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

In the Matter of	)	
	)	
FCC Seeks Comment on Adopting	)	GN Docket No. 13-86
Egregious Cases Policy	)	
	)	

To: The Commission

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

Jane E. Mago
Jerianne Timmerman
Erin L. Dozier
1771 N Street, NW
Washington, DC 20036
(202) 429-5430

Elizabeth Cuttner
Alexis Grilli
Daniel Henry
Legal Interns

August 2, 2013

TABLE OF CONTENTS

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In the Matter of	)	
	)	
FCC Seeks Comment on Adopting	)	GN Docket No. 13-86
Egregious Cases Policy	)	
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I. Introduction and Summary

In June, the National Association of Broadcasters ("NAB"),[1] numerous broadcasters and other interested parties responded to the *Public Notice* asking whether the Commission should change its current broadcast indecency policies or maintain them as they are.[2] As discussed herein, the record supports the constitutional and legal arguments and suggested remedies made by NAB in our initial comments.

Like NAB, a wide range of commenters documented that in today's media environment, there is a disconnect between the current indecency regulations and the government's concern, as expressed in *Pacifica*, that children may be exposed to adult-oriented or otherwise inappropriate material. The record shows the impossibility of making a principled argument that broadcasting is either the most likely or most easily

[1] The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

[2] *FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (More Than One Million Complaints); Seeks Comment on Adopting Egregious Cases Policy*, Public Notice, 28 FCC Rcd 4082, 4082 (EB/OGC 2013) ("*Public Notice*").

available means of exposure. In this environment, the constitutionality of a broadcast-only prohibition on indecent material is increasingly in doubt.

A review of the record here makes the suspect constitutionality of the existing indecency regime even clearer. Broadcasters large and small provided significant evidence of the inconsistent, unpredictable and arbitrary nature of the current regulatory regime. They illustrated how the current atmosphere of regulatory uncertainty chills protected speech through numerous real-world examples, ranging from stories never aired to college station manuals proscribing any content that might possibly cross an indiscernible line. Additionally, commenters showed how indecency enforcement practices exacerbate this chilling effect and impose undue costs and burdens on licensees, both of which harm stations' ability to inform and entertain their local viewers and listeners.

Even leaving core constitutional issues aside, the record here thus demonstrates that the Commission's indecency rules and policies must, at a minimum, be reformed to adhere to the constraints of *Pacifica.* NAB accordingly reiterates its proposals, supported by numerous commenters, that would: (i) confine regulation to material that actually falls within the FCC's long-established indecency definition; (ii) clarify that fleeting expletives and images are not actionably indecent; (iii) establish greater consistency, clarity and predictability; and (iv) show appropriate deference to the artistic judgment and editorial discretion of broadcasters and program providers. NAB also urges the Commission to consider several specific proposals in the record to improve its indecency enforcement procedures. These various reforms would make the FCC's indecency policies more compatible with *Pacifica* and less intrusive into First Amendment sensitive areas.

In stark contrast, parties that oppose any reform of existing indecency policies present no legal rationale or factual basis to support their positions – let alone any convincing constitutional analysis. The Commission cannot accept these unsupported calls to maintain the current uncertain and unpredictable regulatory regime, or unjustifiable proposals to restrict even broader swaths of broadcast content.

Importantly, there is no basis to believe that reversing the current policy with regard to fleeting and isolated expletives and images would result in frequent, unrestrained use of such material by broadcasters. The Commission's pre-2004 policy of declining to take enforcement action against fleeting content functioned for decades without four-letter words becoming commonplace on broadcast programs. Any speculation to the contrary flies in the face of a quarter-century of actual broadcast practices.

II. The *Pacifica* Rationale is Increasingly Suspect

A diverse array of commenters agree with NAB that the Commission must consider its indecency enforcement policies in light of today's media environment.[3] Today's audiences enjoy an abundance of choice and control, and no longer "let media passively into their homes" but select "what they want … and nothing else" through various technologies over multiple platforms.[4] Widely adopted pay television services bring into

[3] *See, e.g.,* Comments of NAB in GN Docket No. 13-86 (Jun. 19, 2013) ("NAB Comments") at 4-12; Comments of Fox Entertainment Group ("Fox") in GN Docket No. 13-86 (Jun. 19, 2013) ("Fox Comments") at 4-8; Comments of CBS Corporation ("CBS Corp.") in GN Docket No. 13-86 (Jun. 19, 2013) ("CBS Corp. Comments") at 13-19; Comments of ABC, Inc. ("ABC") in GN Docket No. 13-86 (Jun. 19, 2013) ("ABC Comments") at 3-11; Comments of The Writers Guild of America West ("WGAW") in GN Docket No. 13-86 (Jun. 19, 2013) ("WGAW Comments") at 3-6; Comments of TechFreedom, Public Knowledge, Electronic Frontier Foundation, and the Center for Democracy and Technology in GN Docket No. 13-86 (Jun. 19, 2013) ("TechFreedom Comments") at 2-3; Comments of NBC Universal Media, LLC ("NBCU") in GN Docket No. 13-86 (Jun. 19, 2013) ("NBCU Comments") at 7-17.

[4] TechFreedom Comments at 2.

the home "dozens and often hundreds of channels of cable and satellite video programming" that are side-by-side broadcast channels on pay TV lineups, "a mere click of the remote away from each other, indistinguishable and equally accessible to children."[5] Consumers also use technology built into their television sets and peripherals including gaming consoles to connect their sets to online programming sources, bringing "potentially unlimited programming sources to their television screen."[6] Similar to NAB, other commenters note that both adults and children increasingly access a wide range of audio and video content via their tablets, mobile devices, and desktop computers.[7] Even certain commenters opposing reform of the indecency rules concede that broadcasting is not "the only pervasive form of media" and that Americans are "inundated" with many other forms of media.[8]

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[5] ABC Comments at 4. ABC explains that the ease of access to non-broadcast platforms and greater likelihood that adult-oriented material will appear on cable, satellite and online platforms underscores the underinclusiveness of broadcast-only indecency regulation. *Id.* at 11. "It is well established that a regulation of speech that is underinclusive because of the easy availability of similar speech through other means cannot withstand First Amendment scrutiny." *Id., citing Brown v. Entertainment Merchants Ass'n,* 131 S.Ct. 2729, 2740 (2011); *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 104-105 (1979). *See also* Comments of Emmis Communications Corporation et al. in GN Docket No. 13-86 (Jun. 19, 2013) ("Emmis et al. Comments") at 12.

[6] ABC Comments at 4*, citing Rodriguez, Is Your TV a Smart TV? How to Connect to the Internet*, L.A. TIMES, May 17, 2013.

[7] *See, e.g.,* NAB Comments at 4-8; ABC Comments at 4*, citing* Center on Media and Human Development, *Parenting in the Age of Digital Technology: A National Survey* 12-14, 24 (June 2013), available at http://web5.soc.northwestern.edu/cmhd/wp-content/uploads/2013/05/Parenting-Report_FINAL.pdf; Fox Comments at 6-7 (discussing the Internet's role in the "revolution in media usage since *Pacifica,*" with Internet users spending an average of 32 hours a week online and teenagers spending an average of approximately 3.5 hours a week playing video game consoles and an average of more than another 1 hour per week watching online video on a computer or mobile phone).

[8] Comments of the American Center for Law and Justice ("ACLJ") in GN Docket No. 13-86 (Jun. 19, 2013") ("ACLJ Comments") at 6.

Beyond abundant media choices, parents today have many new technologies allowing them to control the programming to which their children are exposed,[9] in addition to the V-Chip and TV Parental Guidelines.[10] Parents can and do use a wide range of technologies such as streamed or downloaded audio and video, digital video recorders, MVPDs' "video-on-demand" libraries, CDs, DVD and Blu-ray players, and cloud-based services to assemble packages of content they want their children to hear or watch. With the ability to record, store, upload, download and otherwise manipulate content, parents can create their own "personal libraries of content they deem fit for their children," enabling them "to act as a much more effective gatekeeper between their children and broadcast media than was even imaginable in 1978."[11] This record evidence further undermines the accessibility rationale for broadcaster-specific regulation of speech.

One commenter claims that TV Parental Guidelines are not accurate and therefore cannot be relied upon by parents.[12] In fact, independently conducted research recently submitted to the FCC found that surveyed parents believe TV ratings "provide guidelines to help them make decisions," are "reasonable," and are "accurate and clear."[13] This

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[9] *See* Fox Comments at 7-8.

[10] *See, e.g.,* ABC Comments at 6-7; CBS Corp. Comments at 18-20 (discussing how V-Chip technology provides a less restrictive alternative to indecency regulation, the existence of which is "yet another hurdle that the Commission's indecency policy would have to surmount" to withstand a constitutional challenge); Fox Comments at 7; NBCU Comments at 16-17 (the V-Chip and TV ratings system constitute a sufficient, less-restrictive alternative to protecting children from offensive content).

[11] Fox Comments at 8.

[12] Comments of Timothy Winter in GN Docket No. 13-86 (Jun. 19, 2013) at 1. Mr. Winter, who also is the President & CEO of PTC, is apparently referring to data summarized in this PTC news release: Parents Television Council, *New PTC Research Shows Blurred & Pixilated Nudity Increasing on Broadcast TV and Being Rated as Acceptable for Children,* Press Release, Jun. 4, 2013.

[13] Public Opinion Strategies and Hart Research Associates, *Key Findings From TV Ratings Research,* Apr. 5, 2012, p. 1, Attachment to email from Jane E. Mago, Executive Vice President and General Counsel, NAB, to William T. Lake, Chief, FCC Media Bureau, et al. dated Apr. 6,

national survey shows that parents believe ratings are on target,[14] with only nine percent of parents holding an unfavorable opinion of the ratings system.[15] Moreover, as NAB has previously explained, the TV Parental Guidelines Monitoring Board works with a range of interested parties to promote uniformity and consistency in the application of the ratings system to television programming, both broadcast and cable.[16]

In light of all these proliferating video and audio platforms, devices and parental control technologies, there is no principled way to single out broadcasting as the only, or even the most likely or most easily accessible, means by which children may view or listen to arguably indecent or otherwise inappropriate material. Simply put, the factual predicate set forth in *Pacifica* for the disparate regulatory and constitutional treatment of broadcast outlets has eroded. NAB therefore believes that broadcast-only indecency restrictions should be reexamined, particularly given their significant chilling effect on speech.

III. Inconsistent and Arbitrary Indecency Regulation Chills Protected Speech

As NAB discussed in our initial comments, the more restrictive indecency policies adopted in 2004 led to inconsistent, arbitrary—and thus unconstitutional—enforcement.[17] The record is replete with detailed examples and analyses of unacceptably vague,

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2012 in CS Docket No. 97-55 (May 2, 2012). This research is also part of the record in MB Docket No. 09-194, Empowering Parents and Protecting Children in an Evolving Media Landscape.

[14] *Id.* at p. 2. Only 29 percent of parents report *ever* having seen an inaccurate rating (the survey does not discuss whether these parents considered the rating too lenient or too stringent).

[15] *Id.* at p. 1. These favorable opinions are held by parents in a range of demographic groups. *Id.* at p. 3.

[16] *See* Joint Comments of NAB, The National Cable & Telecommunications Association, and the Motion Picture Association of America in MB Docket No. 09-26 (Apr. 16, 2009) at 9-10 (discussing the membership and activities of the Monitoring Board).

[17] *See* NAB Comments at 12-20.

subjective, and unpredictable indecency regulation.[18] Such arbitrary and inconsistent regulation inevitably chills protected speech, as revealed by the comments of a wide variety of broadcasters, journalists, editors and program creators.[19]

Public television broadcasters, for example, report that because of shifting FCC indecency policies, content decisions require additional layers of review by legal counsel for producers, stations and distributors.[20] The resulting programming decisions "often turn not on whether PBS and its member public television stations believe content is editorially appropriate for their audiences, but on whether the words, phrases, or situations were allowed in past FCC decisions."[21] PTV cites numerous examples covering a wide array of programming where stations chose self-censorship or sanitization of content rather than risking an FCC enforcement action.[22]

NAB agrees with RTDNA's observation that reporters interviewing victims, witnesses or others in emotionally charged circumstances simply cannot predict what will be said. Even where there is an opportunity for editing, such editing should be done

[18] *See, e.g.,* ABC Comments at 11-18; CBS Corp. Comments at 9-12; NBCU Comments at 17-29.

[19] *See*, *e.g.,* NAB Comments at 20-23 (discussing instances of broadcasters choosing not to air certain material due to uncertainty about application of the indecency rules).

[20] Comments of the Association of Public Television Stations ("APTS") and the Public Broadcasting Service ("PBS") (collectively, "PTV") in GN Docket No. 13-86 (Jun. 19, 2013) ("PTV Comments") at 3.

[21] PTV Comments at 3. *Accord* Comments of the Radio & Television Digital News Association ("RTDNA") in GN Docket No. 13-86 (Jun. 19, 2013) ("RTDNA Comments") at 13 (broadcast journalists are compelled by current broadcast indecency regulation to "scrub out expressions that depict the grittiness of war, the reality of an emotionally charged situation, the horror during or catharsis following a tragedy like the Boston Marathon bombing, or the manner in which a public figure expresses him or herself.").

[22] PTV Comments at Exhibit A (describing self-censorship in airing or re-airing of documentaries about civil rights movement, the fall of Enron, a U.S. President, and others).

based on journalistic and editorial factors, not fear of government sanctions.[23] The record even contains evidence that indecency policies chill efforts to make print content available to persons with visual and other disabilities via radio.[24]

The record further shows that young broadcast journalists are learning to censor themselves as a result of shifting, unpredictable indecency policies. SPLC states that the threat of financial ruin from a forfeiture, together with the "uncertainty engendered by an unpredictable enforcement regime" has chilled the speech of collegiate broadcasters.[25] For instance, college station manuals and policies contain warnings to "carefully monitor what we say and play," and if there is any "doubt" or if "you have to think about it, don't say it."[26]

As these comments from a wide range of entities clearly show, content creators, journalists, editors and station personnel are "steer[ing] far wider of the unlawful zone" because of uncertain and unpredictable indecency enforcement.[27] This regulatory environment requires reform to avoid unconstitutionally burdening protected speech.[28]

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[23] *See* RTDNA Comments at 13 (citing experience of Detroit station that bleeped language used by a crime victim to express her anger so as to avoid possible indecency violation).

[24] Sun Sounds of Arizona, an audio information service that makes print material available in an audio format for persons who find it difficult to see, hold or understand print material due to blindness and other disabilities, observes that, although broadcast radio would be an ideal medium for its service, only one radio broadcast licensee has been willing to "accept responsibility for the audio broadcast of uncensored print due to the Commission's indecency policies." Comments of Sun Sounds of Arizona in GN Docket No. 13-86 (Jun. 19, 2013) at 1, 3-4. Sun Sounds of Arizona helped design a product that received the FCC Chairman's Award for Advancement in Accessibility in December 2012. *Id.* at 2.

[25] Comments of Student Press Legal Center ("SPLC") in GN Docket No. 13-86 (Jun. 19, 2013) ("SPLC Comments") at 4.

[26] SPLC Comments at 4 (citing policies of radio stations at University of Toledo, Ohio and Washington University in St. Louis).

[27] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (internal citations omitted).

[28] *See, e.g., FCC v. Fox TV Stations, Inc.*, 132 S. Ct. 2307, 2316-18 (2012) ("*Supreme Court Fox II*") (explaining that due process requires regulations to provide "precision and guidance," and

IV. Substantive Policy Modifications Are Necessary to Comport with the Restraints Articulated in *Pacifica*

A. The Record Supports Limiting Indecency Enforcement to Material that Falls Within the Commission's Indecency Definition

Several commenters agree with NAB that the Commission should reaffirm that, to be actionably indecent, challenged material must "fall within the subject matter scope of [its] indecency definition – that is, the material must describe or depict sexual or excretory organs or activities."[29] *Golden Globe* and several subsequent decisions ignored the limits of this definition by treating *any* use of certain words as descriptions of sex or excrement, regardless of context or form,[30] and also skirted this definitional boundary by finding sexually suggestive material containing no nudity to be actionably indecent.[31]

As commenters explain, FCC acknowledgement of the "critical distinction between the use of an expletive to describe a sexual or excretory function and the use of such a word for an entirely different purpose, such as to express an emotion,"[32] would comport with *Pacifica* and other Supreme Court precedent,[33] and would help avoid confusion

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"[w]hen speech is involved, rigorous adherence to those requirements is necessary" to avoid "chill[ing] protected speech").

[29] NAB Comments at 26*, quoting Industry Guidance On the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999, 8002 ¶ 7 (2001) ("*2001 Policy Statement*").

[30] *See, e.g.*, *Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order, 21 FCC Rcd 2684 ¶ 74 (2006), vacated in part on other grounds, Order, 21 FCC Rcd 13299 (2006).

[31] *See, e.g.*, *Complaints Against Various Television Licensees Concerning Their Dec. 31, 2004 Broadcast of the Program "Without a Trace*," Notice of Apparent Liability of Forfeiture, 21 FCC Rcd 2732 (2006), cancelled in part, Order, 21 FCC Rcd 3110 (2006) ("*Without a Trace*"); *Complaints Against Various Licensees Regarding Their Broadcast Of The FOX Television Network Program "Married By America" On April 7, 2003*, Notice of Apparently Liability for Forfeiture, 19 FCC Rcd 20191 (2004).

[32] NAB Comments at 26*, quoting FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 543-44 (2009) (Stevens, J., dissenting) ("*Supreme Court Fox I*").

[33] *See* ABC Comments at 34-38; *Cohen v. California*, 403 U.S. 15 (1971).

arising from the inconsistent treatment of expletives used merely as rebukes or positive exclamations.[34] Similarly, commenters observe that merely sexually suggestive material that does not depict actual nudity should not be considered actionably indecent so as to comport with the restraint called for by *Pacifica*,[35] and also urge the Commission to clarify that non-sexual nudity is not actionably indecent.[36]

The extreme nature of the regulatory proponents is well illustrated by one commenter who questions whether there is such a thing as non-sexual nudity. The Family Research Council contends that "[v]iewing another human being's genitals or a woman's breasts triggers certain mental associations"[37] and that almost all nudity has "non-trivial levels of sexual content."[38] This position is contrary to both common sense and FCC precedent. For example, the Commission itself apparently concluded that the nudity of Holocaust victims depicted in "Schindler's List" was not about sex.[39] In any event, the Commission cannot adopt a standard that restricts the speech of broadcasters and other content providers because of supposed "mental associations" made by certain members of the public.

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[34] *See, e.g.,* ABC Comments at 37-38 (discussing how use of the word "bullshit" was found indecent, while use of the words "dick and "dickhead" were not); NBCU Comments at 27 (chart comparing inconsistent treatment of similar material).

[35] *See* ABC Comments at 32-34 (discussing inconsistencies in the treatment of material that alludes to sexual activities or organs but does not show actual on-screen nudity); *see also* Fox Comments at 21.

[36] *See, e.g,* WGAW Comments at 3.

[37] Comments of the Family Research Council ("FRC") in GN Docket No. 13-86 (Jun. 19, 2013) ("FRC Comments") at 3.

[38] FRC Comments at 4.

[39] *WPBN/WTOM License Subsidiary, Inc*., Memorandum Opinion and Order, 15 FCC Rcd 1838, 1841-42 ¶¶ 11-12 (2000) (nudity in "Schindler's List" not indecent).

Proposals in the record to confine indecency regulation to material that actually depicts or describes sex or excrement will help ensure that indecency regulation is not "wildly expansive," contrary to *Pacifica*.[40] This approach also demonstrates greater sensitivity to First Amendment concerns.

B. The Commission Must Clarify that Fleeting Expletives and Images are Not Actionably Indecent

NAB urged the Commission to reverse the *Golden Globe* holding and clearly state that the agency will no longer treat fleeting or isolated expletives and images as actionably indecent.[41] Many commenters representing a range of television and radio broadcasters agree.[42] Restraining indecency enforcement to sustained, repetitive material would be consistent with decades of pre-*Golden Globe* policy and the *Pacifica* decision,[43] and would more appropriately account for critical First Amendment interests, particularly with regard to constitutionally sensitive news programming.[44]

NAB also agrees with commenters who stressed that reversing the *Golden Globe* policy with regard to fleeting and isolated expletives and images would not result in the

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[40] *Supreme Court Fox I*, 556 U.S. at 1828 & n.5 (Stevens, J., dissenting)(characterizing the FCC's approach to indecency regulation).

[41] NAB Comments at 28-34*, citing Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Memorandum Opinion and Order, 19 FCC Rcd 4975 (2004) (*"Golden Globe"*).

[42] *See, e.g.,* Comments of KUCR(FM) in GN Docket No. 13-86 (Jun. 19, 2013) at 5; ABC Comments at 18-25 and 30-40; Fox Comments at 19-22; CBS Corp. Comments at 20-24; Emmis et al. Comments at 10-11, 15.

[43] *See, e.g.,* ABC Comments at 30-31, 40; Fox Comments at 19-22; NBCU Comments at 39.

[44] *See* Comments of Morgan Murphy Media in GN Docket No. 13-86 (Jun. 19, 2013) ("Morgan Murphy Comments") at 4-5. Indeed, a number of commenters urge the Commission to exempt news and public affairs programming from indecency regulation due to heightened concerns with governmental intrusion in this context. *See, e.g.,* ABC Comments at 30; Fox Comments at 22; NBCU Comments at 39; RTDNA Comments at 19 (supporting an exemption for material contained in news and public affairs programming).

frequent, unrestrained use of such material. As CBS points out, the Commission's former policy of not taking enforcement action with regard to fleeting content "worked well enough for more than a quarter century, without making gutter language the commonplace vernacular of broadcast television."[45] Any speculation to the contrary simply flies in the face of decades of actual broadcast practices.

A few commenters urge the FCC to continue to treat fleeting/isolated expletives and images as actionably indecent.[46] None of these commenters, however, offer a valid legal or factual basis for their proposals. For example, even as it contends that the Commission should treat fleeting/isolated expletives and images as actionably indecent, ACLJ recognizes that "broadcast media should be afforded the same level of First Amendment protections given to other equally available forms of media like Satellite Radio, cable television and the Internet."[47] Far from supporting ACLJ's proposal for continued enforcement action against fleeting expletives and images, affording equivalent constitutional protection would—contrary to ACLJ's apparent wishes—actually eliminate regulation of indecent content on broadcast outlets. CWA states that "not all speech is protected by the First Amendment to the Constitution" as a rationale for the FCC to continue regulating fleeting expletives and images.[48] While this statement is accurate on

[45] CBS Corp. Comments at 22-23. *See also Fox TV Stations, Inc. v. FCC*, 489 F.3d 444, 460 (2d Cir. 2007) (FCC cannot justify fleeting expletives policy shift on grounds that it would permit broadcasters to air expletives at all hours of the day because, as the FCC itself had recognized, the pre-*Golden Globe* policy did not result in broadcasters "barrag[ing] the airwaves with expletives"), *reversed and remanded on other grounds, Supreme Court Fox I.*

[46] *See, e.g.,* FRC Comments at 3-4; Comments of Concerned Women of America ("CWA") in GN Docket No. 13-86 (Jun. 19, 2013) ("CWA Comments") at 1; Comments of the American Center for Law and Justice ("ACLJ") in GN Docket No. 13-86 (Jun. 19, 2013) ("ACLJ Comments") at 4-5.

[47] ACLJ Comments at 6.

[48] CWA Comments at 2.

its face because obscenity is not protected by the First Amendment, CWA's argument is entirely irrelevant to evaluating the standards for indecency regulation, because indecent speech clearly *is* entitled to First Amendment protection.[49]

FRC baldly asserts that the Commission's current "policy opposing the use of 'fleeting' expletives is reasonable," and contends that since technology allows broadcasters to bleep, blur and pixilate content, there is no reason for expletives or nudity to appear on the air.[50] The record provides no constitutional or legal rationale or factual information that could justify a standard under which *all* nudity and *every* expletive in all contexts is considered indecent, and where the only defense to any complaint against any broadcaster is how much effort the station put into pixilating, blurring or bleeping content. As NAB and many other commenters demonstrated, the FCC's current policy toward fleeting material is unpredictable and inconsistent[51] and unconstitutionally chills speech.[52] FRC entirely fails to justify its call to maintain the *Golden Globe* policy against fleeting content in light of these serious legal and constitutional problems.[53] The record here simply contains no basis for the Commission to decline to reverse this unwarranted policy.

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[49] *See, e.g., Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989); *ACT v. FCC*, 932 F.2d 1504, 1509 (D.C. Cir. 1991).

[50] FRC Comments at 3-4. FRC proposes that when "something offensive" slips past a broadcaster's bleeping and blurring efforts, the FCC can "assess whether a serious effort was made" to keep such material off the air before imposing penalties. *Id.*

[51] *See, e.g.,* NAB Comments at 17-19 (discussing the Commission's inconsistent treatment of similar expletives in "Saving Private Ryan" and "The Blues"); *id.* at 17 (discussing reversal regarding the use of "bullshitter" on "The Early Show"); *see also* NBCU Comments at 27.

[52] *See infra* Section III.

[53] FRC also appears to overestimate the ease of bleeping, blurring or pixilating content, especially with regard to live programming. *See, e.g.,* ABC Comments at 21-22 (discussing the time and expense involved in purchasing, installing and arranging employee training for use of delay equipment, which one broadcast network estimated would cost $16 million per year if applied to all of its live programming); CBS Corp. Comments at 22 ("the Commission cannot, consistent with the First Amendment, command a broadcast licensee to incur the time and personnel costs of installing and utilizing a tape delay system as the price for being able to broadcast a sports event,

C. Commenters Agree that Indecency Policies Must Be Modified to Establish Consistency, Clarity, and Deference to the Artistic Judgment and Editorial Discretion of Broadcasters and Program Providers

In addition to record support for the specific modifications above, commenters agree with NAB that, to comport with legal requirements and Supreme Court precedent,[54] the Commission must make every effort to be clear in establishing its indecency standards and as consistent as possible in their application.[55] NAB and others accordingly urged the Commission to use language that is as precise as possible when defining its standards, while also providing concrete examples of actionable content (not just "adjectives" attempting to describe such content) and specific contexts in which the policy will or will not be enforced.[56]

Indeed, comments in this proceeding reflect the potential for adjectives such as "egregious" to be construed differently by different parties. The Parents Television Council, for example, opposes change to current indecency policies. Among other things, PTC disagrees with the Commission's proposal to take enforcement action only where the

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or any other program, on a live basis"). Smaller market stations face particular burdens in this area. *See* SPLC Comments at 5 (delay technology "may be prohibitively expensive" for small broadcasters, especially since "additional in-studio audio equipment, new computer software, multiple employees, and training may be needed" to implement the technology); *Supreme Court Fox I*, 556 U.S. at 558 (Breyer, J., dissenting) ("the costs of bleeping/delay systems…place that technology beyond the financial reach of many smaller independent local stations").

[54] *See* NAB Comments at 28-29 & n. 104-105.

[55] *See, e.g.,* RTDNA Comments at 3; Comments of National Public Radio, Inc. ("NPR") in GN Docket No. 13-86 (Jun. 19, 2013) ("NPR Comments") at 15; CBS Corp. Comments at 20; ABC Comments at 12; Comments of Allbritton Communications Company ("Allbritton") et al. in GN Docket No. 13-86 (Jun. 19, 2013) ("Allbritton et al. Comments") at 1; Comments of Americom, L.P. ("Americom") et al. in GN Docket No. 13-86 (Jun. 19, 2013) ("Americom et al. Comments"") at 7; Morgan Murphy Comments at 3.

[56] *See, e.g.,* NAB Comments at 28 (pointing out that a term like "egregious" would be defined differently by different people and must itself be defined, often by the use of more adjectives); ABC Comments at 17-18 ("In our view, simply adding another subjective and conclusory term like 'egregious' into the mix of the Commission's current ad hoc balancing of subjective criteria would not appreciably limit the chilling effects of the rules or provide meaningful clarity and notice to broadcasters of what the Commission might from time to time view as crossing the line.").

complained-of content is "egregious," asserting that all content that meets the Commission's existing "patently offensive" standard is also egregious.[57]

To support its opposition to any change, PTC also argues that "there is no reason" for the FCC to change its indecency policies because "no court has compelled the Commission to change its indecency rules."[58] That argument borders on the circular. These commenters are also wrong to suggest that the Supreme Court effectively affirmed the constitutionality of the current indecency regime when the court specifically determined that it was "unnecessary" to address the constitutionality of the current indecency policy.[59] And, even if there had been no litigation concerning indecency, the Commission would be free to modify its rules and policies and does not need to wait for a court to question or vacate those policies before modifying them.[60] Re-evaluating indecency policies to ensure that they satisfy the First Amendment, the Communications Act, and the Administrative Procedure Act is an overdue step, given the many years of uncertainty faced by broadcasters and other content creators, the series of judicial challenges, the chilling effect of the current regulatory environment, and widespread changes in media consumption by viewers and listeners, including children.[61]

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[57] Comments of Parents Television Council ("PTC") in GN Docket No. 13-86 (Jun. 19, 2013) ("PTC Comments") at 3.

[58] PTC Comments at 4. *See also* FRC Comments at 3 (it is "mind-boggling" that the FCC would commence a proceeding about its indecency policies Commission when courts did not strike down the policies on constitutional grounds).

[59] *Supreme Court Fox II*, 132 S. Ct. at 2320.

[60] In fact, in *Supreme Court Fox II*, 132 S. Ct. at 2320, the Supreme Court expressly stated that the Commission is "free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements," and the courts are "free to review the current policy or any modified policy in light of its content and application."

[61] PTC also seems to have misunderstood the reasons why the FCC dismissed certain pending complaints. PTC Comments at 3-4 (contending that the FCC applied an "egregious case" standard to the backlog of pending complaints). The FCC stated that it closed complaints that

As part of this necessary and timely reevaluation, NAB and other commenters also urge the Commission not to substitute its own judgment for that of broadcasters and other content creators.[62] As PTV observes, the Commission has a history of deferring to a licensee's editorial judgment in other areas where doing so is appropriate for First Amendment considerations[63] -- deference that extended for many years to licensees' editorial judgments in the indecency context as well.[64] More recent decisions represent a departure from this longstanding policy of deference, which has been replaced with a system where broadcasters bear the burden of proving that challenged material is "'essential,' 'necessary,' 'required' or 'integral' to the broadcast program" which "provides no real protection at all to the broadcaster's discretion."[65] The agency should reverse course. Substitution of its own judgment for the good faith judgment of content creators, editors and broadcasters places the Commission on dangerous First Amendment ground, as the record reflects and the Supreme Court has stated.[66]

Going forward, the Commission should limit indecency enforcement to instances where there has been a significant abuse of broadcaster discretion.[67] This will help the

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were "beyond the statute of limitations or too stale to pursue, that involved cases outside FCC jurisdiction, that contained insufficient information, or were foreclosed by settled FCC precedent." *Public Notice* at 1. It did not state that any complaints were dismissed because they involved material that did not meet a new standard for "egregious" violations. *Id.*

[62] *See, e.g.,* RTDNA Comments at 19-22; ABC Comments at 40-45; NAB Comments at 31-33.

[63] PTV Comments at 7-8 (citing children's informational and educational programming and the content of donor acknowledgements).

[64] *See* ABC Comments at 40-41; NAB Comments at 32-33.

[65] ABC Comments at 44.

[66] *See* NAB Comments at 31-32, *citing CBS v. Democratic Nat'l Committee*, 412 U.S. 94, 124 (1973) and *Turner Broadcasting System v. FCC*, 512 U.S. 622, 650-51 (1994).

[67] NAB Comments at 34. *See also* NBCU Comments at 42 (urging the Commission to focus its enforcement not on individual complaints but on patterns that reflect "recurring and serious problems").

agency avoid substituting its judgment for the editorial and artistic judgment of broadcasters and the creative community, and prevent unintended bias in application of the indecency rules.[68] Only then could the indecency regulatory regime potentially represent "the least restrictive means" to further an identified "compelling" governmental interest, as the Commission had acknowledged it must.[69]

V. Enforcement Practices Should Include Evidentiary Standards and Promote Predictability, Timeliness and Transparency

NAB's initial comments suggested procedural reforms to bring the FCC's indecency enforcement practices into compliance with constitutional, Administrative Procedure Act and Communications Act requirements. In particular, we urged the Commission to: (i) dispose of non-meritorious complaints very quickly; (ii) proceed with enforcement inquiries only where the complainant has first-hand knowledge of the programming at issue and the complaint contains sufficient information and supporting documentation; (iii) increase transparency by notifying broadcasters of both the filing and dismissal of indecency complaints; (iv) resolve complaints in a timely manner so that license renewal and other applications are not unduly delayed; and (v) take swift action on reconsideration petitions and responses to notices of apparent liability so as to reach final decisions and permit court review.[70] As discussed below, virtually every commenter that addressed indecency enforcement procedures agrees with NAB.

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[68] *See* WGAW Comments at 6-7 (observing that a subjective analysis of content by FCC may also have unintended consequence of bias); *see also Grayned,* 408 U.S. at 108-9.

[69] *2001 Policy Statement*, 16 FCC Rcd at 8000 ¶ 3.

[70] NAB Comments at 34-37.

A. Even Non-Meritorious Complaints Can Impose Costs and Burdens Under Current Procedures

Several broadcasters explain how the mere filing of an indecency complaint, even a non-meritorious one, can have serious consequences for broadcasters.[71] The filing of a complaint often results in the placement of a "hold" on any applications filed by the broadcaster seeking approval for a license renewal or for assignment or transfer of control of a station license.[72] The pendency of a hold imposes significant costs on broadcasters.[73] Holds can make refinancings and other investment transactions much more costly and complex because they must be "explained to and documented for lenders, detailed in schedules to financing documents, and addressed in legal opinion letters—all at significant increased expense."[74] Removing a hold and obtaining application approval may often require the signing of a consent decree or a tolling agreement, which is time consuming and costly to negotiate, requires the advice of counsel, and "sometimes leads to additional, indefinite delays"[75] – all without even

[71] *See, e.g.,* NBCU Comments at 30-36 (discussing delays, uncertainty, lack of transparency and other problems with the current enforcement process).

[72] *See* Comments of Saga Communications, Inc. ("Saga") in GN Docket No. 13-86 ("Saga Comments") at 5-6 (discussing renewal holds affecting Saga radio and television stations, including renewal applications filed as long ago as 2005 and 2006 that still remain pending); CBS Corp. Comments at 1-2, 26 ("it is now not uncommon for indecency complaints to remain pending without resolution for the entire length of a broadcast station's eight-year license term" as is the case for three of its television stations); NBCU Comments at 34 (NBC and Telemundo-owned stations have 11 renewal applications pending from the renewal cycle that began in 2004 and believes that inaction is due to pending indecency complaints; since a new renewal cycle began in 2012, several stations now have two renewal applications pending).

[73] *See, e.g.,* Americom et al. Comments at 8 ("complaints delay grants of stations' license renewals, which can negatively impact station financing and harpoon transactions"); Allbritton et al. Comments at 4 (a hold on a license renewal application also triggers an obligation for the station to retain and ensure the availability of public file records beyond a station's license term – for as many as 16 years).

[74] Allbritton et al. Comments at 3-4.

[75] Americom et al. Comments at 8. *See also* Allbritton et al. Comments at 3-4; Morgan Murphy Comments at 3; NPR Comments at 8.

reaching the merits of the underlying complaint.[76] Commenters also observe that these negative effects are often wholly unnecessary because, had the pending indecency complaints been addressed in a timely manner, many of them would have been dismissed, denied or otherwise acted upon before the affected renewal or assignment/transfer applications were filed.[77]

B. Processing Delays Can Insulate Indecency Regulation from the Critical First Amendment Safeguard of Judicial Review

Delayed Commission action, as well as inaction, on indecency matters can also delay or foreclose opportunities for judicial review, thereby depriving licensees of the opportunity to challenge erroneous or even unconstitutional indecency decisions in court.[78] This delay or inaction is harmful because, in making editorial decisions, stations must either follow the unreviewed decisions setting forth the Commission's interpretation of the indecency statute or risk complaints, investigations, holds, and fines. Foreclosing judicial review eliminates the only available safeguard against arbitrary and/or unconstitutional indecency enforcement, and results in more extensive self-censorship by radio and television stations.[79] The Commission must change its practices in this regard

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[76] *See* Morgan Murphy Comments at 3.

[77] "[I]naction on indecency complaints over a protracted period greatly increases the likelihood that an informal complaint will result in an enforcement hold at the time a broadcaster must file an application for a license renewal or other application." Morgan Murphy Comments at 4. There is often a significant lag time even between receipt of a Letter of Inquiry ("LOI") and release of a Notice of Apparent Liability ("NAL"). *See* NBCU Comments at 33 & n.112 (reporting an average of 17.2 months between issuance of an LOI and an NAL).

[78] *See* NBCU Comments at 34, n.117; Fox Comments at 26-28. *See also* NAB Comments at 4, n.91, 36 (discussing Commission failure to act on petitions for reconsideration of the *Golden Globe* decision, or to take final action regarding "The Blues").

[79] NBCU also observes that the Commission's indecency complaint process was upheld in 1995 in part because the court believed that action on NALs and forfeiture orders was sufficiently swift so as to limit the Commission's ability "to rely upon its own unreviewed forfeiture decisions in setting standards of decency, thereby reducing the tendency for one unconstitutional decision to beget

to be consistent with court decisions stressing the importance of procedural safeguards on both First Amendment and administrative law grounds.[80]

C. The Commission Must Reform its Complaint Review Process

Like NAB, other commenters offer several proposals for procedural reform. Allbritton et al. note that for many years, the FCC processed indecency complaints in a more expedited two-step process involving an initial procedural review and, for those complaints not dismissed during that initial review, a substantive evaluation. For a complaint to avoid dismissal during the initial review, it generally needed to include: (1) a full or partial tape or transcript or significant excerpts of the program; (2) the date and time of the broadcast; and (3) the call sign of the station involved.[81] Allbritton et al. argue that a return to this type of process is warranted by the Constitution and FCC precedent.[82]

NAB agrees with proposals such as those of Allbritton et al. that would add "procedural rigor" to the complaint review process.[83] In addition to such measures, NAB believes that the Commission should adopt proposals to require complainants to: (i) file their complaints within a discrete time period, such as 30 days, after the allegedly

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others." NBCU Comments at 35*, citing Action for Children's Television v. FCC*, 59 F.3d 1249, 1259-60 (D.C. Cir. 1995). At the time, the Commission had an internal guideline of ruling on NAL responses within 60 days, whereas today, such action can take years. NBCU Comments at 36.

[80] *See* NAB Comments at 25, 36 (citing Supreme Court and D.C. Circuit cases).

[81] Allbritton et al. Comments at 5*, citing 2001 Policy Statement.* Other commenters support similar documentation requirements for indecency complaints. *See, e.g*., Saga Comments at 4 n. 7; NBCU Comments at 40-41; Reply Comments of the Named State Broadcasters Associations in GN Docket No. 13-86 (Jul. 22, 2013) ("State Broadcaster Reply Comments") at 8-9.

[82] Allbritton et al. Comments at 5-7.

[83] *See also* Saga Comments at 4-5 (proposing a "triage" system under which meritless complaints would be dismissed promptly and enforcement holds would be placed on applications only in a limited set of circumstances); PTV Comments at 8-9 (proposing procedural reforms including an initial prima facie review in which staff would dismiss complaints that are incomplete, involve material aired during the safe harbor, do not involve content that describes or depicts sexual or excretory organs or activities, or otherwise fail to meet minimum thresholds); State Broadcaster Reply Comments at 9-10.

indecent material was broadcast;[84] and (ii) include a declaration or certification attesting that he/she actually watched or listened to the broadcast that is the subject of the complaint.[85] The Commission should dismiss with prejudice complaints that lack the requisite information and declarations.[86] As we previously proposed, broadcasters should be notified of the filing and dismissal of complaints.[87] Reforms such as these are needed to bring the FCC's indecency enforcement procedures into line with due process requirements and show "appropriate respect for First Amendment values."[88]

NAB also sees merit in the proposals of NBCU for adoption of specific deadlines for action on complaints, such as a rule specifying that complaints will be deemed denied or dismissed unless the Commission issues an NAL within one year of the filing of a complaint, and a rule that would deem an NAL cancelled six months after its issuance if the Commission has not yet issued a forfeiture order.[89] Such steps will help to "avoid

[84] NBCU Comments at 41.

[85] Allbritton et al. Comments at 6. *See also* Saga Comments at 4 n. 7 (FCC should consider only those complaints submitted by a listener or viewer of the affected station); Morgan Murphy Comments at 3 n.7 (to deter abuse of the complaint process, the FCC should require complainants to make an affirmative showing that he/she actually lives in the station's service area and watched the allegedly indecent broadcast); Americom et al. Comments at 7-8 (only complaints from "bona fide viewers and listeners" should be entertained by the FCC); NBCU Comments at 40-41 (complaints should be required to contain information demonstrating that the complainant actually saw and was troubled by the potentially offensive material, including a certification that he/she viewed the programming on the date/time specified and at a time outside the safe harbor hours).

[86] NBCU Comments at 41.

[87] NAB Comments at 35; Emmis et al. Comments at 14.

[88] NAB Comments at 34-35, *citing Galloway v. FCC,* 778 F.2d 16, 23 (D.C.Cir.1985) (approving of FCC's policy of "requiring a substantial prima facie case before proceeding against a broadcaster").

[89] NBCU Comments at 42-43.

exacerbating" the legal and constitutional "weaknesses" of the current enforcement process.[90]

For similar reasons, the Commission should adopt NBCU's proposal to clarify that indecency NALs are not legal precedent and that parties and the Commission may not rely on indecency NALs as precedent or consider the existence of NALs with regard to license renewals unless and until the NAL has been affirmed by a final forfeiture order.[91] Adoption of such a proposal would bring the FCC's enforcement processes in line with Section 504(c) of the Communications Act, as NAB previously explained.[92] Moreover, because only decisions that have been the subject of final agency action are reviewable in the courts, decisions that are insulated from judicial review should not be treated as having precedential value in the sensitive area of speech regulation.

VI. Conclusion

NAB urges the Commission to adopt proposed policy and procedural reforms designed to make its indecency standards compatible with *Pacifica* and somewhat less intrusive into broadcasters' editorial and content creators' artistic judgments. As many commenters have observed, such reforms are critical to the Commission's ability to bring indecency regulation more closely into compliance with the First Amendment and the Communications Act. NAB also urges the Commission to consider the more fundamental issues about the underlying rationale for disparate regulation of broadcast outlets in

[90] NBCU Comments at 43. NBCU states that its proposal likely would eliminate the problem of broadcast license renewals being routinely delayed for years because of pending indecency complaints and establish parity with the statute of limitations for Commission action on non-broadcast NALs. *Id.*

[91] NBCU Comments at 43.

[92] NAB Comments at 24, 36-37.

today's media environment and how, if at all, such regulation can be squared with the statutory prohibition against censoring broadcast content and the First Amendment.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, NW
Washington, DC 20036
(202) 429-5430

Jane E. Mago
Jerianne Timmerman
Erin L. Dozier

Elizabeth Cuttner
Alexis Grilli
Daniel Henry
Legal Interns

August 2, 2013