

**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

**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

June 19, 2013

## TABLE OF CONTENTS

EXECUTIVE SUMMARY.....	i
I. Changes in Technology and Media Consumption Have Undermined the Basis for Broadcaster-Specific Limits on “Indecent” Speech.....	3
A. Changes in the Ways that Americans Access Audio and Video Content Have Eroded the Rationales of <i>Pacifica</i> .....	4
B. Courts Have Questioned the Continuing Validity of <i>Pacifica</i> in Light of Changing Technology.....	10
II. Current Commission Policy Does Not Comport with the Restraints Articulated in <i>Pacifica</i> .....	12
A. Today’s “Wildly Expansive” Indecency Policies Do Not Comport With the Restrained Approach Mandated by <i>Pacifica</i> .....	12
B. More Restrictive Policies Adopted in 2004 Led to Inconsistent, Arbitrary – and Thus Unconstitutional – Enforcement .....	16
C. Inconsistent and Arbitrary Indecency Regulation Chills Protected Speech .....	20
D. Agency Enforcement Practices Have Exacerbated the Arbitrary Nature of Indecency Regulation.....	23
III. At the Very Least, Indecency Policies Must Be Revised to Comport with the Restraints Articulated in <i>Pacifica</i> .....	25
A. The Commission Must Confine its Regulation to Material that Actually Falls Within its Indecency Definition .....	26
B. The Commission Must Clarify that Fleeting Expletives and Images are Not Actionably Indecent.....	28
C. Indecency Policies Must Be Consistent, Predictable and Clear and Must Defer to the Artistic Judgment and Editorial Discretion of Broadcasters and Program Providers .....	28
D. The Commission’s Indecency Enforcement Practices Must Be Reformed to Comport with the First Amendment and the Communications Act .....	34
IV. Conclusion .....	37

## **EXECUTIVE SUMMARY**

The Federal Communications Commission is reviewing its broadcast indecency policies and enforcement “to ensure they are fully consistent with vital First Amendment principles.” In particular, the Commission asks whether it should maintain the approach to isolated expletives adopted in the *Golden Globe* decision, whether it should change this approach, and whether its treatment of isolated nudity should conform to its treatment of expletives. In the comments that follow, the National Association of Broadcasters (“NAB”) demonstrates that the Commission’s indecency policies and procedures should be modified to comply with First Amendment, Communications Act, and administrative law requirements.

In the 35 years since the Supreme Court’s decision in *FCC v. Pacifica*, the rationale for broadcaster-specific limits on “indecent” speech has crumbled under the weight of changes in technology and media consumption. Specifically, with regard to the government’s concern that children may be exposed to adult-oriented or otherwise inappropriate material, there is no principled way to focus solely on broadcast content. Children in particular enjoy unfettered access to content via devices that they carry in their pockets and backpacks—access that usually involves no subscription or special parental involvement. In this environment, the constitutionality of a broadcast-only prohibition on indecent material is increasingly in doubt.

Leaving the core constitutional issues aside, one thing is clear: the Commission’s broadcast indecency policies must, at the very least, adhere to the constraints of *Pacifica*—and thus, unlike the 2004 *Golden Globe* decision and its progeny, they must be limited and restrained. *Golden Globe* and subsequent decisions

focusing on fleeting expletives and isolated nudity led to unpredictable, arbitrary and unconstitutional enforcement of indecency rules and policies that chilled broadcaster speech. Any policies going forward not only must be cautious and restrained, as *Pacifica* requires, they also must be as predictable, consistent and clear as possible.

NAB discusses in detail several steps needed to create additional clarity and predictability. First, the Commission should reverse the *Golden Globe* holding and clearly state that it will no longer treat fleeting or isolated expletives and images as actionably indecent. The Commission also must reaffirm that, to be actionably indecent, challenged material must fall within the scope of its indecency definition—that is, the material must describe or depict sexual or excretory organs or activities. These actions would be consistent with the clear terms of *Pacifica* and years of pre-2004 policy.

NAB believes that merely focusing enforcement on “egregious” indecency cases is not sufficiently clear. In revising its indecency standards, the Commission must use language that is as precise as possible and provide relevant examples and context in its policies and decisions. If the Commission cannot establish sufficiently clear indecency regulations so that broadcasters know what is expected of them, then broadcasters cannot be subject to liability for alleged violations of those standards.

To be consistent with both the First Amendment and the statutory prohibition on censorship, the Commission must also step back from substituting its own editorial and artistic judgment for that of broadcasters and the creative community, in the contexts of both live and scripted programming. Rather than impose penalties based on its fluctuating disagreements with broadcasters’ and programmers’ judgments, the Commission should decline to act absent a significant abuse of discretion.

Finally, procedural reforms to indecency enforcement practices are needed. In particular, the Commission should: (i) dispose of clearly non-meritorious complaints very quickly; (ii) proceed with enforcement inquiries only where complaints have been submitted by a complainant with first-hand knowledge of the programming at issue and contain sufficient information and supporting documentation; (iii) increase transparency by notifying broadcasters of both the filing of indecency complaints and the dismissal of complaints; (iv) address and 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.

Although the Commission likely cannot resolve all problems with vagueness and predictability in the indecency context, the actions proposed above would make its indecency policy more compatible with *Pacifica* and somewhat less intrusive into broadcasters' editorial judgments and content creators' artistic judgments. These actions will not, however, address unresolved questions about the underlying rationale for disparate regulation of "indecent" broadcaster speech and how, if at all, such regulation can be squared with the statutory prohibition against censoring broadcast content and the First Amendment.

**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

**COMMENTS OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (“NAB”)<sup>1</sup> hereby responds to the *Public Notice* requesting comment on whether the Commission should “make changes to its current broadcast indecency policies or maintain them as they are.”<sup>2</sup> Specifically, the *Public Notice* asks whether the Commission should retain the approach to fleeting expletives set forth in its *Golden Globe* decision,<sup>3</sup> or return to prior policy under which expletives alone would not be actionably indecent unless their use was “deliberate and repetitive.”<sup>4</sup> The *Public Notice* also asks whether the Commission should treat isolated images of nudity in the same manner as fleeting expletives, and invites comment on

---

<sup>1</sup> 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.

<sup>2</sup> 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”).

<sup>3</sup> *Id.*, 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”).

<sup>4</sup> *Id.*, citing Pacifica Foundation, Inc., Memorandum Opinion and Order, 2 FCC Rcd 2698, 2699 (1987) (“Pacifica MO&O”).

other aspects of the Commission’s indecency policies.<sup>5</sup> As discussed below, NAB believes that these indecency policies and procedures should be modified to comply with First Amendment, Communications Act, and administrative law requirements.

The ways that Americans obtain and use media content has changed in the past 35 years. Broadcasting remains a vital and important source of news and information. But with particular regard to the government’s concern that children may be exposed to adult-oriented or otherwise inappropriate material, it is not possible to make a principled argument that broadcasting is either the most likely or most easily available means of exposure. Simply put, the factual predicate for the disparate regulatory and constitutional treatment of broadcast outlets has eroded. Thus, the constitutionality of a broadcast-only prohibition on indecent material is increasingly in doubt and remains unresolved after recent court decisions.

Despite this continuing uncertainty, one thing is clear: the Commission’s broadcast indecency policies, at the very least, must adhere to the constraints of *Pacifica*—and thus, unlike the *Golden Globe* decision and its progeny, they must be limited and restrained.<sup>6</sup> These policies must also be limited and restrained in light of Section 326 of the Communications Act.<sup>7</sup>

In response to the specific inquiry in the *Public Notice*, NAB submits that constitutional requirements, as well as sound policy reasons, all support changes to current indecency policies. *Golden Globe* and its progeny led to unpredictable, arbitrary

---

<sup>5</sup> *Id.* at 4082-83.

<sup>6</sup> The FCC historically has taken a “cautious[]” and restrained approach to indecency enforcement. *FCC v. Pacifica Found.*, 438 U.S. 726, 761 n.4 (1978) (“*Pacifica*”) (Powell, J., concurring in part and concurring in the judgment).

<sup>7</sup> 47 U.S.C. § 326.

and unconstitutional enforcement of indecency rules and policies that chilled broadcaster speech. Going forward, any indecency policy and enforcement not only must be restrained, they also must be as predictable, consistent and clear as possible.

## **I. Changes in Technology and Media Consumption Have Undermined the Basis for Broadcaster-Specific Limits on “Indecent” Speech**

The indecency statute in existence today became part of the criminal code in 1948, but it was rooted in a provision of the Radio Act of 1927, and has not been substantively revised over time.<sup>8</sup> The statutory prohibition on broadcast indecency is thus nearly 90 years old, pre-dating even the existence of television. When the Supreme Court last directly addressed the constitutionality of the statute thirty-five years ago, the Court narrowly upheld indecency regulation under the First Amendment on the grounds that broadcasting was a “uniquely pervasive” presence in the American home and was “uniquely accessible” to children.<sup>9</sup> But, as the Second Circuit has recognized, these “twin pillars” are no longer standing.<sup>10</sup>

---

<sup>8</sup> Section 29 of the Radio Act of 1927 provided that: “Nothing in this Act shall be understood or construed to give the licensing authority the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech by means of radio communications. *No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.*” 44 Stat. 1172-1173 (emphasis added). Likewise, today’s criminal indecency statute makes it a federal offense to utter “any obscene, indecent, or profane language by means of radio communication.” 18 U.S.C. § 1464.

<sup>9</sup> *Pacifica*, 438 U.S. at 748-49.

<sup>10</sup> *Fox TV Stations, Inc., v. FCC*, 613 F.3d 317, 326 (2d Cir. 2010) (“Second Circuit Fox II”), vacated and remanded on other grounds, *FCC v. Fox TV Stations, Inc.*, 132 S. Ct. 2307 (2012) (“Supreme Court Fox II”); see also *id.* at 326-27; *Fox TV Stations, Inc. v. FCC*, 489 F.3d 444, 465 (2d Cir. 2007) (“Second Circuit Fox I”), reversed and remanded on other grounds, *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502 (2009) (“Supreme Court Fox I”) (dicta) (“[W]e would be remiss not to observe that it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children.”).

## **A. Changes in the Ways that Americans Access Audio and Video Content Have Eroded the Rationales of *Pacifica***

In upholding the Commission's authority to regulate indecent content on broadcast platforms, the Supreme Court emphasized that the nature of broadcasting made it more difficult to protect children from indecent material on broadcast outlets than, for example, indecent material in bookstores or movie theaters, observing that “[o]ther forms of offensive expression may be withheld from the young without restricting the expression at its source.”<sup>11</sup> The court concluded that the ease with which children could obtain access to broadcast material, coupled with governmental interests in promoting the well-being of the nation’s youth and in supporting parents’ authority in the household, “justify special treatment of indecent broadcasting.”<sup>12</sup>

The supporting rationales relied upon in *Pacifica* have crumbled under the weight of changes in the way Americans consume media. In addition to broadcast outlets, consumers today access audio and video content via their computers, tablets, and smartphones, from their own personal collections of content stored electronically, and from subscription audio and video services.<sup>13</sup>

---

<sup>11</sup> *Id.*

<sup>12</sup> *Pacifica*, 438 U.S. at 750.

<sup>13</sup> See, e.g., Press Release, comScore, *comScore Releases April 2013 U.S. Online Video Rankings* (May 22, 2013), available at <http://finance.yahoo.com/news/comscore-releases-april-2013-u-182200937.html> (181.9 million Americans watched 38.8 billion online content videos in April); Darrell Etherington, *Mobile Video Views Up 300% In 2012, With Tablets Driving The Charge With A 360% Increase*, TECHCRUNCH (APR. 9, 2013), available at <http://techcrunch.com/2013/04/09/mobile-video-views-up-300-in-2012-with-tablets-driving-the-charge-with-a-360-increase/>; Marcelo Ballve, *Why People Watch Video On Their Smartphones*, BUSINESS INSIDER (Apr. 4, 2012, 4:37 PM), <http://www.businessinsider.com/why-people-watch-video-on-smartphones-2013-4#ixzz2UuOMj71M> (41 million people in the U.S. watch video on their phones).

The growth of Internet access is particularly relevant to the issue of children's access to potentially inappropriate content. As of October 2012, 72.4 percent of American households have high-speed Internet access at home, and the number is growing.<sup>14</sup> Sixty-seven percent of Americans have a Wi-Fi network setup in their homes, facilitating the use of the Internet to access video and audio content on multiple devices in the home.<sup>15</sup>

Indeed, Internet access via Wi-Fi is readily available to anyone with a smartphone or tablet. One aggregator of Wi-Fi hotspot location data reports that there are 130,616 hotspots in the U.S, 81.7 percent of which are free hotspots.<sup>16</sup> The FCC has observed that Wi-Fi hotspots "are being deployed by mobile wireless companies, cable companies, businesses, universities, municipalities, households and other institutions" and "have proliferated in places accessible to the public such as restaurants, coffee shops, malls, train stations, hotels, airports, convention centers, and parks."<sup>17</sup> More than 11,500 McDonald's restaurants now offer free Wi-Fi,<sup>18</sup> as do all company-owned Starbucks stores<sup>19</sup> and two thirds of American hotels.<sup>20</sup> In addition, a

---

<sup>14</sup> See National Telecommunications and Information Administration, *Household Broadband Adoption Climbs to 72.4 Percent* (Jun. 6, 2013), <http://www.ntia.doc.gov/blog/2013/household-broadband-adoption-climbs-724-percent>.

<sup>15</sup> Arbitron Inc. and Edison Research, *The Infinite Dial 2013: Navigating Digital Platforms*, at 9 (2013), available at [http://www.edisonresearch.com/wpcontent/uploads/2013/04/-Edison-Research\\_Arbitron\\_Infinite\\_Dial\\_2013.pdf](http://www.edisonresearch.com/wpcontent/uploads/2013/04/-Edison-Research_Arbitron_Infinite_Dial_2013.pdf).

<sup>16</sup> See JWire, *Insights: JiWire Mobile Audience Insights Report Q1 2013* at 14, <http://www.jewire.com/insights> (last visited Jun. 18, 2013).

<sup>17</sup> *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, 27 FCC Rcd 3700, 3934-35 ¶ 377 (2013).

<sup>18</sup> See McDonald's, *Free Wi-Fi at McDonald's*, [http://www.mcdonalds.com/us/en/services/free\\_wifi.html](http://www.mcdonalds.com/us/en/services/free_wifi.html) (visited Jun. 17, 2013).

<sup>19</sup> See Starbucks, *Free Wi-Fi*, <http://www.starbucks.com/coffeehouse/wireless-internet> (visited Jun. 18, 2013).

number of American municipalities offer free public Wi-Fi.<sup>21</sup> Wi-Fi access is by far the preferred method of Internet connectivity for tablet users, with only six percent of data sessions on tablets taking place over cellular networks.<sup>22</sup> Nearly 90 percent of iPads sold are equipped only for Wi-Fi connectivity, and several tablets, such as the Amazon.com Kindle Fire and Google Nexus 7, are offered with Wi-Fi only and do not have an option for mobile network connectivity.<sup>23</sup>

There is no doubt that children are using this Internet access to consume audio and video content. Even as early as 2009, 81 percent of 8 to 18 year-olds had used the Internet to watch a video, 48 percent had used it to watch a TV show, 28 percent had listened to radio online, and 62 percent had downloaded music from the Internet.<sup>24</sup> With young viewers tuning in at high rates, many online video offerings seek to appeal to

---

<sup>20</sup> See Susan Stellin, *Craving Wi-Fi, Preferably Free and Really Fast*, NEW YORK TIMES, May 1, 2013 at F5.

<sup>21</sup> See, e.g., Lauren Hepler, *Santa Clara Launches Free Citywide WiFi Network*, SILICON VALLEY BUSINESS JOURNAL (Mar. 27, 2013), <http://www.bizjournals.com/sanjose/news/2013/03/26/santa-clara-launches-free-citywide.html>; Angela Medina, *The City of San Jose Unveils Fastest Public Wi-Fi Service in North America*, SPARTAN DAILY (Mar. 16, 2013), available at <http://spartandaily.com/100570/the-city-of-san-jose-unveils-fastest-public-wi-fi-service-in-north-america>; Albany FreeNet, <http://web.albanyfreenet.net/site/> (visited Jun. 18, 2013); WiFi Miami Beach <http://web.miamibeachfl.gov/wifi/> (visited Jun. 18, 2013); Ponca City, Oklahoma WiFi, <http://www.poncacityok.gov/index.aspx?NID=417> (visited Jun. 18, 2013).

<sup>22</sup> See *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, 27 FCC Rcd 3700, 3808 ¶ 157 (2013), citing Philip Goldstein, Localytics: Only 6% of iPad Data Sessions are on Cellular Networks, FIERCEWIRELESS, Mar. 23, 2012, <http://www.fiercewireless.com/story/localytics-only-6-ipad-data-sessions-are-cellular-networks/2012-03-23> (visited Oct. 16, 2012).

<sup>23</sup> *Id.* at 3846 ¶ 227.

<sup>24</sup> Victoria J. Rideout et al., Kaiser Family Foundation, *Generation M2: Media in the Lives of 8- to 18-Year-Olds*, at 22 (Jan. 2010), available at <http://kaiserfamilyfoundation.files.wordpress.com/2013/01/8010.pdf>.

children with special programming and packages.<sup>25</sup> Younger Americans also are more likely to watch television by streaming or downloading programming to their televisions, computers, tablets, and cell phones.<sup>26</sup>

Online radio also is gaining momentum. A recent survey estimates that online radio reaches approximately 120 million Americans—or 45 percent of the U.S. population aged 12 and older—every month.<sup>27</sup> The survey also found that 54 percent of smartphone owners listen to downloaded music and 44 percent use the device to listen to online radio,<sup>28</sup> with nearly one-third listening to downloaded music via smartphones daily.<sup>29</sup>

Adolescent ownership of smartphones is on the rise: sixty percent of Americans aged 12-17 own smartphones, up from 54 percent in 2012.<sup>30</sup> Adolescents and children are also becoming avid tablet users, with an estimated 23 percent of Americans aged

---

<sup>25</sup> See James Poniewozik, *The Children Are the Future (of Online Streaming Video)*, TIME (June 5, 2013), <http://entertainment.time.com/2013/06/05/the-children-are-the-future-of-online-streaming-video/> (Amazon announced a plan to begin offering children's programming following an agreement reached with Viacom); Roger Yu, *Amazon Snags 'SpongeBob' and 'Dora The Explorer,'* USA TODAY (June 4, 2013, 5:30 PM), <http://www.usatoday.com/story/money/2013/06/04/viacom-amazon-deal/2388415/> (Amazon's Vice President of Digital Video and Music noted, "[K]ids shows are one of the most-watched TV genres on Prime Instant Video."); George Szalai, *Analyst: Netflix's Popularity Driven by Kids TV Content*, THE HOLLYWOOD REPORTER (July 2, 2012, 7:41 AM), <http://bit.ly/11t9i50> (according to one analyst, Netflix has become "highly dependent upon kids TV," noting that "the moms we talked to originally subscribed to Netflix for themselves, but have recognized the dwindling supply of content for adults and are now using the service primarily for their kids.").

<sup>26</sup> Arbitron Inc., *supra* note 15, at 71 (among Americans aged 12-34 who downloaded or streamed programming via the Internet, 28% viewed the programming on their televisions, 30% on their desktops/laptops, 12% on their tablets, and 12% on their cell phones; these figures were higher in all categories than those for the general survey pool).

<sup>27</sup> *Id.* at 12.

<sup>28</sup> *Id.* at 33.

<sup>29</sup> *Id.* at 34.

<sup>30</sup> *Id.* at 32. The survey also showed that Americans aged 12-17 are more likely to own smartphones than Americans in several other adult age groups (i.e, only 51% of 45-54 year olds, 34% of 55-64 year olds, and 17% of those 65 and older own smartphones). *Id.*

12-17 owning tablets,<sup>31</sup> and 70 percent of tablet-owning households with children under 12 reporting that they allow their children to use tablets, including to watch television shows and movies.<sup>32</sup> Parents and child development experts are actively debating the impact of children's increasing use of iPads and other tablets.<sup>33</sup> Overall, 95 percent of teens aged 12-17 access the Internet and 74 percent do so using mobile devices—with one quarter of teens accessing the Internet *mostly* via mobile phones.<sup>34</sup>

Clearly, myriad audio and video platforms are now easily used by children through devices that need no subscription or special parental involvement to access content. Indeed, many American children literally carry some of them around in their pockets and backpacks.<sup>35</sup> In such a world, there is no principled way to single out broadcasting as a uniquely accessible means by which children may view or listen to

---

<sup>31</sup> Mary Madden et al., Pew Research Center, Pew Research Center's Internet & American Life Project and The Berkman Center for Internet and Society at Harvard University, *Teens and Technology 2013*, at 4-5 (Mar. 13, 2012), available at [http://www.pewinternet.org/~media//Files/Reports/2013/PIP\\_TeensandTechnology2013.pdf](http://www.pewinternet.org/~media//Files/Reports/2013/PIP_TeensandTechnology2013.pdf).

<sup>32</sup> See *American Households See Tablet as Playmate, Teacher and Babysitter*, NIELSEN (Feb. 16, 2012) <http://www.nielsen.com/us/en/newswire/2012/american-families-see-tablets-as-playmate-teacher-and-babysitter.html> (Nielsen survey of adults with children under 12 in tablet-owning households in Q4 2011 shows that seven out of every 10 children in tablet-owning households used a tablet computer - a nine percent increase from previous quarter).

<sup>33</sup> See, e.g., KJ Dell'Antonia, *Parents of the 'Touch-Screen Generation,' Don't Free Your iPad Yet*, NEW YORK TIMES MOTHERLODE BLOG (Mar. 31, 2013, 9:57 AM), <http://parenting.blogs.nytimes.com/2013/03/21/parents-of-the-touch-screen-generation-dont-free-your-ipad-yet/>; Nick Bilton, *The Child, the Tablet and the Developing Mind*, NEW YORK TIMES BITS BLOG (Mar. 31, 2013, 11:11 AM), <http://bits.blogs.nytimes.com/2013/03/31/-disruptions-what-does-a-tablet-do-to-the-childs-mind>; Hanna Rosin, *The Touch-Screen Generation*, THE ATLANTIC, Apr. 2013, available at <http://www.theatlantic.com/magazine/archive-/2013/04/the-touch-screen-generation/309250/>.

<sup>34</sup> Pew Research Center, Pew Research Center's Internet & American Life Project, *Teen Internet Access Demographics*, [http://www.pewinternet.org/Trend-Data-\(Teens\)/Whos-Online.aspx](http://www.pewinternet.org/Trend-Data-(Teens)/Whos-Online.aspx) (visited June 17, 2013).

<sup>35</sup> Arbitron, Inc., *supra* note 15, at 37 (52 percent of mobile phone owners report that their phones are "always" within arm's length and 30 percent report that their phones are within arm's length "most of the time").

arguably indecent or otherwise inappropriate material. Unlike parents at the time of *Pacifica*, parents in the twenty-first century are clearly concerned about their children's access to online content, not just broadcast material.<sup>36</sup> Many parents of young children even fear that their children may become "addicted" to mobile devices such as smartphones and tablets.<sup>37</sup>

In today's multichannel, multiplatform media environment, the "special treatment"<sup>38</sup> of broadcasting—i.e., the imposition of content-based limits on broadcast speech alone—is woefully outdated. Moreover, in recent years, broadcasters have documented and the courts have observed a significant chilling effect from these broadcast-only restrictions.<sup>39</sup> Given both the erosion of its factual predicate and its demonstrated impact on speech, broadcast indecency restrictions are highly constitutionally suspect and must be re-examined.

---

<sup>36</sup> See Amanda Lenhart et al., Pew Research Center, Pew Research Center's Internet & American Life Project, *Teens, Kindness and Cruelty on Social Network Sites*, at 76 (Nov. 9, 2011), available at [http://www.pewinternet.org/~media//Files/Reports/2011/PIP\\_Teens-Kindness\\_Cruelty\\_SNS\\_Report\\_Nov\\_2011\\_FINAL\\_110711.pdf](http://www.pewinternet.org/~media//Files/Reports/2011/PIP_Teens-Kindness_Cruelty_SNS_Report_Nov_2011_FINAL_110711.pdf) (81% of parents reported either being "very" or "somewhat" concerned with their child's exposure to inappropriate content through the use of Internet or cell phones).

<sup>37</sup> See Center on Media and Human Development, School of Communication, Northwestern University, *Parenting in the Age of Digital Technology: A National Survey*, at 11 (June 2013), available at [http://web5.soc.northwestern.edu/cmhd/wp-content/uploads/2013/05/Parenting-Report\\_FINAL.pdf](http://web5.soc.northwestern.edu/cmhd/wp-content/uploads/2013/05/Parenting-Report_FINAL.pdf) (survey shows that 38 percent of parents with children under age eight are concerned that their children will become "addicted" to mobile devices).

<sup>38</sup> *Pacifica*, 438 U.S. at 750.

<sup>39</sup> See, e.g., *Second Circuit Fox II*, 613 F.3d at 334-35 (FCC indecency policy forces broadcasters to "choose between not airing or censoring controversial programs and risking massive fines or possibly even loss of their licenses, and it is not surprising which option they choose;" application of policy to live broadcasts "creates an even more profound chilling effect;" effect "extends to news and public affairs programming as well."); *Second Circuit Fox I*, 489 F.3d at 463 ("We can understand why the Networks argue that the FCC's [indecency test] ... fails to provide the clarity required by the Constitution, creates an undue chilling effect on free speech, and requires broadcasters to 'steer far wider of the unlawful zone.'"); see also discussion at *infra* Section II.C.

## **B. Courts Have Questioned the Continuing Validity of *Pacifica* in Light of Changing Technology**

Although the Supreme Court has not yet resolved these questions about the current constitutionality of broadcast indecency regulation under the First Amendment, the courts have expressed strong doubts about the continuing validity of *Pacifica's* underlying rationale in light of technological developments and shifts in media usage. With respect to pervasiveness, the Second Circuit concluded that “[c]able television is almost as pervasive as broadcast,” and “[t]he internet, too, has become omnipresent, offering access to everything from viral videos to feature films and ... broadcast television programs.”<sup>40</sup>

Even before widespread use of the Internet, the Supreme Court had begun to recognize that the factual underpinnings of *Pacifica* may no longer hold true. In 1996, it acknowledged that broadcast television is no longer uniquely pervasive or uniquely accessible to children: “Cable television broadcasting ... is as ‘accessible to children’ as over-the-air broadcasting .... Cable television systems ... ‘have established a uniquely pervasive presence in the lives of all Americans.’”<sup>41</sup> The pervasiveness and accessibility of cable and satellite television today is even greater.<sup>42</sup> With respect to

---

<sup>40</sup> *Second Circuit Fox II*, 613 F.3d at 326.

<sup>41</sup> *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727, 744-45 (1996) (quoting *Pacifica*, 438 U.S. at 748).

<sup>42</sup> Multichannel video programming distributors (MVPDs) deliver hundreds of channels to their subscribers, including many with adult-oriented or other programming inappropriate for children. See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fourteenth Annual Report, 27 FCC Rcd 8610, 8662 ¶ 128 (2012) (Verizon’s FiOS TV offers 530 all-digital video channels and 130 high definition (“HD”) channels; AT&T’s U-Verse TV offers a basic package with local channels only, a range of additional channel packages with anywhere from 130 to 470 video channels, and 170 HD channels); *id.* 8655 ¶ 106 (Comcast video services range from a limited basic package with 20 to 40 channels of linear programming to digital packages that may include over 300 linear channels and more than 100 HD channels; Time Warner Cable similarly offers hundreds of video channels and HD

accessibility to children specifically, parents today have technological choices to control their children's access to broadcast television signals, whether viewed over-the-air or via a cable or satellite system.<sup>43</sup>

Individual Justices more recently questioned the continuing validity of *Pacifica*. Justice Thomas has said he is “open to reconsideration” of *Pacifica*, noting that “dramatic technological advances have eviscerated the factual assumptions underlying” the decision, and that “traditional broadcast television and radio are no longer the ‘uniquely pervasive’ media forms they once were.”<sup>44</sup> Similarly, Justice Ginsburg has said that “[t]ime, technological advances, and the Commission’s untenable rulings in the cases now before the Court show why *Pacifica* bears reconsideration,”<sup>45</sup> and that the Court’s remand in *Supreme Court Fox II* “affords the Commission an opportunity to reconsider its indecency policy in light of technological advances and the Commission’s uncertain course since this Court’s ruling in *FCC v. Pacifica Foundation*....”<sup>46</sup>

---

channels). Even the average basic cable package contains 49 channels of programming. *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Report on Cable Industry Prices*, DA 13-1319, ¶ 18 (rel. Jun. 7, 2013). An estimated 82.2 percent of U.S. television households subscribe to MVPD service. See GfK-Knowledge Networks, *Home Technology Monitor 2012 Ownership Survey and Trend Report* (Spring 2012-March 2012).

<sup>43</sup> See, e.g., *Second Circuit Fox II*, 613 F.3d at 326 (the V-chip has “given parents the ability to decide which programs they will permit their children to watch,” and there thus “now exists a way to block programs that contain indecent speech in a way that was not possible” at the time of *Pacifica*.); *Supreme Court Fox I*, 556 U.S. at 534 & n.\* (Thomas, J., concurring) (“technology has provided innovative solutions to assist adults in screening their children from unsuitable programming – even when that programming appears on broadcast channels”). In addition to the V-chip, parental controls provided through cable and satellite providers are available and frequently used by parents.

<sup>44</sup> *Supreme Court Fox I*, 556 U.S. at 533, 535 (Thomas, J., concurring).

<sup>45</sup> *Supreme Court Fox II*, 132 S. Ct. at 2321 (Ginsburg, J., concurring).

<sup>46</sup> *FCC v. CBS Corp.*, 132 S. Ct. 2677 (2012) (Ginsburg, J. concurring in denial of petition for writ of certiorari). Judge Edwards of the D.C. Circuit has also indicated that “[w]hatever the merits of *Pacifica* when it was issued ..., it makes no sense now.” *Action for Children’s*

Commission enforcement of Section 1464 must take account of changes in technology and media consumption and the significant chilling effect on broadcast speech.

## **II. Current Commission Policy Does Not Comport with the Restraints Articulated in *Pacifica***

Despite unresolved questions about the constitutionality of enforcing broadcast indecency restrictions today, the FCC's indecency policies and procedures clearly must, at the very least, comply with *Pacifica*. As Justice Stevens, author of the *Pacifica* opinion, recently stated, changes in technology and the marketplace since that time "certainly counsel a restrained approach to indecency regulation, not the wildly expansive path the FCC"<sup>47</sup> chose starting in 2004 with the *Golden Globe* decision. For a host of legal and policy reasons discussed in detail below, the Commission must reverse the indecency policies of *Golden Globe* and its progeny and, at a minimum, adopt a "restrained approach" more sensitive to First Amendment principles.

### **A. Today's "Wildly Expansive" Indecency Policies Do Not Comport With the Restrained Approach Mandated by *Pacifica***

The Commission's indecency policy of recent years stands in direct conflict with the narrow, restrained, and cautious approach to indecency regulation approved in *Pacifica* and generally practiced by the Commission for decades. Such a sweeping

---

*Television v. FCC*, 58 F.3d 654, 673 (D.C. Cir. 1995) ("ACT III") (Edwards, J., dissenting). And FCC Commissioner Furchtgott-Roth similarly opined that the "continuing validity" of *Pacifica* "is highly doubtful from both an empirical and jurisprudential point of view." *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, 8020 (2001) (Separate Statement of Commissioner Furchtgott-Roth) ("2001 Policy Statement").

<sup>47</sup> *Supreme Court Fox I*, 556 U.S. at 544 n.5 (Stevens, J., dissenting).

indecency policy cannot pass muster under *Pacifica*, even assuming its continuing validity.

The Supreme Court explicitly emphasized the narrowness of its holding in *Pacifica*:

It is appropriate, in conclusion, to *emphasize the narrowness of our holding*. This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction.<sup>48</sup>

Justices Powell and Blackmun, whose concurrences provided critical votes for upholding the Commission, relied on the fact that “the Commission’s order was limited to the facts of this case, … [and] the Commission may be expected to proceed cautiously, as it has in the past.”<sup>49</sup> They also emphasized that “certainly the Court’s holding today, does not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast.”<sup>50</sup>

Over time, the Supreme Court reiterated that *Pacifica* was an “emphatically narrow holding.”<sup>51</sup> Justice Stevens, the author of *Pacifica*, confirmed that “[o]ur holding was narrow in … critical respects.... We did not decide whether an *isolated* expletive could qualify as indecent.... And we certainly did not hold that any word with a sexual or scatological origin, however used, was indecent.”<sup>52</sup> The D.C. Circuit, in upholding 1987 modifications to the Commission’s indecency policy against a subsequent First

---

<sup>48</sup> *Pacifica*, 438 U.S. at 750 (emphasis added).

<sup>49</sup> *Id.* at 761 n.4 (Powell, J., concurring; Blackmun, J., joining concurrence) (emphasis added).

<sup>50</sup> *Id.* at 760-61.

<sup>51</sup> *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (quoting *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 127 (1989)).

<sup>52</sup> *Supreme Court Fox I*, 556 U.S. at 542 (Stevens, J., dissenting).

Amendment challenge, relied in part on the fact that “the potential chilling effect of the FCC’s generic definition of indecency will be tempered by the Commission’s *restrained* enforcement policy.”<sup>53</sup>

For many years, the Commission did proceed with a comparatively “cautious” and “restrained” indecency policy. On reconsideration of its own *Pacifica* decision, the Commission indicated that it would “be inequitable for us to hold a licensee responsible for indecent language” in the context of “public events” that “are covered live, and there is no opportunity for journalistic editing.”<sup>54</sup> Shortly after the Supreme Court opinion in *Pacifica*, the Commission said:

We intend strictly to observe the narrowness of the *Pacifica* holding. In this regard, the Commission’s opinion, as approved by the Court, relied in part on the repetitive occurrence of the “indecent” words in question. The opinion of the Court specifically stated that it was not ruling that “an occasional expletive... would justify any sanction...” Slip Op. at 22. Further, Justice Powell’s concurring opinion emphasized the fact that the language there in issue had been “repeated over and over as a sort of verbal shock treatment.” Concurring Slip Op. at 2. He specifically distinguished “the verbal shock treatment [in *Pacifica*]” from “the isolated use of a potentially offensive word in the course of a radio broadcast.”<sup>55</sup>

The Commission declined to take action against programming that included, among other things, the words “shit” and “bullshit,” as well as alleged nudity, because the programs “differ[ed] dramatically from the concentrated and repeated assault involved in

---

<sup>53</sup> *Action for Children’s Television v. FCC*, 852 F.2d 1332, 1340 n.14 (D.C. Cir. 1988) (emphasis added).

<sup>54</sup> “Petition for Clarification of Reconsideration” of a Citizen’s Complaint Against *Pacifica Foundation*, Memorandum Opinion and Order, 59 F.C.C. 2d 892, 893 n.1 (1976).

<sup>55</sup> *Application of WGBH Educational Foundation for Renewal of License of Noncommercial Educational Station WGBH-TV, Boston, Massachusetts*, Memorandum Opinion and Order, 69 F.C.C. 2d 1250, 1254 (1978) (“WGBH”) (brackets in FCC decision).

*Pacifica.*<sup>56</sup> Indeed, until 1987, the Commission “limited its enforcement efforts to the specific material involved in *Pacifica*, that is, to seven particular words that were broadcast in a George Carlin monologue.”<sup>57</sup>

Even when it expanded its indecency policy beyond the “seven dirty words” in 1987, the Commission reiterated that “speech that is indecent must involve more than an isolated use of an offensive word,” and “[i]f a complaint focuses solely on the use of expletives, we believe that under the legal standards set forth in *Pacifica*, deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency.”<sup>58</sup> The Commission also held that “nudity itself is not *per se* indecent.”<sup>59</sup> It continued this narrow, restrained, and cautious approach for nearly two more decades.<sup>60</sup>

Then, in 2004-2006, the Commission, in what the Supreme Court recognized to be an “abrupt” departure from its entire post-*Pacifica* practice,<sup>61</sup> adopted its current

---

<sup>56</sup> *Id.* at 1254 n.6. See also *Application of Pacifica Foundation*, Memorandum Opinion and Order, 95 F.C.C.2d 750, 760 (1983) (broadcasts of “motherfucker,” “fuck,” and “shit” not actionable indecent).

<sup>57</sup> *New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licensees*, Public Notice, 2 FCC Rcd 2726, 2726 (1987).

<sup>58</sup> *Pacifica MO&O*, 2 FCC at 2699 ¶ 13. Accord, *The Regents of the University of California*, Memorandum Opinion and Order, 2 FCC Rcd 2703, 2703 ¶ 3 (1987) (“Speech that is indecent must involve more than an isolated use of an offensive word.”).

<sup>59</sup> *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).

<sup>60</sup> See, e.g., *Lincoln Dellar, For Renewal of License of Stations KPRL(AM) and KDDB(FM)*, Memorandum Opinion and Order, 8 FCC Rcd 2582, 2585 ¶ 3 (MMB 1993); *L.M. Communications of South Carolina, Inc.*, Letter, 7 FCC Rcd 1595 (MMB 1992). These decisions were cited in the 2001 *Policy Statement* as “cases where material was found not indecent because it was fleeting and isolated.” *2001 Policy Statement*, 16 FCC Rcd at 8008 ¶ 18. See also *Golden Globe*, 19 FCC Rcd at 4980 n.32 (citing similar unpublished staff decisions from 2001 and 2002).

<sup>61</sup> *Supreme Court Fox II*, 132 S. Ct. at 2318.

indecency policy,<sup>62</sup> under which fleeting expletives,<sup>63</sup> as well as fleeting nudity,<sup>64</sup> now can and are found to be indecent. Even assuming, *arguendo*, that *Pacifica* still provides a sustainable justification for broadcast indecency regulation, the Commission's stricter new policy cannot be reconciled with the narrow, restrained and cautious approach upheld by the Supreme Court in *Pacifica*. It must be jettisoned.

#### **B. More Restrictive Policies Adopted in 2004 Led to Inconsistent, Arbitrary – and Thus Unconstitutional – Enforcement**

Consistency and predictability are critical to all administrative agency decision-making under the Administrative Procedure Act, which makes arbitrary and capricious agency actions unlawful. An agency's obligation to be consistent and predictable is far greater when a regulation has First Amendment implications. The inconsistent treatment of similar material, unpredictable decisions, and unprincipled reversals in FCC cases following *Golden Globe* left broadcasters attempting to comply with the indecency rules flummoxed. These inconsistent and unpredictable policies unconstitutionally burden the protected speech of broadcasters and program creators.

---

<sup>62</sup> *Supreme Court Fox I*, 556 U.S. at 544 n.5 (Stevens, J., dissenting).

<sup>63</sup> *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 2664 (2006) ("Omnibus Order"), vacated in part on other grounds, Order, 21 FCC Rcd 13299 (2006) ("Remand Order"); *Golden Globe*, 19 FCC Rcd at 4982 ¶ 16.

<sup>64</sup> See *Complaints Against Various Television Licensees Concerning Their Feb. 25, 2003 Broadcast of the Program "NYPD Blue"*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 1596 (2008) (broadcast of a woman's buttocks for seven seconds and the side of her breast for a moment in an episode of *NYPD Blue* found to be actionably indecent); *Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, Forfeiture Order, 21 FCC Rcd 2760 (2006) (following Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 19230, 19235 ¶ 13 (2004)) (finding broadcast of a woman's breast during live performance for nine-sixteenths of a second to be actionably indecent); *Young Broadcasting of San Francisco, Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 1751 (2004) (finding broadcast of a penis during a news show segment for less than one second to be actionably indecent).

An especially egregious example of the inconsistencies plaguing indecency enforcement since *Golden Globe* involved the single utterance of the word “bullshitter” during CBS’s “The Early Show.” An order acting on multiple indecency complaints about various programs held that this material was indecent, focusing primarily on the fact that the word was used “during a morning news interview,” which made use of the word particularly “shocking and gratuitous.”<sup>65</sup> An order released later that year completely reversed this position, finding that the use of the word during “news programming” made it *not* indecent. Thus, the same exact reasoning led to both a finding of indecency and a reversal of the indecency finding in the same year.<sup>66</sup> Such arbitrary action is unacceptable, particularly in the highly First Amendment sensitive area of news.

Indecency enforcement in other contexts has been similarly unpredictable following *Golden Globe*. For example, in response to complaints about the repeated use of expletives including “fuck,” “shit” and variations thereof during the airing of the film “Saving Private Ryan,” the Commission determined that such language was not indecent.<sup>67</sup> To distinguish the case from *Golden Globe*, the Commission focused primarily on the perceived “value” of the program. Much of the decision describes the FCC’s view of the program’s artistic value, finding that the expletives “realistically reflect the soldiers’ strong human reactions to, and, often, revulsion at, those unspeakable

---

<sup>65</sup> *Omnibus Order*, 21 FCC Rcd at 2699 ¶ 141.

<sup>66</sup> See *Remand Order*, 21 FCC Rcd at 13326-28 ¶¶ 67-73. This decision also reversed a previous finding that the use of the word “shit” in an episode of “NYPD Blue” was actionably indecent, but on procedural, rather than substantive grounds. *Id.* at 13328-29, ¶¶ 74-77.

<sup>67</sup> *Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network’s Presentation of the Film “Saving Private Ryan”*, Memorandum Opinion and Order, 20 FCC Rcd 4507 (2005) (“*Saving Private Ryan Order*”).

conditions and the peril in which they find themselves,” making the material “neither gratuitous nor in any way intended or used to pander, titillate or shock” and “integral to the film’s objective of conveying the horrors of war....”<sup>68</sup> Based on the opinion that deleting the expletives from “Saving Private Ryan” would have “altered the nature of the artistic work,”<sup>69</sup> but that the utterances in “Golden Globe” had no such redeeming social, scientific, or artistic value,<sup>70</sup> the Commission found that “Saving Private Ryan” was neither indecent nor profane.

A year later, an order purporting to “provide substantial guidance to broadcasters and the public about the types of programming that are impermissible,” actually created more confusion.<sup>71</sup> Among other things, this *Omnibus Order* determined that the use of expletives in a Martin Scorsese-produced documentary entitled “The Blues: Godfathers and Sons” was indecent and proposed a \$15,000 fine against a non-commercial educational station licensed to a community college.<sup>72</sup> “The Blues” decision found that, unlike the use of expletives in “Saving Private Ryan,” the use of expletives in “The Blues” was not “essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.”<sup>73</sup> Although the Commission acknowledged that the program had an educational purpose, it believed that this purpose “could have been fulfilled and all viewpoints expressed without the repeated

---

<sup>68</sup> *Id.* at 4512-13 ¶ 14.

<sup>69</sup> *Id.* at 4513 ¶ 14.

<sup>70</sup> See *id.* at 4513-14 ¶ 18.

<sup>71</sup> *Omnibus Order*, 21 FCC Rcd at 2664 ¶ 2.

<sup>72</sup> The documentary contains interviews of blues performers, a record producer, and other individuals in which the interviewees use “the ‘F-Word,’ the ‘S-Word,’ and various derivatives of those words.” *Id.* at 2683 ¶ 72.

<sup>73</sup> *Id.* at 2686 ¶ 82.

broadcast of expletives.”<sup>74</sup> The FCC’s subjective determinations that expletives were essential to the artistic value of a dramatic film, but not to the artistic or educational purpose of a documentary, provide no clear guidance for broadcasters and content providers making fundamental decisions about the airing and/or creation of programming.

While the Commission reached opposite conclusions about artistic value and the judgment of content creators in “Saving Private Ryan” and “The Blues,” these and other FCC decisions still share a common constitutional infirmity.<sup>75</sup> All of these cases impermissibly placed the Commission in the editorial driver’s seat—a governmental entity substituting its editorial and artistic judgment for that of the speaker.<sup>76</sup> In each decision, there was an intensive focus on—and lengthy evaluation of—the social, artistic, political or educational value of the programming, followed by an FCC assessment as to how critical the purportedly indecent speech was to that artistic/educational value. “The Blues” decision went so far as to complain that not all of the interviewees who used expletives were blues performers (some were record label producers and hip-hop artists) as though the identity of individual speakers determined

---

<sup>74</sup> *Id.*

<sup>75</sup> 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”). An episode of “Without a Trace” found to be indecent included teenage sexual conduct, but no nudity. Despite the lack of actual nudity, the FCC concluded that the program “[went] well beyond what the story line could reasonably be said to require.” *Id.* at 2736 ¶ 15.

<sup>76</sup> “[E]sthetic and moral judgments about art and literature … are for the individual to make, not for the Government to decree.” *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 818 (2000). Such content-based determinations of whether speech is acceptable should be presumptively unreasonable, for “[i]t is rare that a regulation restricting speech because of its content will ever be permissible.” *Id.*

whether the words spoken were actionably indecent.<sup>77</sup> Following *Golden Globe*, the Commission has delved entirely too deeply into editorial and artistic judgments that must be left to the discretion of broadcasters and program creators. As the Supreme Court has stressed, such judgments constitutionally are for “individual[s] to make, not for the Government to decree.”<sup>78</sup>

### **C. Inconsistent and Arbitrary Indecency Regulation Chills Protected Speech**

In an environment of inconsistent and arbitrary regulation, where the Commission repeatedly substitutes its own editorial judgment for that of program producers and broadcasters, the inevitable impact is chilled speech. This is not just a hypothetical concern. Broadcasters and the courts have cited multiple examples of broadcasters choosing to abandon certain material over uncertainty about application of the indecency rules.<sup>79</sup>

As the Court of Appeals for the Second Circuit observed, uncertainty surrounding indecency policy led to broadcasters’ decisions not to air the Peabody Award-winning documentary “9/11” because it contained expletives; not to go forward with a planned reading of Tom Wolfe’s novel, “I Am Charlotte Simmons” because of adult language; not to air a live political debate because one of the local politicians involved had previously

---

<sup>77</sup> *Omnibus Order*, 21 FCC Rcd at 2685 ¶ 77.

<sup>78</sup> *Playboy*, 529 U.S. at 818. See also *Cohen v. California*, 403 U.S. 15, 25 (1971)(discussing “matters of taste and style” where “governmental officials cannot make principled distinctions”); *Brown v. Entm’t Merchants Ass’n*, 131 S.Ct. 2729, 2733 (2011).

<sup>79</sup> See, e.g., Amicus Br. for the National Association of Broadcasters and Radio-Television Digital News Association in Support of Respondents at 20-28, *Supreme Court Fox II* (Nov. 10, 2011); Amicus Br. for the National Association of Broadcasters and Radio Television News Directors Association in Support of Respondents at 20-29, *Supreme Court Fox I* (Aug. 8, 2008) (“Supreme Court Fox I NAB Amicus Br.”).

used expletives on air; and not to broadcast live coverage of a memorial service for Pat Tillman, a football star and soldier killed during the war in Afghanistan, because of language used by his family to express their grief.<sup>80</sup> There are numerous other instances where commercial and noncommercial broadcasters made editorial decisions based not on their best judgment, but on their uncertainty about indecency regulation. PBS offered its affiliates only an edited version of a documentary that follows an Iraq War regiment, requiring any affiliates that wanted an unedited version to sign a waiver acknowledging that PBS would not indemnify the station in the event that the program was found to violate FCC indecency policy.<sup>81</sup>

Broadcasters have been forced to rethink whether and how to present local and national news and sports programming due to concerns that live coverage of newsworthy events such as arraignments, trials, emotionally charged political demonstrations, or breaking news such as disasters, will place their stations at risk for costly investigations and fines. Even routine live sports reporting, such as locker room interviews, presents regulatory land mines. NAB has received inquiries from member stations in small markets concerned about providing coverage of live events, including local fairs. The result is self-censorship that inhibits what viewers and listeners can obtain from their leading providers of news and information. Rather than providing live coverage of “Occupy Wall Street” protests, for example, some broadcast journalists aired sanitized coverage of the protests and deleted language that, in their sound editorial judgment, might otherwise have been included to present the most accurate

---

<sup>80</sup> Second Circuit Fox II, 613 F.3d at 334-35.

<sup>81</sup> See Edward Wyatt, *PBS Warns Stations of Risks from Profanity in War Film*, NEW YORK TIMES, Feb. 18, 2005, at C2.

and informative account of events.<sup>82</sup> According to another report, a radio station in Philadelphia broadcast children speaking on the street about a stolen car and bleeped some of the children's own language.<sup>83</sup>

Broadcasters' concerns extend beyond the possibility of fleeting expletives to shifting regulatory policy on nudity. This is perhaps best illustrated by local stations' approach to coverage of an attack on the Paul Gauguin masterpiece, "Two Tahitian Women," at the National Gallery. Stations reporting on the event either blurred or cropped their shots of the painting to avoid showing the bare breasts of the women in the painting.<sup>84</sup>

Of course, these and other examples represent only the tip of the chilled speech iceberg. It is impossible to discern how much content is not being aired and how greatly editorial/artistic judgments are being altered due to uncertainty engendered by the FCC's contrary, subjective judgments and fear of enforcement actions.<sup>85</sup> Unsurprisingly, the FCC's altered indecency polices have also led to numerous court appeals by broadcasters and court losses for the Commission.<sup>86</sup>

---

<sup>82</sup> See Frank Mungeam, *Video: KGW Crew Harassed at Occupy Portland*, *KGW.com* (Nov. 8, 2011, 5:19 PM), <http://www.kgw.com/news/local/Videoshows-KGW-crew-harassed-at-OccupyPortland-133496118.html>.

<sup>83</sup> See Burton Crane, *It's Time to End Censorship on the Public Airwaves*, *Philly.com* (Jan. 18, 2012), [http://articles.philly.com/2012-01-18/news/30639524\\_1\\_censorship-first-amendment-npr](http://articles.philly.com/2012-01-18/news/30639524_1_censorship-first-amendment-npr).

<sup>84</sup> See Lisa de Moraes, *Some Local Stations Cautious in Gauguin Painting Coverage*, WASH. POST, Apr. 6, 2011, at C01.

<sup>85</sup> See *Second Circuit Fox II*, 613 F.3d at 335 (observing as examples of chilled speech that Fox decided not to air an episode of "That 70s Show" which later "won an award from the Kaiser Family Foundation for its honest and accurate depiction of a sexual health issue;" "an episode of 'House' was re-written after concerns that one of the character's struggles with psychiatric issues related to his sexuality would be considered indecent").

<sup>86</sup> See, e.g., *Second Circuit Fox I*; *Second Circuit Fox II*; *Supreme Court Fox II*; *CBS Corp. v. FCC*, 663 F.3d 122 (3d Cir. 2011) (holding that the FCC's sanction of fleeting indecent nudity during a live broadcast was arbitrary and capricious due to the FCC's failure to give notice or

#### **D. Agency Enforcement Practices Have Exacerbated the Arbitrary Nature of Indecency Regulation**

Certain FCC enforcement practices have exacerbated the arbitrary nature of its indecency policies. The Commission will not act upon applications for the renewal of a license that has a pending indecency complaint associated with it until the complaint has been investigated and resolved<sup>87</sup> – even in cases where the complaints are not meritorious.<sup>88</sup> The pendency of such complaints creates a cloud of uncertainty that can have a direct financial impact on broadcasters. For example, such delays inhibit the assignment or transfer of licenses, because licenses cannot change hands until they are renewed. Where the FCC permits a license renewal to go forward by means of a tolling agreement, the unresolved complaints have a negative impact on license valuation and can inhibit a license owner’s refinancing and recapitalization. The impact of the FCC’s tolling policy is even more severe when the subject licenses are being assigned: in such cases, the Commission has in the past required the assignor to place into escrow the maximum fine for a potential indecency forfeiture. This practice effectively imposes a monetary penalty without any finding as to the validity of a complaint, which would appear to be beyond the scope of the Commission’s authority.

---

justify its departure from prior indecency policy); see also John Eggerton, *DOJ, FCC Drop Pursuit of Fox ‘Married by America’ Indecency Fine*, BROADCASTING & CABLE (Sept. 21, 2012, 5:09 PM), [http://www.broadcastingcable.com/article/489505-DOJ\\_FCC\\_Drop\\_Pursuit\\_of-Fox\\_Married\\_by\\_America\\_Indecency\\_Fine.php](http://www.broadcastingcable.com/article/489505-DOJ_FCC_Drop_Pursuit_of_Fox_Married_by_America_Indecency_Fine.php).

<sup>87</sup> See, e.g., *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4348 ¶ 271 (2011) (noting that Commission action on 11 NBCU television station license renewal applications “has been stayed in part due to pending indecency complaints filed against the stations”) (citation omitted).

<sup>88</sup> See *Public Notice*, 28 FCC Rcd at 4082 (describing reduction in backlog by closing complaints that were, among other things, “outside FCC jurisdiction, that contained insufficient information, or that were foreclosed by settled precedent.”). Even these clearly non-meritorious cases can be the cause of delayed action on license renewal applications.

Practices such as delaying action on license renewals, tolling agreements, and escrow requirements place undue weight on unreviewed and unadjudicated complaints. The practices thus contravene the statutory directive of Section 504(c) of the Communications Act, which expressly provides that when a notice of apparent liability for forfeiture has been issued by the Commission, that fact “shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued” unless the fine has been paid or payment has been finally ordered.<sup>89</sup> In the indecency context, broadcasters have been and are being prejudiced even by the existence of unscrutinized complaints, without any action approaching notices of apparent liability.<sup>90</sup>

In addition to its improper treatment of pending complaints, the FCC also frequently fails to take timely action on petitions for reconsideration of indecency decisions or oppositions to enforcement notices so that affected parties can exhaust their administrative remedies, obtain a final order, and bring adverse FCC decisions to court for review.<sup>91</sup> These enforcement practices are particularly inappropriate in the

---

<sup>89</sup> 47 U.S.C. § 504(c).

<sup>90</sup> NAB has discussed these issues in detail in court filings. See *Supreme Court Fox I NAB Amicus Br.* at 30-33.

<sup>91</sup> The *Golden Globe* decision left open numerous questions for broadcasters seeking to comply with the revised indecency policy, such as which of the “specific facts” the Commission relied upon would make a difference in their cases (e.g., was it the use of the word “fucking” itself that dictated the indecency ruling?; the use of this expletive “on a nationally telecast awards ceremony”?; that the network “could have” but did not “delay[] the broadcast for a period of time sufficient … to effectively bleep the offending word”? See *Golden Globe*, 19 FCC Rcd at 4979 ¶ 9, 4980 ¶ 11). Such questions prompted broadcasters to seek reconsideration of the *Golden Globe* decision. Unfortunately, further clarification from the Commission was not forthcoming. The Commission never acted on the petitions and thus never finalized the order for judicial review. Similarly, the 2006 decision condemning “The Blues” as indecent is still not final (and thus not ripe for judicial consideration) because the Commission still has not acted upon the broadcasters’ oppositions to its notice of apparent liability. See *Remand Order*, 21 FCC Rcd at

constitutionally sensitive area of speech regulation. The courts have repeatedly emphasized the importance of procedural safeguards in regulatory schemes that provide a regulator with power to suppress speech.<sup>92</sup> Reform of its enforcement practices is critical to the constitutionality of the Commission's indecency policies.

### **III. At the Very Least, Indecency Policies Must Be Revised to Comport with the Restraints Articulated in *Pacifica***

As the *Public Notice* states, the FCC's "indecency policies and enforcement" must be "fully consistent with vital First Amendment principles."<sup>93</sup> Thus, for all the reasons set forth above, the Commission cannot continue to apply its current indecency policies. Maintaining the current policies will only continue to significantly and unconstitutionally chill the speech of broadcasters and content creators—with the inevitable result being more court challenges and likely adverse court decisions for the agency. As the Court emphasized in *Supreme Court Fox II*, its opinion "leaves the courts free to review the current policy or any modified policy in light of its content and application."<sup>94</sup>

---

13311 n.86 (declining to address broadcasters' arguments and stating that it would "address such issues in further proceedings in that case").

<sup>92</sup> See *City of Littleton v. Z.J. Gifts D-4*, 541 U.S. 774 (2004). See also *Freedman v. Maryland*, 380 U.S. 51, 58 (1964) (an administrative licensing process that regulates speech can overcome the presumption of unconstitutionality only if it contains "procedural safeguards designed to obviate the dangers of a censorship system"); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133-34 (1992) (overturning county ordinance because it lacked procedural safeguards to prevent viewpoint discrimination: the ordinance did not require officials to explain their decisions or to render a decision in any particular timeframe; provided no process for appealing an adverse decision; and lacked criteria to guide official discretion and prevent arbitrary decision making).

<sup>93</sup> *Public Notice*, 28 FCC Rcd at 4082.

<sup>94</sup> *Supreme Court Fox II*, 132 S.Ct. at 2320.

## A. The Commission Must Confine its Regulation to Material that Actually Falls Within its Indecency Definition

An initial matter, the Commission must reaffirm that, to be actionably indecent, challenged material must “fall within the subject matter scope of our indecency definition – that is, the material must describe or depict sexual or excretory organs or activities.”<sup>95</sup> While this may seem obvious, *Golden Globe* and its progeny deviated from this requirement by assuming that any use of certain words, in any context or in any form, necessarily described sex or excrement.<sup>96</sup> As Justice Stevens explained in *Supreme Court Fox I*, “there is a 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,” and by “improperly equating the two, the Commission has adopted an interpretation of ‘indecency’ that bears no resemblance to what *Pacifica* contemplated.”<sup>97</sup> Post-*Golden Globe* decisions regarding images also skirted this requirement by finding sexually suggestive material that contained no nudity to be actionably indecent.<sup>98</sup>

---

<sup>95</sup> 2001 Policy Statement, 16 FCC Rcd at 8002 ¶ 7.

<sup>96</sup> See, e.g., *Omnibus Order*, 21 FCC Rcd at 2684 ¶ 74 (“In light of the core meanings of the ‘F-Word’ and ‘S-Word,’ any use of those terms inherently has sexual or excretory connotations and falls within the first prong of our indecency definition.”).

<sup>97</sup> *Supreme Court Fox I*, 556 U.S. at 543-44 (Stevens, J., dissenting). See also *Second Circuit Fox I*, 489 F.3d at 459 (in response to the FCC’s claim that “even non-literal uses of expletives must fall within its indecency definition because it is ‘difficult (if not impossible) to distinguish whether a word is being used as an expletive or as a literal description of sexual or excretory functions,’” quoting *Remand Order*, 21 FCC Rcd at 13308 ¶ 23, the court stated that “[t]his defies any commonsense understanding of these words, which, as the general public well knows, are often used in everyday conversation without any ‘sexual or excretory’ meaning. Bono’s exclamation that his victory at the Golden Globe Awards was ‘really, really fucking brilliant’ is a prime example of a non-literal use of the ‘F-Word’ that has no sexual connotation.”).

<sup>98</sup> See, e.g., *Without a Trace*, 21 FCC Rcd at 2732; *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).

The Supreme Court has expressly recognized that expletives do not always have sexual meaning. For example, in *Cohen v. California*, the court considered whether a man could be lawfully convicted for disturbing the peace for wearing a jacket bearing the words “Fuck the Draft.” The Court observed that use of the word “fuck” in this manner “cannot plausibly” be characterized as “erotic.”<sup>99</sup>

The Court in *Cohen* also recognized the importance of the “emotive function” of words in communicating messages.<sup>100</sup> This distinction is not merely an academic or legalistic one. It was recently illustrated by Boston Red Sox player David Ortiz’s use of an expletive during a pregame ceremony on April 20. At the first major city event following the bombings that killed three and injured hundreds during the Boston Marathon, an emotional Ortiz caught the first pitch from a bombing victim, praised law enforcement officers, and rallied the crowd by closing his remarks with “This is our fucking city, and nobody’s going to dictate our freedom!”—a statement that then-Chairman Julius Genachowski acknowledged as an expression of emotion.<sup>101</sup> Drawing a distinction between actionably indecent material that depicts or describes sex or excrement and those words used to convey emotion that do *not* describe sex or excrement, reflects how people actually communicate and helps ensure that indecency

---

<sup>99</sup> *Cohen v. California*, 403 U.S. 15, 20 (1971).

<sup>100</sup> See *Cohen v. California*, 403 U.S. at 25-26 (“it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force.”).

<sup>101</sup> See Federal Communications Commission Twitter, (Apr. 20, 2013, 3:55 PM), <https://twitter.com/FCC/status/325714412143013888>. (“David Ortiz spoke from the heart at today’s Red Sox game. I stand with Big Papi and the people of Boston. – Julius”) (emphasis added); see also Elizabeth Titus, *FCC Chairman Genachowski Tweets on Ortiz F-Bomb*, POLITICO (Apr. 20, 2013, 8:46 PM), <http://www.politico.com/story/2013/04/fcc-julius-genachowski-david-ortiz-twitter-90376.html>.

regulation does not grow “wildly expansive.” This approach is also properly sensitive to First Amendment concerns.<sup>102</sup>

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

Next, the FCC must reverse the *Golden Globe* holding and clearly state that the agency will no longer treat fleeting or isolated expletives and images as actionably indecent. As discussed above, this action would be consistent with the clear terms of *Pacifica* and years of pre-2004 FCC policy, including the *2001 Policy Statement*, which stressed whether material was dwelled on or repeated at length as an important factor in indecency determinations.<sup>103</sup> To some extent, this change should help produce more consistent decisions by the agency and help reduce the chilling effect on broadcasters, especially in making the provision of live programming (including but not limited to on-location news and sports reporting) where the unexpected may arise.

### **C. Indecency Policies Must Be Consistent, Predictable and Clear and Must Defer to the Artistic Judgment and Editorial Discretion of Broadcasters and Program Providers**

Beyond the above steps, the Commission must make every effort to be predictable and clear in its indecency standards and as consistent as possible in their application. Broadcasters must have clear notice as to their obligations under the indecency rules.<sup>104</sup> The Supreme Court has repeatedly stressed the necessity for

---

<sup>102</sup> See, e.g., *Cohen v. California*, 403 U.S. at 26 (government cannot “forbid particular words without also running a substantial risk of suppressing ideas in the process”).

<sup>103</sup> *2001 Policy Statement*, 16 FCC Rcd at 8003 ¶ 10, 8008-10 ¶¶ 17-18.

<sup>104</sup> See *Supreme Court Fox II*, 132 S. Ct. 2307, 2318 (2012) (“The Commission’s lack of notice to Fox and ABC ... ‘fail[ed] to provide a person of ordinary intelligence fair notice of what is prohibited.’ This would be true with respect to a regulatory change this abrupt on any subject,

clarity in speech-related regulations and has frequently opined about the problems of regulatory vagueness in this area.<sup>105</sup>

Simple adjectives like “egregious” are of limited use in clarifying indecency standards because such words would be defined differently by different people. These adjectives must themselves be defined. The use of more adjectives (e.g., “graphic” or “explicit”) is likely insufficient. References to examples that the Commission generally would regard as “egregious,” and/or stating that certain types of material (e.g., material that is merely suggestive or impliedly sexual in nature) would not be regarded as egregious could be more helpful. Although the Commission cannot resolve all problems with vagueness and predictability, it must use language that is as precise as possible and provide relevant examples and context in its indecency policies and decisions. If the Commission cannot establish “sufficiently clear” indecency regulations so that broadcasters know “what is expected” of them, then the Commission cannot “impos[e] civil or criminal liability” on broadcasters.<sup>106</sup>

There is, however, a fundamental difficulty in defining indecency clearly and applying indecency standards consistently. The fact that the Commission itself has been unable to apply its indecency standards in a consistent, predictable manner over

---

but it is surely the case when applied to the regulations in question, regulations that touch upon ‘sensitive areas of basic First Amendment freedoms.’”) (citations omitted); *Satellite Broadcasting Co., Inc. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987).

<sup>105</sup> See, e.g., *Supreme Court Fox II*, 132 S. Ct. at 2318 (“The vagueness of [a content-based regulation of speech] raises special First Amendment concerns because of its obvious chilling effect.”) (quoting *Reno v. ACLU*, 521 U.S. at 870-71); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (if “law interferes with the right of free speech or of association, a more stringent vagueness test should apply”); *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 683-84 (1968)(Court recognized that “vice of vagueness” produces chilling effect on creators and distributors of media products).

<sup>106</sup> *Trinity Broadcasting v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000).

time underscores how difficult it is for broadcasters to do so.<sup>107</sup> This difficulty was readily apparent even before the abrupt shift in policy in the mid-2000s. For example, in 2001-2003, the Enforcement Bureau first found, with little explanation, two songs to be indecent and then, also with little explanation, reversed itself and found them not to be indecent.<sup>108</sup>

The situation only worsened under the Commission's expanded approach to indecency following *Golden Globe*. Beyond acting inconsistently within the same case,<sup>109</sup> the distinctions drawn between challenged material in other cases became virtually incomprehensible and failed to "give[] broadcasters notice of how the Commission will apply" its indecency standards in the future.<sup>110</sup> The disparate treatment of the movie "Saving Private Ryan" and the Public Broadcasting Service

---

<sup>107</sup> See *Second Circuit Fox II*, 613 F.3d at 332 (the standard is one "that even the FCC cannot articulate or apply consistently.").

<sup>108</sup> Compare *Citadel Broadcasting Co.*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 11839, 11840 ¶ 6 (EB 2001) (song indecent because it "contains unmistakable offensive sexual references. In this regard, portions of the lyrics contain sexual references in conjunction with sexual expletives that appear intended to pander and shock") with *Citadel Broadcasting Co.*, Memorandum Opinion and Order, 17 FCC Rcd 483, 486 ¶ 10 (EB 2002) (same song not indecent because the sexual references "are not expressed in terms sufficiently explicit or graphic enough to be found patently offensive," and "do not appear to pander to, or to be used to titillate or shock its audience"). Compare *The KBOO Foundation*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 10731, 10733 ¶ 8 (EB 2001) (song indecent because, notwithstanding its "contemporary social commentary," its "sexual references appear to be designed to pander and shock and are patently offensive.") with *The KBOO Foundation*, Memorandum Opinion and Order, 18 FCC Rcd 2472, 2474 ¶ 9 (EB 2003) (same song not indecent because, "[w]hile this is a very close case, we now conclude that the broadcast was not indecent because, on balance and in context, the sexual descriptions in the song are not sufficiently graphic to warrant sanction. For example, the most graphic phrase ('six foot blow job machine') was not repeated. Moreover, we take cognizance of the fact presented in this record that Ms. Jones has been asked to perform this song at high school assemblies.").

<sup>109</sup> See *supra* Section II.B, discussing "The Early Show."

<sup>110</sup> *Second Circuit Fox II*, 613 F.3d at 330 (FCC concluded that "bullshit" in an episode of "NYPD Blue" was patently offensive while "dick" and "dickhead" were not, essentially because "bullshit" is "vulgar, graphic and explicit" while "dick" and "dickhead" were not sufficiently vulgar, graphic or explicit).

documentary “The Blues: Godfathers and Sons”<sup>111</sup> further underscores the inconsistency and unpredictability of the post-*Golden Globe* standards and highlights the constitutional infirmities of Commission attempts to substitute its own artistic and editorial judgments for those of broadcasters and program creators.<sup>112</sup>

Ultimately, there is simply “little rhyme or reason to these decisions and broadcasters are left to guess....”<sup>113</sup> Because of the constitutional dimensions of this ambiguity and unpredictability, NAB believes that – if the Commission continues to proceed with indecency enforcement – it must step back from substituting its own editorial and artistic judgment for that of broadcasters and the creative community, in the contexts of both live and scripted programming. Rather than impose penalties based on its fluctuating disagreements with broadcasters’/programmers’ artistic and editorial judgments, the FCC should decline to act absent a significant abuse of licensee discretion.

Taking an approach to indecency regulation that shows significant respect for, and reluctance to second-guess, the editorial and artistic judgments of stations and program creators in the indecency context would be more consistent with the Commission’s constitutional obligations and regulatory approach outside the indecency context. As the Supreme Court has recognized in the broadcasting context: “For better

---

<sup>111</sup> See *supra* Section II.B.

<sup>112</sup> The Second Circuit found this “disparate treatment” inexplicable: We query how fleeting expletives could be more essential to the ‘realism’ of a fictional movie than to the “realism” of interviews with real people about real life events, and it is hard not to speculate that the FCC was simply more comfortable with the themes in “Saving Private Ryan,” a mainstream movie with a familiar cultural milieu, than it was with “The Blues,” which largely profiled an outsider genre of musical experience.

*Second Circuit Fox II*, 613 F.3d at 333.

<sup>113</sup> *Id.* at 332. See *id.* (referring to the Commission’s “indiscernible” standard).

or worse, editing is what editors are for; and editing is selection and choice of material.”<sup>114</sup> Moreover, the Commission is

forbidden by statute from engaging in “censorship” or from promulgating any regulation “which shall interfere with the [broadcasters’] right of free speech.” 47 U.S.C. § 326. The FCC is well aware of the limited nature of its jurisdiction, having acknowledged that it “has no authority and, in fact, is barred by the First Amendment and [§ 326] from interfering with the free exercise of journalistic judgment.”... Indeed, our cases have recognized that Government regulation over the content of broadcast programming must be narrow, and that broadcast licensees must retain abundant discretion over programming choices.<sup>115</sup>

In the past, the Commission has stressed the importance of reliance on editorial discretion in the indecency context as well, stating that *Pacifica* should be construed “consistent with the paramount importance we attach to encouraging free-ranging programming and editorial discretion by broadcasters.” It is “certainly not our intent...to

---

<sup>114</sup> CBS v. Democratic National Committee, 412 U.S. 94, 124 (1973). See also *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983) (“the Commission has chosen to value most highly the goal of preserving licensee discretion and flexibility in selecting the types of programming which are responsive to community issues. Seeking to maximize the journalistic discretion of licensees, especially in the constitutionally sensitive area of informational programming, is clearly consistent with the Commission’s statutory duty to chart a workable middle course in its quest to preserve a balance between the essential public accountability and the desired private control of the media.”) (internal quotation marks omitted).

<sup>115</sup> *Turner Broadcasting System v. FCC*, 512 U.S. 622, 650-51 (1994) (quoting *Hubbard Broadcasting, Inc.*, Memorandum Opinion and Order, 48 F.C.C.2d 517, 520 (1974)). We recognize that the Supreme Court has held that section 326 “does not limit the Commission’s authority to impose sanctions on licensees who engage in obscene, indecent, or profane broadcasting.” *Pacifica*, 438 U.S. at 738. But the Commission still must develop an indecency policy that is as consistent as possible with the policies of governmental restraint underlying section 326. See *WGBH*, 69 F.C.C.2d at 1254 (“With regard to ‘indecent’ or ‘profane’ utterances, the First Amendment and the ‘no censorship’ provision of Section 326 of the Communications Act severely limit any role by the Commission and the courts in enforcing the proscription contained in Section 1464”).

inhibit coverage of diverse and controversial subjects by licensees, whether in news and public affairs or in dramatic or other programming contexts.”<sup>116</sup>

The Commission often deferred to the editorial/programming discretion of broadcasters in subsequent indecency cases. For example, in finding that multiple uses of the word “fucking” in the context of a recording played as part of a news story was not indecent, the Commission stated that “we traditionally have been reluctant to intervene in the editorial judgments of broadcast licensees on how best to present serious public affairs programming to their listeners.”<sup>117</sup> Even in connection with its more aggressive recent indecency policy, the Commission has “recognize[d] the need for caution with respect to complaints implicating the editorial judgment of broadcast licensees in presenting news and public affairs programming, as these matters are at the core of the First Amendment’s free press guarantee.”<sup>118</sup>

---

<sup>116</sup> *WGBH*, 69 F.C.C. 2d at 1254-55; see also *id.* at 1255 (“We wish to stress again that it is first and foremost the individual licensee’s responsibility to decide what programming is appropriate or suitable for airing to their audiences, and when. Moreover, because of the broad importance of avoiding any intrusive role for government, we believe that the independence of the broadcast medium and the free exchange of ideas over the airwaves depends significantly on the mutual exercise of judgment by broadcasters and viewers alike.”).

<sup>117</sup> *Peter Branton*, Letter, 6 FCC Rcd 610, 610 (1991) (citation omitted).

<sup>118</sup> *Omnibus Order*, 21 FCC Rcd at 2668 ¶ 15. The FCC consistently defers to the judgment of broadcasters in program selection generally, and rejects challenges to license renewals based on programming-related complaints. See, e.g., *Application of WGBH Educational Foundation*, 69 FCC 2d 1250, 1251 (1978) (in determining whether a licensee has served the public interest, “consideration of a licensee’s programming is and must be limited to determining whether the licensee’s *overall* programming has served its service area, and not whether any particular program is ‘appropriate’”) (emphasis in original); *Certain Broadcast Stations Serving Communities in the State of Louisiana*, Memorandum Opinion and Order and Notice of Apparent Liability, 7 FCC Rcd 1503, 1507 ¶ 30(1992) (in determining during license renewal process whether a licensee served the public interest, the FCC “focuses on whether the licensee has made a reasonable effort in its overall programming”); *Commission En Banc Programming Inquiry*, Public Notice, 44 F.C.C. 2303, 2307-08 (1960) (FCC must “determine whether the total program service of broadcasters is reasonably responsive to the interests and needs of the public they serve,” and cannot base licensing decisions “upon its own subjective determination of what is or is not a good program.”).

Nevertheless, under its recent policy, and as exemplified by its decision regarding “The Blues,” the Commission has not given due deference to the editorial and artistic discretion and judgments of licensees and program creators, both in terms of their choices regarding which programs to air and which events to cover live. The agency should reverse course by limiting indecency enforcement to situations where there has been a significant abuse of broadcaster discretion. In doing so, it must apply clear and meaningful standards that permit broadcasters to know in advance when the Commission will deem such discretion to have been significantly abused. Only in such circumstances could the Commission come even potentially close to justifying indecency regulation under the First Amendment as “the least restrictive means” to further an identified “compelling” governmental interest – the legal standard the Commission has acknowledged it must meet.<sup>119</sup>

#### **D. The Commission’s Indecency Enforcement Practices Must Be Reformed to Comport with the First Amendment and the Communications Act**

Finally, the Commission must reform its enforcement practices and procedures.<sup>120</sup> As an initial matter, the Commission should pursue only those complaints (i) submitted by a complainant who actually watched/listened to the programming at issue; and (ii) that present sufficient information and supporting documentation as to the particular station concerned, the specific material aired and the

---

<sup>119</sup> *2001 Policy Statement*, 16 FCC Rcd at 8000 ¶ 3. *Accord, ACT III*, 58 F.3d at 660 (“strict scrutiny” applies to broadcast indecency regulation but in a way that “take[s] into account the unique context of the broadcast medium.”); *id.* at 660-69 (applying “compelling interest” and “least restrictive means” criteria).

<sup>120</sup> See *Public Notice*, 28 FCC Rcd at 4082 (“indecency policies and enforcement” both must be “consistent with vital First Amendment principles”).

time the program aired.<sup>121</sup> A *prima facie* case of licensee misconduct requires such “specific evidentiary facts,”<sup>122</sup> and “requiring a substantial *prima facie* case before proceeding against a broadcaster” is particularly important in the First Amendment sensitive area of indecency.<sup>123</sup> Basic due process also requires that stations not be required to disprove inadequately supported allegations of indecency.<sup>124</sup>

Greater transparency is also needed. A broadcast licensee generally does not know whether an indecency complaint has been filed concerning its station(s), even when action on its license renewal application has been stalled because of a complaint. Broadcasters also are generally “in the dark” about the status of pending complaints, with some having reported that they were not informed by the FCC when a complaint was dismissed. The FCC should reform its procedures to notify broadcasters of both the *filing* of indecency complaints and the *dismissal* of complaints.

---

<sup>121</sup> The Commission has previously reversed itself upon finding that the complainant had not actually viewed the program. See *Remand Order*, 21 FCC Rcd at 13328-29, ¶¶ 74-77 (reversing notice of apparent liability for forfeiture against Station KMBC-TV involving an episode of “NYPD Blue” that included the word “shit” because none of the complaints were filed by anyone residing in the market served by the station—nor were complaints filed by anyone residing in a market where the complained of material was aired outside of safe harbor hours).

<sup>122</sup> *U.S. v. FCC*, 652 F.2d 72, 89 (D.C. Cir. 1980); *accord Am. Sec. Council Ed. Found. v. FCC*, 607 F.2d 438 (D.C. Cir 1979).

<sup>123</sup> *Galloway v. FCC*, 778 F.2d 16, 23 (D.C.Cir.1985) (observing that FCC’s policy of requiring a substantial *prima facie* case “reflects an appropriate respect for First Amendment values.”).

<sup>124</sup> The courts have said time and again that the “core requirements’ of due process” are “adequate notice … and a genuine opportunity to explain.” *Propert v. District of Columbia*, 948 F.2d 1327, 1332 (D.C. Cir. 1991), quoting *Gray Panthers v. Schweiker*, 652 F.2d 146, 165 (D.C. Cir. 1980). FCC “proceedings must satisfy ‘the pertinent demands of due process.’” *L.B. Wilson, Inc. v. FCC*, 170 F.2d 793, 802 (D.C. Cir. 1948), quoting *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 276 (1933). See also *Gray Panthers*, 652 F.2d at 168-69 (explaining that without adequate notice, including the specific reasons for an adverse action, a party “is reduced to guessing what evidence can or should be submitted in response and driven to responding to every possible argument … at the risk of missing the critical one altogether”); *General Electric Co. v. United States EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (Court observed that “fair notice” rule is most commonly applied in criminal context, but explained that “as long ago as 1968, we recognized this ‘fair notice’ requirement in the civil administrative context”).

As discussed above, the Commission should address and resolve indecency claims in a timely manner so that license renewal, assignment, and transfer applications are not subjected to undue delays.<sup>125</sup> To facilitate this, the Commission should dispose of patently non-meritorious complaints (e.g., those that complain of material aired during the safe harbor, those that contain insufficient information, those that were not filed by someone who was in the viewing or listening audience, or those foreclosed by settled precedent) very quickly.

The Commission also should act on reconsideration petitions and responses to notices of apparent liability in timely fashion so to reach final decisions and allow proper court review of cases sanctioning broadcasters for their speech.<sup>126</sup> For example, action on the licensee's response to the notice of apparent liability for forfeiture regarding "The Blues" documentary has been delayed for more than seven years. The D.C. Circuit has previously criticized the Commission for playing "administrative law shell game[s]" to "avoid judicial review."<sup>127</sup> Indecency enforcement should not be, or appear to be, a "shell game." In addition, the Commission must examine and revise its enforcement procedures to ensure that broadcasters are not improperly prejudiced by the existence of notices of apparent liability (let alone the pendency of mere complaints), contrary to

---

<sup>125</sup> See *supra* Section II.D (describing financial and practical impacts on broadcasters of long pending indecency complaints).

<sup>126</sup> See *supra* Section II.D.

<sup>127</sup> *AT&T v. FCC*, 978 F.2d 727, 731-33 (D.C. Cir. 1992). See also *Radio-Television News Dirs. Ass'n v. FCC*, 229 F.3d 269, 270-71 (D.C. Cir. 2000) (directing FCC to vacate its personal editorial and political attack rules in light of a petition concerning the rules that was pending for nearly two decades, during which "nothing happened for long periods of time" and where the FCC had responded to previous court direction by temporarily suspending the rules while it again sought to update its record).

Section 504(c).<sup>128</sup> These reforms of its enforcement practices and procedures would significantly further the Commission's obligation to "choose the least restrictive means" of enforcing Section 1464.<sup>129</sup>

#### **IV. Conclusion**

The actions proposed above will make the Commission's indecency policy more compatible with *Pacifica* and subsequent cases and somewhat less intrusive into broadcasters' editorial judgments and content creators' artistic judgments. They will not, however, address more fundamental issues about the underlying rationale for disparate regulation of broadcast outlets in 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

June 19, 2013

---

<sup>128</sup> 47 U.S.C. § 504(c); see *supra* Section II.D.

<sup>129</sup> *2001 Policy Statement*, 16 FCC Rcd at 8000 ¶ 3.