inc. (WYBB(FM)),* 7 FCC Rcd. 1595 (Mass Media Bureau 1992) (fleeting and isolated utterance in a live and spontaneous program is not actionable); *Pacifica Foundation,* 95 F.C.C.2d 750, 760 (1983) ("speech that is indecent must involve more than an isolated use of an offensive word").

[11] *In the Matter of a Petition for Clarification or Reconsideration of a Citizen's Complaint Against Pacifica Foundation, Station WBAI(FM), New York, N.Y.,* 59 F.C.C.2d 892, 893 n.1 (1976).

[12] *Pacifica,* 438 U.S. at 760-761 (Powell, J., concurring). *See also id.* at 772 (Brennan J., dissenting) ("I believe that the FCC is estopped from using either this decision or its own orders in this case . . . as a basis for imposing sanctions on any public radio broadcast other than one aired during the daytime or early evening and containing the relentless repetition, for longer than a brief interval, of [offensive language].").

[13] H. Res. 482, 108th Cong., 1st Sess. (Dec. 8, 2003) (expressing sense of the House the *Golden Globes Order* is erroneous and directing the FCC to "utilize its enforcement authority to its proper extent"); S. Res. 283, 108th Cong., 1st Sess. (Dec. 9, 2003) (expressing sense of the Senate with respect to a number of FCC decisions, and suggesting that the Commission should reconsider the *Golden Globes Order* plus undertake "new and serious efforts to sanction broadcast licensees that refuse to adhere to the [indecency] standard"). The Senate resolution was approved by unanimous consent. CONG. REC., December 9, 2003 at S16213.

[14] H.R. 3687, 108th Cong., 1st Sess. (introduced Dec. 8, 2003).

[15] H.R. 3717, 108th Cong., 2d Sess. (January 21, 2004). The bill would amend Section 503(b)(2) of the Communications Act to authorize fines of up to $275,000 for each violation of the FCC's indecency rules up to a limit of $3 million "for any single act or failure to act" in the case of a continuing violation. The language of the bill suggests that such penalites could be imposed even if the violation is not "willful" or "repeated."

[16] *See Ahrens, supra* note 5.

and the agency has threatened to revoke the licenses of broadcasters who commit "serious violations" of the indecency policy. [17]

II. ANY CHANGE IN THE FCC'S INDECENCY POLICY REQUIRES A COMPREHENSIVE CONSTITUTIONAL REVIEW OF THE RULES

Whatever course the FCC and Congress may take in this area, neither body can avoid the need for thorough constitutional scrutiny of its actions. It is insufficient simply to note that the Supreme Court upheld the FCC in an indecency action a quarter century ago in *FCC* v. *Pacifica Foundation,* 438 U.S. 726 (1978) given the intervening changes in the law, technology, and in society. Thus far, however, the FCC has resisted any such review.[18] But as Chairman (then Commissioner) Powell has said, "as government pushes the limits of its authority to regulate the content of speech, the more its actions should be constitutionally scrutinized, not less." He previously has stressed that "any responsible government official who has taken an oath to support and defend the Constitution must squarely address this important question." [19] In this regard, the United States Court of Appeals for the District of Columbia Circuit has reminded the FCC Commissioners that "[f]ederal officials are not only bound by the Constitution, they must also take a specific oath to support and defend it." [20] Accordingly, Chairman Powell has said that he tries to answer a series of questions before taking regulatory actions in order to "execute this haughty responsibility without feeling [the] decisions are the result of nothing more than . . . personal preferences or the skillful lobbying efforts of the most effective special interest groups or politicians." The final, and most important question he asks is, "Would any action we take violate the Constitution?" [21]

With respect to regulating broadcast content, Chairman Powell has criticized as a "willful denial of reality" the Commission's failure to reexamine the "demonstrably faulty premises for broadcast regulation," including the claim "that broadcasting is uniquely intrusive as a basis for restricting speech." Of this rationale he has said, "[t]he TV set attached to rabbit ears is no more an intruder into the home than cable, DBS, or newspapers for that matter. Most Americans are willing to bring TVs into their living rooms with no illusion as to what they will get when they turn them on." [22] The Chairman has explained that "[t]echnology has evaporated any meaningful distinctions among distribution [media], making it unsustainable for the courts to segregate broadcasting from other [media] for First Amendment purposes. It is just fantastic to maintain that the First Amendment changes as you click through the channels on your television set." [23]

Yet the FCC's reluctance to address these basic issues led Commissioner Powell to observe that "the government has been engaged for too long in willful denial in order to subvert the Constitution so that it can impose its speech preferences on the public—exactly the sort of infringement of individual freedom the Constitution was masterfully designed to prevent." [24] As Chairman, Powell has said that he is hesi-

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[17] *Infinity Broadcasting Operations, Inc.,* FCC 03-302 ¶3 (released Dec. 8, 2003) (Forfeiture order imposing fine of $27,500 on WKRK-FM and indicating that future violations may be treated as multiple, repeated offenses subject to significantly higher forfeitures; other licensees were placed on notice that enforcement actions may include "initiation of license revocation proceedings") ("*WKRK Order*"); *Infinity Broadcasting Operations, Inc.,* FCC 03-234 (released October 2, 2003) (Notice of Apparent Liability in amount of $357,500 for broadcast of Opie & Anthony Show over 13 stations); *AMFM Radio Licenses, LLC,* FCC 03-233 (released October 2, 2003) (Notice of Apparent Liability in amount of $55,000 for broadcasts of "Elliott in the Morning" program).

[18] *See, e.g., WKRK Order* ¶6 n.1 (dismissing detailed legal analysis of FCC policies in a footnote: "Nothing in the Comments alters our decision here or leads us to conclude that the Commission should initiate a broader proceeding to reconsider our indecency policies in light of the First Amendment issues raised by the Comments.").

[19] Remarks by Commissioner Michael K. Powell, *Willful Denial and First Amendment Jurisprudence,* Media Institute (Washington, D.C., April 22, 1998) ("*Willful Denial Speech*").

[20] *Meredith Corp.* v. *FCC,* 809 F.2d 863, 874 (D.C. Cir. 1987) (citing U.S. Const. art. VI, cl. 3). In this regard, it is elementary that enforcing "a Commission-generated policy that the Commission itself believes is unconstitutional may well constitute a violation of that oath." But, in any event, "the Commission must discharge its constitutional obligations by explicitly considering [a] claim that the FCC's enforcement of [its policies] against [a licensee] deprives it of its constitutional rights. The Commission's failure to do so seems to us the very paradigm of arbitrary and capricious administrative action." *Id.*

[21] Remarks by Commissioner Michael K. Powell, *The Public Interest Standard: A New Regulator's Search for Enlightenment,* American Bar Association 17th Annual Legal Forum on Communications Law (Las Vegas, Nevada., April 5, 1998) ("*Search for Enlightenment Speech*").

[22] *Willful Denial Speech, supra.*

[23] *Search for Enlightenment Speech, supra.*

[24] *Willful Denial Speech, supra. See also* Remarks by Commissioner Michael K. Powell, The Freedom Forum (Arlington, VA, April 27, 1998) ("We must admit to these new realities and quit

tant to second-guess the choices made by members of the broadcast audience and has noted that "I don't want the government as my nanny." And while acknowledging that some programming content makes him anxious, he has stated "I don't get paid to write general anxiety rules. I get paid to write specific ones that have sufficient clarity to sustain judicial review as not being arbitrary and capricious and not just an expression of my preference." [25]

This is not intended to suggest that the Chairman would reaffirm these prior statements in a formal proceeding, nor is it an attempt to predict how a Commission majority might act. Rather, the point is that the government has a constitutional obligation to address these significant First Amendment issues to the extent it modifies or reaffirms its indecency enforcement policy. The same constitutional duty applies regardless whether Congress or the FCC takes the lead in this area.[26] As I explain in the following sections, the Commission's existing approach to indecency enforcement is fraught with constitutional difficulties, and any effort to increase enforcement efforts, raise the level of fines, or to specify a per se indecency rule will make these problems even more pressing. I have not been asked to analyze any particular proposal or to express an opinion about its constitutionality. Accordingly, my testimony simply identifies the principal First Amendment questions that will need to be addressed. My primary conclusion is, one way or the other, the FCC can no longer put off constitutional review of its indecency policies.

III. FCC V. *pacifica foundation does not provide unlimited authority to define and punish broadcast indecency*

Senate Resolution 283, adopted last month by unanimous consent, urges the FCC to "vigorously and expeditiously enforc[e] its own United States Supreme Court-approved standard for indecency in broadcast media, as established in the declaratory order In the Matter of a Citizen's Complaint Against Pacifica Foundation Station WBAI(FM), 56 F.C.C.2d 94 (1975)." But in this regard, it is important not to read too much into the *Pacifica* precedent. The Supreme Court's 5-4 decision in that case did not give the FCC carte blanche authority to decide what broadcasts are indecent or to impose unlimited penalties.

It is important to keep in mind that the ability to regulate so-called "indecent" speech is a limited constitutional exception, not the general rule. The Supreme Court has invalidated efforts to restrict indecency in print,[27] on film, [28] in the mails,[29] in the public forum,[30] on cable television [31] and on the Internet.[32] The Pacifica Court applied a somewhat different standard for broadcasting, but that decision cannot be read too broadly. Pacifica was a fragmented (5-4) decision that did not approve a particular standard or uphold a substantive penalty against the licensee.[33] The Supreme Court subsequently has acknowledged that the FCC's definition of indecency was not endorsed by a majority of the Justices, and it repeatedly has described Pacifica as an "emphatically narrow holding." [34] Later decisions by

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subverting the Constitution in order for the government to be free to impose its speech preferences on the public.").

[25] *The Chairman Elucidates,* BROADCASTING & CABLE, February 12, 2001 at 34-35.

[26] *See, e.g., United States* v. *Playboy Entertainment Group, Inc.,* 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."); *Sable Communications of California, Inc.* v. *FCC,* 492 U.S. 115, 129 (1989) ("Court does not defer to congressional findings because "our task in the end is to decide whether Congress has violated the Constitution.").

[27] *Butler* v. *Michigan,* 352 U.S. 380, 383 (1957). *See also Hamling* v. *United States,* 418 U.S. 87, 113-114 (1974) (statutory prohibition on "indecent" or "obscene" speech may be constitutionally enforced only against obscenity).

[28] *United States* v. *12 200-ft. Reels of Film,* 413 U.S. 123, 130 n.7 (1973).

[29] *Bolger* v. *Youngs Drug Products Corp.,* 463 U.S. 60 (1983).

[30] *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975).

[31] *United States* v. *Playboy Entertainment Group, Inc.,* 529 U.S. 803 (2000).

[32] *Reno* v. *ACLU,* 521 U.S. 844 (1997).

[33] *See Pacifica,* 438 U.S. at 743 (plurality op.) and at 75556 (Powell, J., concurring) ("[t]he Court today reviews only the Commission's holding that Carlin's monologue was indecent 'as broadcast' at two o'clock in the afternoon, and not the broad sweep of the Commission's opinion"). *See also Carlin Communications, Inc.* v. *FCC,* 837 F.2d 546, 559 (2d Cir. 1988) ("[t]he *Pacifica* Court declined to endorse the Commission definition of what was indecent"); *ACLU* v. *Reno,* No. Civ. A. 96-963, 1996 WL 65464 at *3 (E.D.Pa. Feb. 15, 1996) (Buckwalter, J.) ("it simply is not clear, contrary to what the government suggests, that the word 'indecent' has ever been defined by the Supreme Court").

[34] *Reno,* 521 U.S. at 866-867, 870; Sable, 492 U.S. at 127; *Bolger,* 463 U.S. at 74.

lower courts did not analyze or reaffirm Pacifica so much as simply recite and apply its outcome.[35]

Accordingly, it is not prudent simply to assume that policies approved in the past remain valid now or in the future. The Supreme Court has long held that "because the broadcast industry is dynamic in terms of technological change[,] solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded ten years hence."[36] The Commission recently reaffirmed this principle in its omnibus broadcast ownership proceeding, noting that current regulations failed to account for vast changes in the media landscape.[37]

Much has happened in the 25 years since *Pacifica* was decided and the 10 years since the D.C. Circuit last addressed the issue of the broadcast indecency standard. To begin with, it is far less plausible for the FCC to justify indecency regulations on the premise that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans."[38] As the Commission most recently concluded, "the modern media marketplace is far different than just a decade ago." It found that traditional media "have greatly evolved," and "new modes of media have transformed the landscape, providing more choice, greater flexibility, and more control than at any other time in history."[39] Of particular relevance here, the Commission noted that "[t]oday's high school seniors are the first generation of Americans to have grown up with this extraordinary level of abundance in today's media marketplace." It found that most teens have access to cable television and high speed Internet access, many live in households that receive 100 to 200 channels of video programming and thus "have come to expect immediate and continuous access to news, information, and entertainment."[40] In this environment, imposing special speech restrictions on the broadcast medium compared to other media seems futile.[41]

It also must be noted that society has changed as well, and has grown far more tolerant of the wide range of content that is available. In 1951 a Houston television station caused a public outcry when it planned to air a bedding commercial showing a husband and wife in a double bed, and that same decade the Everly Brothers' song *Wake Up, Little Susie* was banned in Boston.[42] We do not live in the same culture as when Rob and Laura Petrie on the *Dick Van Dyke Show* had to sleep in

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[35] *E.g., Action for Children's Television* v. *FCC,* 852 F.2d 1332, 1339 (D.C. Cir. 1988) ("ACT I") ("if acceptance of the FCC's generic definition of 'indecent' as capable of surviving a vagueness challenge is not implicit in *Pacifica,* we have misunderstood Higher Authority and welcome correction"). *See also Action for Children's Television* v. *FCC,* 932 F.2d 1504, 1508 (D.C. Cir. 1991) ("*ACT II*"); *Information Providers' Coalition for Defense of the First Amendment* v. *FCC,* 928 F.2d 866, 875 ("We note that the *Sable* opinion did not describe the Commission's definition of indecency in *ipsissimis verbis.* No question was presented there, and none here, of the contents of the Commission's definition discussed in *Pacifica*.") (9th Cir. 1991); *Alliance for Community Media,* 56 F.3d 105, 129 (D.C. Cir. 1995), *rev'd in part and aff'd in part sub nom. Denver Area Educ. Telecomms. Consortium* v. *FCC,* 518 U.S. 717, 756 (1996); *United States* v. *Evergreen Media Corp. of Chicago,* 832 F. Supp. 1183, 1186 (N.D. Ill. 1993) (the *ACT I* court "went so far as to openly invite correction by the Supreme Court").

[36] *CBS* v. *Democratic National Committee,* 412 U.S. 94, 102 (1973). *See National Broadcasting Co.* v. *United States,* 319 U.S. 190, 225 (1943) ("If time and changing circumstances reveal that the 'public interest' is not served by application of the regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.").

[37] *2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* 18 FCC Rcd. 13,620, 13,623 (2003) ("*Biennial Regulatory Review*"). *See also Carriage of Digital Television Broadcast Signals,* 16 FCC Rcd 2598, ¶ 12 (2001) (concluding that proposed new applications of must carry rules would violate the First Amendment despite Supreme Court approval of analog must carry rules in 1997).

[38] *Pacifica,* 438 U.S. at 748.

[39] *Biennial Regulatory Review* ¶¶ 86-87.

[40] *Id.* ¶ 88. Current research shows that teens and young adults spend considerably more time online than they do watching TV or listening to the radio (16.7 hours per week online versus 13.6 hours watching TV or 12 hours listening to the radio). COMMUNICATIONS DAILY, July 25, 2003, p. 7 (reporting results of study by Harris Interactive and Teenage Research Unlimited).

[41] *See Bolger,* 463 U.S. at 72-73, striking down a restriction on unsolicited mailings of advertisements for contraceptives because the government could not demonstrate that the policy actually serves the stated interest. The Court noted that the policy could at best lend only "incremental support" because parents "must already cope with the multitude of external stimuli that color their children's perceptions of sensitive subjects." *See also Rubin* v. *Coors Brewing Co.,* 514 U.S. 476, 488-89 (1995) ("exemptions and inconsistencies" render a speech restriction irrational and undermine the government's ability to show that it serves its intended purpose).

[42] *See* Lili Levy, *The Hard Case of Broadcast Indecency,* NYU REV. L. & SOC. CHANGE 49, 50 (1992-93).

separate beds,[43] yet the FCC's indecency rules are based on a history of indecency enforcement dating back to 1927.[44] Changes in technology, in society, and in audience expectations all have contributed to vastly different broadcast standards and practices.[45] This is not to suggest that such developments necessarily are "good" or "bad." They merely reflect changes in the "contemporary community standards for the broadcast medium."

The law also has evolved since the Supreme Court considered the FCC's broadcast indecency rules. The Court has since confirmed that "indecent" speech is fully protected by the First Amendment and is not subject to diminished scrutiny as "low value" speech, as three Justices who joined the *Pacifica* plurality opinion had suggested.[46] Rather, it stressed that "[t]he history of the law of free expression is one of vindication in cases involving speech that many citizens find shabby, offensive, or even ugly," and that the government cannot assume that it has greater latitude to regulate because of its belief that "the speech is not very important."[47] Additionally, since *Pacifica* the Court has invalidated government-imposed indecency restrictions on cable television channels despite its finding that "[c]able television broadcasting, including access channel broadcasting, is as 'accessible to children' as over-the-air broadcasting, if not more so."[48] More importantly, in *Reno* v. *ACLU,* the Court for the first time subjected the indecency definition (in the Internet context) to rigorous scrutiny and found it to be seriously deficient.[49] These decisions raise serious questions about the continuing validity of *Pacifica.*

Throughout this period, the FCC has shown a marked inability to clarify and apply its own standard. After a decade in which the FCC applied its policy only to the seven specific words in the George Carlin monologue (the so-called "seven dirty words"), it switched to enforcing a "generic" indecency policy.[50] In 1994, the Commission settled an enforcement action (in part to avoid having to respond to a First Amendment defense in court) and committed to providing "industry guidance" as to the meaning of the indecency standard within six months of the settlement agreement.[51] It took another six and one-half years for the Commission to fulfill this condition by issuing a policy statement in 2001 purporting to offer interpretive guidance on the indecency standard.[52] Yet despite this belated attempt at clarification, the Commission itself has been unable to interpret its own standard, as explained in greater detail below.

IV. THE INDECENCY STANDARD PRESENTS A CONSTITUTIONAL PARADOX

From the outset, the indecency standard has presented a genuine paradox. The courts confirm that indecent speech is fully protected by the First Amendment, yet the FCC's amorphous standard provides no protection as a practical matter. On the other hand, obscenity is "unprotected" by the First Amendment, yet constitutional doctrine has evolved that provides far greater legal protection than does the indecency standard. A brief review of these two doctrines and how they developed places the current deficiencies of the indecency regime into bold relief.

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[43] *See* Louis Chunovic, ONE FOOT ON THE FLOOR: THE CURIOUS EVOLUTION OF SEX ON TELEVISION FROM I LOVE LUCY TO SOUTH PARK 19 (2000) ("At first, any mention at all of sex on TV was strictly taboo—so much so that the ubiquitous censors mandated that even married couples portrayed on the new medium must sleep in separate beds, and the very word 'pregnant' was banned from the airwaves."); Tom Shales, "*Twilight Zone*": *A Dim Shadow of its Former Self*," WASHINGTON POST, November 15, 2002, p. C1 ("There would have been no way of dealing with [the morality of 'virtual sex'] in the original [*Twilight Zone*] because on television of that era, nobody talked about having sex before, during or after marriage—or at any other time, either.").

[44] *See Pacifica,* 438 U.S. at 737-738.

[45] *See generally* Alfred R. Schneider, THE GATEKEEPER: MY 30 YEARS AS A TV CENSOR 4, 140 (Syracuse University Press 2001).

[46] Only Justices Stevens, Rehnquist, and Chief Justice Burger joined that part of the opinion asserting that indecent speech lies "at the periphery of First Amendment concern." *Pacifica,* 438 U.S. at 743.

[47] *Playboy Entertainment Group,* 529 U.S. at 826.

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

[49] 521 U.S. at 871-881.

[50] *New Indecency Enforcement Standards to be Applied to all Broadcast and Amateur Radio Licensees,* 2 FCC Rcd. 2726 (1987) ("*New Indecency Enforcement Standards*").

[51] *Evergreen Media, Inc.* v. *FCC,* Civil No. 92 C 5600 (N.D. Ill. Feb. 22, 1994).

[52] *See Industry Guidance,* 16 FCC Rcd. 7999.

A. Experience With a Vague Test for Obscenity Foreshadowed the Constitutional Problems of the Indecency Standard

Before the courts extended First Amendment principles to the law of obscenity, the legal test that applied was very similar to the standard now used by the FCC to define indecency. The first American cases were based on a 19th Century English decision, *Regina* v. *Hicklin,* which held that obscenity was material that tended to corrupt the morals of a young or immature person.[53] Under the *Hicklin* standard, literature was judged obscene based upon a review only of brief excerpts of a publication and not the work as a whole.[54] Consequently, the intended audience of a book was unimportant if a young and inexperienced person might be exposed to the supposedly corrupting influence. Additionally, it was immaterial whether the book possessed literary merit. Indeed, some found that literary merit compounded the crime, by "enhancing a book's capacity to deprave and corrupt." [55]

Not surprisingly, under this test for obscenity, "[t]he first half of the 20th century [was] marked by heated litigation over books which are now generally regarded as classics."[56] Using the *Hicklin* rule, American courts held obscene such works as Theodore Dreiser's *An American Tragedy,*[57] D.H. Lawrence's *Lady Chatterley's Lover*,[58] Erskine Caldwell's *God's Little Acre*,[59] Radclyffe Hall's *The Well of Loneliness*,[60] Arthur Schnitzler's *Casanova's Homecoming,*[61] Henry Miller's *Tropic of Cancer* and *Tropic of Capricorn*,[62] and James Joyce's *Ulysses.*[63]

In many cases, the mere threat of prosecution was enough to stop publication. By this method, publishers were "persuaded" to withdraw from circulation and destroy all outstanding copies of *Women in Love,* by D.H. Lawrence, *The Genius,* by Theodore Dreiser, and *Memoirs of Hecate County,* by Edmund Wilson.[64] Other literary greats that were attacked included Nathaniel Hawthorne, Walt Whitman, Ernest Hemmingway, Sinclair Lewis, Leo Tolstoy, Honore de Balzac, and George Bernard Shaw.[65]

A significant break with *Hicklin* came in *United States* v. *One Book Entitled Ulysses,* where the United States Court of Appeals for the Second Circuit declined to find the book *Ulysses* obscene when "taken as a whole" and after assessing its effect on the average member of the community.[66] Some other courts began to follow suit.[67] Despite this emerging trend, however, many publishers continued to shy away from books they considered risky. For example, *Lady Chatterley's Lover,* written in 1928, was not published in its unexpurgated form in America until 1959.[68] *Tropic of Cancer,* written in 1934, was unpublished in the United States for 26 years.[69]

Finally, in 1957, the Supreme Court expressly abandoned the *Hicklin* rule and held that the First Amendment requires that works must be judged as a whole in their entire context, considering their effect on the average member of the community—not the most vulnerable. Moreover, a work could not be considered obscene if it possessed serious value.[70] That same year, the Court struck down a Michigan law that prohibited books containing "immoral, lewd [and] lascivious lan-

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[53] *Regina* v. *Hicklin,* 3 L.R.-Q.B. 360 (1868). The test focused not on the "average person in the community," but on "those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

[54] Frederick F. Schauer, THE LAW OF OBSCENITY 23 (1976).

[55] Edward de Grazia, GIRLS LEAN BACK EVERYWHERE 12 (1992).

[56] Schauer, *supra,* at 23-24.

[57] *Commonwealth* v. *Friede,* 171 N.E. 472 (Mass. 1930).

[58] *People* v. *Dial Press,* 48 N.Y.S.2d 480 (Magis. Ct. 1944).

[59] *Attorney Gen.* v. *Book Named "God's Little Acre",* 93 N.E.2d 819 (Mass. 1950).

[60] *People* v. *Friede,* 233 N.Y.S. 565 (Magis. Ct. 1929).

[61] *People* v. *Seltzer,* 203 N.Y.S. 809 (Sup. Ct. 1924).

[62] *United States* v. *Two Obscene Books,* 99 F. Supp. 760 (N.D. Cal. 1951), *aff'd sub nom. Besig* v. *United States,* 208 F.2d 142 (9th Cir. 1953).

[63] Not only was a small literary magazine convicted of obscenity for publishing Ulysses in installments, but the U.S. Post Office seized and burned all of the issues of the magazine. No American publisher considered printing *Ulysses* for the next eleven years. *See* de Grazia, *supra,* at 9-13, 16-17.

[64] *Id.* at 72-73, 710.

[65] Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew,* 33 WM. & MARY L. REV. 741, 746, 758, 771 (1992).

[66] *United States* v. *One Book Entitled Ulysses,* 72 F.2d 705, 707-708 (2d Cir. 1934).

[67] *E.g., United States* v. *Levine,* 83 F.2d 156 (2d Cir. 1936); *ACLU* v. *City of Chicago,* 121 N.E.2d 585 (Ill. 1954), *appeal dismissed,* 348 U.S. 979 (1955); *People* v. *Viking Press, Inc.,* 264 N.Y.S. 534 (Magis. Ct. 1933).

[68] de Grazia, *supra,* at 94; *see Grove Press, Inc.* v. *Christenberry,* 276 F.2d 433 (2d Cir. 1960).

[69] de Grazia, *supra,* at 55, 370.

[70] *Roth* v. *United States,* 354 U.S. 476, 489-490 (1957).

guage . . . tending to the corruption of the morals of youth" because it "reduce[d] the adult population . . . to reading only what is fit for children." [71]

Eventually, the Court settled on the current three part test for obscenity: (1) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." [72] Debate about the test for obscenity has continued, but the problems associated with the discredited *Hicklin* rule are now a thing of the past.

B. The Indecency Standard Provides Less Constitutional Protection Than Does the Test for Obscenity

The unfortunate history of obscenity law and the change that occurred after courts imposed the discipline of the First Amendment on this area of the law should have been instructive in the development of an indecency standard since such speech is supposed to be constitutionally protected. However, the test for indecency prohibits the transmission (at a time of day when children are likely to be in the audience) of "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." [73] Just as under *Hicklin,* the indecency standard applies to selected passages, not to works as a whole; it is based not on the average person in a community, but upon children; and literary or artistic merit does not bar liability. In short, the three-part test that courts developed over time to ensure the application of First Amendment restraints on obscenity laws is precisely what the indecency standard lacks.

The FCC historically has defended its indecency definition on the basis that it is "similar to language" employed in part of the Miller obscenity test.[74] In Reno, however, the government unsuccessfully offered precisely the same argument—that the Communications Decency Act's ("CDA's") "patently offensive" and "indecency" standards are one part of the three-prong Miller test and therefore are constitutional—but the Supreme Court rejected that defense. It stressed that "[j]ust because a definition including *three* limitations is not vague, it does not follow that one of those limitations, standing by itself, is not vague." [75] The Court explained that the other Miller limitations (requiring that the work be "taken as a whole," appeal to the "prurient" interest, and that it must lack serious literary, artistic, political or scientific value) "critically limit[] the uncertain sweep of the obscenity definition." [76]

1. The Indecency Standard Does Not Require Review of the Work as a Whole

Unlike the *Miller* obscenity test, the indecency standard enforced by the FCC has never required an examination of the work "as a whole," or that the material appeal to the prurient interest.[77] Quite to the contrary, the Commission has expressly rejected claims that it "is required [to] take into account the work as a whole."[78] Accordingly, the FCC has found a violation of the law where less than five percent of a program was devoted to sexually-oriented material. The Commission concluded that it could impose a fine "[w]hether or not the context of the entire [program] dwelt on sexual themes." [79] Similarly, if the FCC reverses the staff *Golden Globes Order,* it will have decided that a single word uttered in the course of a three-hour live telecast is sufficient to render the program indecent.

The focus of indecency enforcement on selected passages and not the work as a whole is a significant constitutional defect. Because of this, the Supreme Court found that the indecency standard when applied to the Internet "unquestionably si-

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[71] *Butler,* 352 U.S. at 383.

[72] *Miller* v. *California,* 413 U.S. 15, 24 (1973).

[73] *Industry Guidance,* 16 FCC Rcd. at 8000.

[74] *See Playboy Entertainment Group, Inc.* v. *United States,* 945 F. Supp. 772, 791 (D. Del. 1996).

[75] *Reno,* 521 U.S. at 872-873 (emphasis added).

[76] *Id.* The *Reno* Court found that the indecency standard is inadequate even with respect to the one part of the *Miller* test that it sought to incorporate. *Id.* at 846. The type of programming covered by the indecency standard is not "specifically defined by the applicable . . . law" since Section 1464 (like the CDA) includes no "textual embellishment." *Id.* at 871 & n.35.

[77] *Illinois Citizens Comm. for Broad.* v. *FCC,* 515 F.2d 397, 406 (D.C. Cir. 1974).

[78] *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992,* 8 FCC Rcd. 998, 1004 (1993), *aff'd, Alliance for Community Media* v. *FCC,* 56 F.3d 105 (D.C. Cir. 1995), *rev'd in part and aff'd in part sub nom. Denver Area Educ. Telecomms. Consortium,* 518 U.S. 717.

[79] *WIOD (AM),* 6 FCC Rcd. 3704, 3705 (1989).

lences some speakers whose messages would be entitled to constitutional protection."[80] The Court held that the requirement that the isolated passages be considered "in context" did not cure the problem. More recently, in rejecting the application of the "harmful to minors" standard to online communications, the United States Court of Appeals for the Third Circuit explained that "[t]he taken 'as a whole' language is crucial."[81] As the Supreme Court has emphasized, it is "an essential First Amendment rule [that t]he artistic merit of a work does not depend on the presence of a single explicit scene."[82] Accordingly, any standard that permits a decisionmaker to penalize "indecent" or "harmful to minors" material in isolation necessarily "results in significant overinclusiveness."[83]

2. The Indecency Standard Does Not Evaluate the Effect of Material on the Average Person

The *Miller* test requires that the patent offensiveness of a work be measured by its impact on the average member of the community, and not its effect on the most "vulnerable," but the indecency standard is precisely the opposite. Like the discredited *Hicklin* rule, the focus of indecency regulation is the effect of sexually-oriented material on children.[84] This focus on minors was one of the principal problems of obscenity law before the First Amendment was brought to bear on this area of the law, yet the indecency standard replicates the error.

Even if the indecency standard employed all three prongs of the Miller test, its requirement that the Commission assess patent offensiveness as to children makes the standard far less precise. As the Third Circuit pointed out in *ACLU* v. *Ashcroft,* the term minor "applies in a literal sense to an infant, a five-year-old, or a person just shy of the age of seventeen" and that speakers "must guess at the potential audience of minors and their ages" in order to comply with the law.[85] Such a requirement "is not narrowly drawn to achieve the statute's purpose . . . and does not lend itself to a commonsense meaning."[86] The court concluded that "[a]s a result of this vagueness" those affected by the law will be deterred from engaging in a wide rage of constitutionally protected speech" and that "[t]he chilling effect caused by this vagueness offends the Constitution."[87]

The Third Circuit in *Ashcroft* was ruling on the "harmful to minors" standard, which is even more analytically rigorous than indecency because it applies all three parts of the *Miller* test (as modified for minors). The court's conclusions apply with even greater force to the indecency standard, given its lack of definitional embellishment. Moreover, the "harmful to minors" standard requires the government to demonstrate that material is "virtually obscene" and even then cannot impose restrictions that limit access by adults.[88] The indecency standard, by sharp contrast, does not come close to providing this level of protection, thus magnifying the constitutional problems of the FCC's rules.

3. The Indecency Standard May Restrict Material That Has Serious Literary, Artistic, Political or Scientific Value

Contrary to the *Miller* standard, the FCC has stated that the merit of a work is not a complete defense to an indecency complaint, but is only "one of many variables that make up a work's 'context.'"[89] In this regard, Judge Patricia Wald has noted that "'[i]ndecency' is not confined merely to material that borders on obscenity—'obscenity lite.'"[90] Rather, the standard casts a larger net encompassing other, less offensive protected speech regardless of its merit. Thus, in many instances, "the programming's very merit will be inseparable from its seminal 'offensiveness.'"[91] The FCC has even acknowledged that, because serious merit does not save material from an indecency finding, there is a "broad range of sexually-oriented material that has been or could be considered indecent" that does "not [include] obscene speech."[92]

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[80] *Reno,* 521 U.S. at 874.
[81] *ACLU* v. *Ashcroft,* 322 F.3d 240, 252 (3d Cir. 2003).
[82] *Ashcroft* v. *Free Speech Coalition,* 122 S. Ct. 1389, 1401 (2002).
[83] *ACLU* v. *Ashcroft,* 322 F.3d at 267.
[84] *Pacifica,* 438 U.S. at 749-750; see *Reno,* 521 U.S. at 871 n.37.
[85] *ACLU* v. *Ashcroft,* 322 F.3d at 254.
[86] *Id.* at 255.
[87] *Id.* at 269 n.37.
[88] *American Booksellers Ass'n,* 484 U.S. at 394; *accord American Booksellers* v. *Webb,* 919 F.2d 1493, 1504-05 (11th Cir. 1990).
[89] *Infinity Broadcasting Corp.,* 3 FCC Rcd. 930, 932 (1987), *aff'd in part and rev'd in part on other grounds sub nom. ACT I,* 852 F.2d 1332.
[90] *Alliance for Community Media* v. *FCC,* 56 F.3d at 130 (Wald, J., dissenting).
[91] *Id.*
[92] *Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464,* 5 FCC Rcd. 5297, 5300 (1990), *rev'd on other grounds sub nom. ACT II,* 932 F.2d 1504.

Thus, the Commission has expressly declined to hold that "if a work has merit it is *per se* not indecent," and that material may be found indecent for broadcast even where the information is presented "in the news" and is presented "in a serious, newsworthy manner."[93] In this regard, it is sobering to realize that in *Gillett Communications* v. *Becker,* a federal district court held that the videotape *Abortion in America: The Real Story,* transmitted as part of a political advertisement by a bona fide candidate for public office, was indecent.[94]

In striking down the CDA's indecency standard as applied to the Internet, the *Reno* Court found the absence of a "societal value" requirement "particularly important."[95] It noted that requiring the inclusion of a work's merit "allows appellate courts to impose some limitations and regularity on the definition by setting, as a matter of law, a national floor for socially redeeming value."[96] No such requirement is contained in the indecency standard.[97] As a result, the Court concluded that application of the indecency standard threatened to restrict "discussions of prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalogue of the Carnegie Library."[98] The district court in *Reno* similarly had expressed concern that the indecency standard restricts "a broad range of material" including "contemporary films" such as "*Leaving Las Vegas.*"[99]

The FCC has been baffled by such questions, as evidenced by its investigation for indecency of the BBC-produced, Peabody Award-winning mini-series, *The Singing Detective.* The critically-acclaimed program was aired by various public television stations between 1988 and 1990, and a year-long FCC investigation ensued after the program appeared on a KQED-TV in San Francisco in 1990. The Commission's review did not consider the full seven hours of the program, but instead focused on several short scenes that included brief glimpses of nudity and one scene in which a child witnessed a sexual encounter. The FCC never formally resolved the complaint, and simply let the matter fade away after putting the TV station through the trouble and significant expense of defending its actions for an extended period.[100] But the Commission's actions ensured that *The Singing Detective* would not be broadcast again in the United States. The episode demonstrates that, just as under the *Hicklin* rule, a lax standard can censor meritorious speech, and that a successful prosecution is not needed in order to suppress the work.[101]

4. The Indecency Standard Lacks Strong Procedural Safeguards

As a general matter, the First Amendment requires the government to use "sensitive tools" to "separate legitimate from illegitimate speech."[102] Strict procedural requirements govern any administrative procedure that has the effect of denying or delaying the dissemination of speech to the public.[103] In particular, the First Amendment commands that any delay be minimal, and that the speaker have access to prompt judicial review.[104] Where ongoing government regulation of speech

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[93] *Letter to Merrill Hansen,* 6 FCC Rcd. 3689, 3689 (1990) (citation omitted). See also KLOL (FM), 8 FCC Rcd. 3228 (1993); *WVIC-FM,* 6 FCC Rcd. 7484 (1991).

[94] *Gillett Communications* v. *Becker,* 807 F. Supp. 757 (N.D. Ga. 1992), *appeal dismissed mem.,* 5 F.3d 1500 (11th Cir. 1993).

[95] 521 U.S. at 873.

[96] *Id.*

[97] *E.g., Pacifica Found. Inc.,* 2 FCC Rcd. 2698 (1987) (case involving serious drama regarding homosexual relations in the post-AIDS era). Significantly, in that case, the FCC disregarded the artistic merit of the play, saying that its indecency finding was not affected by the fact that the material presented "was excerpted from a dramatic performance that dealt with homosexual relations and Acquired Immune Deficiency Syndrome (AIDS)" or that the excerpts came from a "critically acclaimed and long-running [play] in Los Angeles area theatres." *Infinity Broadcasting Corp. of Pennsylvania,* 3 FCC Rcd. at 932; *cf. ACLU* v. *Reno,* 929 F. Supp. 824, 852-853 (E.D. Pa. 1996) (Sloviter, J.) (discussing the chilling effect of indecency standard to serious dramas such as the gay-themed play "*Angels in America*").

[98] 521 U.S. at 878.

[99] *ACLU* v. *Reno,* 929 F. Supp. 824, 855 (E.D. Pa. 1996) (Sloviter, J.).

[100] *See* Robert Corn-Revere, *New Age Comstockery,* 4 CommLaw Conspectus 173, 181-182 (1996); Marjorie Heins, NOT IN FRONT OF THE CHILDREN 119 (Hill & Wang: New York 2001).

[101] *Compare Pacifica,* 438 U.S. at 741 n.16 (even if *Lady Chatterley's Lover,* when taken as a whole, is not obscene, "the utterance of such words or the depiction of such sexual activity on radio or TV would raise . . . public interest and section 1464 questions") (quoting *En Banc Programming Inquiry,* 44 F.C.C. 2303, 2307 (1960)) with *Kingsley Int'l Pictures Corp.* v. *Regents,* 360 U.S. 684, 688-689 (1959) (invalidating, on First Amendment grounds, licensing restriction directed at film *Lady Chatterley's Lover* because it "portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of [the] citizenry").

[102] *Speiser* v. *Randall,* 357, U.S. 513, 525 (1958).

[103] *Freedman* v. *Maryland,* 380 U.S. 51, 58-61 (1965).

[104] *United States* v. *Thirty-Seven Photographs,* 402 U.S. 363 (1971).

is involved, the government's obligation to provide due process is heightened.[105] In every case where the government seeks to limit speech, the constitutional presumption runs against the government, which must justify the restriction.[106]

The FCC's regime of enforcing the indecency rules is inconsistent with these basic principles. For example, the Commission has begun to issue letters of inquiry that indicate "a complaint has been filed" and demand detailed responses from licensees but do not indicate the identity of the complainants.[107] Indeed, the Commission does not require its anonymous complainants to submit a tape or transcript of allegedly offending broadcasts, and has indicated that when a complaint is received it is the licensee's obligation to prove that the transmission in question was not indecent. As the Chief of the FCC's Enforcement Bureau said at a conference of the National Association of Broadcasters' state leadership, "[i]f the station can't refute information in the complaint, we'll assume the complainant got it right."[108] But such an approach "raises serious constitutional difficulties" when the government seeks "to impose on [a speaker] the burden of proving his speech is not unlawful."[109]

This problem is exacerbated by the erosion of the Commission's requirement that complainants provide a tape or transcript of the offending broadcast. As recently as 2001 the FCC stressed that it needed "as full a record as possible to evaluate allegations of indecent programming" because of "the sensitive nature of these cases and the critical role of context."[110] It explained that it could take action only in response to "documented complaints," and that the Commission's historic practice was to require "a full or partial tape or transcript or significant excerpts of the program."[111] More recently, however, the FCC has moved away from this requirement, and some Commissioners have suggested that it be dispensed with entirely. In one case, the Enforcement Bureau acknowledged the lack of "a tape, transcript or significant excerpt" but nevertheless concluded that "the excerpts referenced in complainant's letters . . . were 'significant enough'" for it to consider "the context of the material."[112] This practice begs the question of how the Commission can evaluate context in the absence of a tape or significant excerpt, and it raises the more constitutionally troubling issue of shifting the burden of proof. To "cure" this problem, the Commission has begun to require broadcasters to supply tapes in response to letters of inquiry (that were triggered by complaints). Some of the complaints are years old and are unsubstantiated, but the Commission has asked licensees to provide information in order to supply the necessary context.[113] Some FCC Commissioners have even suggested requiring licensees to submit tapes of their broadcasts in response to any indecency complaint. But whether or not tapes are required as a matter of routine or merely to bolster otherwise deficient complaints, the Commission has ventured into dangerous territory. The D.C. Circuit has held that requiring licensees to tape programs to facilitate official oversight "presents the risk of direct governmental interference in program content" and is constitutionally infirm.[114]

Finally, once the Commission, in its sole discretion, decides that a particular broadcast is indecent, the process to review that decision is anything but prompt. For the licensee, challenging an indecency determination generally requires refusing

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[105] *City of Lakewood,* 486 U.S. at 757; *Houston* v. *Hill,* 482 U.S. 451 (1987).

[106] *Playboy Entertainment Group,* 529 U.S. at 816 ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."); *Interactive Digital Software Ass'n* v. *St. Louis County,* 329 F.3d 954, 959 (8th Cir. 2003).

[107] The Commission's decision to act on anonymous complaints is puzzling since current rules provide that informal complaints should be routinely available to the public. *See* 47 C.F.R. §§ 0.453(a)(2)(ii)(F), 0.453(a)(2)(ii)(H).

[108] *See* Bill McConnell, *New Rules for Risque Business,* BROADCASTING & CABLE, March 4, 2002.

[109] *Free Speech Coalition,* 122 S. Ct. at 1404; *ACLU* v. *Ashcroft,* 322 F.3d at 260.

[110] *Industry Guidance,* 16 FCC Rcd. at 8015.

[111] *Id.* at 8015. In addition to a tape or transcript, the Commission requires complaints to specify the date and time of the broadcast and the call sign of the station.

[112] *In the Matter of Emmis Radio License Corp.,* 17 FCC Rcd. 18,343, 18,344 (Enforcement Bureau 2002) ("[a]bsent any contrary evidence from [the licensee], we determined that the record was adequate enough for us to determine that the station willfully and repeatedly aired indecent material"). *See also Letter from Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau to Mindy Pierce,* EB-01-IH-0331/GDJ (Feb. 12, 2002) ("even an inexact transcript may be sufficient to meet procedural requirements").

[113] In some cases the Commission staff has asked for tapes that include a "buffer zone" of up to an hour on each side of the program that was the subject of the complaint. Such a request bears no relationship to the context of a particular program and amounts to nothing more than a fishing expedition.

[114] *Community-Service Broadcasting of Mid-America* v. *FCC,* 593 F.2d 1102, 1110, 1116 (D.C. Cir. 1978) (*en banc*) (invalidating a program taping requirement imposed on public broadcasters where the purpose of the requirement was to increase government review of controversial programming content).

to pay a proposed forfeiture and enduring an enforcement proceeding before it may raise a defense in court, assuming the government initiates a collection action.[115] During this time, the Commission may withhold its approval of other matters the licensee has pending before the agency. For this reason, no licensee has been able to hold out long enough to test the validity of an FCC indecency determination.[116] From the perspective of the artist whose work may be effectively banned from the air by an FCC decision (including a decision made on delegated authority by a lower level official), the government's position is that there is no right to seek judicial review at all.[117]

C. Judicial Scrutiny of the Indecency Standard in Other Contexts Underscores its Constitutional Problems

Recent decisions of the Supreme Court and of lower courts confirm that the indecency standard cannot survive rigorous constitutional review. Although these decisions did not examine the indecency regime in the context of broadcasting, their analysis undermines the key premises of the same standard the FCC historically has used to enforce its broadcast rules. These decisions are particularly instructive, since no majority of the Supreme Court ever endorsed the broad application of the *Pacifica* standard, and lower courts pointedly refrained from analyzing the logic of the test. Yet when the Supreme Court finally deconstructed the language of the indecency rule, it held that it was unconstitutional for all of the reasons identified above.

Reno v. *ACLU* represents the first time the Supreme Court subjected the indecency test to rigorous First Amendment review and in doing so it found the standard to be seriously deficient. Writing for a near-unanimous Court, Justice Stevens concluded that the indecency restrictions of the Communications Decency Act ("CDA") were invalid because of vagueness and overbreadth.[118] This finding is especially meaningful since Justice Stevens also wrote the *Pacifica* decision, and he began his analysis by reaffirming the constitutional baseline: that the governmental interest in protecting children from harmful materials "does not justify an unnecessarily broad suppression of speech addressed to adults."[119] Reaffirming the Court's earlier rulings in *Butler,* and *Bolger,* the Court emphasized that the government may not reduce the adult population to only what is fit for children.[120]

Since then, virtually every court that has ruled on similar laws has held that they are unconstitutional.[121] These cases related primarily to state attempts to regulate "harmful to minors" material. But as the Third Circuit found most recently in reviewing the Child Online Protection Act, successor to the CDA, the focus on minors (among other things) rendered the law ambiguous. "The chilling effect caused by this vagueness," the court concluded, "offends the Constitution."[122] These cases struck down or enjoined laws that restricted online communications, not broadcasting, but the logic of the decisions is not affected by the medium of transmission. A vague standard does not become more precise—or more consistent with constitutional requirements—because the law is applied to one technology and not another. The question, then, is whether First Amendment protections for broadcasting are so attenuated to permit the government to apply a standard that the courts have now found to be patently defective.[123] The primary rationale for such different treatment, cited both by the Supreme Court and now touted by the Commission, is that more intensive content regulation has been permitted for broadcasting histori-

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[115] *See Industry Guidance,* 16 FCC Rcd. at 8016.

[116] *ACT IV,* 59 F.3d at 1254.

[117] *Sarah Jones* v. *FCC,* 30 Media L. Rep. 2534 (S.D.N.Y. Sept. 4, 2002), *vacated as moot,* Docket No. 02-6248 (S.D.N.Y. March 12, 2003)(not reported in F. Supp. 2d).

[118] 521 U.S. at 875.

[119] *Id.* at 870-874, 881-882. Justice O'Connor, joined by Chief Justice Rehnquist, wrote an opinion concurring in part and dissenting in part on other grounds, but the Court was unanimous in holding that the CDA provisions requiring the screening of "indecent" displays from minors "cannot pass muster." *Id.* at 886.

[120] *Id.* at 875 & n.40.

[121] *ACLU* v. *Johnson,* 194 F.3d 1149 (10th Cir. 1999); *Cyberspace Communications, Inc.* v. *Engler,* 238 F.3d 420 (6th Cir. 2000) (table); *ACLU* v. *Napolitano,* Civ. 00-505 TUC ACM (D. Ariz. Feb. 21, 2002); *American Bookseller's Foundation for Free Expression* v. *Dean,* 202 F. Supp.2d 300 (D. Vt. 2002); *Bookfriends, Inc.* v. *Taft,* 223 F. Supp.2d 932 (S.D. Ohio 2002); *PSINet* v. *Chapman,* 167 F. Supp.2d 878 (W.D. Va. 2000), *question certified,* 317 F.3d 413 (4th Cir. 2003).

[122] *ACLU* v. *Ashcroft,* 322 F.3d at 269 n.37.

[123] *See Pacifica,* 438 U.S. at 759-760 (Powell, J., concurring) ("This is not to say . . . that the Commission has an unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from momentary exposure to it in their homes.").

cally.[124] The Court in Pacifica described the "pervasive presence" of broadcasting and relied on the fact that broadcast licensees have been barred by federal law from transmitting "obscene, indecent or profane language" ever since the Radio Act of 1927.[125] The Commission continues to point to "special justifications" for the different treatment, including "the history of extensive government regulation of the broadcast medium," spectrum scarcity, and the "invasive nature" of broadcasting.[126]

Given the changes in the media landscape most recently catalogued by the FCC in various proceedings, the principal remaining "special justification" is the history of content regulation by the FCC. But this is a tenuous basis upon which to perpetuate a constitutionally deficient standard. For the FCC to argue that it can regulate broadcasting content more restrictively now because it did so in the past does not distinguish broadcasting from other media. Indeed, as noted earlier, the government restricted books under the *Hicklin* rule in a way that is almost identical to the FCC's current regulation of radio and television. Similarly, when the FCC was first chartered, state and local governments subjected films to prior review and censorship.[127] But the law changed, and the last such cinema review board in the United States was finally dismantled a decade ago.[128]

Accordingly, it is difficult for the Commission to argue that it may continue to rely on First Amendment law as it applied to broadcasting in 1927 or 1934 because Congress authorized it to regulate "indecent" or "profane" broadcasts in those years. A brief look at the Commission's actions during that period shows why this is so. In late 1937, for example, hundreds of radio listeners complained about an episode of NBC's "Charlie McCarthy" program in which the puppet Charlie McCarthy and Mae West portrayed the title characters in a sketch entitled "Adam and Eve." The FCC investigated the matter and found nothing in the script objectionable, but some of Mae West's inflections during the broadcast were found to be "suggestive." On this basis the FCC admonished NBC and its affiliates that the program was "vulgar, immoral or of such other character as may be offensive to the great mass of right-thinking, clean-minded American citizens."[129] In another early case, the Ninth Circuit upheld the conviction of an individual for violating Section 29 of the Federal Radio Act which prohibited the utterance of "any obscene, indecent, or profane language by means of radio communication." Although the court agreed that the speaker did not make any statements that could be considered obscene or indecent (even though it applied the *Hicklin* rule), it nevertheless concluded that the broadcast was "profane" because the defendant "referred to an individual as 'damned,'" that he "used the expression 'By God' irreverently," and "announced his intention to call down the curse of God upon certain individuals."[130]

Such decisions obviously are unsupportable today, yet they represent "the history of extensive government regulation of the broadcast medium" upon which the Commission relies as a "special justification" supporting its indecency policies.[131] While some may argue that the Commission's notion of what is "patently offensive" or "indecent" has been updated since the 1930s, this does not answer the question presented by the indecency standard's emphasis on "contemporary" community standards. The standard was not frozen in 1978, when the Supreme Court decided *Pacifica,* and the Commission has a constitutional obligation to determine what type of programming current audiences have come to expect in 2004. In whatever fashion the Commission chooses to address this issue, it is clear that the First Amendment

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[124] *Reno,* 521 U.S. at 867 (noting that the FCC "had been regulating radio stations for decades").

[125] *Pacifica,* 438 U.S. at 735-738.

[126] *See Industry Guidance,* 16 FCC Rcd. at 8000 & n.9.

[127] *See, e.g., Times Film Corp.* v. *City of Chicago,* 365 U.S. 43, 69-78 (1961) (Warren, C.J. dissenting) (providing detailed examples of film censorship and noting the "astonishing" extent "to which censorship has recently been used in this country").

[128] *Freedman* 380 U.S. at 58-61; Elizabeth Kastor, *It's a Wrap: Dallas Kills Film Board,* WASHINGTON POST, Aug. 13, 1993 p. D1.

[129] *See FCC Issues Rebuke for Mae West Skit,* BROADCASTING, Jan. 15, 1938, p. 13.

[130] *Duncan* v. *United States,* 48 F.2d 128, 134 (9th Cir.), *cert. denied,* 283 U.S. 863 (1931). The FCC has relied on the *Duncan* case to support its indecency policies as recently as 1970. *See In re WUHY-FM,* 24 F.C.C.2d 408, 412-413 (1970). In a 1962 case, the FCC found that a D.J.'s banter that included nicknames for local towns ("Ann's Drawers" for Andrews; "Bloomersville" for Bloomville) and his use of the expressions such as "let it all hang out" was "obscene, coarse, vulgar, and suggestive material susceptible of indecent double meaning." Palmetto Broadcasting Co., 33 FCC 250, 251 (1962), *aff'd on other grounds, Robinson* v. *FCC,* 334 F.2d 534 (D.C. Cir. 1964). For additional examples, *see* Heins, *supra note* ____ at 89-97.

[131] *See Industry Guidance,* 16 FCC Rcd. at 8000 & n.9.

does not countenance the notion of individual Commissioners using their personal preferences to define community standards.[132]

FCC ENFORCEMENT EXPERIENCE CONFIRMS THE IMPRECISION OF THE INDECENCY STANDARD

FCC decisions under the indecency standard provide scant guidance either for those who must enforce or comply with the law. Since there is no body of court decisions interpreting or applying the indecency standard in particular cases, licensees must look to the Commission for guidance. But the FCC's rulings provide no real assistance, because most are unavailable, thus constituting a body of secret law.[133] The vast majority of indecency decisions are unpublished, informal letter rulings that are stored in individual complaint files at the FCC. In this regard, the dismissals would be most helpful to understanding the Commission's application of the standard, but these decisions, with a few exceptions, are not made public. Even where the Commission reaches the merits of an indecency complaint, its decision typically consists of conclusory statements regarding its determination that a particular broadcast is indecent.[134]

Seeking to address this problem (and finally to respond to its obligation in the *Evergreen Media* settlement agreement), the Commission in April 2001 issued a Policy Statement purporting to clarify its criteria governing enforcement of the indecency standard.[135] It noted that there are two fundamental determinations that must be made: (1) whether the material depicts or describes sexual or excretory organs or activities, and (2) whether the material is "patently offensive" as measured by a national standard for the broadcast medium. The Policy Statement set forth a number of examples of enforcement actions and sought to analyze their outcomes based on the degree of explicitness, whether the material "dwells" on sexual matters, and whether the material is "pandering."[136] However, the Commission pointed out that such "contextual determinations are necessarily highly fact-specific, making it difficult to catalog comprehensively all of the possible contextual factors that might exacerbate or mitigate the patent offensiveness of particular material." In other words, because each case is decided based on its individual facts, the Commission could not articulate specifically what factors will distinguish one case from another.

The FCC's inability to describe how the factors it uses would apply in a given case highlighted the absence of precision in the indecency standard itself. The root problem, as the *Reno* Court recognized, is with the lack of judicial rigor in the definitions of "indecency" and "patent offensiveness." The indecency standard gives the FCC excessive discretion because it is not limited by requirements that the affected speech be specifically defined by law, or lack serious merit, or be considered as a whole.[137] These problems were graphically illustrated by two forfeiture orders that were issued within weeks of the *Industry Guidance.*

In the first of these decisions, the Enforcement Bureau issued a $7,000 Notice of Apparent Liability to noncommercial radio station KBOO-FM for the broadcast of a rap song entitled "Your Revolution."[138]— The song, written and performed by award-winning poet and performance artist Sarah Jones, is a loose reworking of Gil Scott-Heron's classic poem, "The Revolution Will Not Be Televised." According to Jones, "'Your Revolution' was written as a response to music on mainstream radio which often treats women as sex objects and play things." The song has been performed for junior high and high school students in educational programs coordinated through the New York City Board of Education. Nevertheless, the Bureau concluded

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[132] *HBO, Inc.* v. *Wilkinson,* 531 F. Supp. 987, 993 n.9 (D. Utah 1982) (striking down indecency standard for cable television because it established "a standard that permitted a judge to get out of the formula any value judgment that he chose to put in"). *See also Jones* v. *Wilkinson,* 800 F.2d 989 (10th Cir. 1986), *aff'd mem.* 480 U.S. 926 (1987).

[133] As Commissioner Copps has noted, of the nearly 500 complaints received by the Enforcement Bureau in 2002, "83% were either dismissed or denied, one company paid a fine, and the rest are pending or otherwise in regulatory limbo." Remarks of Commissioner Michael J. Copps to the NATPE 2003 Family Programming Forum (January 22, 2003).

[134] After a comprehensive analysis of the FCC's indecency rulings, Professor Lili Levy concluded that "the Commission applies its policy conclusorily, acontextually, and even inconsistently, in an ambivalent practice suggesting that it simply knows indecency 'when it sees it.'" Levy, *supra* note ____ at p.175. *See generally id.* at pp. 101-112 (discussing cases).

[135] *Industry Guidance,* 16 FCC Rcd. at 7999.

[136] *Id.* at 8003.

[137] *Reno,* 521 U.S. at 872-876.

[138] *In the Matter of The KBOO Foundation,* 16 FCC Rcd. 10731 (Enforcement Bureau 2001) (issuing $7,000 forfeture for broadcast of "Your Revolution").

that "Your Revolution" is indecent because it contains "unmistakably patently offensive sexual references."

Although the policy statement described the context of a work as "critically important," the Bureau dismissed KBOO's arguments that the sexual references in "Your Revolution" must be evaluated as contemporary social commentary. It pointed out that "the Commission has rejected an approach to indecency that would hold that material is not *per se* indecent if the material has merit," and concluded that the FCC "previously has found similar material to be indecent, and we see no basis for finding otherwise in this case." Despite this confident assessment, the Enforcement Bureau reversed itself nearly eighteen months later, in February 2003.[139] Describing the broadcast as "a very close case," the Bureau found that "on balance and in context, the sexual descriptions in the song are not sufficiently graphic to warrant sanction." It noted that Sarah Jones has been asked to perform "Your Revolution'" at high school assemblies and concluded that the song did not violate contemporary community standards for the broadcast medium.

Shortly after the initial KBOO forfeiture was released, the Enforcement Bureau issued another $7,000 Notice of Apparent Liability for the broadcast of a rap song.[140] This time, the notice was issued to a Pueblo, Colorado commercial station for repeated broadcasts of the "radio edit" of the Eminem song "The Real Slim Shady." Although the Bureau acknowledged that the station played a version of the song "that omitted certain offensive language through the use of a muting device or overdubbed sound effect," it found that "the licensee failed to purge a number of indecent references" and that even the edited version of the song "contains unmistakable offensive sexual references." [141]

On reconsideration, however, the Bureau found that it had been mistaken about its previous "unmistakable" conclusions. It characterized the sexual references in the radio edit of "The Real Slim Shady" as "oblique," and not "expressed in terms sufficiently explicit or graphic enough to be found patently offensive." As to the context of the song, the Bureau concluded that the edited version did "not appear to pander to, or to be used to titillate or shock its audience." [142]

These decisions show that the FCC is sometimes willing to correct its mistakes—which is good—but they also show that the agency was unable to apply its own standard even as it was attempting to provide industry guidance. The initial rulings effectively banned the material in question from the air, except for radio stations that might have been willing to risk the transmission of material already branded by the government as indecent. [143] Sarah Jones' "Your Revolution" was kept off the air for almost two years, while the radio edit of "The Real Slim Shady" was banned for over six months.

In cases such as this, the fault lies not so much in the agency as in the standard it has been called upon to enforce. Indeed, the initial indecency findings regarding Sarah Jones and Eminem were foreshadowed by Justice Brennan's dissent in *Pacifica* where he criticized the plurality for its "depressing inability to appreciate that in our land of cultural pluralism, there are many who think, act, and talk differently from the Members of this Court, and who do not share their fragile sensibilities." He added that "[i]t is only an acute ethnocentric myopia that enables the Court to approve the censorship of communications solely because of the words they contain." [144] The FCC illustrates Justice Brennan's point only too well, where five political appointees have been tasked with defining "contemporary community

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[139] *In the Matter of The KBOO Foundation,* 18 FCC Rcd. 2472 (Enforcement Bureau, 2003).

[140] *In the Matter of Citadel Broadcasting Company,* 16 FCC Rcd. 11,839 (Enforcement Bureau, 2001).

[141] The decision brings to mind a recent parody of FCC enforcement policies in *The Onion:*

Frustrated FCC Unable to Stop Use of Word "Friggin"

Washington, DC—The government agency responsible for enforcing broadcast-decency laws can do nothing to stop rampant use of the word "friggin," Federal Communications Commission Chairman Michael K. Powell said Monday. "Everyone knows what it really means when someone uses that word," Powell said. "Still, we hear it all over the morning radio shows, all the time. Oooh, it burns me up. Those DJs aren't fooling anyone, certainly not us here at the FCC. But sadly, our hands are tied." Powell suggested that users of the non-profanity just grow up. *Latest Headlines,* THE ONION, October 8, 2003.

[142] *In the Matter of Citadel Broadcasting Company,* 17 FCC Rcd. 483 (Enforcement Bureau, 2002).

[143] *See KGB, Inc.,* 13 FCC Rcd. 16396 (1998) ("higher degree of culpability for the subsequent broadcast of material previously determined by the Commission to be indecent"); *Industry Guidance,* 16 FCC Rcd. at 8016 (same).

[144] *Pacifica,* 438 U.S. at 775 (Brennan, J., dissenting).

standards for the broadcast medium." Experience shows that the Commission is ill-equipped to do so.[145]

Administrative procedures that the Commission believed would mitigate the inherent uncertainty of the indecency standard have proven to be an utter failure. The FCC in the past has asserted that, if individual rulings fail to "remove uncertainty" in this "complicated area of law," it may use its power to issue declaratory rulings to clarify the indecency standard. [146] In practice, however, the Commission has never granted such a request.

When Pacifica Radio sought to broadcast its annual Bloomsday reading from James Joyce's *Ulysses,* the Commission declined to issue a declaratory ruling that the material was not indecent despite a 60-year-old judicial precedent supporting the literary value of the book.[147] The FCC's refusal to issue an opinion on the literary merits of Ulysses (in the same year it promised to "remove uncertainty" through declaratory rulings) is particularly telling. As Judge Sloviter observed in holding that the CDA's indecency standard was invalid, the government's promise that it will enforce the indecency standard "in a reasonable fashion . . . would require a broad trust indeed from a generation of judges not far removed from the attacks on James Joyce's *Ulysses* as obscene."[148]

The Commission has refused to clarify its indecency standard even in the face of judicial requests for guidance. In *Playboy,* for example, the district court asked whether there are "any FCC letter or advisory opinions that are available to assist this Court, the plaintiff, or other channels . . . in construing the permissible scope of regulation."[149] Notwithstanding the district court's prompting, the FCC rejected Playboy's request for a declaratory ruling to clarify the status of a safe sex documentary that was to premiere on World AIDS Day in December 1997, anlong with several other programs. In a one-page letter denying the request, issued long after World AIDS Day came and went, the Chief of the Cable Services Bureau wrote that "declaratory rulings related to programming issues must be dealt with cautiously" and "have the potential to be viewed as prior restraints."[150]

Just as the declaratory ruling process was no help to Playboy, it failed to provide any specific relief for Sarah Jones, whose work was banned from the air for eighteen months by the Bureau's forfeiture order. Jones initially filed a declaratory judgment action in federal district court seeking a determination that the work is not indecent and that the FCC's decision violated her rights under the First and Fifth Amendments. However, the court dismissed the action, finding that the Bureau decision was not "final agency action" and that any appeal from a final action must be brought in the court of appeals. The court suggested that Jones should ask the FCC to issue a declaratory ruling if she was concerned about delay in obtaining a final order.[151] On October 2, 2002, Jones filed such a declaratory ruling request, but it was dismissed as moot when the Bureau reversed its initial order in February 2003.

Although Jones ultimately got the substantive ruling she sought as a result of KBOO's reconsideration request, the FCC's declaratory ruling procedures did nothing to expedite the process or clarify the law. Even with the correct (albeit grossly delayed) resolution, the Bureau's description of the matter as "a very close case" ensures that artists and broadcasters will derive no meaningful guidance from the reconsideration decision, other than in its application to the poem "Your Revolution."[152] If the Commission still believes that the Sarah Jones matter was "close," then the only thing that is clear about this area of law is the FCC's inability to evaluate artistic merit.

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[145] *See WUHY-FM,* 24 F.C.C.2d at 423 (Dissenting statement of Commissioner Johnson) ("What the Commission decides, after all, is that the swear words of the lily-white middle class may be broadcast, but that those of the young, the poor, or the blacks may not."); Levy, *supra* note 17 (indecency restrictions have led to "class- and race-based censorship"). *See generally id.* pp. 70-85.

[146] *See New Indecency Enforcement Standards,* 2 FCC Rcd. at 2727.

[147] *William J. Byrnes, Esq.,* 63 R.R.2d 216 (Mass Media Bur. 1987). See United States v. *One Book Entitled Ulysses,* 72 F.2d 705 (2d Cir. 1934).

[148] *ACLU* v. *Reno,* 929 F.Supp. at 857.

[149] *Playboy Entertainment Group, Inc.* v. *United States,* Civil Action No. 96-94-JJF (D. Del. Oct. 31, 1997), slip op. at n.6.

[150] *See Letter from Meredith J. Jones, Chief, Cable Services Bureau to Robert Corn-Revere, Counsel for Playboy Entertainment Group, Inc.* (January 30, 1998).

[151] *Sarah Jones* v. *FCC,* 30 Media L. Rep. 2534 (S.D.N.Y. Sept. 4, 2002), *vacated as moot,* Docket No. 02-6248 (S.D.N.Y. March 12, 2003)(not reported in F. Supp. 2d).

[152] *KBOO Foundation,* 18 FCC Rcd. 2472.

VI. THERE ARE NO QUICK FIXES THAT CAN CURE THE CONSTITUTIONAL DILEMMA POSED BY THE INDECENCY STANDARD

Given the inherent imprecision of the indecency standard it is superficially tempting to remove uncertainty simply by specifying which words are forbidden on radio and television. The FCC followed this approach between 1978 and 1987 by focusing enforcement on the seven words contained in the George Carlin routine that led to *Pacifica.*[153] However, the Commission concluded that the approach was unsatisfactory, and in mid-1987 announced that it would apply the indecency standard generically. Now, after 16 years of experience with the generic standard, people both inside and outside the FCC are advocating once again the adoption of specific prohibitions. As noted earlier, Chairman Powell reportedly has called for a per se ban on profanity between 6 a.m. and 10 p.m. (with a possible exception for political speech),[154] and Congressman Ose has introduced a new list of prohibited words.[155]

Such a *per se* approach is unlikely to remove uncertainty in the way its proponents hope, and would raise a host of new constitutional questions. Currently, the indecency standard seeks to evaluate the context in which words are used as a diluted proxy for the obscenity test's "serious merit" prong. Removing this factor from the analysis would mean that the listed words are considered indecent regardless of the context, so long as they are broadcast between 6 a.m. and 10 p.m. A *per se* approach would be easier to apply than the current indecency standard (at least initially), but would impose significant penalties on speech that unquestionably is protected by the First Amendment. For example, such a rule would impose significant penalties on any broadcaster who permitted readings from certain portions of the Bible.[156]

It would also impose sanctions on broadcasters that transmitted one of the forbidden words during a newscast, or in the presentation of classic literature. The FCC has faced such questions in the past:

- In 1991 the Commission dismissed an indecency complaint against National Public Radio for a newscast which included an except of a wiretap from the trial of mob boss John Gotti. The words "f**k" or "f**king' were repeated ten times in a 30-second segment. Nevertheless, the Commission found that the "surrounding circumstances persuade us that the use of expletives during the Gotti segment does not meet our definition of broadcast indecency." [157]
- When Pacifica radio sought a declaratory ruling permitting it to broadcast annual Bloomsday reading from James Joyce's *Ulysses,* the Commission declined to give "official" approval. But it noted that "the Commission specifically declined to define indecency by referring to a list of particular words," and stressed "the fact that Pacifica's petition recited passages containing some of the same words that were involved in the 1978 and 1987 *Pacifica* rulings is not necessarily dispositive." [158]

A *per se* indecency rule would preclude the FCC from allowing this type of editorial discretion in the future. Such an inflexible rule would thus invite close judicial scrutiny for restricting too much expression, including speech that has serious literary, artistic, or scientific merit.

Perhaps for that reason, Chairman Powell reportedly has suggested a possible exception to a *per se* rule for "political" speech. However, from a constitutional standpoint, it is difficult to justify such a carve-out without also including news, commentary, literature, or art. Moreover, assuming such a technical limitation is possible, it is difficult to predict how it would provide the type of limits that its proponents presumably intend. For example, if U-2's Bono had made a political state-

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[153] The seven words are "sh*t, p*ss, f**k, c*nt, c**ksucker, motherf**ker, and t*ts." *Pacifica,* 438 U.S. at 751 (Appendix to opinion of the Court).

[154] Ahrens, *supra* note 5.

[155] H.R. 3687 would impose a categorical ban on the words "'sh*t', 'pi*s', 'f**k', 'cu*t', 'a**hole', and the phrases "'c**k sucker', 'mother f**ker', and 'a** hole.'" It inexplicably drops the word "t*ts" from the list set forth in *Pacifica* and adds the word "a**hole" twice.

[156] *See, e.g.,* I Samuel 25:22 ("So and more also do God unto the enemies of David, if I leave of all that *pertain* to him by the morning light *any that* p*sseth against the wall."); II Kings 18:27 ("*hath he* not *sent me* to the men which sit on the wall, that *they* may eat their own dung, and drink their own p*ss with you?"); Isaiah 36:12 (same). HOLY BIBLE (King James Version) (emphasis in original).

[157] *Letter to Peter Branton,* 6 FCC Rcd. 610, 611 (1991) *petition for rev. dismissed,* 993 F.2d 906 (D.C. Cir. 1993).

[158] *William J. Byrnes, Esq.,* 63 R.R.2d 216. The Bureau noted that Pacifica "should be able to make an informed decision with respect to the proposed broadcast, and helpfully cited the district court opinion in *United States* v. *One Book Entitled Ulysses,* 5 F. Supp. 182 (S.D.N.Y. 1933): "although [the book] contains . . . many words considered dirty, I have not found anything that I consider to be dirt for dirt's sake."

ment during the Golden Globe presentation (*e.g.,* "thanks for the trophy, and, by the way, f**k the war in Iraq"), the Commission would face the same interpretive problem that currently exists, given the weight of precedent in this area. [159] In short, there are no easy answers in this area, whether one proposes a straight per se indecency rule, or one with one or more exceptions. Either way, Congress and the FCC will have the task of drawing and defending a line between speech that is protected and expression that can be punished.

CONCLUSION

Congress and the FCC currently are considering an array of proposals to increase the level of enforcement of the FCC's broadcast indecency rules and to apply the standard more strictly. However, it has been 25 years since the Supreme Court considered the First Amendment implications of indecency enforcement in the context of broadcasting, and much has changed during that time. Any move to reaffirm the existing rules or to make them more stingent must be accompanied by a comprehensive review of the rules' constitutionality.

The law of indecency is the direct descendent of the Hicklin rule—a legal doctrine born during the reign of Queen Victoria. Imported to America during the age of Anthony Comstock in the Nineteenth Century, it governed obscenity law until the First Amendment was brought to bear over half a century later. Under its lax standards, courts focused primarily on the potential impact of books on children, with the predictable result that literary classics were prosecuted and banned. This doctrine is unknown in American jurisprudence today but for one area: the FCC's broadcast indecency rules. Although courts and the Commission routinely state that indecent speech—unlike obscenity—is constitutionally protected, the standard the government employs permits it to penalize speech without regard to the work as a whole, its artistic merit, or its overall appeal to the average person.

Where the Victorian era obscenity standard was used to censor Ulysses, An American Tragedy, and Tropic of Cancer, the indecency standard has effectively suppressed works like the Peabody Award winner The Singing Detective, critically-acclaimed plays, and political poetry like "Your Revolution." Because of its vagueness, the indecency test can be used to restrict a wide range of constitutionally protected speech including "discussions of prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalogue of the Carnegie Library." [160] For that reason, a full constitutional review of the FCC policy is essential.

Mr. UPTON. Thank you.

Mr. Wertz.

STATEMENT OF WILLIAM J. WERTZ

Mr. WERTZ. Thank you, Mr. Chairman and members of the committee, for allowing me to share our convictions on the issue of decency and community standards with you.

We are a long-time broadcast licensee, and we believe that the broadcast license should be permitted to use the seven words George Carlin says you can use on the air.

I understand first amendment considerations cause the FCC to be reluctant to take a firm stand on obscenity and community standards issues, and the root of this likely dates to when the National Association of Broadcasters Code of Ethics was struck down on antitrust issues over 20 years ago in a court case brought by the Justice Department against the NAB. Since the NAB settled that case and the Code of Ethics was eliminated, there has been a steady decline of over-the-air decency standards as some have

[159] *E.g., Cohen* v. *California,* 403 U.S. 15, 25 (1971) (political slogan "f**k the draft" is protected under the First Amendment). This was just one of a series of decisions in which the Supreme Court held that the use of four-letter words in a variety of political contexts is constitutionally protected. *E.g., Papish* v. *Board of Curators of the University of Missouri,* 410 U.S. 667, 670 (1973) (university newspaper); *Kois* v. *Wisconsin,* 408 U.S. 229, 231-232 (1972) ("sex poem" in underground newspaper); *Cason* v. *City of Columbus,* 409 U.S. 1053 (1972); *Rosenfeld* v. *New Jersey,* 408 U.S. 901 (1972) (school board meeting); *Lewis* v. *City of New Orleans,* 408 U.S. 913 (1972) (confrontation with police); *Brown* v. *Oklahoma,* 408 U.S. 914 (1972) (political rally).

[160] *Reno,* 521 U.S. at 878.

pushed the envelope to the ripping point and far exceeded what any reasonable person would find as generally accepted community standards.

We aired announcements on WQLR and WKZO, two of our stations, and would like to share some of them with you.

Although I do not consider myself a prude, I find the level of obscenity on the air is not tolerable. Please fight for much stricter guidelines and controls so our children do not have to listen to the vulgar garbage that seems to be taking over.

From another E-mail: This is a sensitive subject, especially when you are raising a 12-year-old son. Your stations I believe do set the tone in this community. It is so troubling to see what is really happening out there today, in journalism, print, radio, and television. There just seems to be almost no stopping as to where this is going.

And the third: For the love of our children, we should not rob them of their innocence by perverting their minds and exposing them to the vile hatred that we are witnessing in the world today.

The National Association of Broadcasters issued a voluntary statement of principles for radio and TV broadcasters in the early 1990's, but it has no enforcement action.

I would suggest this hearing cover a majority of issues, including, and I quote: Where significant child audience can be expected, particular care should be exercised when addressing sexual themes. Obscenity is not constitutionally protected speech and is at all times unacceptable for broadcast.

In conclusion, our company has always strived to set the bar for radio broadcasting in Kalamazoo, Michigan, and the subject of this hearing is vitally important to our listeners, to our community, and to us.

We are very concerned that we witness the steady decline of over-the-air decency standards and at the same time lament the determination in 1982 of the NAB Code of Ethics that held stations to a higher standards. The voluntary NAB statement of principles should be an excellent starting point for restoring decency as defined by generally accepted community standards.

It is my hope the government would permit NAB to establish voluntary guidelines and allow it to create a self-enforcement division that would administer obscenity and decency on radio and TV and also that NAB will accept this responsibility. I will personally volunteer my time to NAB, if it is permitted, to pursue this avenue. Many of us in radio have repeatedly asked for clear guidelines and guidance from the FCC, but perhaps it is best if these guidelines were developed by those of us in the industry on this issue. It is my hope that this hearing today will begin that process.

Thank you, Mr. Chairman.

[The prepared statement of William Wertz follows:]

"Radio and Talk Radio in particular - a bastion of Free Speech - seems, ironically, to be asking for some guidance from the FCC on content regulation." Holland Cooke

I'm William Wertz, Executive Vice-President and co-owner of Fairfield Broadcasting Company in Kalamazoo, Michigan. Our company owns and operates 4 radio stations (Q-106.5 WQLR-FM, The Sports Station AM1660 WQSN-AM, Super Talk AM1470 WKLZ-AM and Kalamazoo's News/Talk AM590 WKZO-AM, all licensed to Kalamazoo. We are Kalamazoo's *only* locally owned and operated daily media and we've been serving the listeners of our area since 1972 with over 40 full-time employees. The Kalamazoo-Battle Creek 3-County (Kalamazoo-Calhoun-Van Buren) SMSA Census 2000 population 12+, updated by Claritas, is 381,800. I've been in radio since 1968 starting with Susquehanna Broadcasting Company in York, PA, worked as a Programming Consultant to over 100 Radio stations, am a founding member and current member of the Board of Directors of Kalamazoo Public Schools' non-commercial/educational Radio station WKDS-FM, am on the Board of Directors of the Michigan Association of Broadcasters Foundation, and have worked with my business partner, Stephen Trivers, since 1969. Mr. Trivers has spent his entire adult life in radio, having started at WAGA in Atlanta Georgia in the summer of 1957; he served as Program Director of WPAT AM/FM in New York City in 1963-1964 and held sales/management positions in Boston, Providence, and York PA in the late 60's/early 70's. He also served as Vice President of the NAFMB/NRBA Board of Directors in the 1970's/early 1980's and served as Chairman of the Michigan Association of Broadcasters in 1997.

I believe, as a preamble, it's appropriate to share the Mission Statement of our company...
"It is the mission of Fairfield Broadcasting Company to set the standard for radio broadcasting in the Kalamazoo Market. Our programming will be of the highest quality, emphasizing locally-focused content. Our advertising sales effort will be the most professional, client-focused available in the market. We will treat our employees with dignity and respect and we will endeavor to be fair in resolving conflicts. The entire staff will be the best-trained to be able to provide superior service to our listeners and advertisers."

I have traveled here today to share with you our convictions on the issue of decency and community standards. We're a long-time Broadcast licensee (1972-current)...*asking* for direction from an FCC that seems not-to-want-to-take-on Infinity's "stunts" or, more specifically, issues that many of those of us in the industry consider to be beyond generally accepted community standards. I've always believed AM/FM/TV Broadcast licensees should not be permitted to use the 7-words George Carlin says you can't say on-the-air. At the same time the "cure" is sometimes more difficult than the "disease" itself and I understand to some degree why the FCC has been reluctant to take a firm stand on obscenity/community standards issues. The root of this likely dates to when the National Association of Broadcasters NAB Code of Ethics was struck down on anti-trust issues over 20 years ago in a court case brought by the Justice Department against the NAB. Since this Code of Ethics was eliminated there has been a steady decline of over-the-air decency standards as some Broadcasters, for a wide variety of reasons, have pushed the envelope to the ripping point and far exceeded what any reasonable person would define as generally accepted community standards.

We aired promo's on WQLR-FM and WKZO-AM for 2 days, asking for comments, and they are included here. Please remember that our stations primarily appeal to Adults 25+. The beauty of radio is the ability to "target" a particular socio-economic group and, as such, responses from listeners under the age of 25 are likely to be not included in the following comments I've received...

Here are the scripts Fairfield Broadcasting Company VP/Operations Ken Lanphear and WKZO Program Director Dave Jaconette recorded for WQLR-FM and WKZO...
HI, I'M KEN LANPHEAR FROM THE Q-106.5 MORNING SHOW. AT Q-106.5, WE WORK TO MAKE OUR PROGRAMMING SAFE FOR THE WHOLE FAMILY, SO YOU'LL NEVER HAVE TO BE UNCOMFORTABLE TO LISTEN WHILE YOUR

KIDS ARE ALONG SIDE. THE RADIO INDUSTRY AS A WHOLE, PROUD SUPPORTERS OF FREE SPEECH, IS SEEKING GUIDANCE ON CONTENT FROM THE FEDERAL COMMUNICATIONS COMMISSION. FAIRFIELD BROADCASTING COMPANY, LOCALLY OWNED OPERATORS OF Q-106.5, HAS BEEN INVITED TO MAKE A PRESENTATION TO CONGRESSMAN FRED UPTON'S HEARING WEDNESDAY, JANUARY 28TH ON THE TOPIC "CAN YOU SAY THAT ON TV". AND, WHILE RADIO IS NOT DIRECTLY ADDRESSED, IT IS A PART OF THE HEARING AND WE'D LIKE TO HEAR FROM YOU ON THE SUBJECT. PLEASE E-MAIL YOUR THOUGHTS ON BROADCAST CONTENT TO WJW@FAIRFIELD-RADIO.COM. THAT'S WJW@FAIRFIELD-RADIO.COM AND WE WILL INCLUDE YOUR THOUGHTS IN THE PRESENTATION TO CONGRESSMAN UPTON'S HEARING. AND, THANKS FROM Q-106.5

HI, I'M WKZO'S DAVE JACONETTE. THE RADIO INDUSTRY, AS A WHOLE, PROUD SUPPORTERS OF FREE SPEECH, IS SEEKING GUIDANCE ON CONTENT FROM THE FEDERAL COMMUNICATIONS COMMISSION. FAIRFIELD BROADCASTING COMPANY, LOCALLY OWNED OPERATORS OF AM 590 WKZO, HAS BEEN INVITED TO MAKE A PRESENTATION TO CONGRESSMAN FRED UPTON'S HEARING, WEDNESDAY, JANUARY 28TH, ON THE TOPIC "CAN YOU SAY THAT ON TV". RADIO CONTENT IS A PART OF THE HEARING AND WE'D LIKE TO HEAR FROM YOU ABOUT WHAT'S APPROPRIATE ON THE AIR. PLEASE E-MAIL YOUR THOUGHTS ON BROADCAST CONTENT TO WJW@FAIRFIELD-RADIO.COM. THAT'S WJW@FAIRFIELD-RADIO.COM AND WE WILL INCLUDE YOUR THOUGHTS IN THE PRESENTATION TO CONGRESSMAN UPTON'S HEARING. AND, THANKS FROM WKZO.

These are the e-mails I've received as of January 23, 2004...

"Although I don't consider myself a prude, I find the level of obscenity on the air is intolerable. Please fight for much stricter guidelines and controls so our children don't have to listen to the vulgar garbage that seems to be taking over." (Ed Bernard)

"Thank you for the opportunity to provide you with input. This is a sensitive subject, especially when you are raising a 12-year-old son. Your stations, I believe, do set the tone in this community that I am extremely proud of. You and your management team should be proud of that.
It is so troubling to see what is really happening out there today in journalism, print, radio and television. I can remember when the biggest secret we had was to see women in the J.C. Penny catalog in the underwear pages. There just seems to almost no stopping as to wear this is going.
We do need standards and I believe you are a perfect one to represent West Michigan around your stations mission." Kathy Beauregard

"I agree the FCC needs to regulate what is seen and heard on TV. The amount of sex, nudity, violence and inappropriate language has escalated in the last several years and I believe will only get worse if nothing is done. Talk shows, advertising, films, music, cartoons and news broadcasts have all pushed the envelope. The morals in this country are at an all time low and I believe something needs to be done now as I don't want my grandchildren viewing and hearing the trash that TV currently broadcasts. Thanks for giving me a chance to express my opinion." (Gary Niemeck)

"I am writing regarding something I heard on the WKZO afternoon show yesterday, 1/21/2004. Dave Jaconette asked listeners for comments to be given to the FCC regarding profanity on the radio.
I have two young daughters (ages 9 & 7) - we rarely allow them to watch TV, and my husband and I watch very little ourselves. We do not have cable, and we feel that most

shows on "regular free" TV are trash - violent and/or filled with sex and sexual innuendos.
The same holds true for radio. I don't let my children listen to very much radio except for the Children's Sunshine Network. I usually listen to WKZO and some radio talk shows in the evening (besides Christian stations) - but I will not listen to a station that is willing to broadcast offensive programming.
I will not frequent businesses that support immoral, offensive TV or radio programs. I might be only one person, but I don't think I'm the only person who feels this way or responds as I do.
For the love of our children, we should not rob them of their innocence by perverting their minds and exposing them to the vile hatred that we are witnessing in the world today. Let kids be kids while they are kids. We try to protect them from being hurt in automobiles by requiring them to be buckled in to their seats; we buy them helmets, knee pads, elbow pads, etc to protect them while they are bicycling and skating; we try to protect them from being hurt in fires by installing smoke detectors and sprinkler systems and teaching them escape routes; we try to protect them from the elements, such as damaging sun rays, by bundling them in the winter and covering their skin with sun block in the summer; there are laws in regards to noise pollution to protect their hearing, etc; there are warning labels on items with small pieces or plastic bags to protect children; our cleaning chemicals and medicines come in child resistant packaging to keep our children from swallowing something harmful; and the list could go on and on. How about their minds? When are we as a nation going to protect our children's minds from the damaging media presentations? If we allow their minds to be corrupted when they are young, they will grow up thinking that what they see and hear is the norm - no wonder so many teens are troubled.
In my opinion, if adults want to see and hear trash, they should pay for it. But sponsored, free programming should be kept clean." (Robyn Lilek)

"I do not know how to respond to your request on Broadcast indecency other than to say some of the language I hear on both radio and TV bothers me. On radio I don't even like to hear a hell or damn. Since TV gives me the ability to see the situation and contexts of the situation the language is used in I do not find that offensive. Any other language beyond the fore mentioned is not appropriate on either radio or TV. Maybe I am old fashion!!!" (Dan Nulty).

"You may be surprised that I would say this, but you cannot legislate morality. People have to change. If there was not a market for all of the indecency, immorality, vulgarity and violence we have on the airways today, advertisers would not buy the airtime and the junk would never make it to the first show. At the same time though, someone has to draw a line in the sand and say "we will go this far, but no further". Now I understand that where I would draw the line is different from where you would and much different than where the Hollywood producers would. What has to be decided is what Middle America wants. My opinion is that most Americans do not want to see a lot of skin or suggestive bedroom scenes. Nor do they want to hear a lot of four letter words. These kinds of pictures and language are degrading to the viewers/listeners and to society as a whole. If a writer/producer has to use "little left to the imagination" dress or bedrooms scenes and/or vulgar language to make the show appealing, something is wrong with the show to begin with. Many of today's programs, radio and television, present behavior and language that is unusual (at least for most of America) as the norm. Fifty years ago, if you had called someone a SOB or said "screw you" to someone, you would have at least received a scowl, if not a "watch you tongue". Today's young people do not even know what those words mean! They just know to use them when they are upset with someone. The broadcast industry should think about what is good for society as a whole, because, without the society, they will not have listeners and viewers. It is not good to suggest that cheating on your partner is normal and acceptable. Nor is good to suggest that it is normal and acceptable for two people of the same sex to be partners. The idea that the only way to solve a problem is to shot someone, may not be portrayed on all shows, but often times it is. Some of these behaviors may be normal on the east coast and the left coast. But, even if they are normal, this kind of behavior is not good. Sometimes laws

have to be made because we, as a people (judges included), are to blind to figure what is right for ourselves. I'm hoping the broadcast industry can figure this out for themselves, without any new laws." Herb Persons

"In my opinion is it not merely a question of "Can you say that on TV?" it is really a question of "should you broadcast that on TV or Radio?" By definition, utilization of the broadcast media insures radio and television the maximum impact on the public. It would behove the Media to view this power as a public trust complete with the pre-requisite responsibility that any trust implies.
It is without doubt that the combined media of Television and Radio are the guarantors of "main stream" thought in America. If it is in the broadcast medium, a fashion, a catch phrase, a notion takes on a life of its own and becomes an acceptable (or at least more acceptable) fashion, phrase or notion than it would be if known to only a local audience. Think of what you are mainstreaming when the afternoon television fair headlines teen paternity tests (where the number of former sexual partners has to be winnowed down in order to define paternity) or bizarre family betrayals (usually involving a mother sleeping with a daughter's teen boyfriend or, even more salaciously, girlfriend) are the constant messages.
Think of what you are doing when for the sake of ratings, quality programs are dropped from line-ups and replaced by "reality" shows where men and women gag on maggots, or bear all in a supposed contest to be the chosen partner for the Adonis or Helene due jour. As I said, the Media is the guarantor of the American status quo. It is a responsibility, not a commodity." (Roberta Shultz)

"I am 47 years old, married with two children ages 10 and 8. Simply put, I feel that I should be able to turn on my radio or television and scan through the various channels without concern that my children might be subject to very inappropriate conversation or pictures.
It is so out of control that I can not even be comfortable watching sports on television due to the willingness of the broadcasters to air the sleaziest commercials, and what makes it worse is that the most disgusting, most suggestive commercials are for the broadcasters own shows not some other companies products. This is Saturday and Sunday afternoon sports broadcasting not late at night.
As for the radio, us parents (the ones who care anyway) are afraid to search for a station that plays something we want to listen to when the children are around because of what they might be exposed to while moving through the channels.
I do not advocate eliminating broadcasts from the airwaves as I believe that consenting adults have a right to view or listen to what they desire. However we need to be able to segregate the adult content from everything else so that individuals and particularly children are not subjected to it just by moving through the radio dial or the television/cable channels.

Neither my wife or I are prudes or overly conservative however children have a right to remain innocent for as long as possible and our current society is destroying that right. As parents we should be able to control when and how our children get exposed to things based on the childs maturity level." *(Larry Andreano)*

"I am usually one who wants LESS government intervention and LESS regulation, however I have NO problem with the FCC re-establishing better guidelines and a code of ethics for TV and radio. I can't think of any reason for vulgarity on the television or radio and all it does is tear at the moral fibers of our society. And I don't give any credibility to people who cry freedom of speech. Indecent language doesn't need to be broadcasted, plain and simple. If people want to use obscene language, they can do it in "appropriate circles" which is NOT public TV or radio." (Nancy Andreano)

"To me it's pretty simple. No one has the right to subject an unwilling adult, or any minor, to profanity, scatological remarks, pornography, indecent exposure and the like. Nor should our government be a party to such behavior. Broadcast companies utilizing the public radio/tv spectrum should be prevented from transmitting such material. There

are many pay per view outlets for such stuff. I'm no prude. I'm not personally offended by it. However, minor children should not be exposed until they have reached adulthood, except with their parents consent. Adults who object should not be "ambushed" by unanticipated public broadcasts of such material. We all should have freedom of choice in whether or not we see and hear such material. When it suddenly pops up on the TV in the middle of a prime time sitcom, or on the radio as we are driving the carpool to school, that freedom of choice has been stolen from us. It is a clear abuse of the concept of freedom of speech, like falsely crying "fire" in a crowded theater."
(Jim Holtshouse)

"There is a terrible problem with the loose regulations in broadcasting. I honor and respect your stand on this issue. I am truly disappointed and in awe, when I see the same persons in legislation complaining about free speech and at the same time trying to stop it ...i.e. even mentioning religion in schools or government buildings, what hypocrisy! Yet people are supposed to be free to express their opinion, unless it is true or threatening. It is OK to tell our children their ancestors are monkeys or apes according to the theory of Darwin, however we cannot talk about the theory of Christ or any aspect of his being, because government is truly afraid to stand for truth. It appalls me to know that the same politicians that are telling our children and us what it is we must watch on t.v. and/or hear on radio are the same people that do not understand where their children are going and what will happen to them, because of their all too liberal life style. It will be their children and grand children that will one day be voting and trying to run this country, the problem is ... these kids are so liberated that they do not even know how to vote for the most part, let alone understand for who or what they are voting for. We definitely need some control on broadcasting, I hate knowing that driving down the road we have no control over what we might hear at any given time. Unfortunately we cannot turn back the hands of time and say, boy I didn't want to hear that, or I wish my 10 year old did not have to hear that! It is my opinion and same as many others that those that want to listen to filth or poor ethics should have to seek it out, it should never be pushed on anyone and by not having regulations, that is exactly what is happening. At the very least all broadcasting should have public warning not only at the beginning but through out the program and before each commentary that is not of high moral standards, contains graphic, lude or any degrading information that would be inappropriate for any young listener not having the ability to block it out. It is a disgrace that politicians are too afraid to allow for a more ethical and moral world, or maybe it is because they know they couldn't live up to their own rules if they existed. I am in total support of regulations in Broadcasting and think that there is no damage done to those who seek for themselves alternative and unethical programs if they so choose. But to force it on all is completely out of line. Looking at the standards set by our own government and them isolating religion, they too should isolate filth, and other inappropriate programming, Good luck!"
James Kaiser

The following comments are from 2 of my co-workers...

"My biggest pet peeve is the relaxed views on violence versus conservative feelings on nudity and even more why there is such a huge difference in the amount of female nudity in movies and TV than male nudity." *(Lacy Hemenway)*

"As I understand it, obscene is defined as going against contemporary community standards. This is obviously a very ambiguous definition, and I believe it was designed to be so. I do not view the standards for over the air decency is declining. Rather, it is evolving to suit the changing standards of American society. Television and radio have always pushed the envelope to see what they could broadcast. In the 1950's, I Love Lucy, could not use the word "pregnant" in their dialogue. They were forced to use the word "expecting". Since our society has changed, pregnant is not only allowed now, you can even find the word in children's programming. In the past few years, formerly taboo subjects like T.V. bra commercials, semi- nudity and even the word "shit" have been used on a regular basis. On the radio, shock jocks such as Howard Stern have made an industry out of not only pushing the envelope, but actually creating new envelopes. In the future, the envelope for decency for television and radio will keep evolving. It is

inevitable. Any guidelines that lay down in black and white what is indecent and what is not will not hold up over time. Simply put, one person's indecency is another person's accepted practice. I believe that any rules describing what is indecent or obscene need to be handled on a case by case basis." (John Thierwachter)

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The following excerpts are taken from 3 of Holland Cooke's newsletters, and included here with his permission, to his subscribers from October 2002 and May & October 2003 on the subject of obscenity. Mr. Cooke is America's #1 NewsTalk Radio consultant and has weighed in on the issue of decency, or more specifically, indecency, on numerous occasions. Mr. Cooke is often quoted in news media accounts of Broadcast issues including recently by the Washington Post and Entertainment Weekly. He was the Program Director of WTOP in Washington DC for 7 years from 1984-1991.

Holland Cooke Newsletter October '02

WHAT YOU MISSED IF YOU MISSED NAB'S RADIO SHOW IN SEATTLE

"Certainly nobody in this crowd doesn't cherish Free Speech. But if radio can spend a year congratulating ourselves over what we did in New York on September 11, we ought to be able to spend a few minutes talking about something else radio did in New York recently. As a Catholic, however lapsed, I am particularly offended that this Opie & Anthony fiasco occurred where it did, in St. Patrick's Cathedral. But suppose it was a synagogue. Or a Baptist church in Harlem. How can this licensee NOT be held-accountable for perpetrating a hate crime?"

My question to Commissioners Abernathy and Copps, during Q+A at that session.

"People are sick about this."

Commissioner Copps, responding, after a stunned silence.

Copps was already on the warpath over Indecency BEFORE the Opie & Anthony incident. Now, he's calling for a return of the broadcast industry's voluntary programming code.

He also renewed his proposal that stations voluntarily keep tapes of all programming, for review when there's a listener complaint. Presently, with no such requirement, the burden-of-proof is on the complainant. But Copps says "when something is said on the public airwaves, there ought to be a way to check." Though I'm a big fan of hers, it was disappointing to hear Commissioner Abernathy parrot-back Infinity's spin that, responding to public outrage over the situation, the company "acted quickly" by canceling The Opie & Anthony Show. Infinity acted pretty deliberately CREATING the show.

"It was one of the most horrible things I've ever heard in my lifetime."

Radio One exec Mary Catherine Sneed, on the Opie & Anthony incident, speaking at the Radio Group Executives Super

Session (02NABRS-SS2).

"It's the door of St. Patrick's Cathedral."

Clear Channel President & COO Mark Mays, answering the question "Where's 'the line' for Indecency?" at the same session.

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Holland Cooke Newsletter May '03

This month's issue is being distributed at Talkers Magazine's New Media Seminar, May 16-17 in New York. If we're meeting for the first time, hello! I'm Holland Cooke, the consultant, McVay Media's news/Talk Specialist. Look for me on the New Media Seminar opening panel.

A NEW LOW FOR TALK RADIO

FROM THE COMPANY THAT GAVE YOU OPIE & ANTHONY

Think I'm exaggerating? Hit

www.fcc.gov/Daily_Releases/Daily_Digest/2003/dd030403.html
Scroll down to Texts, and click on the first blue link (FCC-03-71A1.doc). Unbelievably, the talent responsible for the transcript you will read has not been fired. In January 2002, Detroit area listeners, possibly with children in the car during the 4PM hour, heard WKRK/Detroit hosts Deminski & Doyle and callers detail various oral, anal, and physically-violent sexual practices. Your FCC is still hearing about it, not doing much about it, and trying to avoid saying anything about it. As a result, Talk Radio – a bastion of Free Speech – seems, ironically, to be asking for some guidance on content regulation. Yet, a year after FCC commissioners appearing at NAB's 2002 Las Vegas convention squirmed though questions about co-owned WNEW-FM's Opie & Anthony sex-in-St. Patrick's Cathedral episode, they ducked questions about the WKRK incident at NAB2003 (#03NAB-KN4). Yes, Commissioner Michael Copps dissented as his colleagues settled on WKRK's not-whopping fine; and, at this year's NAB session, he sounded every-bit -as-livid as he sounded last year over Opie & Anthony's incident. He has called the Deminski & Doyle show in question "some of the most vulgar and disgusting indecency that I have had the misfortune to examine since I joined the commission." Suggesting that the statutory maximum $27,500 fine "will easily be absorbed by the station as 'a cost of doing business,'" Copps says he believes "that a financial slap on the wrist does not adequately reflect the seriousness of the station's actions." He's called for a hearing to revoke WKRK's license. But, when asked by both moderators and attendees in two NAB2003 sessions, whether the WKRK case would end with the fine, or whether there will be a revocation hearing, not one of the FCC's five commissioners would offer a simple yes/no answer. Chairman Powell started to answer, calling the Deminski & Doyle broadcast "indefensible and unlawful;" before – LAUGHINGLY -- admitting that the FCC's General Counsel, sitting in the audience, had gestured that he not reply further (#03NAB-KN2).
Should this not be a matter of public record?
Doesn't Talk Radio -- and the public -- deserve to know where we stand on this? Members of Congress appearing at the convention were even less forthcoming (unfortunately, this session is not listed on Mobiltape's order form). Rep. Gene Green (R-TX) allowed that he'll "let the FCC do the best they can" with indecency enforcement, venturing only that "it's not impossible to imagine that Congress, at some point, could take action." Other members appearing winced and looked at the floor. Having read a published transcript of the broadcast, I cannot imagine that radio has suffered more graphic, gratuitous pornography than the Deminski & Doyle show in question. Stunts like this are one reason that "FM Talk" remains, largely, an oxymoron. After the Opie & Anthony flap, Infinity changed format in New York.
And how's this for justice? Although Infinity beat the bullet again, the consequence of its latest shock-jock gross-out could be tougher penalties for OTHER owners. The FCC notes that, since this Deminski & Doyle show comprised several distinct caller conversations, each call could have been fined as a separate violation. Although, in this case, it treated the WKRK broadcast as a single violation, the FCC warns that, in the future, similar material within a single program may be treated as multiple, repeated violations. NAB session moderator Sam Donaldson asked Chairman Powell why he thought hosts were wandering into smut. The chairman ventured that increased competition was pushing talkers to push the envelope. Generally, it is comforting to hear Mr. Powell call himself "a First Amendment guy" who's loath "to let three of five unelected Regulators decide what can and cannot be broadcast;" and to hear him say "I get queasy when the government is the editor." And he sounded duly deliberate waxing that "social mores and levels of acceptability of things change over time." But what does that tell YOU, the on-air talent, about doing your job? NAB President and CEO Eddie Fritts warned, "stations that cross that line do so at their own peril."
Without the guidance of a clear determination concerning these repeated demonstrations of Infinity's custody of the public trust, it's tough to spot that line. Wander near it at your peril.

Holland Cooke Newsletter ,October '03

I'm late...deliberately! So don't blame your mailman...unless his name is "Newwwwwwman." I held-the-presses for this issue, so it can include my notes from The NAB Radio Show in Philadelphia. Look for the November issue around the first of the month, as usual.

"Is that Opie & Anthony?"
"Is that the one in Michigan?"
Exchange between FCC Commissioner Kathleen Q. Abernathy and an unidentified FCC staff counsel in the audience at NAB's FCC Breakfast
She was responding – or, possibly, attempting not-to – to my asking, during Q+A, if a final determination had been reached in the WKRK/Detroit Deminsky & Doyle indecency matter.
Though fellow commissioner Michael Copps has called for WKRK's license to be revoked, and remains on the warpath over indecency generally, and this episode in particular, Commissioner Abernathy continues to be non-committal, thus unhelpful, to those of us seeking the clear signal that the FCC could send us by closing this case.
Abernathy sounded duly diligent reciting, "I'm careful only to act on what the law defines as indecent, and not what I personally find offensive;" and assuring that continued complaints against a licensee would result in harsh-if-undefined penalties.
Beyond sounding noncommittal, Abernathy sounded, frankly, uninformed, as she called out to a staff lawyer in the audience, asking, "Is this [the Deminsky & Doyle incident] the same station as Opie & Anthony?"
To help her, I clarified: "Same licensee, different episode at a different station."
But there was SOME news at the FCC Breakfast session. The New Year will bring a new series of public hearings, around the country, on localism in radio. Abernathy and her colleagues are hearing, loud-and-clear, a public increasingly uncomfortable with consolidation. Hearings will seek to determine the public sentiment on, as she put it, "whether our existing rules are serving the public interest, or should additional steps be taken?"

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The National Association of Broadcasters NAB Code of Ethics was, in essence, a long-standing self-policing code that was terminated in 1982 in an anti-trust case brought against the NAB by the US Justice Department. NAB agreed to a settlement of this case and the NAB Code of Ethics was eliminated. In the early 1990's the NAB issued a voluntary "Statement of Principles" for Radio and TV Broadcasters but has no enforcement action. I would suggest the included NAB "Statement of Principles" in my presentation covers the majority of issues this Hearing is addressing.

Statement of Principles

Of Radio and Television Broadcasters

Issued By

The Board of Directors of The

National Association of Broadcasters

Preface

The following Statement of Principles of radio and television broadcasting was

adopted by the Board of Directors of the National Association of Broadcasters on behalf of the Association and commercial radio and television stations it represents.

America's free over-the-air radio and television broadcasters have long and proud tradition of universal, local broadcast service to the American people. These broadcasters, large and small, representing diverse localities and perspectives, have strived to present programming of the highest quality to their local communities pursuant to standards of excellence and responsibility. They have done so and continue to do so out of respect for their status as daily guests in the homes and lives of a majority of Americans and with a sense of pride in their profession, in their product and in their public service.

The Board issues this statement of principles to record and reflect what it believes to be the generally accepted standards of America's radio and television broadcasters. The Board feels that such a statement will be particularly useful at this time, given public concern about certain serious societal problems, notably violence and drug abuse.

The Board believes that broadcasters will continue to earn public trust and confidence by following the same principles that have served them will for so long. Many broadcasters now have written standards of their own. All have their own programming policies. NAB would hope that all broadcasters would set down in writing their general programming principles and policies, as the Board hereby sets down the following principles.

Principles Concerning Program Content

Responsibly exercised artistic freedom

The challenge to the broadcaster often is to determine how suitably to present the complexities of human behavior without compromising or reducing the range of subject matter, artistic expression or dramatic presentation desired by the broadcaster and its audience. For television and for radio, this requires exceptional awareness of considerations peculiar to each medium and of the composition and preferences of particular communities and audiences.

Each broadcaster should exercise responsible and careful judgment in the selection of material for broadcast. At the same time each broadcast licensee must be vigilant in exercising and defending its rights to program according to its own judgments and to the programming choices of its audiences. This often may include the presentation of sensitive or controversial material.

In selecting program subjects and themes of particular sensitivity, great care should be paid to treatment and presentation, so as to avoid presentations purely for the purpose of sensationalism or to appeal to prurient interest or morbid curiosity.

In scheduling programs of particular sensitivity, broadcasters should take account of the composition and the listening or viewing habits or their specific audiences. Scheduling generally should consider audience expectations and composition in various time periods.

Responsibility In Children's Programming

Programs designed primarily for children should take into account the range of interests and needs of children from informational material to wide variety of entertainment material. Children's programs should attempt to contribute to the sound, balanced development of children and to help them achieve a sense of the world at large.

SPECIAL PROGRAM PRINCIPLES

1. Violence.

Violence, physical or psychological, should only be portrayed in a responsible

manner and should not be used exploitatively. Where consistent with the creative intent, programs involving violence should present the consequences of violence to its victims and perpetrators.

Presentation of the details of violence should avoid the excessive, the gratuitous and the instructional.

The use of violence for its own sake and the detailed dwelling upon brutality or physical agony, by sight or by sound, should be avoided.

Particular care should be exercised where children are involved in the depiction of violent behavior.

2. Drugs and Substance Abuse.

The use illegal drugs or other substance abuse should not be encouraged or shown as socially desirable.

Portrayal of drug or substance abuse should be reasonably related to plot, theme or character development. Where consistent with the creative intent, the adverse consequences of drug or substance abuse should be depicted.

Glamorization of drug and substance abuse should be avoided.

3. Sexually Oriented Material.

In evaluating programming dealing with human sexuality, broadcasters should consider the composition and expectations of the audience likely to be viewing or listening to their stations and/or to a particular program, the context in which sensitive material is presented and it's scheduling.

Creativity and diversity in programming that deals with human sexuality should be encouraged. Programming that purely panders to prurient or morbid interests should be avoided.

Where significant child audience can be expected, particular care should be exercised when addressing sexual themes.

Obscenity is not constitutionally protected speech and is at all times unacceptable for broadcast.

All programming decisions should take into account current federal requirements limiting the broadcast of indecent matter.

Endnote

This statement of principles is of necessity general and advisory rather than specific and restrictive. There will be no interpretation or enforcement of these principles by NAB or others. They are not intended to establish new criteria for programming decisions, but rather to reflect generally accepted practices of America's radio and television programmers. They similarly are not in any way intended to inhibit creativity in or programming of controversial, diverse or sensitive subjects.

Specific standards and their applications and interpretations remain within the sole discretion of the individual television or radio licensee. Both NAB and the stations it represents respect and defend the individual broadcast's First Amendment rights to select and present programming according to its individual assessment of the desires and expectations of its audiences and of the public interests.

In conclusion I want to thank Congressman Fred Upton and his General Counsel, Will Nordwind, for giving me the opportunity to address this Hearing today. Our company has always strived to set the bar for Radio Broadcasting in Kalamazoo and the subject matter of this Hearing is vitally important to our company, our listeners, and our community. We are very concerned that we've witnessed a steady decline of over-the-air decency standards and, at the same time, lament the termination in 1982 of the NAB Code of Ethics that held stations to a higher standard for many years. The voluntary NAB "Statement of Principles" should, in my opinion, be an excellent starting point for restoring decency as defined by generally accepted community standards. It's my hope that the Government would permit NAB to establish voluntary guidelines and allow it to create a self-enforcement division to administer obscenity/decency on Radio and TV and also that NAB would accept this responsibility. I will personally volunteer my time to NAB if it is permitted to pursue this avenue. Many of us in Radio have repeatedly asked for *clear* guidelines and guidance from the FCC...but perhaps it's best if these guidelines were developed by those of us in the industry...on this issue. It's my hope that this Hearing today will begin that process.

Thank you

Mr. UPTON. Thank you all for your testimony.

At this point, we will take questions from members of the subcommittee and those who have got unanimous consent.

I would note Mr. Wynn gets 8 minutes since he deferred on his statement when we get to his turn.

Mr. Solomon, you indicated—I am maybe going to put words in your mouth, but it seemed to me in your testimony that you welcomed Chairman Powell's statement that they were going to reverse the decision of the enforcement decision with regard to Bono's comment. Do you have an indication of when that may occur?

Mr. SOLOMON. When?

Mr. UPTON. I actually would have thought they would have decided that before this hearing.

Mr. SOLOMON. Well, as a personal matter I would have thought they would have put me out of my misery and decided before today as well, but they are actively working on it and it is under active consideration by the commissioners.

Mr. UPTON. Oh, good. I am pleased to hear that.

I want to say off the Web I was able to get a whole list of different broadcasters, obviously, mostly radio, and the fines that had occurred over the last couple years and with that, too, was able to get the transcript. We were able to get the transcript, as to why they were fined. What concerns me as I look through this list is that there are a number of broadcasters in different parts of the country that are repeat offenders.

And pretty bad stuff in my reading of what went on. And to me, it clearly defines the reason of why we are pursuing H.R. 3717 and have such broad bipartisan support, and not only in the Congress but certainly on the subcommittee and the full committee.

And I would have to say, based on your experience as the Enforcement Bureau Chief, do you believe that our bill, 3717, which allows for the tenfold increase in the fine, will put a serious damper if not an end to some of the repeat violations that a number of the broadcasters are going through?

Mr. SOLOMON. I think it would very much have a significant effect. Certainly my experience, not just in this area but in other areas of enforcement, is that higher penalties, not just when used as a punishment but also as a deterrent, do have an effect. Wheth-

er it would eliminate it, I don't know. But I think it would have a significant effect.

I think also this is also combined with the fact that the Commission has made clear that in the kinds, for example, of repeat cases that you are talking about, it is now looking seriously at the potential for revocation. I think that any sort of series of strong signals that the penalties are going to be increased should have a deterrent effect.

Mr. UPTON. I was going to ask you about revocation next. You know, I indicated in my opening statement three—some number—the three strikes and you are out legislation that the Congress passed a number of years ago.

What is your sense of three times and you are off? I mean, some of these occurrences, in essence, are three times or more, just in the last couple of years. And, again, pretty serious violations in terms of the content that I read.

Mr. SOLOMON. I agree that the kind of repeated offenses by often the same licensees and even the same disk jockeys or other people on the air is a cause for very serious concern.

And I think that is why we have made clear that we are starting seriously to look at revocation as a potential remedy during the period after the Commission had announced that as its new approach.

Mr. UPTON. As I think about the future of our bill in terms of trying to move it quickly—it appears as though we are likely to have another hearing before we get to the markup stage—it might be instructive for us to have one of these violators come and talk about the impact of the fine, perhaps $7,000 or whatever, and what our bill would do to the type of content that they aired.

Mr. Bozell, what is your sense on these two questions that I asked Mr. Solomon?

Mr. BOZELL. Well, I think it will make a tremendous difference, simply because $27,000 is meaningless. It is one—as one Member of Congress said, $270,000 will be meaningless as well to a multi-billion-dollar corporation. That is just a good TV ad there.

If you slap a $3 million fine for continued violations, you will get their attention. And if behind it comes the threat of license revocation, you will get their attention. In the ruling yesterday on that one radio show, I think it was commendable that the FCC levied a $750,000 fine. But I believe in his dissenting opinion that Commissioner Copps was also correct in saying that what the FCC should have done is announced that it was going to look to revoke the license of those stations, because this was—they have been doing it since 1997, I believe. They have been laughing in everyone's face.

Mr. UPTON. I would just note in reading some of the decisions, it seems like virtually every one of the commissioners has said in their statement they wish the fine could be more.

Mr. BOZELL. That is correct. That will get their attention. I mean if a station is receiving not just a higher fine, but, as I believe you have proposed in your bill, which is extremely important, a fine for every occurrence instead of just one fine—if you put a fine for every time they used an obscenity or an indecency and you totaled them

up, then like the Senator once said, sooner or later it will be serious money.

Mr. UPTON. We might be able to balance the budget maybe.

Mr. Markey.

Mr. MARKEY. Thank you, Mr. Chairman, very much.

Mr. Bozell, your testimony makes reference to the fact that the ownership of a broadcast property is a privilege.

Mr. BOZELL. Yes, sir.

Mr. MARKEY. And, as you know, the broadcasters wish to own even more broadcast properties, and that Chairman Michael Powell of the Federal Communications Commission agrees with that, and in fact, has been able to pass out of the Federal Communications Commission a new regulation which is now in court that would allow one company to own the biggest newspaper in town, 3 TV stations in that town, 8 radio stations in that town, the cable system for that town, and all of the Internet Web sites related to all of those entities providing information in that community. So that means that it would be an even greater privilege for each of those companies in each community.

Could you elaborate, Mr. Bozell, on this whole notion of the privilege of owning a broadcast property, and what the concomitant responsibilities are that attach to that?

Mr. BOZELL. Yes, sir. The Supreme Court has said, in effect, that they are called public airwaves for a reason. They belong to the public. The late Steve Allen once told me a very insightful insider's view of this. He said, Back in the 1950's and through the early 1960's in the entertainment community, you saw yourself as an invited guest in the family living room where there were children assembled. As such, you performed for the family because you were the guest of the family in the living room.

As Senator Joe Lieberman says, today it is a situation where families are trying to impart values at the kitchen table, and then when the children go into the living room afterwards, you have got an industry that tells them that they can tell their parents to drop dead.

But these are the public airwaves. These do not belong to the networks. Never have, never will. They belong to the public, therefore, and the Supreme Court has stated such, that they have a responsibility to abide by community standards.

And I would ask you, Congressman, and I applaud you for cosponsoring this bill which I think is so important, I would ask you, Can anyone name me a single community in the United States of America that abides by these kind of standards where they find this acceptable?

This is abhorrent to every community in America, even 90210. So the networks don't have a leg to stand on. And I believe that what the Congress ought to have been doing with this vote on ownership is to say to them that you have abused that privilege, you have abused that right; rather than giving you more stations, we are going to take some away.

Mr. MARKEY. Let me ask you this, Mr. Bozell. The standard which Mr. Upton and I have built into this legislation would increase the fines from $27,000 up to $270,000. But we are open on this question, because it raises the question, when individual com-

panies have revenues for a year of $27 billion, whether or not that is a sufficient deterrent.

Given the consolidation that is perhaps in the immediate historical future, would it perhaps make some sense to tie the fine to the number of stations that a company own, and have the control over in broadcasting this information, or the revenues of that company, rather than a $270,000 fine? Have you given any thought to what would be the best-tailored punishment if there is a violation of these standards?

Mr. BOZELL. I think, Congressman, that it ought to be a fine per occurrence, per station, airing that violation. Because the stations are the ones making the decision to air it.

Now, if you asked the affiliates what they think about that, they will say, Now wait a minute. This, Congressman, is the blame game that everyone plays. Everyone blames someone else. Their answer will be, You can't blame us because the networks don't let us see this programming before we air it. And they, in fact, say to us or infer to us that if you give us any trouble, we are not going to let you be part of the network, and we are going to give your affiliation to someone else. So we have to air this. No, we ought to make the affiliates take responsibility for their actions. You air it, you violate it, you get fined.

Mr. MARKEY. Under what scenarios, Mr. Bozell, should a license be revoked? What would you establish as the test, if there were a series of violations, that would then invoke the revocation of the ownership of a television station?

Mr. BOZELL. Congressman, I think it is intent that is at the bottom line here.

Mr. MARKEY. What would be intent? The intent to do what and how many offenses, over what period of time? What would you establish as the standard?

Mr. BOZELL. I don't know that I would establish a numerical quotient on this, but I think I would look at what is the history of this station, to what degree—when Clear Channel puts out a statement yesterday saying it is not their intent to be indecent, I believe that is preposterous. Of course it is. That is what they have been trying to do with these shock jocks.

I think that if the intent is to be indecent, and I think if it is established that there is a history of this, that they have been warned, they have been fined, and they continue doing it again, I think there becomes a point when you can look at that and say, You don't have any intention of abiding by the law.

Mr. MARKEY. Mr. Bozell, thank you. And I thank all of you for your participation here today. I think this is a very important American discussion about the future of the relationship of all families and the sights and the sounds which are allowed to go into living rooms all across the country. I don't think that there is a more important cultural debate that we could be having.

Mr. UPTON. Mr. Bilirakis.

Mr. BILIRAKIS. Thank you, Mr. Chairman. Mr. Solomon—well named, by the way. Has the FCC ever tried to revoke a license for indecency?

Mr. SOLOMON. It has not had any revocation hearings on indecency. Last year the Commission announced for the first time that

it was going to start looking at revocation for behavior that took place after that announcement. And I can tell you we are doing that as we look at cases.

Mr. BILIRAKIS. So in other words, the Communications Act of 1934, as amended, did not give them that authority?

Mr. SOLOMON. It gave us the authority. The Commission in general doesn't revoke very many licenses and tends to focus on misrepresentation and abuse of process. So it was significant that it announced that it was going to also look at indecency cases as an area for possible revocation.

Mr. BILIRAKIS. That hasn't scared too many people, apparently.

Mr. Corn-Revere, referring to that same act, the 1934, I know you are a first amendment specialist and whatnot, but in terms of the act as it exists, you know amended and whatnot, do you have any problems with the act, the intent of the Congress in the act?

Mr. CORN-REVERE. No, not per se. But there are some tensions in the act that have to be addressed. Not only did Congress adopt what originally was section 27 of the Radio Act that became part of the Criminal Code, but it also adopted section 326, which says that it does not give the FCC the power of censorship, either by direct rule or by condition.

So the difficulty has been, both from a matter of statutory interpretation and constitutional analysis, how to resolve that tension.

Mr. BILIRAKIS. All right. But you refer to the—giving the FCC the power of censorship. The act, though, would give, as I understand it, the right to preempt network programming as a right granted to local licensees understood under that act. And as I understand it again, the real world, is that increasingly network affiliation agreements threaten affiliates with termination of their network affiliation if there are more than 2 or 3 preemptions of network programming, I guess, depending on the contracts, without the network's consent.

So I guess I would ask all of you that question. Doesn't this undermine the rights of Congress specifically delegated to broadcast licensees under the Communications Act to program their stations in a manner that serves the public interest, convenience, and necessity?

Should, Mr. Solomon et al, the rest of you, should the networks have the right to use their power of negotiation, if you will, in granting licenses to operators or whatnot? People have invested, you know, their life savings, et cetera, et cetera, and all of the money that they have had to borrow, to start a broadcast station, they need the affiliation, they need the programming and whatnot.

So what power do they have, in spite of the fact that Congress has given them that right? At least the way that I think it has been interpreted.

Mr. SOLOMON. Let me make two points. One is there is a proceeding pending before the Commission involving the affiliates and questions about the affiliate-network relation, so I don't want to comment on that proceeding.

But certainly the premise of your question from a perspective of how we do enforcement, if we find a TV program to be indecent that was broadcast over a number of stations, we would look to take enforcement action against each of those.

Mr. BILIRAKIS. But what I am saying is that the licensee should have the right to determine—they are charged with the responsibility. They are fined by the FCC when in fact this indecent programming takes place on their station.

Should they then have a right to determine whether or not—Congress gave them that right, as I understand it, to determine whether or not they want that on their station, in that particular locale, if you will—should they have that right? Congress gave them that right. Do we disagree with that in terms of interpreting what Congress' intent was back in 1934 and since then? Do we have a problem with that? We don't. So what should Congress do, then, in order to abide by that intent of Congress regarding licensees having the right that Congress intended them to have?

Mr. WERTZ. I would like to answer that.

Mr. BILIRAKIS. You are a radio station. That is the only reason I didn't focus it on you.

Mr. WERTZ. We are radio, but for this committee as well for everybody, radio plays to the largest theater of all, the theater of the mind, where television plays to 2-D. So, a little aside.

The Communications Act: There are a few things that we would like as long-term broadcasters to see brought back. Ascertainment existed until I believe sometime in the mid- to late 1970's. And ascertainment was a process where we as licensees were required to go out into our community and find out what made it work and what, more specifically, made it not work. And we couldn't fix problems, but we could certainly offer, you know, two sides the opportunity to discuss our needs of our communities on the air.

As part of deregulation, that process has been eliminated. I think that was a mistake. You know, third class operator permits used to be required for on-air talents. That was from a technical standpoint, because they were operating the transmitters.

But I would like to see, from the talent side—and this is as an owner—I would like to see talent be given permits again. And as part of that, before we punish people, let's educate them. Let's train them as to what they can and cannot say, and then give them permits so that when they actually go on the air they have some clear guidelines that we have not had any direction from in over 20 years. You know, the education, I think, is a very important part of this whole process.

Mr. UPTON. Go ahead.

Mr. BOZELL. Congressman, the law states that these networks have to abide by community standards, local community standards. How can they abide by community standards when they don't allow the affiliates to have a say in community standards?

Mr. BILIRAKIS. Amen. Correct. So that is really my whole point. I wonder—we are talking about words here. And who was it, Greg and others have brought up the point that—and Mr. Corn-Revere referred to the Bible and whatnot. So I don't care how many words we come up with in this legislation, there are going to be other problems arising, other words, if you will, other phrases, et cetera, other conduct, et cetera.

So shouldn't we be giving them the authority? Mr. Chairman, forgive me for taking up so much time. Shouldn't we be giving them the authority that is intended by Congress in the first place

to the licensees to make that determination, which is what was intended?

Well, all right, I am not asking for an answer to that. We have already taken up too much time. But that is something that we ought to be focusing on. Thank you.

Mr. UPTON. Thank you. Mr. Rush.

Mr. RUSH. Thank you, Mr. Chairman.

Mr. Solomon, I am going to venture off into another area of this discussion. In a column that appeared in one of my local newspapers, the Chicago Sun-Times, dated January 23, 2004, a column written by a former education reporter for the same newspaper and also now currently a teacher in a public school in the city of Chicago, she writes and I quote—I am just going to amend this, just give you some of the highlights of this column.

She writes: For at least a month, radio pirates have been broadcasting profane, violent rap music on Chicago airwaves using a frequency belonging to contemporary Christian station WCFL.

I came upon this pirate station by accident, scanning the dial while driving near the elementary school where I teach. I nearly drove into oncoming traffic when I heard FM taken over by MF. It was a riveting radio, especially if you are old enough to remember when Shat was a bad dot, dot, dot, and the second half of the compound word was shut your mouth.

Then she goes on to describe some of the words, not describe some of the material. She said the material broadcast by the pirates was so low that any thinking person who listened would surely doubt his sanity. One song was about a drug dealer who was seduced by a woman who was working for another drug dealer, and while the first drug dealer was having sex with the woman, he happened to roll over just in the nick of time to see the woman's head get blown apart by a bullet shot through a window intended for the first drug dealer. And the line about her brains splattered all over the bed and the walls really stuck with me.

That leads me into my question. She also indicates that she did call the FCC and someone, who I don't want to put into the public record, said there don't seem to be any complaints. She said in response to a complaint, investigators with electronic monitoring equipment hunt down the pirate signal.

Is there a problem that the FCC has been—has discovered? Are you aware of a serious problem with pirates using the airwaves and pirating the airwaves and using all kinds of provocative and indecent language over the airwaves?

Mr. SOLOMON. There certainly is a problem with pirate radio. We have made that a major priority. We have field offices in 25 locations around the country. And pirate radio is an important aspect of what they do. We do have, as you alluded to, interference detection equipment that we can use to locate the signals.

Last year we shut down something on the order of 300 pirate radio stations around the country. We do it through a variety of means. In the first instance, we often do it through warnings. In extreme instances, we work with the Department of Justice and seize the equipment with U.S. Marshals. In a few cases we have also worked with U.S. Attorney's offices where there have been injunctions or even criminal actions.

So pirate radio is a problem. It is something that we have given high priority to. Our focus is really on shutting down the pirates per se, more than focusing on what it is that they are saying, because even if what they were saying was, "good stuff," they still shouldn't be on as unlicensed. It can interfere with other broadcasters. In some cases it can interfere with aviation frequencies. So it is a serious problem.

Mr. RUSH. Has there been a significant increase in the number of pirate stations over the last, say, 3 to 5 years?

Mr. SOLOMON. I think it has probably been fairly steady. I think—maybe this is overly optimistic—we are having some inroads. There are some areas where it is still very serious, but in some other areas I think we have made progress.

Mr. RUSH. In order to initiate an FCC investigation, what would be the process?

Mr. SOLOMON. They can call our field office, call me or e-mail me. We have a division in Washington called the Spectrum Enforcement Division. They can contact them, and we give the information to the field and they do investigate it.

Mr. RUSH. So one would just have to inform the FCC via e-mail, letter, or phone call in order to initiate an investigation?

Mr. SOLOMON. Right. In this area, yes.

Mr. RUSH. Are there any kind of criminal proceedings or any kind of financial fines or anything levied against those individuals who are involved in it?

Mr. SOLOMON. Yes, we can take several actions. In many cases we have issued fines. In some cases we have, working with the U.S. Marshals, seized the illegal equipment. In other cases there have been some injunctions or arrests in terms of repeated or extreme offenses. So we have a series of tools, and we use several of them.

Mr. RUSH. So has any violator or pirate been jailed?

Mr. SOLOMON. I think there was one in Florida that had a criminal conviction. That may have been an amateur. I know there was also an injunction in Florida. The most serious problems are in south Florida.

Mr. RUSH. Thank you, Mr. Chairman. I yield back.

Mr. UPTON. Thank you. Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman. Again, I appreciate this hearing. And in the opening statement, one thing I forgot to mention, that of all of the problems and concerns that the Nation is experiencing in this area, this is my No. 1 issue that people have contacted me for.

I know Mr. Terry added on to what we were discussing; but when I say it is the proverbial straw, it has really awakened a great segment of my district. So I want to ask questions with direction to the piece of legislation proposed and also the concern of addressing intent.

Legislatively, there is always a problem when we pass laws. And I think we know there are malicious actors out there that are intent on trying to grab an insidious part of a market share, and they are abusing the public airwaves. No one disputes that. Those are the people that we want to go after. Those are the people we want to shut down because they are abusing the public airwaves.

Mr. Corn-Revere, you mentioned scripture, which brings us to this issue of intent. Second Timothy 3:16 says: All scripture is inspired by God and profitable for doctrine for rebuke, for training and righteousness, but the man of God might be equipped for every good deed.

So if we just had a radio show and quoted scripture and then penalized the use of the word in scripture, the intent of the language in the scripture is not to debase, but it is to train, instruct, and it is—to train in righteousness. That is the whole intent.

So I am going to throw out, how do we fashion legislative language—and I am a cosponsor—to make sure that we go after the bad actors, the people who are intending to defraud and abuse and misuse the public airwaves, and not go after, you know, as I said in the opening statement, slippage? And how do you craft in the FCC a ruling body that can judge intent?

And I am going to stop. I am going to throw it open to you all. But one of the things and one of the points addressed by the committee was an issue of multiple utterances in a defined monologue and speech over maybe the course of a show. I mean, if you hear it two times in the same sentence, then you can probably guess that wasn't a slip, it is part of a show. It is part of the aura of that period of time. Where if it was just a mistake, we all are sinful human beings, we all will make a mistake, is that punishable? And how do we craft the language of law to do that?

And let me just—Mr. Solomon, why don't you start and then we'll let the panelists in order answer that question.

Mr. SOLOMON. Well, I think the kind of intent and other factors that you are talking about are what we traditionally look at in assessing penalties. Traditionally, the Commission in this area and other areas looks at all of the facts and circumstances, looks at intent, looks at the seriousness of the violation.

Mr. SHIMKUS. You don't feel the language proposed, based upon your ability, would not affect the—any change, you would still judge intent and still—this would just give you more of a penalty aspect?

Mr. SOLOMON. Right.

Mr. BOZELL. Well, Congressman, three points. One was in the Bono—in the now famous Bono situation. It was not accidental in the sense that NBC, as I understand it, chose not to use the bleeper button that night. Plus, once it came out, NBC not only didn't apologize for it, they defended themselves vigorously over a period of months saying they had the right to do that. And I believe if they had simply said oops, we made a mistake, and we forgot to turn it on, that would be fine.

Now, insofar as the wording is concerned, Congressman, you are right. And I believe Mr. Corn-Revere is correct when he says, you know, if you use the Ose bill on the seven dirty words, the way it is crafted I don't think it will hold water constitutionally on a per se basis.

On the other hand, I would invite you to look at the legal definition of the word "obscenity." It is four paragraphs long. If you look at the Webster's definition of obscenity, it is one line. If you look at the legal definition of obscenity, you find that basically it has to have hard-core pornography and penetration that is visual.

If you look at the Webster's definition, it is abhorrent to morality or virtue; it has nothing to do with that. I think sometimes the simple answer is the clear one.

Mr. CORN-REVERE. Well, Mr. Bozell is absolutely correct. And actually just for the record, this may be the only time those words will be spoken, but he was absolutely correct when he says that the Ose bill——

Mr. SHIMKUS. I apologize. I am glad for bringing everyone together here.

Mr. CORN-REVERE. The Ose bill has serious constitutional problems because it would establish a per se rule. And as you point out, that is where any use, including Biblical use of language that appears in that bill, would be subject to an automatic violation regardless of intent.

But your question goes to the heart of why this is such a difficult constitutional problem. And that is, once you start looking at other factors, whether it is intent, serious literary, artistic, political, scientific merit, or any of the other factors, then you have a host of variables that makes this a more complicated puzzle.

That is why the FCC has had such a difficult time with this. Mr. Bozell mentioned the test for obscenity. But it took 100 years for the courts to refine and develop what became a three-part test in 1973 to define obscenity. It is not perfect. But it comes a lot closer than had existed in the past.

The difficulty with the indecency standard is that it lacks the same level of precision and leaves more to administrative discretion and more to guesswork on whether or not something fits within that definition.

Now, Mr. Bozell says that it is up to local community standards. That is just plain wrong. The FCC has said on numerous occasions that, unlike the test for obscenity, the test for indecency is not based on a local community standard. It is the community standard as defined by whatever five commissioners happen to be filling those seats at any given time. They decide what the community standard is for broadcasting. And based on that, they could make a wide range of decisions, because the definition is so very broad for what could possibly be indecent.

Now, in that respect, Justice Kennedy at the Supreme Court has written that self-assurance is the hallmark of the censor. And in that case, Mr. Bozell seems to be very, very certain about what programs we should not be watching on television or listening to on radio. Just going by the Web site of the Parents Television Council, for example, they list the top 10 and the worst 10 and the best 10 television shows.

The No. 1 show on the worst 10 is CSI, Crime Scene on CBS, which just coincidentally is the top-rated show on television. If the community standard for broadcasting has nothing to do with people—with what people have chosen to watch, I am not sure what the community standard may be.

There is also a part of the Web site for Parents Television Council that calls on people to file complaints with the FCC over the Victoria's Secret fashion show. Now, say what you will about that show, you might like it, you might hate it, for purposes of constitu-

tional analysis it is really the same thing as Baywatch, although with perhaps better acting.

And so, you know, there is no way in the world under the current standard that that show can be considered indecent. And yet if we are to judge community standards by the testimony we have heard today, television would be a very different place, contrary to the choices that most television viewers make.

Mr. BOZELL. Since this attack came out of nowhere, can I defend myself?

Mr. UPTON. I will give you 30 seconds.

Mr. BOZELL. Fine. First of all, we have never suggested that nobody should watch CSI. That is preposterous, and you know that.

Second, where Victoria's Secret is concerned, many organizations complained, people complained from all over the country. I thought that was our right, first amendment. Thank you.

Mr. UPTON. The gentleman from Maryland—oh, before I recognize the gentleman from Maryland, I wanted to say, under unanimous consent, that we will enter the newspaper story from the Chicago Sun-Times that was referenced earlier.

[The information referred to follows:]

[Friday, January 23, 2004—Chicago Sun-Times, Inc.]

GANGSTAS TAKE OVER CHRISTIAN RADIO, AND NO ONE COMPLAINS

By Leslie Baldacci

For at least a month, radio pirates have been broadcasting profane, violent rap music on Chicago airwaves, using a frequency belonging to "contemporary Christian" station WCFL.

The bigger shock is that no one complained.

I came upon the pirate station by accident, scanning the dial while driving near the elementary school where I teach in Chatham. I nearly drove into oncoming traffic when I heard FM taken over by "MF."

"Someone at that station is going to be in big trouble," I thought, waiting for the song to suddenly be yanked off the air. I was dying to hear how the embarrassed DJ would talk himself out of such a gaffe.

But on chugged the verses. And when that "song" was over, another one came on, and then another.

It was riveting radio, especially if you're old enough to remember when Shaft was "a bad mother . . ." and the second half of the compound word was "Shut your mouth!"

That first night, I listened from 83rd and Cottage Grove to 42nd and Lake Park, all through Chatham (home of the former police superintendent), Hyde Park and Kenwood. It was so crazy and other-worldly to hear such language on the radio that I started to wonder whether I was having some weird aural hallucination after a stressful day at school. So I tuned in again on my way home from my book club, and there it was! I listened until I lost the signal around 95th and Halsted.

I listened the next morning, but the signal was weak. But on Saturday night, driving to the North Side for a party, I caught it clear as a bell and listened to 50 Cent, Jay-Z and Ludacris rhyme about their sex lives in graphic detail all along the Dan Ryan Expy. from 87th Street to Cermak Road.

Which means that the thousands of people in other cars driving through Chicago could have been listening, too. Nice welcome mat for the folks driving in from the east! Way to set the table for our fair city! Or a fair adieu for the folks driving out of town: Y'all come back now, hear?

The material broadcast by the pirates was so raw that any thinking person who listened would surely doubt his sanity. One (song) was about a (drug dealer) who was seduced by a (woman) who was working for another (drug dealer) and while the first (drug dealer) was (having sex with) the (woman) he happened to roll over just in the nick of time to see the (woman's) head get blown apart by a bullet shot through a window, intended for the (first drug dealer). The line about her brains splattered all over the bed and the walls really stuck with me.

Freddrenna M. Lyle, alderman of the 6th Ward, came upon it the same way I did: "scanning" the dial.

"I couldn't believe it. It's X-rated," she said. "I picked it up with my 17-year-old niece when we were Christmas shopping. I said 'What is that? They can't play that!' She said it was an underground station. All of the kids knew about it."

I asked my students, who are 10 and 11 years old, if they knew about the station, if they'd heard it. They had.

"I heard it when I was driving with my mother. She switched the station," said one of my fifth-graders.

I happened to catch the signal one night last week while idling at a light with a 14-year-old.

"What is this?" she shrieked.

Lyle said she received not a single complaint. She suspects the only people who would know of the pirate station would be people like us, who happened upon it. (And kids. C'mon, who are they going to tell? Other kids!)

"There don't seem to be any complaints," said Suzanne Tetrault of the FCC's enforcement office in Washington, D.C.

She said in response to a complaint, investigators with electronic monitoring equipment hunt down the pirate signal. When they find it, and the people responsible, they take action to shut them down. Penalties include fines and even criminal prosecution.

Until then, the bombardment of negative, hateful, gangsta images will likely continue on the South Side airwaves. I hate to think that any of my students caught in the radio crossfire would take to heart testimony of hate and genocide from artists operating under the banner of truth and validation.

It must be doubly confusing when the pirate signal cuts in and out with the Christian station's promises that "Your children are safe here."

Mr. UPTON. Mr. Wynn.

Mr. WYNN. Thank you, Mr. Chairman. Let me begin by saying that I was pleased to cosponsor the bill that you and the Ranking Member have put together. I think it does address the issue.

I would like to ask my colleague, Mr. Rush, if he still needs the time.

Mr. RUSH. No, I don't. Thank you.

Mr. WYNN. Thank you.

Mr. Solomon, if the FCC in fact does reverse the Bureau, are we now moving into the area of a per se rule with respect to certain words as is referenced in Mr. Ose's bill?

Mr. SOLOMON. Well, I think at this point the commissioners are looking at those issues and focusing on what they plan to do and what the rationale will be. So it is hard for me to say what they are going to decide.

Mr. WYNN. Didn't you just say that you anticipated that they would in fact reverse the Bureau?

Mr. SOLOMON. The chairman has certainly proposed that.

Mr. WYNN. Let's assume that they did, and you said that that would be a significant strengthening of the indecency enforcement. Are you then recommending that we move toward a per se rule with respect to certain words?

Mr. SOLOMON. I really can't speak to what rationale or what rule the Commission is going to adopt in the case, because it hasn't decided it yet. It is deciding——

Mr. WYNN. I am going to try one more time. Hypothetically, if they do what you have suggested they ought to do, would that be the adoption of a per se rule, and would that be the beginning of a policy of per se rules with respect to indecency enforcement?

Mr. SOLOMON. It could be; but it might not be. It would depend on the theory of what the Commission uses in deciding the case and what kind of explanation——

Mr. WYNN. Are there any other words that you believe—this is to quote from your testimony—would represent a significant strengthening of indecency enforcement?

Mr. SOLOMON. I guess what I would say at this point—and I hope this doesn't sound too bureaucratic—but my job is to follow Commission precedent. Right now the Commission has said in its precedent that no word is, per se, indecent, and that isolated use of a particular word is not indecent. To the extent they overrule the Golden Globe decision and alter or depart from the precedent that we based it on, I think it is going to depend how they explain it.

Mr. WYNN. But you recommend overruling the Bureau?

Mr. SOLOMON. The chairman has recommended overruling it.

Mr. WYNN. Do you recommend overruling the Bureau?

Mr. SOLOMON. Well, there are rules——

Mr. WYNN. Your testimony seems to think it is a good idea.

Mr. SOLOMON. It certainly would be a significant strengthening.

Mr. WYNN. That is fine.

Mr. Bozell made an interesting point, with which I actually concur to some extent, because I am the father of a 9-year-old, with regard to innuendo and the Saturday Night Live parody.

Is there a way to get to the innuendo—which kind of goes to my colleague's question regarding intent—and how far we can go if we really want to get to that? My personal opinion is that this type of parody and innuendo is probably much more dangerous than the use of the quote "f" word in a context that has a nonsexual context. So, how are you proposing that we get to that issue, Mr. Bozell?

Mr. BOZELL. Well, let me make it even more confusing.

Mr. WYNN. I don't need to be more confused. I am trying to make it clearer.

Mr. BOZELL. It is difficult, Congressman. It is what is worse? Saying the "f" word or bleeping the "f" word? Someone who goes—and you know exactly what they are doing on television.

Mr. WYNN. You mean like a football coach.

Mr. BOZELL. Yeah. But when you are doing it at 8 p.m., deliberately in a script, and you bleep it, therefore now it is okay; but every child saw you say the "f" word. I mean, is there—is there intent to be—to do something indecent? I think so. But it was bleeped.

So, Congressman, I don't know the answer. But I think, you know, it is like the old definition of pornography: You know it when you see it. When someone is talking about things that were discussed in that transcript, you know what the intention was.

Mr. WYNN. I do sympathize with you, in sincerity. But I am not sure we are moving forward in terms of getting to that issue of the parody. I mean, quite frankly—and I thought I was fairly knowledgeable and worldly on the matter—some of the things that you have said, kids would know what it meant; I didn't know what it meant.

So, again, is there anything that you are suggesting that would enable us to get to issues of deliberate sexual and inappropriate sexual innuendo without compromising the first amendment?

Mr. BOZELL. Senator Lieberman put it best. Would you use this language at your dinner table with your children? If you wouldn't, then it is probably going to be indecent.

Mr. WYNN. But the point is we have to make laws for broadcasters and affiliates, and parodies are a quite common issue.

And I am going to have to assume that you don't really have an answer. That is not to find fault with you, but to say that you acknowledge the difficulty in enforcing parodies.

Mr. BOZELL. Absolutely, I do.

Mr. WYNN. That is fine. Would you advocate the censorship of shock jocks?

Mr. BOZELL. Well, you can't say what some shock jocks say, you can't put that on your license plate on your car, it is against the law. Why should they be allowed to say it? Why should they be allowed to say it? Why should—if you had a situation as you had here in——

Mr. WYNN. So you do advocate the censorship of shock jocks?

Mr. BOZELL. I believe there are limits to free speech. And I believe the Supreme Court has written so.

Mr. WYNN. So how would you propose that we approach that?

Mr. BOZELL. Well, a shock jock isn't a shock jock until he does something indecent.

Mr. WYNN. So we have to ban shock jocks?

Mr. BOZELL. No. You fine the stations that have the shock jocks and they will stop hiring shock jocks.

Mr. WYNN. So you basically want to——

Mr. BOZELL. I think you ought to focus on the stations and the networks as opposed to the individuals.

Mr. WYNN. To get rid of shock jocks. Do you draw any distinction between the invasive nature of television and radio?

Mr. BOZELL. Not as much as I would a distinction between television and movie theaters. I think you drive to the movie theater, but the radio is in your car as well.

Mr. WYNN. Okay. But you do have a lot more latitude to turn it off or change the channel, would you not agree?

Mr. BOZELL. Congressman, the responsibility is—the onus ought not to be on the owner of the airwaves to change the channel, it ought to be on those who are borrowing those channels to honor the wishes of the owners.

Mr. WYNN. What are we going do about that football coach? This is humorous, obviously. But it also is serious. Because, you know, Mr. Solomon has just moved us into the realm of per se indecency, and one guy is Bono, the other guy is an NFL coach, and they are basically saying the same thing. I think it is a little problematic.

Mr. BOZELL. I think, Congressman, as Congressman Terry said before, you expect Bono to say what he said. Well, if we have come to the point in our society where we expect football coaches to do that, then we ought to have a bleep machine. That is all you have to do.

Mr. WYNN. Are you in favor of mandatory bleeping?

Mr. BOZELL. I think it ought to be a voluntary thing that the networks do in good faith.

Mr. WYNN. Okay. All right. Thank you.

Mr. UPTON. The gentlelady from New Mexico, Mrs. Wilson.

Mrs. WILSON. Thank you, Mr. Chairman, and thank you for holding this hearing. I think like many others on this committee, I have got a lot of e-mail and letters about your indecency ruling, and I

am glad that you appear to be pleased by the FCC chairman's intention to overrule your technical decision.

And I understand the situation that you are in. But the nature of the mail I have been getting is frankly also the way I feel: that it is really hard to rise G-rated kids in an R-rated world. And while as parents we make choices about where we take our kids, we don't get in the car and go to movies that we don't want them to see, or to art exhibits that go beyond Rodin, we have a technology that is pervasive in our automobiles and in our homes.

And while we have practices at our home that may limit the exposure of our children, why should we have to worry what is on television at 7 o'clock at night on a Sunday? And I don't think we should have to. I think we should be able as a family, to be able to watch television and not have to use it as teaching a lesson of what not to say, and explain why that is not the thing that we say. And I know we all have first amendment rights, but we also have responsibilities. And in this case, because the broadcasters have licenses, there is the ability to enforce that responsibility.

Mr. Corn-Revere, you talked a little bit about television and community standards being set in a way—we talked about the number of people that watch CSI and so forth. Now, we have an interactive situation here a little bit. TV influences standards in addition to being influenced by community standards. And I don't think there is a way—I think we have to acknowledge that—maybe it is a paradox. It is like standing in a hall of mirrors where it goes—the light goes backwards and forwards.

And I am very concerned about the coarsening influence of television on society. And I also worry, Mr. Bozell, that unfortunately there are some dinner tables where the language you and I would not want to hear is used. And if that is the standard, if we go to the lowest common denominator of don't say anything—nothing is allowed on television that you wouldn't say at your own dinner table, unfortunately there are people who use that language at their dinner table. But I don't want to have it in my living room. And I think there are a large number of Americans who don't want to have that as well.

So I appreciate the testimony that we have had here this morning. And I appreciate your time and attention to these matters because I was very disappointed in the FCC ruling. And you may have felt as an enforcement bureau, that somehow you were constrained in what you could do, but the truth is, I don't care if it is an adjective or a verb, we shouldn't be getting—it is absurd to get to that level of splitting hairs to decide what can be on or off television. And it is also absurd to try to set up that standard for a station owner who is trying to figure out what these rules really mean. So I think this Congress is going to roll this back. I am a cosponsor of a couple of the bills and resolutions to do so, and I think the FCC is as well. And I say good on them.

Thank you, Mr. Chairman.

Mr. UPTON. Mr. Gonzalez.

Mr. GONZALEZ. Thank you very much, Mr. Chairman. My first observation: My first day here, and this is so much more interesting than anything in 5 years in Financial Services.

Mr. UPTON. I will tell Mr. Oxley you said that.

Mr. GONZALEZ. I probably will tell him myself. As you know, he probably would have rather have been over here the whole time.

Mr. UPTON. Welcome to the big house.

Mr. GONZALEZ. I agree with Mr. Dingell that we are probably going to have to follow up where we have the chairman and members of the Commission here. But I also wish to indicate that I know where the chairman is today and some of the commissioners. They are in my district and they are conducting a hearing on localism. But I know that they would welcome the opportunity to be here and testify, and I hope that we will give them that opportunity soon.

My question really is, Do we have uniform standards? It seems to me that it is kind of a moving target, case-by-case evaluation and some criteria. And yet there are suggestions out there that maybe get the industry involved along with other representatives, as this Congress may choose, to form some sort of a task force, come out with some sort of industrywide standards. And that I think provides certain advantages.

The first one, if you have standards that are adopted that reflect what the courts also like to see—and that is, what are the morals and values that are supposed to be reflected in any regulatory scheme—then it will probably pass constitutional muster.

And second, in its application it will be fair to the industry itself; because I do believe that you probably have a certain application of any given time that may differ, and that we should not do that in any type of regulatory scheme.

How is the best way to achieve a uniform standard? And that is the question to all of the witnesses.

Mr. SOLOMON. I guess one thing I would say is that there is a standard that the FCC has that has been affirmed by the courts. I don't know the details of the Clear Channel proposal from yesterday. I certainly think it is a good idea if broadcasters work voluntarily to try to adopt and improve on their own standards, regardless of what the legal standard is.

I also think it is important that we be careful that any sort of private standard-setting body doesn't lead to or doesn't start with the premise that the FCC's rules that have been affirmed by the Court are too confusing and therefore until broadcasters and others figure out what should replace our standards, we can't enforce what we have.

I think it is important from our perspective that we have a standard that. As Chairman Tauzin mentioned, there may be close cases on the margin, but we have a standard that we have applied that the courts have upheld.

And, I think, without deciding or prejudging particular cases, it is hard, for example, in the Clear Channel, Notice of Apparent Liability that we issued yesterday for a company to come along and say, we had no clue that this kind of thing might violate the FCC's rules.

So I think it is useful for companies to focus on voluntary standards, the NAB Code kind of thing, but it shouldn't be used as a way to say that the FCC can't enforce what is already lawful.

Mr. BOZELL. Congressman, I would say that the idea I think is fanciful if it could happen. If it could work, it would be wonderful.

But I believe that pigs would fly and Bono would stop using the "f" word before this happened. Look at the history. The industry spent years and years talking about a ratings system which one network, NBC, won't even put an age-based disclaimer on there as everyone else does, and the industry continues to violate their own standards that they came up with, and nobody can do anything about it. Why? Because they are the ones who regulate their standards.

So I am afraid that any kind of standards on decency requirements really wouldn't amount to much at this point from the industry. I would love to be wrong.

Mr. CORN-REVERE. I would just say that the search for some kind of uniform standard has been a difficult matter from the beginning. And the FCC has been hampered by the fact that the overall standard for indecency is so very general.

Mr. Solomon is correct that in certain cases you can look at a particular broadcast and say—it is not plausible to say that you didn't know that there was difficulty.

The problem comes up when you have those marginal cases, and they are becoming more and more of them, where the FCC makes a judgment on something where it perhaps in its first review of the matter didn't have sufficient merit, literary merit, artistic merit; and then on reflection, after 2 years, says, Oh, we were wrong, you can go ahead and broadcast that.

It is a very difficult thing, coming up with a standard that can survive that kind of scrutiny. And you veer between the per se approach, which has serious flaws, and then something that leaves judgment to the level—to the matter of administrators. There has to be something better than the I-know-what-you-are-thinking standard that Mr. Bozell mentioned earlier.

Also, I think it is very dangerous when we start talk about matters like having a full-time office of the speech police in the FCC to monitor what goes on over the air. That is not the system we have. It is not the system envisioned by the first amendment. And I think that would raise serious problems too.

Mr. WERTZ. I concur. The only other concern I might address would be whatever this committee does, will it stand up to a court challenge, which unfortunately is likely to be forthcoming, and hopefully it will.

Again, as a broadcaster, all we are looking for is a return to clear understanding of what you would like us to do. And by the way, I believe most of us already are doing just that.

And as for licensees, I would just like to extend one more thing. XM and Sirius are both satellite broadcasters now, licensees by the FCC. Now, I would submit from our perspective that they be held to the same standard. I am not certain under the current rules they are.

Mr. GONZALEZ. Thank you very much.

Mr. UPTON. Thank you, Mr. Gonzalez. I have just a couple more questions. And if members have a couple more, we will continue. The House is back in session. We don't expect a vote for a little while.

Mr. Wertz, I am curious to know your sense of our legislation, H.R. 3717. Do you think that if we are able to pass this, like we

are going to try and do—and I am very grateful for the Members that have cosponsored this legislation, the Dear Colleague just hit Members' offices this morning.

Already, Members yesterday, our first day of votes, were coming up to me, and we added a number last night. I am told that I am going to be adding a number of Members today.Chairman Tauzin has told me that he would like to put this on the fast track. So we are going to try and move it quickly.

But do you think that if our legislation passes and we are able to get it to the President's desk—and the administration has indicated their support for the legislation in a letter this morning—that in fact it will put a damper and lay a little better framework and signal to the broadcasters of what is allowable and what is not, based on what—particularly what may or may not come from the commissioners as they review the Enforcement Division's decisions from a couple of months ago?

Mr. WERTZ. Absolutely. I believe it will be very beneficial. I support it. I am not in favor of fines, but then I am not in favor of the actions that been going on over the past few years either.

At the same time, I would hope that we would be able to, as broadcasters, as a couple of Members brought this up, that we would be able to go back to our suppliers and be able to negotiate with them on content as well. Because sometimes we can't change what they provide to us, or they will take it away and give it to somebody else.

But yes, I am in full support of the bill.

Mr. UPTON. Mr. Solomon, in listening to Mr. Bozell's testimony, he indicated his frustration that the FCC until yesterday had not gone after—with an enforcement action on a TV broadcaster. Indicated you all didn't have the personnel to look into that.

I would like to know what your response is to what he said in his testimony.

Mr. SOLOMON. Sure. We have probably about 20 to 25 people who work a substantial portion of their time in indecency. And I can't say off the top of my head whether any of them work 100 percent, as opposed to 90 or 95 percent, but there is a significant staff that spends a lot of time on indecency, including myself. I am responsible for all enforcement at the FCC, or virtually all enforcement. And I probably spend, it varies, but 25 percent of my time, overall, on indecency. So it is a very high priority for our staff.

In terms of TV, I think there has been an evolution in the kinds of complaints that we are getting. In 2003, for example, we received about 250,000 complaints. This is the first year where a majority of the complaints are about television programs as opposed to radio. So I think there is a shift.

Traditionally our enforcement focused on radio, because that is where the complaints were. To give you an example from just a couple of years ago, in 2000, we had about 111 complaints. About 85 of them were about radio. That has changed. Now we have many more programs from TV that are challenged.

So I think you probably will be more likely to see more attention to TV in the future.

Mr. UPTON. What would you say to his statement in his testimony—and I believe Mr. Shimkus might have referenced it in his

question as well—with regard to e-mails that may have been automatically blocked from going to the FCC? Is that accurate or not?

Mr. SOLOMON. I don't really know the details. I know that sometimes when there are thousands coming in at once, there are questions about—and I am going beyond my expertise—the interoperability of the Web site that is sending them, et cetera. But I am sure that the people, particularly in our Consumer and Governmental Affairs Bureau that receive the e-mails, would be happy to work with his organization to make sure there aren't technical problems causing their complaints not to come through to us.

Mr. UPTON. Mr. Corn-Revere, as I began to prepare for this hearing—and staff provided a very good book to look through a number of the situations. The title here that they Scotch-taped is "Broadcast Indecency Briefing Materials."

I went through the entire book as I came back from Michigan yesterday, which is a long experience. Mr. Wertz and I actually left early in the morning and were fortunate to get here yesterday. I would say in fact when we landed, I thought we had gone back to Detroit because of the snow and the ice that was at the runway.

And I finished the book, and I put it into the airline seat, into the pocket in front of me. And as I grabbed my coat to run to my car in the parking lot, I neglected to take it with me. And I didn't discover that I didn't have it until I got to my car. And I knew that I could not go back through security to get the book. And when I called Northwest—that is my airline that I flew—to see how I could retrieve this book, they sort of laughed, because they in fact had found the book and were a little embarrassed. I don't know if they actually read some of the transcripts that were in there on the violations, but it was pretty serious stuff.

And I know as we talk about community standards, you know, I am sure that you have looked at some of their material, too, in terms of preparing for today, whether it was the Opie and Anthony Show or the Elliot in the Morning Show and some of the things that are in here.

I don't know of anyone that would disagree with the FCC's enforcement decision. Maybe they would complain about the fine because it was too small; but I think anyone would say yes, this is more than some of the things that were discussed here.

I mean the—I mean, as you looked at it, I think you would agree that this stuff is not appropriate for over-the-air broadcast by TV or radio with the sound effects and other things; is that not true? And I know you are a first amendment scholar. But I can't imagine that anyone would disagree with that.

Mr. CORN-REVERE. Well, I am also the father of four children, and I deal with these issues on a daily basis at home in a whole another capacity. So I take your point exactly.

Mr. UPTON. But you looked at it?

Mr. CORN-REVERE. Sure. Sure I have. And I think you read some of that stuff and you wonder what in the world was going on in the minds of the people who chose to broadcast this stuff. The point that I am trying to make is that it is dangerous to try and define a policy and legal standard by the worst examples you can find.

Because if you draft a poor standard, then you also catch up in that net examples that should never have been sanctioned by the

government. And there are a growing number of examples of the FCC enforcement policy that fall in that category because of the imprecision of the legal test.

And there is one just technical point——

Mr. UPTON. You would not disagree with some of the stuff here, that the FCC didn't—you are not saying——

Mr. CORN-REVERE. I am not trying to endorse any particular broadcast at all.

Mr. UPTON. You have read it. Would you disagree that they were wrong in announcing a fine on the Opie and Anthony Show or the Elliot in the Morning? Did you look at the Elliot in the Morning transcript?

Mr. CORN-REVERE. I do not recall that example from just your describing it. I would have to go back.

Mr. UPTON. I can remember when we had hearings in this subcommittee, last year or the year before, and we had the recording industry here, and I guess it was in the last Congress because it was Mr. Largent, Steve Largent, Barbara Cubin, and they asked Hillary Rosen, then the Director of the Recording Industry Association, and they asked her if she could read some of the lyrics that had not been marked for parents, and she could not read them, and, you know, I could not, you know, possibly read some of this stuff that was in this in any type of public forum. You know, it was difficult to get through it yesterday as I tried to screen it from the fellow that was sitting next to me on the plane coming back.

Mr. CORN-REVERE. And you may have noticed, Mr. Chairman, in drafting my testimony I was careful to avoid using language and examples from cases that are constitutionally protected because those words do appear in those cases.

The technical point I wanted to reach was Mr. Bozell's point made earlier that the FCC in his words had never, never fined a television station. It was a point we had discussed before and in fact I corrected him on the Senate side. In fact, the FCC had acted in the case of complaints against the television stations in the past.

In 1988, it did so in a station, KZKC, in Kansas City. In 1997 it fined a station in Roanoke, Virginia, but this gets back to the point that you were addressing about using those worst examples to define the field, because it has gone after television and has investigated a number of types of programs in the early 1990's and also investigated a public broadcast station for the transmission of a miniseries called The Singing Detective, which, incidentally, had won a Peabody Award.

There were a few brief scenes which caused difficulty to the Commission. I know because I was a staff member at the time and was looking at this particular example.

I think if you look at this under a rational first amendment test you could not possibly find that the program was indecent, that it lacked sufficient merit to be broadcast, and yet because of the investigation this program has never appeared on public television again or commercial television for that matter in the decades of investigation. So the standards you use and the power you bring to bear from the FCC is really an awesome power and limited under the first amendment.

Even when you can point to examples that you think are absolutely clear, the standard is what is important?

Mr. UPTON. Well, that is exactly why so many Members have cosponsored this legislation, because they have seen some of the stuff that has been fined and said: You know, it is still not stopping it.

Again, some of these examples that are in here are multiple occurrences on different days from the same station, and sometimes they have received the maximum fine and yet they come at it again, and that is what we are trying to stop.

Mr. Bilirakis has additional questions.

Mr. BILIRAKIS. Mr. Corn-Revere, I cannot help, as you were telling us, that you have four children.

Do you oftentimes or do you sometimes find yourself turning off the television or basically disallowing them from watching a particular station?

Mr. CORN-REVERE. Oh, sure, I do, as a parent. I just do not want Mr. Bozell as my parent.

Mr. BILIRAKIS. Do they use the defense of the first amendment when you do that?

Mr. CORN-REVERE. No, because they know I am the dictator in the household.

Mr. BILIRAKIS. You know, maybe I am a little hard-headed and I support the legislation and it is going to do some good, and yet, Mr. Corn-Revere, there is certainly the power, the FCC is there, and it is preventing a lot of these bad things from taking place, not all of them but some of them.

We know there is going to be all sorts of outpouring, words and phrases additional, that are coming into the picture, all that sort of thing, and I keep wondering if maybe we should not place more authority in the hands of the local licensee to determine, because they are closer to the public; you know, if I contact my local broadcaster, if you will, they are more likely to listen to me than trying to contact the FCC, which I guess is already evidence that they seem to be ignoring the inputs there and what not.

Mr. CORN-REVERE. I do not mean for any of my comments to address or to diminish the level of editorial discretion that the local licensee should have.

Mr. BILIRAKIS. Well, apparently, it is diminished and from a real world standpoint, but the policy says clearly: Broadcast licensees must assume responsibility for all material which is broadcast from their facilities. So they are being fined. Some of them are being fined, right, Mr. Solomon, the local people?

Mr. SOLOMON. If you look at the statement.

Mr. BILIRAKIS. How many of those cases do they come in with a defense, explanation, rationale, whatever you want to call it, to the effect that, well, my, the network has forced me to put this on the air, even though I do not want to do it?

Mr. SOLOMON. I do not recall any such instances in our cases.

Mr. BILIRAKIS. Anybody know anything different, different in that regard?

I am told by some of these licensees, these broadcasters, that that is a big problem.

Mr. SOLOMON. I do know there is a broader proceeding going on that the Commission is addressing, and I am answering it from my perspective in enforcement cases.

Mr. BILIRAKIS. Yes, I realize your responsibility is enforcement.

Yes, and I realize your responsibility is enforcement.

Before I go on, Mr. Bozell, yes?

Mr. BOZELL. There is an example, but there are others, and we have heard them anecdotally, but there is a written example I would be happy to give you.

Last year on Fox there was a program, Keen Eddie, which features a prostitute having sex with a horse.

Mr. BILIRAKIS. Oh, yes, sir.

Mr. BOZELL. And that was over the airwaves.

Or attempting to have sex, I should say. The Fox affiliate in Kansas city said he was forced to run that and that was not his responsibility.

Mr. BILIRAKIS. Yes, if you could share that with us, I would appreciate that.

With unanimous consent, I would ask it be made part of the record.

Mr. UPTON. Without objection.

[The information referred to follows:]

FOX 4
WDAF-TV, KANSAS CITY, MO
July 25, 2003

Mr. TIM MAUPIN
Chapter Director, Kansas City Metro Chapter
Parents Television Council
P.O. Box 22641
Kansas City, MO 64113

DEAR MR. MAUPIN,

We received your letter dated June 30, 2003 regarding the content of the Keen Eddie show that aired on June 10, 2003, at 8pm.

We forwarded your letter to the FOX Network. The Network, not WDAF TV4, decides what shows go on the air for the FOX Owned and Operated Television stations.

Sincerely,

CHERYL MCDONALD
Vice President/General Manager
WDAF-TV/FOX 4

Mr. BILIRAKIS. Yes, sir.

Well, I guess I am the only one. It may not be a good idea, I do not know. Nobody has really followed up on what my emphasis has been here.

Are they not taking away or belittling what the chairman and Mr. Markey and what the most of the rest of us who have co-sponsored legislation want to do; but I think we are also coming to a consensus that there are going to continue to be problems, because that in itself is not going to cover everything that may come out of the woodwork.

Mr. BOZELL. Congressman, may I make a good point here?

Mr. BILIRAKIS. Yeah.

Mr. BOZELL. You do not want to come in with this with a rifle and do it so fine-tuned that you lose the spirit of what you are trying to do. According to the letter of the law, not a single thing we discussed today is obscene, when everyone in this room knows that

everything we have been discussing is having to do with obscenities. Yet the way the law is written none of it is obscene.

Mr. BILIRAKIS. If the local licensee were not forced, basically, in order to stay in business, to go along with the contracts by the networks, which would basically place them in the fear of maybe losing their, you know, affiliation, if they did not go along with it, could that take care of some of the problem?

Mr. BOZELL. I think, yes, because at that point you have got a community standard.

Mr. BILIRAKIS. Right.

Mr. BOZELL. You have got the community which would be able to voice itself with the station and the station could in turn react. I think it would be a positive influence.

Mr. BILIRAKIS. Mr. Corn-Revere.

Mr. CORN-REVERE. Certainly, anything that increases licensees' editorial discretion.

Mr. BILIRAKIS. Mr. Wertz, I think you have already indicated you would like to be able to have that type of freedom, if you will.

Mr. WERTZ. We actually had a case that addresses directly what you are talking about. We were affiliated with the network. A sports show was on an afternoon drive of one of our stations, and this was the Super Bowl in San Diego. The talent had a prostitute on, talked about all the different people that she had had at San Diego and not specific acts per se but pretty close, and we ended our relationship with the network over it because they refused to back down, and we wound up with what some people could consider—and I among them—a lesser network at that moment, but we did it based on our principles, that that just did not play in Kalamazoo.

Mr. BILIRAKIS. Well, I certainly commend you for that.

All right, thank you very much.

Thanks, Mr. Chairman.

Mr. UPTON. Mr. Wertz, I want you to know that Mr. Bilirakis is also a Cubs fan.

Mr. WERTZ. Yes, they were very good for us this past fall.

Mr. UPTON. So is Mr. Engel when he does not have to root for the Mets or the Yankees, and I would just acknowledge for those members who were not able to be present today I would ask unanimous consent that all members of the subcommittee have an opportunity to submit an opening statement and in their absence, Mr. Engel, I address you.

Mr. ENGEL. I am not going to ask any questions, Mr. Chairman. I just want to ask unanimous consent to put in the record, but I want to say I admire Bono for the good work he has done to highlight poverty, hunger and AIDS in Africa, he is a very talented musician, he has shown himself to be bright and capable, but he should know better than to use curse words on national television, and I also just want to say that I am very encouraged to learn that the broadcast networks are adopting the 7-second delay or longer when showing a live program. I think that is a good step, and I understand members of the industry are calling for an industry-wide effort to design and adopt indecency guidelines for all broadcasters, and I think that is good too.

I have read the testimony. I found it fascinating that Mr. Wertz pointed out that in the 1950's the cast of I love Lucy could never use the word "pregnant" but only words such as expectant. I am dating myself, that is my all time favorite program, but I commend you, Mr. Chairman, for holding this hearing and I know that we on this committee take this very, very seriously and are going to be doing everything we can to come out with an acceptable way of dealing with this problem, and again I ask unanimous consent for my testimony, and I yield back my time.

[The prepared statement of Hon. Eliot Engel follows:]

PREPARED STATEMENT OF HON. ELIOT ENGEL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Thank you Mr. Chairman:

When my staff told me about this hearing and the reasons behind it, I really started to think. I thought about the impact that popular figures can have on our children. I thought about the fact that what popular figures say and do can sometimes have an extraordinary impact on our children. Now, there are moments when I delude myself into believing that I am the biggest influence on my children. And, I know that in fact I certainly am an important influence. But, between the media and peer pressure, it isn't being a kid today. It's not easy being a parent either.

I, for one, admire Bono for the good work he has done to highlight poverty, hunger and AIDS in Africa. He is also a very talented musician. He's shown himself to be a bright and capable man. So he should know better than to use curse words on national television.

I am encouraged to learn that the broadcast networks are adopting a 7 second delay or longer when showing live programming. I also understand that members in the industry are calling for an industry wide effort to design and adopt indecency guidelines for all broadcasters—radio and television. These are two strong steps that industry should and can take.

I also want to point out that I believe that the violence on television seems to get a greater "pass" than sexual content. We seem to tolerate violence more than we do sexual content. This really disturbs me.

I am very aware that we must tread lightly. The First Amendment's guarantee of freedom of speech is vital to our democracy. People are going to have differing views on many issues. For example, as I said, I object to the violence on televison. And I know that Parents Television Council objects too. I appreciate that PTC has done research to show the rate of violence our children are exposed to.

However, Mr. Bozell's other organization, the Media Research Center, has also consistently campaigned against what he says is the media's "attempt to legitimize homosexuality." I disagree 100 percent. I have gay friends. They visit my home and eat at my table with my children. I want my children to know that being gay is ok, if that is what you are. I want them to know that gay and lesbian people hold jobs, pay taxes, and have families too.

So I am conscious that there will always be disagreements as to what is appropriate. As is pointed out in Mr. Wertz's testimony—that in the 1950's, the cast of "I Love Lucy" could not use the word pregnant—but only words like expecting. I can't imagine there is a person in this room who finds the word pregnant offensive. This just goes to show that our standards—our "contemporary community standards"—are always changing and we should be loathe to try and set standards for 2040 in 2004.

Who knows? In 2040—calling someone a Luddite could be considered very offensive!

Mr. Chairman, the guarantee of freedom of speech is a powerful tool for us to use to insure that all views have an opportunity to be expressed. But, it can also mean that people will hear and see things they don't like or agree with or like.

It isn't an easy balance.

But, then again, Democracy should not be easy.

I yield back.

Mr. UPTON. Without objection, I recognize the gentleman from Texas for questions, Mr. Green.

Mr. GREEN. Mr. Chairman, I understand that a lot of the questions I was going to ask concern about I think we do need to have

some guidelines and I think most of us philosophically would like the industry to put it together if we could, and I think, as Congress, maybe to satisfy the Justice Department, we might need to be more active in it; ultimately some type of statute, but again I am glad that that is what the testimony has shown, and again, from what I understand, the questions from both my Republican and Democratic colleagues, so I look forward to moving along and seeing how we can deal with some of the issues not only on this legislation but also on the major issue of obscenity on the airwaves.

Thank you.

Mr. UPTON. Thank you.

I want to reiterate my thanks to you as well for being a cosponsor of the legislation, so with that our time is concluded. I appreciate very much the testimony by all four of you. We look forward to your further input for sure as we look at this legislative process.

God bless.

[Whereupon, at 1:27 p.m., the subcommittee was adjourned.]

[Additional material submitted for the record follows:]

PREPARED STATEMENT OF FRANK WRIGHT, PRESIDENT, NATIONAL RELIGIOUS BROADCASTERS

My name is Frank Wright and I serve as president of the National Religious Broadcasters, the largest association of Christian communicators in the world. My written testimony is supplied on behalf of our more than 1500 member organizations to encourage Congress to affirmatively address the rampant and growing problem of indecent speech on the airwaves.

At the outset let me be clear that as the head of an association representing broadcasters, I am keenly aware of the concerns relating to censorship. Since the heart of our members' mission is to share the life-changing Gospel of Jesus Christ, we know that the censorship sword cuts both ways. When any one interest group can determine what is appropriate for the populace at large, the very essence of democracy and freedom in our nation is at risk.

Having said that, it is important to note that our First Amendment rights to free speech have never been absolute. One cannot, for example, shout "Fire!" in a crowded theater because of the potential risk of injury or loss of life from an ensuing panic. One cannot commit treason by communicating important national security information to hostile nations and afterward claim First Amendment freedoms. Neither can one commit libel or slander and justify such damaging communications by claiming constitutional protection.

Regarding matters of indecency, the United States Supreme Court has also carved out an exception to First Amendment concerns because of the very real threat to the welfare of our nation's children. For this reason, while we must tread very lightly on this subject, there are certain standards respecting what children should not have to hear that we as an entire people hold in common, and which the United States Supreme Court has affirmed as constitutional. It is in this light that I submit my testimony to the subcommittee.

I. BACKGROUND: INDECENCY DEFINED.

Congress gave the FCC the authority to police the airwaves and uphold community standards. According to Title 18, Section 1464, of the United States Code, "any obscene, indecent or profane language" is prohibited for mass communication via radio.[1] Also, Title 47, Section 73.3999, of the Code of Federal Regulations states, "no licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent."[2]

In 1975, the FCC found that "obnoxious, gutter language . . . [has] no place on radio when children are in the audience."[3] The Commission went on to define indecency as

[1] 18 U.S.C. § 1464.
[2] 47 C.F.R. § 73.3999.
[3] *In the Matter of a Citizen's Complaint against Pacifica Foundation,* 32 RR 2d 1331, 1336, ¶ 11 (1975).

> "... intimately connected with the exposure of children to language that describes [or depicts], in terms patently offensive [sic] as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience."[4]

Unfortunately, after establishing an important and helpful standard and making a commitment to protect the welfare of innocent children, the FCC almost immediately began to back away from its own standard. In 1976, one year later, the Commission began backpedaling from its own standard to cater to broadcasters, stating it would be "inequitable for us to hold a licensee responsible for indecent language" during live broadcasts.[5]

Since that time, the FCC has eroded its own standard by adding yet more criteria to test whether broadcasts cross the threshold of indecency:

> "(1) *the explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; (3) *whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.*" (emphasis in original)[6]

By making the definition of indecency sound more like obscenity, the Commission has set the indecency bar unnecessarily high, making infractions more difficult to prove and thus more difficult to punish.

II. INDECENCY COARSENS SOCIETY AND TEACHES CHILDREN THAT MORALITY IS IRRELEVANT TO WHAT THEY SAY.

Indecency standards are worth enforcing because publicly broadcasting such words when there are children likely in the audience dramatically coarsens our society. Permitting indecent speech on the airwaves teaches children that there are no limits on improper speech. It desensitizes the culture to what is detrimental and unacceptable. As a result, we have confused children, told they cannot say certain words at school and other places, only to hear them repeated on the radio or television.

When families cannot sit down to watch a program together during the so-called "Family Hour" without hearing indecencies, we know there is a problem with our broadcasting standards. If the FCC were serious about enforcing those standards, then we wouldn't have such a problem. Some have even suggested that the continual drone of profanity on our airwaves can also lead to a reduction of civility in society, leading to violence and the loss of moral values.[7] As newspapers daily document our culture's violent crimes and lack of morality, we can see that there is at least a correlation between indecent speech and incivility.

C.S. Lewis, the Christian philosopher, stated that profanity is degrading to us as people because it describes our actions in animalistic terms. Our culture's ideals should be encapsulated in our art (e.g., film, radio, TV, Internet, etc.); our art ought not reduce us to less than we are.

Part of childrearing involves teaching children what is acceptable and what is not. If we cannot consistently teach them what they should or should not say, then how will we teach them what they should or should not do?

III. THE FCC ALREADY HAS A CONSTITUTIONAL STANDARD FOR DETERMINING INDECENT SPEECH.

On October 30, 1973, a New York radio station owned by Pacifica Foundation broadcast comedian George Carlin's previously recorded monologue "Filthy Words" at approximately 2:00 p.m. A father and his young son heard the broadcast and filed a complaint. On February 21, 1975, the FCC ruled administrative sanctions could be imposed on Pacifica. On July 3, 1978, the United States Supreme Court upheld the FCC, in part, because of the nature of the medium involved.

First, the Court found in *FCC v. Pacifica Foundation* that broadcasting has "a uniquely pervasive presence" in modern-day life. Since it found Americans have a right to privacy within their own homes, the content of the broadcast medium ought

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[4] *In the Matter of Pacifica Foundation,* 32 RR 2d at 1336, ¶ 11.

[5] *Memorandum Opinion and Order, In the Matter of a Petition for Clarification or Reconsideration of Pacifica Foundation,* 36 RR 2d 1008 (1976).

[6] *See Policy Statement, In the Matter of Industry Guidance on the Commission's Case Law Interpreting § 1465 and Enforcement Policies Regarding Broadcast Indecency,* 16 FCC Rcd 7999 (2001).

[7] Parents Television Council, "The Blue Tube: Foul Language on Prime Time Network TV," (September 15, 2003), http://www.parentstv.org/PTC/publications/reports/stateindustrylanguage/main.asp.

to be controlled, in spite of the potential for First Amendment concerns. If someone were to miss content warnings at the beginning of a program, he or she could unwittingly tune in and hear something they would ordinarily not have willingly brought into their home.[8]

Second, the Court determined that broadcast medium is "uniquely accessible to children, even those too young to read." Since children might easily hear indecency on the airwaves during the afternoon (and a young boy did in the instance of the *Pacifica* case), the Court took special notice.[9]

Since the FCC's 1975 policy was declared constitutional, the Commission ought to state emphatically in its rulings that Americans have a right to be free from indecency in their homes, when children may be in the audience.

IV. THE FCC'S RETREAT FROM ITS OWN STANDARD TELLS BROADCASTERS THAT THEY CAN SAY ANYTHING ON THE AIR.

Since the FCC has not consistently followed its own policy, broadcasters will continue to push the envelope to boost ratings. This has prompted FCC Commissioner Michael Copps to frequently describe broadcasters' actions as a "race to the bottom."[10]

In just four years, from 1998 to 2002, profanity increased on nearly all television networks during essentially all of the prime time viewing hours. During the Family Hour, incidents of indecent and obscene speech rose by 94.8%, and in the 9:00 p.m. time slot by 109.1%. Interestingly, the 10:00 p.m. hour, when small children would be least likely to watch, reported the smallest increase in foul language,[11] possibly because that timeslot's standards had already fallen so low.

Within the past two years, the New York radio program "Opie & Anthony" broadcasted reports describing sexual acts performed in or near St. Patrick's Cathedral. In January 2003, NBC affiliates broadcast the f-word unbleeped during the Family Hour. Then just in December, the f-word aired again during a live prime time awards broadcast.

Unless the FCC resolutely pursues indecency and levies punishments to discourage it, broadcasters will feel emboldened to slide even further into the gutter. The current fine structure, levied by the FCC, is treated simply as a cost of doing business. The fines are not viewed as punitive actions, but merely as indecency-licensing fees.

FCC Commissioner Copps has frequently dissented from FCC disciplinary rulings involving monetary forfeitures by saying that they do not go far enough. He has recommended holding hearings on revoking licenses from broadcasters for consistent and egregious violations.[12]

There is no standing still. The current level of indecency on the airwaves will not stay the same but will increase, absent consistent enforcement by the FCC.

V. THE FCC MUST RETURN TO TOUGHER STANDARDS AND ASSERT ITS ROLE AS DEFENDER OF THE PUBLIC INTEREST.

In order to prevent the downward slide in what is acceptable over the airwaves, the FCC must return to the standard it established—the *Pacifica* standard. By so doing, it can take its rightful place as the defender of the public interest.

Commissioner Copps has repeatedly lamented that the agency has done little to counteract indecency on radio and television.[13] I am encouraged that numerous Members of Congress over the past few months have condemned the FCC's ruling on last year's NBC Family Hour broadcast of the Golden Globe Awards program,

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[8] *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978).

[9] Ibid.

[10] *See Separate Statement of Michael J. Copps, Dissenting, In the Matter of Infinity Broadcasting Operations Inc., Licensee of Station WKRK-FM, Detroit, Michigan, Notice of Apparent Liability for Forfeiture,* File No. EB-02-IH-0109, (December 8, 2003), http://hraunfoss.fcc.gov/edocs__public/attachmatch/FCC-03-302A5.html. *See Separate Statement of Michael J. Copps, Dissenting, In the Matter of Infinity Broadcasting Operations, Inc.; Infinity Radio Operations, Inc.; Infinity Radio Subsidiary Operations, Inc.; Infinity Broadcasting Corporation of Dallas; Infinity Broadcasting Corporation of Washington, D.C.; Infinity Holdings Corporation of Orlando; Hemisphere Broadcasting Corporation, Notice of Apparent Violation for Forfeiture,* EB-02-IH-0685, (October 2, 2003), http://www.fcc.gov/eb/Orders/2003/FCC-03-234A1.html.

[11] Parents Television Council, "The Blue Tube."

[12] *See Copps Dissenting Statement, Re: Infinity Broadcasting Operations, Inc., Notice of Apparent Liability for Forfeiture,* File No. EB-02-IH-0109, (December 8, 2003), http://hraunfoss.fcc.gov/edocs__public/attachmatch/FCC-03-302A5.html.

[13] Ibid.

in which musician Bono used the f-word twice on national television.[14] Last December, NRB worked with the other chamber to write language for S. Res. 283, which was adopted by the full Senate on December 9th. That Sense of the Senate Resolution called on the FCC to "return to vigorously and expeditiously enforcing its own United States Supreme Court-approved standard for indecency in broadcast media."

Last week, it appears that FCC Chairman Michael Powell bowed to congressional pressure, and public outcry, when he abruptly changed course and recommended that the FCC commissioners reverse the agency's Enforcement Bureau's Golden Globe decision.[15] He also called on Congress to increase fines tenfold for future indecency violations.[16] In quick response, the Chairman of this subcommittee, Representative Fred Upton, introduced H.R. 3717, the *Broadcast Decency Enforcement Act of 2004,* to codify that increase.

Increasing fines is a critical first step. Yet we also submit that the airwaves will not ultimately be transformed until the FCC changes the way it thinks about enforcement. The Commission should increase fines *and* return to the *Pacifica* standard if the airwaves are to meet a higher content standard and protect our children. In 1975 when the Commission took the stand, it didn't know for certain that the Court would uphold *Pacifica.* When it did, the high court gave the FCC a firm place to stand. Since then, by the FCC's own admission, "The federal courts consistently have upheld Congress' authority to regulate the broadcast of indecent speech, as well as the Commission's interpretation and implementation of the governing statute."[17] So let us do both.

The FCC appears reluctant to assert their authority, not wanting to take any action until prompted by Congress. If that is what it takes, then so be it. In the words of Commissioner Copps,"[t]he time has come for us to send a message that we are serious about enforcing the indecency laws of our country and that we will be especially vigilant about the actions of repeat offenders."[18] What is needed here more than any other single thing is bold leadership. That is why we applaud Representative Upton for the important first-step of introducing legislation to increase fines, and for holding this hearing to draw attention to this critical issue. We also applaud the actions of other subcommittee members, like Representative Pickering, who has introduced a House resolution that is very similar to the one passed by the Senate.

Overall, there is a sense of agreement in both houses on this issue: indecency on the airwaves is unacceptable. The time is right to hold the FCC to a higher standard of enforcement. The over 1500 organizations represented by the National Religious Broadcasters thank Representative Upton for holding this hearing, and we encourage the subcommittee to look into this matter further and exert the kind of bold leadership needed at this critical juncture. If the FCC will not willingly enforce their own constitutionally-approved indecency standard, then perhaps Congress needs to statutorily require them to do so.

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON ENERGY AND COMMERCE
January 27, 2004

Mr. ALEX WALLAU
President
ABC Television Network
47 West 66th Street
New York, New York 10023

DEAR MR. WALLAU: As you may be aware, during recent live broadcasts on the NBC and FOX television networks, use of language that most Americans would consider indecent, profane, or both was broadcast unedited to millions of American

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[14] Larry Wheeler, "Congressman joins attack on agency's f-word ruling," Gannett News Service, November 27, 2003; Associated Press, "Bill would ban some swear words from radio, TV," December 16, 2003.

[15] Jonathan D. Salant, "FCC Chairman wants to overturn decision on expletive aired in NBC broadcast," Associated Press, January 14, 2004.

[16] Jonathan D. Salant, "FCC head wants bigger fines for profanity," Associated Press, January 15, 2004.

[17] *In the Matter of Complaints Against Various Licensees Regarding Their Airing of the "Golden Globe Awards" Program,* EB-03-IH-0110, (October 3, 2003), http://www.fcc.gov/eb/Orders/2003/DA-03-3045A1.html.

[18] *See Copps Dissenting Statement Re: Infinity Broadcasting Operations, Inc.; Infinity Radio Operations, Inc; Infinity Radio Subsidiary Operations, Inc.; Infinity Broadcasting Corporation of Dallas; Infinity Broadcasting Corporation of Washington, D.C.; Infinity Holdings Corporation of Orlando; Hemisphere Broadcasting Corporation, Notice of Apparent Violation for Forfeiture,* EB-02-IH-0685 (October 2, 2003), http://www.fcc.gov/eb/Orders/2003/FCC-03-234A1.html.

homes. I am referring to NBC's live broadcast of the *Golden Globe Awards* on January 19, 2003, and to FOX's live broadcast of the 2003 *Billboard Music Awards* on December 10, 2003. Both of these broadcasts occurred during a viewing period in which the Federal Communications Commission (FCC) has determined that children are likely to be watching television.

Since that time, the FCC has been asked to determine whether the NBC and FOX broadcasts were indecent, as a matter of law. In the case of the Golden Globe Awards, the FCC has determined that the broadcast was not indecent, and the agency is still investigating complaints related to the FOX broadcast. However, in my mind, whether the remarks in question fall within the FCC's narrow reading of the definition of indecency is not the core issue. No matter how the FCC rules on the pending complaints, a more important question is how the FOX and NBC television networks permitted such objectionable language to be broadcast to millions of American homes.

Though neither of these broadcasts involved the ABC network, I would still appreciate answers to the following questions in order to better inform the Congress as to industry practices:

1. Does the ABC Television Network believe that it is acceptable to transmit programming—live or otherwise—that contains the "f word" or similarly objectionable language? Does the network believe that it has a responsibility to its viewers to prevent such broadcasts?
2. What preventive mechanisms and procedures does ABC presently have in place to ensure that obscene, indecent, or otherwise objectionable language is not transmitted to ABC broadcast stations?
3. Legislation has been introduced in the House, H.R. 3717, which would increase by ten-fold the monetary penalty that the FCC can impose upon licensees that broadcast programming which contains obscene, indecent, or profane content. Do you support such legislation? If so, why? If not, why not?
4. The FCC has recently indicated that it may begin to impose monetary penalties per utterance rather than per broadcast program upon licensees that broadcast obscene, indecent, or profane content. Do you support such a change in the agency's enforcement policy? If so, why? If not, why not?
5. The FCC has also recently indicated that, for certain licensees that repeatedly violate its indecency rules, it may begin to seek the revocation of the repeat offenders licenses rather than simply continue to impose fines. Do you support such a change in enforcement policy? If so, why? If not, why not?

As you may be aware, the Subcommittee on Telecommunications and the Internet plans to conduct a hearing on the subject of broadcast indecency tomorrow, January 28, 2004. I would appreciate if you could respond to this letter on or before Tuesday, February 3, 2004, and I will ask that your answers be included in the hearing record. If you have any questions, please contact me, or have your staff contact Gregg Rothschild, Minority Counsel, at 202-226-3400.

Sincerely,

JOHN D. DINGELL
Ranking Member

cc: The Honorable W.J. "Billy" Tauzin, Chairman
Committee on Energy and Commerce

February 3, 2004

The Honorable JOHN D. DINGELL
Ranking Member
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515-6115

DEAR MR. DINGELL: This letter is in response to your letter asking ABC to answer several questions regarding broadcast indecency.

At the outset, we want to emphasize that ABC takes very seriously its responsibility to its audience. As discussed in more detail below, ABC considers and reviews very carefully the content of its programming.

In response to your first question, ABC believes that the "f-word" is not appropriate for network programming in almost any circumstance. We note, however, that the "f-word" was included in ABC's network broadcast of the Academy-Award Winning film "Saving Private Ryan," in which the word was uttered a number of times as a profanity by soldiers at war. Because of the special nature and quality of the film, ABC decided to retain this language in its airing of "Saving Private Ryan," but proceeded the broadcast with an extensive advisory and parental warning about language and violence and repeated the warning at several points within the broadcast.

Your second question asks about ABC's preventative mechanisms and procedures. ABC's preventative mechanisms are extensive. Specifically, ABC has a Broadcast Standards and Practices Department, headed by a Senior Vice President with twenty years of television experience and composed of 24 professionals who are responsible for the review and acceptance of all ABC primetime entertainment programming. ABC's Broadcast Standards staff works with creative personnel throughout the entire prime-time program development process, from inception all the way through to the on-air broadcast of entertainment programming. Broadcast Standards editors are assigned to specific ABC scripted entertainment programs and, in this role, they read, review and issue notes of each draft of the script for each episode. A Broadcast Standards editor also is on set or location during the live or taped production of comedy, reality, specials and awards shows.

Rough cuts of taped prime-time entertainment programming are reviewed and, when necessary, revised prior to broadcast. Acquired theatrical films are reviewed and where necessary revised prior to broadcast. Live prime-time entertainment programming is subject to a delay mechanism staffed by experienced Broadcast Standards editors.

With respect to your last three questions, we want to assure you that ABC is committed to complying with all indecency rules adopted and articulated by Congress and the Federal Communications Commission, regardless of the magnitude of the available sanctions.

Sincerely,

ALEX WALLAU, *President*
ABC Television Network

cc: The Honorable W.J. "Billy" Tauzin, Chairman
Committee on Energy and Commerce

PREPARED STATEMENT OF MR. PATRICK J. VAUGHN, GENERAL COUNSEL, AMERICAN FAMILY ASSOCIATION, INC.

Much of the raunchy material on television and radio today is the fruit of the FCC's lax enforcement policy concerning broadcast indecency.

The Federal Communications Commission (FCC) is charged with enforcement of the law banning broadcasts of obscenity, indecency, and profanity. 18 U.S.C. § 1464, ("[W]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.") The FCC has not adopted regulations to implement this statute. Instead, the Commission has adopted a *Policy Statement* that sets forth an extremely narrow definition of indecency, completely ignores profanity, and places such a high documentation burden on anyone attempting to file an indecency complaint that most are rejected by the FCC without the station becoming aware that a complaint has been filed. *Policy Statement, In the Matter of Industry Guidance On the Commission's Case Law Interpreting 18 U.S.C.* § 1464 and Enforcement Policies Regarding Broadcast Indecency, FCC 01-90, 2001.

The American Family Association, Inc. (AFA) recommends that Congress instruct the FCC to (1) Adopt a more comprehensive definition of broadcast indecency; (2) Enforce the statutory ban on broadcast profanity; (3) Reform its enforcement practices so that indecency and profanity complaints receive the same level of investigation as other types of complaints.

1. The law protecting minors from the broadcast of obscenity, indecency, and profanity is constitutional.

Of all forms of communication, broadcast speech is entitled to the most limited First Amendment protection. *FCC v. Pacifica Foundation,* 438 U.S. 726, 748 (1978). The Supreme Court has stated a variety of reasons that justify broadcasting's lower level of constitutional protection, including the fact that the broadcasting media confront citizens in "the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder," and that "because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer form unexpected program content." *Ginsberg v. New York,* 390 U.S. 629 (1968). Therefore, the FCC can appropriately regulate offensive broadcasts, even when they do not sink to the level of criminal obscenity. *FCC v. Pacifica Foundation,* at 750-751 ("when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.").

The courts have found a compelling Government interest in restricting offensive broadcasts to (1) support parental supervision of children, and to (2) protect chil-

dren's physical and emotional well-being, as well as their ethical and moral development. *ACT III,* at 661, 662 (citing, *Ginsberg* at 641). The DC Circuit Court of Appeals has reaffirmed that "the 'channeling' of indecent broadcasts to the hours between midnight and 6:00 a.m. would not unduly burden the First Amendment." *Action for Children's Television III,* 58 F. 3d 654, 656 (1995).

Given this statutory mandate, which falls with constitutional authority, how has the FCC gone about enforcing the prohibition against the broadcast of obscenity, indecency, and profanity?

2. The FCC's current definition of indecency misses a lot of material that is bad for kids.

Addressing the last point first, FCC policy totally ignores the statutory ban on the broadcast of profanity. To define broadcast indecency, the FCC uses a two prong test: (1) "the material must describe or depict sexual or excretory organs or activities"; and (2) "the broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast medium." *Policy Statement,* at ¶¶ 7, 8. Applying this test, David H. Solomon, the Chief of the FCC Enforcement Bureau, found that broadcast of the word "f*cking" during the broadcast of the 2003 Golden Globe Awards did not fit the definition. Solomon ruled:

> As a threshold matter, the material aired during the "Golden Globe Awards" program does not describe or depict sexual and excretory activities and organs . . . Indeed, in similar circumstances we have found that offensive language used as an insult rather than as a description of sexual or excretory activity or organs is not within the scope of the Commission's prohibition of indecent program content.
>
> Moreover, we have previously found that fleeting and isolated remarks of this nature do not warrant Commission action. Thus, because the complained-of material does not fall within the scope of the Commission's indecency prohibition, we reject the claims that this program content is indecent, and we need not reach the second element of the indecency analysis.

Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Glove Awards" Program, FCC File No. EB-03-IH-0110 at ¶¶ 5, 6 (2003).

This ruling highlights the excessive narrowness of the FCC's definition of indecency. It becomes apparent that the FCC has failed to enforce the law when you measure its "Golden Globe" decision against the Government's compelling interest in restricting offensive broadcasts to (1) support parental supervision of children, and to (2) protect children's physical and emotional well-being, as well as their ethical and moral development. *See ACT III,* at 661, 662.

Although the FCC has adopted an extremely narrow range of subject matter that it will evaluate for indecency, even within that narrow range, broadcasts to children of the depiction of sexual or excretory organs or activities may be acceptable to the FCC in many cases. The Commission defines the *patently offensive* standard to refer to the standards of an average national broadcast viewer. *Id.* Although the FCC's use of a national standard for what is patently offensive, imposes the morals of New York City or Los Angeles on every community, the FCC's standard of what is offensively indecent has a far worse flaw. The FCC's "average broadcast viewer" standard applies an adult standard to law that is designed to protect children. The Commission has lost sight of the fact the constitutional justification of the broadcast indecency prohibition is to protect children from material that would be harmful to their physical and emotional well-being, as well as their ethical and moral development. *See ACT III,* at 661, 662.

Further, the Commission has plunged its indecency regulations into a relativistic quagmire by stating:

> [T]he *full context* in which the material appeared is critically important . . . Moreover, contextual determinations are necessarily highly fact-specific, making it difficult to catalog comprehensively all of the possible contextual factors that might exacerbate or mitigate the patent offensiveness of particular material.

Id. at ¶ 9. First, the FCC's fuzzy policy regarding "full context" ensures that there are no bright-line rules. Undoubtedly, material that is indecent in a teen sitcom might appropriately be covered in an educational broadcast of an anatomy class or on a National Geographic special. However, the vagaries of the FCC's full context doctrine encourages broadcasters who want to pander to young audiences by being "edgy" to include more and more indecent or profane material, but "in context."

Second, the full context doctrine overlooks the fact that one of the constitutional justifications for the regulation of broadcast speech is "because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the

listener or viewer from unexpected program content." *Ginsberg v. New York,* 390 U.S. 629 (1968). Full context does not rescue a channel surfer.

Finally, the FCC has used its "full context" doctrine to impose insurmountable burdens on anyone attempting to file an indecency complaint.

3. The FCC's foot dragging regarding broadcast indecency is most apparent in the way it has handled complaints filed by the public.

Many complaints are returned unprocessed. It is the FCC's current practice to refuse to process a citizen's complaint about broadcast indecency unless the complainant happens to have, "a full or partial tape or transcript or significant excerpts of the program." *Policy Statement,* at ¶24. A dad driving his kids to school, who is shocked by indecency while tuning across the radio dial cannot provide such documentation. Few people startled by an offensive incident in a television program have a tape or transcript of the program. The courts have cited the fact that broadcast indecency normally catches the audience unawares as a basic justification for Government regulation in this area. *See Ginsberg v. New York,* 390 U.S. 629 (1968). In contexts other than indecency, the FCC employs standard investigatory procedures. The complainant reports what they saw or heard and the FCC requires the broadcaster to state under oath whether or not it had aired the material that was the subject of the complaint. By placing an insurmountable burden for documentation on indecency complaints, (1) the FCC has discouraged the public from filing broadcast indecency complaints, and (2) the FCC has shielded broadcasters from indecency complaints.

To illustrate the tools at the FCC's disposal to investigate a complaint regarding something broadcast, I have attached as Exhibit 1 a copy of an investigatory letter that AFA recently received after one of its noncommercial stations aired a wrongly worded underwriting acknowledgment. *Mea culpa.* Letter from William D. Freedman, Deputy Chief, Investigations & Hearings Division, Enforcement Bureau, Federal Communications Commission, to American Family Association, Licensee Station WAEF(FM), EB-03-IH-0427, December 1, 2003. In this case the FCC required AFA to state under oath whether or not they had broadcast the material, or something similar, required AFA to provide a transcript and a tape, required AFA to state what was broadcast before and after the underwriting spot. The FCC's enforcement of the advertising ban on noncommercial stations is altogether appropriate, and believe me, we take pains to avoid errors such as the cited above. The Commission should apply no less zeal and use no weaker enforcement tools when the public complains about the broadcast of indecency or profanity.

4. Conclusion.

Congress should reprimand the FCC for dereliction of its duty to protect children from broadcasts of material that is harmful to their physical and emotional well-being, as well as their ethical and moral development. Congress should instruct the Commission to (1) Adopt a more comprehensive definition of broadcast indecency; (2) Enforce the statutory ban on broadcast profanity; (3) Reform its enforcement practices so that indecency and profanity complaints receive the same level of investigation as other types of complaints.

FEDERAL COMMUNICATIONS COMMISSION
Enforcement Bureau
Investigations and Hearings Division
445 12th Street, S.W., Suite 3-B443
Washington, D.C. 20554

December 1, 2003

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

American Family Association, Licensee
Station WBJY(FM)
P. O. Drawer 2440
Tupelo, Mississippi 38803

Re: EB-03-IH-0427
ID # 82835

Dear Licensee:

The Enforcement Bureau is investigating allegations that American Family Association ("AFA") licensee of Station WBJY(FM), Americus, Georgia, may have broadcast an advertising announcement in violation of Section 399B of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 399b. We direct AFA, as defined herein, pursuant to sections 308(b) and 403 of the Act, 47 U.S.C. §§ 308(b) and 403, to provide the information and documents specified herein, within twenty (20) calendar days from the date of this letter.

Instructions

If AFA requests that any information or Documents, as defined herein, responsive to this letter be treated in a confidential manner, it shall submit, along with all responsive information and Documents, as defined herein, a statement in accordance with Section 0.459 of the Commission's rules. 47 C.F.R. § 0.459. Requests for confidential treatment must comply with the requirements of Section 0.459, including the standards of specificity mandated by Section 0.459(b). Accordingly, "blanket" requests for confidentiality of a large set of documents are unacceptable. Pursuant with Section 0.459(c), the Bureau will not consider requests that do not comply with the requirements of Section 0.459.

If AFA withholds any information or Documents under claim of privilege, it shall submit, together with any claim of privilege, a schedule of the items withheld that states, individually as to each such item, the numbered inquiry to which each item responds and the type, title, specific subject matter, and date of the item; the names, addresses, positions, and organizations of all authors and recipients of the item; and the specific grounds for claiming that the item is privileged.

Each requested Document not subject to a claim of privilege shall be submitted in its entirety, even if only a portion of that Document is responsive to an inquiry made herein, unless the Document is a recording or transcript, in which case it should be provided only for the period of time of the broadcast specified in the pertinent inquiry herein.. This means that the Document shall not be edited, cut, or expunged, and shall include all appendices, tables, or other attachments, and all other Documents referred to in the Document or attachments. All written materials necessary to understand any Document responsive to these inquiries must also be submitted.

If a Document responsive to any inquiry made herein existed but is no longer available, or if AFA is unable for any reason to produce a Document responsive to any inquiry, identify each such Document by author, recipient, date, title, and specific subject matter, and explain fully why the Document is no longer available or why AFA is otherwise unable to produce it.

With respect only to Documents responsive to the specific inquiries made herein and any other Documents relevant to those inquiries, AFA is directed to retain the originals of those Documents for twenty-four (24) months from the date of this letter unless (1) AFA is directed or informed by the Enforcement Bureau in writing to retain such Documents for some shorter or longer period of time or (2) the Enforcement Bureau and/or the Commission releases any item on the subject of this investigation, including, but not limited to, a Notice of Apparent Liability for Forfeiture or an order disposing of the issues in the investigation, in which case, AFA must retain all such Documents until the matter has been finally concluded by payment of any monetary penalty, satisfaction of *all* conditions, expiration of all possible appeals, conclusion of any collection action brought by the United States Department of Justice or execution and implementation of a final settlement with the Commission or the Enforcement Bureau.

The specific inquiries made herein are continuing in nature. AFA is required to produce in the future any and all Documents and information that are responsive to the inquiries made herein but not initially produced at the time, date and place specified herein. In this regard, AFA must supplement its responses (a) if AFA learns that, in some material respect, the Documents and information initially disclosed were incomplete or incorrect or (b) if additional responsive Documents or information are acquired by or become known to AFA after the initial production. The requirement to update the record will continue for twenty-four (24) months from the date of this letter unless (1) AFA is directed or informed by the Enforcement Bureau in writing that AFA's obligation to update the record will continue for some shorter or longer period of time or (2) the Enforcement Bureau and/or the Commission releases an item on the subject of this

investigation, including, but not limited to, a Notice of Apparent Liability for Forfeiture or an order disposing of the issues in the investigation, in which case the obligation to update the record will continue until the release of such item.

For each Document or statement submitted in response to the inquiries below, indicate, by number, to which inquiry it is responsive and identify the persons from whose files the Document was retrieved. If any Document is not dated, state the date on which it was prepared. If any Document does not identify its authors or recipients, state, if known, the names of the authors or recipients. AFA must identify with reasonable specificity all Documents provided in response to these inquiries.

Unless otherwise indicated, the period of time covered by these inquiries is January 1, 2003, to the present.

Definitions

For purposes of this letter, the following definitions apply:

"Any" shall be construed to include the word "all," and the word "all" shall be construed to include the word "any." Additionally, the word "or" shall be construed to include the word "and," and the word "and" shall be construed to include the word "or." The word "each" shall be construed to include the word "every," and the word "every" shall be construed to include the word "each."

"Broadcast," when used as noun, shall mean any audible sounds or language that Station WBJY(FM) transmitted or disseminated during the course of a radio broadcast.

"Broadcast," when used as a verb, shall mean the transmission or dissemination of radio communications intended to be received by the public. The verb broadcast may be used interchangeably with the verb "air."

"Document" shall mean the complete original (or in lieu thereof, exact copies of the original) and any non-identical copy (whether different from the original because of notations on the copy or otherwise), regardless of origin or location, of any taped, recorded, transcribed, written, typed, printed, filmed, punched, computer-stored, or graphic matter of every type and description, however and by whomever prepared, produced, disseminated, or made, including but not limited to any broadcast, radio program, advertisement, book, pamphlet, periodical, contract, correspondence, letter, facsimile, e-mail, file, invoice, memorandum, note, telegram, report, record, handwritten note, working paper, routing slip, chart, graph, photograph, paper, index, map, tabulation, manual, guide, outline, script, abstract, history, calendar, diary, agenda, minute, marketing plan, research paper, preliminary drafts, or versions of all of the above, and computer material (print-outs, cards, magnetic or electronic tapes, disks and such codes or instructions as will transform such computer materials into easily understandable form).

"Identify," when used with reference to a person or persons, shall mean to state his/her full legal name, current business address, and phone number. "Identify," when used with reference to a document, shall mean to state the date, author, addressee, type of document (*e.g.*, the types of document, as described above), a brief description of the subject matter, its present or last known location and its custodian. "Identify," when used with reference to an entity other than a person, shall mean to state its name, current or last known business address, and current or last known business telephone number.

"Licensee" or "AFA" shall mean the holder of the license for WBJY(FM), and any predecessor-in-interest, affiliate, parent company, any wholly or partially owned subsidiary, or other affiliated company or business, and all owners, including but not limited to, partners or principals, and all directors, officers, employees, or agents, including consultants and any other persons working for or on behalf of the foregoing at any time during the period covered by this letter.

Inquiries: Documents and Information to be Provided

1. State whether AFA broadcast the material described at Exhibit A over Station WBJY(FM) on September 5, 2003, and/or at any other time. If so, provide the date and time of each such broadcast.

2. With regard to the broadcast referred to in the response to Inquiry 1 above, if the programming reflected at Exhibit A does not accurately reflect the material broadcast over Station WBJY(FM), describe any inaccuracies.

3. With regard to the broadcast referred to in the response to Inquiry 1 above, provide any and all compact discs, tapes, transcripts or other Documents reproducing or discussing the material reflected in Inquiry 1, plus the fifteen (15) minutes of material broadcast immediately before and after the material referred to in Inquiry 1. Provide any and all such recordings on compact disc (CD-R).

4. State whether AFA broadcast all or any portion of the material reflected in Exhibit A over any other noncommercial station licensed to it other than WBJY(FM).

5. If AFA's response to Inquiry 4, above, is "yes," provide with regard to each such broadcast and announcement:

(a) the call sign, community of license and licensee;

(b) the number of times that the announcement aired;

(c) the dates and times that the announcement aired; and

(d) any and all audiotapes, transcripts or other Documents that reproduce or discuss the material in the announcement. Provide all recordings on compact disc (CD-R).

6. With regard to each announcement and broadcast identified in the responses to Inquiries 1 and 5, above:

(a) Identify each person that requested that AFA air the announcement;

(b) state the terms of the agreement between AFA and each person requesting that AFA broadcast the announcement;

(c) state whether any person requesting that the announcement be aired provided, or promised to provide AFA, its employees, or its station programmers, any remuneration or other consideration in exchange for the broadcast of the announcement;

(d) state whether any person requesting that the announcement be aired is a general station contributor or a specific program underwriting sponsor;

(e) state whether any person requesting that the announcement be aired was, at the time of the request, a representative of a not-for-profit enterprise, and, if so, provide copies of any and all Documents that support this characterization; and

(f) provide copies of all Documents that reproduce or discuss the agreement between AFA and each person requesting that the announcement be aired relating to the broadcast of the announcement.

7. Describe AFA's past and current policies for accepting donations and airing donor and underwriting announcements. Provide any and all Documents that reflect AFA's policies or otherwise support the response to this Inquiry.

8. What procedures does AFA employ to determine whether donor acknowledgements meet the Commission's standards for noncommercial underwriting announcements (i.e., section 399B of the Act, section 73.503(d) of the Commission's rules and interpretive rulings)? Provide copies of all Documents that outline or pertain to such procedures or otherwise support the response to this Inquiry.

9. If AFA believes that a defense to the subject allegations exists, state concisely the nature of the defense.

We direct AFA to support its responses with an affidavit or declaration under penalty of perjury, signed and dated by an authorized officer of AFA with personal knowledge of the representations provided in AFA's response, verifying the truth and accuracy of the information therein and that all of the Documents and information

requested by this letter which are in AFA's possession, custody, control or knowledge have been produced. If multiple AFA employees contribute to the response, in addition to such general affidavit or declaration of the authorized officer of AFA noted above, provide separate affidavits or declarations of each such individual that identify clearly to which responses the affiant or declarant is attesting. All such declarations provided should comply with section 1.16 of the Commission's rules. 47 C.F.R. § 1.16, and be substantially in the form set forth therein. To knowingly and willfully make any false statement or conceal any material fact in reply to this inquiry is punishable by fine or imprisonment. *See* 18 U.S.C. § 1001; *see also* 47 C.F.R. § 1.17.

AFA should submit its response, by hand delivery, to the attention of Kenneth M. Scheibel, Jr., Esq., Investigations & Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 3-A325, Washington, DC 20554. At the same time, it should transmit its response, including all supporting Documents to the extent practicable, via facsimile at 202-418-2080 or via email, to Kenneth.Scheibel@fcc.gov.

Direct any questions regarding this investigation to Kenneth M. Scheibel, Jr., Esq. at 202-418-1420.

Sincerely,

William D. Freedman
Deputy Chief
Investigations & Hearings Division
Enforcement Bureau

Enclosure

Exhibit A

Set forth below is the text of an announcement allegedly aired on Station WAEF(FM), Cordele, GA, on September 5, 2003:

Dr. Joel M. Johnson (45 seconds)

For surgical excellence that's close to home, Dr. Joel M. Johnson offers both the advanced care and convenience you deserve, for all your general and vascular surgery needs. You may contact Dr. Joel M. Johnson at the South Georgia Surgical Clinic at 382-9733. Dr. Johnson's lifelong commitment has been to help people live whole, healthy lives and he is confident that you will notice this the moment that you meet. Dr. Joel M. Johnson is a proud underwriter of positive Christian music in South Georgia. 382-9733.

51 WEST 52 STREET
NEW YORK, NEW YORK 10019-6188
(212) 975-4321

February 9, 2004

The Honorable John D. Dingell
Ranking Member
Committee on Energy and Commerce
United States House of Representatives
Washington, D.C. 20515-6115

Dear Mr. Dingell:

I am writing on behalf of the CBS Television Network in response to your letter of January 27, 2004 regarding indecency on broadcast network television. As part of my responsibilities at CBS, I oversee the Network's Program Practices Department.

CBS knows it is a guest in viewers' living rooms. Thus, aside from any legal and regulatory requirements that govern our content, we strongly believe that we have an obligation to remain attuned to our audience.

With respect to the first question in your letter, regarding the acceptability of transmitting programming that contains the "f-word" or similar language, it is our policy that the "f-word" and other expletives like those contained in the George Carlin monologue "Filthy Words" and which led to the Supreme Court's *Pacifica* decision should not be broadcast at any time of the day, including "safe harbor" periods — except in the rare instance where deleting such language would undermine classic creative content delivered in context. Several years ago, for example, CBS aired a live production of "On Golden Pond," in which we allowed language we would not have otherwise permitted. We also note that other networks have taken the same approach when airing movies such as "Schindler's List" and "Saving Private Ryan." When such exceptions are used, however, warnings to viewers about language are frequently interspersed within the programming. To enforce this policy, we take appropriate action, up to and including termination, against any CBS employee who violates this policy.

As to the second question of your letter, that relating to CBS's preventive mechanisms, we continue to maintain an extensive Program Practices Department that screens all scripted and reality programming, movies and commercial messages before they air. For live programming, CBS for years has employed delay equipment

to make possible the deletion of unanticipated language. But this system is designed to catch only audio. With respect to video, the first line of defense for our network, as always at live entertainment and sporting events, has been the cut-away camera, which moves the camera away from inappropriate graphic subjects. Given the history of broadcast television up until this last Super Bowl, deleting troublesome video has never been a concern, except, perhaps, for the occasional streaker dashing across a sports field. As you are aware, the cut-away camera regrettably did not work to eliminate completely the Janet Jackson-Justin Timberlake stunt, but it did render the scene truly fleeting. The cut-away camera also, a few moments later, managed to protect completely the home audience from viewing a streaker who eluded heavy police security and darted across Reliant Stadium's field in front of 70,000 fans. But with the Jackson-Timberlake incident, we now understand that celebrities pushing the limits have outdated our first line of defense.

For the live Grammy Awards show on Sunday, February 8, 2004, CBS implemented an enhanced delay system for deletion of any inappropriate audio and video footage, had it been needed. Under this system, the broadcast of the live Grammy Awards event was delayed by a full five minutes. Developed by CBS engineers on short notice, at great cost, and under tremendous pressure, the system is groundbreaking — no other network has ever undertaken the task of creating a system that gives the capability to eliminate video from a live program. In fact, the system we used for the Grammys truly is an invention in process, and I caution that we are at the mercy of the technology and of our personnel on the scene. While we would like to commit to using this enhanced technology for all potentially problematic live network events, we are still studying how it works. However, CBS will use it or something better whenever appropriate.

We also will do everything technically and humanly possible to eliminate inappropriate language and behavior, but we do worry that anything more drastic could mean eliminating all live television. We do not think that is a good outcome for viewers of broadcast television. One further concern we have is that, with an enhanced delay system in place, some celebrities in fact may lower the bar in a belief that they now have license to say and do anything by assuming the network will catch it before it airs.

Finally, with respect to the final three questions of your letter regarding enforcement of indecency laws, we trust that the ultimate goal of any law or rule is to keep indecency from being broadcast to American listeners and viewers. Fines have a deterrent effect, for sure, and, if assessed judiciously, can also motivate broadcasters to take more precautions, which, in turn will lead to fewer indecent incidents. But it is also important that as the FCC levies fines it exercise its discretion to adjust the amounts downward for behavior that is clearly not deliberate, that is, where the broadcaster has taken all reasonable precautions to comply with the indecency rules.

It is also important to note that vagueness is a chronic problem that is not cured by any of the proposed changes to the enforcement scheme. Before the FCC levies any fine or revokes any license, it must determine that a broadcaster has violated a rule. In the case of indecency, the rules are neither clear nor static. The precedent constantly changes and the standard is not clearly articulated to broadcasters. This concern about vagueness also extends to fines for each "utterance," as well as to license revocation, where broadcasters would be subjected to the harshest of penalties under standards that are inherently unclear.

In short, broadcasters need a much better roadmap. To that end, the FCC should undertake a full rule making proceeding in which all interested parties can participate so that the constitutional parameters of indecency enforcement can be made as intelligible as possible. The Commission has never held such a proceeding relating to indecency, nor has the FCC ever tried to establish a mechanism by which it can reliably ascertain the required *contemporary* community standard for the broadcast medium. Given the fast-paced nature of change in our society, such an updated standard is critically needed. Then the courts can decide whether the lines have been drawn in proper deference to the First Amendment.

Of course we will abide by whatever rules and enforcement scheme that the FCC, Congress and the courts mandate, but we also feel obliged to share with you some of the challenges faced by broadcasters in this difficult area.

In conclusion, we appreciate the opportunity to provide you with information as to how CBS endeavors daily to provide its viewers high quality news, information, sports and entertainment that we are proud to deliver.

We would be happy to provide you with any additional information.

Sincerely,

Martin D. Franks
Executive Vice President
CBS Television

National Broadcasting Company, Inc.
30 Rockefeller Plaza
New York, NY 10112
212 664-4444

February 3, 2004

The Honorable John Dingell
Committee on Energy and Commerce
2322 Rayburn Building
Washington, DC 20515

Dear Congressman Dingell:

NBC appreciates the opportunity to respond to your letter of January 27th and to clarify the record regarding NBC's position on a number of matters dealing with broadcast indecency.

First, NBC takes seriously its responsibilities to its viewers to air programming that is not indecent, profane or obscene. NBC unequivocally does not believe that it is appropriate to transmit network entertainment programming -- live or otherwise --which includes the "f-word" or similarly objectionable language, except in the extraordinarily rare case of serious and critically acclaimed theatrical or similar presentations, such as *Schlinder's List* or *Saving Private Ryan*, each of which has aired to great public acclaim on network television in recent years. As a broadcast network, our goal is to reach a large, heterogeneous viewing audience with network entertainment programming that is appropriate, acceptable, and consistent with all Congressional and FCC requirements. There is absolutely no question that objectionable language in our network entertainment programming would be antithetical to this objective.

Furthermore, NBC agrees that we are responsible for any content that is broadcast or transmitted over the NBC Television Network. NBC remains willing and prepared to uphold that obligation. For instance, NBC maintains a fully staffed team of 17 highly experienced professionals whose fundamental mission is to ensure that NBC network entertainment programming and advertising is consistent with NBC's own internal standards, which often are more restrictive than any governmental requirement. Our Standards & Practices group reviews all manner of NBC network entertainment programming, ranging from NBC scripted programming to NBC reality shows and Saturday Night Live. We assist in the placement of the appropriate voluntary rating on programming, and we have substantial oversight in place to ensure that NBC's entertainment programming does not involve inappropriate language. But it is not just our Standards team that ensures the quality of NBC network entertainment programming. All NBC network personnel understand the critical importance of transmitting suitable entertainment content.

Second, Bono's spontaneous and unfortunate choice of word at the Golden Globes in 2003 stands in stark contrast to NBC's history in this area and, specifically, our history with the Golden Globes broadcast. NBC broadcasts hundreds of thousands of minutes of network audio annually. Prior to Bono's remark, NBC had broadcast the Golden Globes live and without incident since 1996. The program is produced by Dick Clark Productions, which has a long-standing reputation for professionalism and programming quality. Before the 2003 Golden Globes, the producer, as it had in years past, instructed every participant in the event that appropriate broadcast decorum was to be observed. That Bono uttered the "f-word" despite such instructions was completely unexpected by everyone involved. Of course, NBC immediately edited the tape for the subsequent broadcast to all NBC affiliated stations in the Mountain and Pacific time zones. Unfortunately, at that moment, there was no way for NBC to prevent the inappropriate word from being transmitted to those stations that carried the show live

Such an occurrence is a rare and regrettable exception in NBC's long history with live entertainment programming. For example, Saturday Night Live has been broadcast live for 27 years and, to our recollection, has had only one serious incident - and that occurred over 20 years ago. The cast and guests who appear on SNL tend to be younger and less experienced than those performers who traditionally appear on the Golden Globes. Yet, our long experience is that they are able to adhere to the rules of network television regarding appropriate behavior and language. To us, it is ironic that the Bono incident was part of an awards program that featured a cast of more experienced performers who would have been reasonably expected to conduct themselves both professionally and appropriately, as they had each of the prior years in which NBC aired the programming.

Third, and in light of the Bono incident, NBC instituted the practice of running all live award shows on a ten second delay beginning with our broadcast of the Radio Music Awards in November 2003. Going forward, all live awards shows will be broadcast with the delay in effect. Although the delay process is challenging to implement in the course of the live event programming that U.S. households have come to expect to be available on free television, NBC professionals are among the most practiced in the industry. In addition, we want to assure you that we continue to impress upon the producers and the talent of these programs that the institution of the delay in no way absolves them from their responsibility to provide programming which is consistent with the Network's standards and that includes no objectionable language or behavior. As a further precaution, NBC also has upped the voluntary rating NBC assigns to such live entertainment programming in an effort to remind parents that such programming may include a live, spontaneous and unpredictable broadcast.

Pursuant to your remaining questions regarding current proposals to strengthen Commission indecency enforcement, NBC agrees that the last three decades have seen, in addition to thousands of upstanding broadcast licensees, some bad actors who regularly air programming that is seriously indecent under any reasonable interpretation of established indecency precedent. NBC shares Congressional and Commission concern regarding such bad actors, while remaining fully cognizant of the many legal difficulties

presented by any retroactive application of any such significant policy change in the definition or application of FCC indecency policy. In this context, NBC fully supports the current legislative proposal to assess higher maximum forfeitures in future indecency proceedings against those broadcast stations that already have been compelled to pay multiple forfeitures for serious violations of established indecency standards.

Of course, NBC will abide by any legal action taken by the Commission to enforce established indecency standards. NBC is not aware of its network entertainment programming being the subject of any indecency complaint involving more than a single allegedly indecent word since the FCC first announced this prospective change in policy, but has not challenged the FCC's intention to impose monetary penalties per indecent utterance rather than per broadcast program in future indecency cases. As for other enforcement proposals, NBC lacks sufficient information to comment usefully at this time, but agrees that broadcast stations that repeatedly and seriously violate established indecency standards should be held accountable for their intentional and serious misdeeds under the standards in place at the time of the relevant broadcast.

Please contact Robert Okun, VP of NBC Washington at 637-4532, if we may be of further assistance.

Sincerely,

Alan Wurtzel
President, Research and Media Development

Cc: Congressman Billy Tauzin
Congressman Fred Upton
Congressman Ed Markey

FOX BROADCASTING COMPANY
A UNIT OF FOX TELEVISION

P.O. Box 900
Beverly Hills, California 90213-0900
Phone 310 369 7595 • Fax 310 969 0546

Gail Berman-Masters
President
Entertainment Group

February 5, 2004

The Honorable John D. Dingell
Ranking Member
United States House of Representatives
Committee on Energy and Commerce
Washington, D.C. 20515-6115

RE: Your Letter of January 27, 2004

Dear Congressman Dingell:

I am writing in response to your letter of January 27, 2004 on behalf of Fox Broadcasting Company, which operates the FOX Television Network ("FOX"). FOX appreciates your interest in ensuring that America's children are not exposed to objectionable content during live television entertainment events. Indeed, we have long shared this goal, and that is why we have diligently attempted since FOX's inception to keep objectionable content out of live television.

1. FOX does not believe that it is acceptable to transmit entertainment programming, live or otherwise, that contains the "f word" or similarly objectionable language. The only exception to this general policy would be in the very rare instance where necessary for artistic reasons, in programming which does not target children and which includes clear parental advisories. The network believes that it has a responsibility to its viewers to attempt to prevent the broadcast of objectionable content, particularly during the broadcast of live entertainment events. FOX takes this responsibility very seriously and has in place procedures designed to achieve this goal. Even though these procedures historically have been, on the whole, quite successful, we recently implemented several key changes to bolster our efforts in this regard.

2. With the immediacy of live television comes the possibility that performers will spontaneously deviate from the script and do or say something that is offensive to some viewers. This, in fact, was what happened with the Billboard

Music Awards broadcast on December 10, 2003. During that broadcast, FOX was utilizing a time delay procedure, as it does for all live entertainment programming. This five-second delay provided that viewers saw "live" programming on their television screens five seconds after the events actually occurred. That delay allowed a member of FOX's Broadcast Standards division to edit out objectionable content before it aired on viewers' television through use of a "delete button."

Although these procedures have been in place for a number of years, their effectiveness depends ultimately on the actions of a human being. The Broadcast Standards employee working during the 2003 Billboard Music Awards broadcast did manage to use the delay button to successfully edit out the first spontaneous expletive spoken by Nicole Richie during the show. Unfortunately, however, he did not catch the other two objectionable words spontaneously spoken by Ms. Richie immediately after the first objectionable word that had been deleted. We emphasize that the objectionable words contained in Ms. Richie's remarks were spontaneously delivered, and departed from the script prepared for the show.

FOX immediately edited the tape of the Billboard Music Awards show to remove the objectionable content before the material aired on tape delay in the Mountain and Pacific time zones. In addition, FOX has taken steps to try to prevent this type of error from occurring again (see below).

3. FOX has implemented several significant enhancements to its time-delay system and operational protocols in an effort to reduce the risks associated with human error during future live entertainment broadcasts. We are adding personnel to permit simultaneous but parallel and separate review processes by up to four separate teams, each with their own separate sub-systems to independently remove audio and video. Further, the entire system will include redundant hardware to protect against equipment failure. We believe these steps will help ensure objectionable content does not air during live entertainment events.

4-6. Questions 4, 5 and 6 ask whether Congress and the Federal Communications Commission ("FCC") should increase the sanctions applicable to the broadcast of indecent programming. We believe that the FCC has historically followed a cautious approach to indecency regulation – and for good reason. The FCC's indecency standard is inherently vague, yet it constitutes a restriction on creative content protected by the core of the First Amendment. Whenever content creators are faced with governmental interference, particularly if the standard for oversight is vague, there is a serious risk of chilling free speech. That having been said, we will comply with laws passed by Congress, or regulations implemented at the FCC, that pass constitutional muster.

In sum, FOX understands and appreciates your interest in ensuring that America's children are not exposed to objectionable content on live television. We

believe that the changes that we are implementing will greatly reduce this risk on our network.

Sincerely,

Gail Berman

cc: The Honorable W.J. "Billy" Tauzin, Chairman
Committee on Energy and Commerce