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Before the
Federal Communications Commission
Washington, D.C. 20554
Federal Communications Commission
Office of Secretary

In the Matter of)
TV Industry Proposal for)
Rating Video Programming)
_____)

CS Docket No. 97-55

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Reply Comments of

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I. INTRODUCTION

These Reply Comments are filed by a third-year law student at American University's Washington College of Law. His concerns are for the future of America's children, to ensure a safe society in which to raise children and a country with minimal government interference. These Reply Comments are submitted in response to the Federal Communication Commission's ("FCC") Public Notice request for comments on (1) whether the industry proposal is "acceptable" and (2) what factors the Commission should consider in making such a determination.¹

The Telecommunications Act of 1996 ("Telecom Act") stands as the first major overhaul of Communications law in over sixty years. Accepting some of its provisions as the determinative law for the next sixty years would be a major mistake. The creation of new technologies, like the V-chip and video programming ratings, does not entitle Congress and the FCC to disregard the law of the land. The stated goal in Section 551 of the Telecom Act is to empower parents to block television programs. While noble, this goal faces serious constitutional challenges. Even though "Congress

¹ Public Notice, Commission Seeks Comment on Industry Proposal for Rating Video Programming, CS Docket No. 97-55, FCC 97-34, Report No. CS 97-6 (February 7, 1997).

and the President have already decided the issue," the Supreme Court has not. Comments of Para Technologies, Inc. p. 1. In the end, Section 551 does nothing more than violate Supreme Court precedent.

II. THE IMPENDING CONSTITUTIONAL CHALLENGE TO THE "RATINGS" LEGISLATION

Under the current arrangement, the provision implementing a ratings system for video programming lies very close to a constitutional challenge. After the ten month rating system trial period, the Television Ratings Implementation Group will make its recommendation to the FCC. At that point the FCC may vote to reject the age-based ratings and propose an alternative. While an FCC proposal alone would not bind the television industry, Section 551 requires the industry to implement the "voluntary" rules.

Only one of the formal commenters recognized the legal implications that may arise if the FCC changes the current industry ratings system. Morality in Media, Inc. cites Jack Valenti, creator of the TV industry's system:

If Congress tries to interfere [with the TV industry rating plan] "We'll be in court in a minute" to challenge the legislation on constitutional grounds. Comments of Morality in Media, Inc. p. 9.

The current age-based system is not entirely voluntary, because Congress encouraged Mr. Valenti and the TV industry to act. However, if the age-based ratings are changed by the FCC, then Section 551 will indisputably constitute direct state action. "Only a State or a private person whose action 'may be fairly treated as that of the State itself' may deprive [a citizen] of 'an interest encompassed within the Fourteenth Amendment's protection.'" *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) and *Fuentes v. Shevin*, 407 U.S. 67 (1972)). The same principle applies to the federal government regarding the First Amendment. From this legal perspective, Congress' first step shrewdly allowed the television broadcasters to determine the most effective ratings, the age-based version. This step avoided any state action, and thus the grounds for a constitutional action in court. But, if and when the V-chip sets appear on the market, Congress' preferred content-based ratings system will replace the original. *Morality in Media* raises the concern of a revised system passing constitutional muster, but skims over the appropriate case law.

A. The Television Ratings Provision in Section 551 Places Pressure on Interested Parties, Forcing a Ratings System that Will Meet Congressional Approval

Congress adopted Section 551 of the Telecommunications Act of 1996 as a tool by which to control the amount of violent and sexual content in today's television programming. Section 551's title "Parental Choice in Television Programming" is a misnomer. This provision places an inevitable pressure upon all interested parties, to the extent that one's "choice" will become increasingly restricted. A ratings system convinces parents which programs are suitable for their children.

The most overreaching pressure arising from Section 551 is the requirement that sexual, violent, and other indecent material in video programming be identified through a ratings system. Despite allowing the television industry to implement the first comprehensive TV ratings system, Congress had a strong notion of how the system should work. Through its "Findings," Congress justified the need to identify specific content in video programming. Congress uses its findings to bestow upon itself a compelling governmental interest through which it can regulate what children and parents watch on television.

The collection of Comments submitted to the FCC on April 8, 1997 all echo the same view point: the current voluntary system for rating television programming is unacceptable and must be revised to include information about sexual, violent, and indecent content. Any attempt to change from an age-based ratings system to content-based ratings will cause several constitutional problems. To avoid serious legal challenges and invalidations of Section 551, the FCC should maintain the status quo.

Further, the V-chip legislation mandates that within two years, all television sets with thirteen inch screens, or larger, must contain the apparatus to block television programming. Thus any American, whether a parent or not, must buy a V-chip television and incur the additional costs of its technology.

In addition, Section 551(b)(1) of the Telecom Act requires the "distributors of such [rated] video programming to transmit such rating to permit parents to block the display of video programming that they have determined is inappropriate for their children." Ironically, this provision forces the TV industry to limit the number of viewers tuning into its video programming. As advertising revenues are lost by television stations, this cooperation

will cease to continue.

B. The Appropriate Standard of Review For Content-Based Ratings Falls Under Strict Scrutiny

Morality in Media indicates in its comments that "strict scrutiny might apply." Comments of Morality in Media, Inc. p. 10. The U.S. Supreme Court has repeatedly held that content-based regulations receive strict scrutiny analysis. In fact, the Court has found that "content-based regulations are presumptively invalid." *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992). Most of the Comments have called for further regulation of violent, sexual, and other indecent material in video programming by citing studies, surveys, and polls. For example, the Comments of Center For Media Education, et al., cites the popular Survey from Media Studies Center in which 79% of the parents polled preferred a content-based system to the current age-based system. See Comments of Center For Media Education, et al., p. 17, n. 42. However, Justice Scalia argued, "The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content." *R.A.V. v. St. Paul*, 505 U.S. at 380.

To confuse matters, the true determinant of whether adults want networks to program violent and sexual material

is the popularity of these shows. As long as these "harmful" TV programs receive large advertising revenue, they will override all the surveys provided by the Comments. While programs like *Friends* may not meet the approval of some. See Comments of Center for Media Education, et al. these programs sell, thereby encouraging other similar shows. Ultimately, the market decides, a fact that Congress and some parents cannot accept. Congress wrote Section 551 with a content-based system in mind, and now it forces the FCC's hand.

A change to a content-based ratings system would require a determination as to whether the regulation is content-based or content-neutral. On its face, a content-based ratings system will be found to be content-based for purposes of applying a strict scrutiny analysis. The Supreme Court indicated the "principal inquiry in determining content-neutrality...is whether the government has adopted the regulation of speech because of disagreement with the message it conveys." (*Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Thus, the first prong of the level-of-scrutiny inquiry must be to determine Congress' purpose behind its legislation.

One set of Comments points out that Section 551's

Findings establish "that Congress sought a ratings system capable of combating the ills of violent programming." Comments of Center for Media Education, et al. p. 3. Several Comments note Congress' goal of empowering parents to block violent programming. By identifying violent material, content-based ratings would be placing a negative value on this type of expression. This stigmatization would lead most parents to block any programs labeled for violence or sexuality, regardless of degree. While the parents will physically block the material, it would be Congress, through the FCC, that unconstitutionally distinguishes these programs as low-level speech. *See infra, FCC v. Pacifica Foundation*, 438 U.S. 726, 743 (1978).

Although the government may not regulate the content of television programs, broadcast media enjoy less First Amendment protection for several reasons. As the second prong to a level-of-scrutiny inquiry, the context or medium must be considered. *Denver Area Educ. Telecommunications Consortium, Inc., et al., v. FCC*, ___ U.S. ___, 116 S.Ct. 2374, 2405 (1996). First of all, the Supreme Court justified limiting broadcasting rights due to the scarcity of broadcast frequencies. *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 213 (1943). Second, television and radio

pervade the privacy of American life. The Supreme Court in *FCC v. Pacifica* found that the intrusiveness of broadcast medium into American homes warrants less First Amendment protection within this medium. 438 U.S. 726, 748 (1978). Finally, Congress declared broadcast regulation permissible because it is in the public interest.

The Comments of Morality in Media correctly indicate that *Pacifica* is the most analogous case to apply to an FCC mandated ratings system. But none of the Comments apply *Pacifica* as the best model for analyzing whether a television ratings system deserves strict scrutiny. In 1973, the Supreme Court upheld the FCC's authority to channel the radio broadcast of George Carlin's satirical "Filthy Words" monologue to an hour when children would, most likely, not be listening. The Carlin monologue was deemed "indecent" by the high Court, which reasoned that the inability to screen such profane language warranted its restriction.

Pacifica granted the FCC an unprecedented authority to regulate "indecent" material within the broadcast media. The Court relaxed the First Amendment protection in *Pacifica* mainly because children could be exposed to indecent language in the mid-afternoon. According to *Pacifica*, the

only content to which the FCC can place labels would be indecent material. The FCC defines indecent material as that which describes, in patently offensive terms, sexual or excretory activities or organs. *FCC v. Pacifica*, 438 U.S. at 739.

According to two scholars *Pacifica* would not enable the FCC to regulate violence on television. Thomas G. Krattenmaker & L.A. Powe Jr., *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA.L. REV. 1123 (1978). In fact, they conclude that *Pacifica* must be limited to the regulation of material containing sexual or excretory matters. See *supra*, Krattenmaker & Powe. George Carlin's use of profane language is already prohibited from broadcast television, because it is considered low-level speech. Unless a program's material contains sexual or excretory activities, defined as obscene or indecent, the Supreme Court has ruled that regulation is unconstitutional. See, e.g., *Miller v. California*, 413 U.S. 15 (1973); *Ginsberg v. New York*, 390 U.S. 629 (1968); and *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

By incorporating violence as the primary target, the Telecom Act attempts to expand the category of indecent material beyond its boundaries of sexual and excretory

activities. Presumably, the concept of "indecent" material requires a case-by-case application along with the consideration of prevailing standards of morality. See *Miller v. California*, 413 U.S. 15, 24 (1973) (establishing a three-part test to determine whether material is obscene according to contemporary community standards). This country plays more violently than it did in 1973, therefore, if anything, our community standards are more accepting of violence as a form of entertainment. In addition, the sexual and excretory ideas behind the Carlin monologue have found a popularized version in the radio rituals of Howard Stern.

In drafting the television ratings legislation, Congress chose the words "other indecent material," knowing that constitutionally, ratings could only apply to this narrow category. Because indecent material, like Mr. Carlin's "Filthy Words," is already prohibited from broadcast television, content-based ratings would not find any video programs to which they may apply. On the contextual prong then, strict scrutiny must apply to a content-based ratings system unless the FCC can show that the rated material fits *Pacifica's* definition of "indecent."

C. The Least Restrictive Means Is Not Achieved Through a Content-Based Ratings System

In the realm of speech and expression, the First Amendment envisions the citizen shaping the government, not the reverse. *Denver Area Educ. Telecommunications Consortium, Inc., et al., v. FCC*, ___ U.S. ___, 116 S.Ct. 2374, 2405 (1996).

Supreme Court precedents "apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, --, 114 S.Ct. 2445, 2459 (1994). The language of Section 551 intimates that any ratings system would be content-neutral and deserving of an intermediate level of scrutiny. Congress wrote that TV ratings are a "narrowly tailored means of achieving that compelling governmental interest." Telecommunications Act of 1996, Pub. L. No. 104-104, title V, subtitle B § 551(a)(9), 110 Stat. 56, 140 (1996) (codified at 47 U.S.C. § 303(w)). However, the strict scrutiny standard only allows the government to

regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989).

The Supreme Court has repeatedly held "there is a compelling interest in protecting the physical and

psychological well-being of minors." *Sable v. FCC*, 492 U.S. at 126. Conceding that there is a compelling interest in protecting today's youth, the FCC would need to show that a content-based ratings system would alleviate the danger to children in a direct and effective manner. See, e.g., *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994).

1. Imposition of Ratings For Content Will Not Have The Desired Effect

The scheme to install a content-based ratings system will fail a strict scrutiny analysis because nobody can necessarily prove that it will have the desired effect. Studies show that exposure to televised violence may lead to aggressive behavior. Comments for The American Psychological Association p. 3. However,

it is true that all the psychological evidence can establish is a correlation between viewing televised violence and aggressiveness, and correlation is not the same as causation. Kevin W. Saunders, *Violence As Obscenity: Limiting the Media's First Amendment Protection* 41 (1996).

Other factors may cause such behavior, like the influence of other children. Gang violence, for instance, plagues this country, but the rituals and methods of gangs are learned on the streets not through television. In addition, those children prone to aggressive behavior may

gravitate toward violent programming. Denying a child's exposure to violent programming will have less of the desired effect than a parent taking the time to instill the proper values in the child.

If the goal is to deter aggressive behavior among children how come attention has not been given to a child's direct involvement with the violence of a video game? The basic reason Congress chooses to regulate television is because they can. Motion pictures, videotape rentals, and video games are not subject to direct congressional regulation. Kevin W. Saunders, *Violence As Obscenity: Limiting the Media's First Amendment Protection* 18 (1996). With the authority to regulate the nation's airwaves, Congress does not have the power to trample the First Amendment as a consequence.

The areas of sexual content and adult language present an even greater causation problem to the commenters advocating a revised ratings system. The American Psychological Association admits that their research does not indicate a correlation between exposure to sexual activity and profanity and the negative development of a child. Comments for The American Psychological Association p. 6. Having shown that a ratings system will not

necessarily serve the government's compelling interest, a content-based system will surely fail the least restrictive means test.

2. The Content-Based Ratings Are Ineffective and Unnecessary

Another reason that the content-based ratings system fail to meet the least-restrictive means test concerns its premise. Several commenters repeatedly state that they seek to empower parents to make decisions which can block certain programming. See generally Comments of Mediascope; Comments of Children Now. However, a revised ratings system will only have an impact if parents take a more active role, by figuring out what the new ratings mean and then programming their V-chips. Instead of empowering parents, a new system would confuse and disable parents.

For example, one proposed system would incorporate the rating codes S (sexuality), V (violence), and L (language) along with an intensity scale (0-5). A sample rating may read: S2-V1-L3. To best utilize this information a parent would have to discern what types of programs receive each gradation. Then a parent must determine the acceptable levels for their child. The process is complicated by a household with more than one child. Assuming a parent can program the V-chip, the process may entail the un-blocking

for a movie-of-the-week special that has already been edited for network broadcast. In the end, the only parents who may benefit from the proposed system are those who are already active monitors of a child's viewing habits.

Another suggestion is to adopt the content indicators used by HBO and Showtime, "BN" (brief nudity) and "MV" (mild violence). See Comments of Children Now. These indicators are usually shown for five to 10 seconds at the beginning of a movie. The movie has already been rated according to the Motion Picture Association of America's ratings system, which is also shown for five to 10 seconds. The "BN" type ratings exist because programs on cable are allowed greater latitude in severity of content than are broadcast programs. Whereas Children Now concerns itself with a content label for *Basic Instinct*, nudity is rarely shown on the networks, aside from the broadcast of the exceptional *Schindler's List*. Movies deemed suitable for broadcast on a network will receive a substantial edit to comply with FCC regulations. The current practice and rules already screen material that receives less First Amendment protection.

Some comments indicated that the age-based ratings are a "one rating fits all" approach. However, if sexual and violent content is as prevalent as all the comments believe,

then content-based ratings would effectively block most programs. "Use a V-chip...to exclude those programs, and you've wiped away just about everything in prime-time." Comments of Morality in Media, Inc. (quoting David Bianculli of the New York Daily News). Programs of stories containing violence and sex may be worth showing, but will become swept under the rug. Labeling and blocking programs will deny them full protection of the First Amendment, assuring that the content-based ratings will fail the strict scrutiny analysis. *See supra*, Sable at 126.

3. The Age-Based Ratings System Provides the Best Option for Parents and Children

On the other hand, the current age-based system appears to have the general approval of parents, while avoiding an evisceration of the First Amendment. At most television stations around the country few complaints have been voiced. Paul Farhi, *Chorus of Boos Greets TV Ratings System*, WASHINGTON POST, April 25, 1997, at G2. For example, the NBC affiliate in Amarillo, Texas indicated that they received very few comments, and even those have been positive. Comments of KAMR-TV. As of April 4, 1997, the NBC affiliate in Madison, Wisconsin has not received any comments whatsoever. Comments of WMTV, NBC 15. A multitude of the

comments filed by individual parents, opposed to the age-based ratings system, echoed the same exact language which indicates an organizational effort. Terry Connelly of the Washington, D.C. affiliate, WJLA said, "The only people I see or hear talking about it are people on Capitol Hill." See *supra*, Farhi article.

Although few criticisms by America's parents does not necessarily prove that the age-based ratings system works, there is not any indication to the contrary. If the current system helps to curb a child's exposure to harmful television programming, then the least-restrictive means will have been achieved. Until such results come forth, the current arrangement should remain intact.

III. SEVERAL CONSTITUTIONAL CHALLENGES WILL INVALIDATE THE CONTENT-BASED RATINGS SYSTEM

As *Morality in Media* warned the FCC may have to defend a prior restraint challenge. Comments of *Morality in Media, Inc.* p. 10. The *Pacifica* decision emphasized that the radio audience was unable to pre-screen Mr. Carlin's profane language. However, the Court admonished the FCC to avoid prior restraint. *FCC v. Pacifica*, 438 U.S. at 735. In *Near v. Minnesota*, the Supreme Court indicated that the form of governmental action was less important than the effect on

speech. 283 U.S. 697 (1931). Coupled with the proposed V-chip, content-based ratings will approximate an unconstitutional technological restraint.

The content-based ratings system may face another constitutional challenge. As indicated above, Part II(b), p. 8, the stigmatization of programs containing violence, sex, and other indecent material will be unconstitutional if it results in chilling speech. Although political and religious programs are exempted from any video programming ratings, other rated programs contain worthy messages that would be restrained by a content-based system. For example, programs like NBC's *Law & Order* and *Homicide: Life on the Street* may contain scenes of violence and murder victims, yet these shows also portray the wrong-doers within the criminal justice system. A mandated "violence" label from the FCC will have the unstated, but intended goal of hurting these programs' Nielsen ratings. This, in turn, may force a change in the program's content, thereby chilling this form of expression.

The direct effect of a content-based ratings system would be to discourage programming that was labeled as violent, sexual, or indecent. Therefore, because program decisions are based entirely on the Nielsen ratings, the

effect of a content-based system will be to change the face of television. Programs blocked by the V-chip may not survive. Parents who can barely use a VCR will never rescue a popular, but stigmatized show consigned to the black hole inside the V-chip television. Justice Brennan might agree that this regulation resembles "the dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting, and speaking." *FCC v. Pacifica*, 438 U.S. at 777.

Related to the chilling effect is the constitutional challenge to content-based ratings legislation as overbroad. By devaluing programs that contain violent and sexual labels, the FCC would reduce the programs available to adults to that which is fit for children. See *Butler v. Michigan*, 352 U.S. 380, 383 (1957). Deeming programs which contain sexual or violent activity as unacceptable will "burn up the house to roast the pig." *Butler v. Michigan*, 352 U.S. at 383.

The alternative to a restrictive content-based ratings system is to educate parents about the already existing time restrictions that networks follow when programming. Congress prohibits indecent material outside of the safe harbor, from 10 p.m. to 6 a.m., the hours when unsupervised

children are least likely to be in the audience. According to the Comments of Center for Media Education, et al., "over 61% of prime time programs receive a TV-PG rating." For those parents who allow their children to watch during prime time, the current system provides fair warning: Parental guidance suggested. If the age-based ratings were included in all of the newspapers, then parents could monitor unsuitable programming for those children who watch television. This method avoids any constitutional challenges.

IV. CONCLUSION

Section 551 of the Telecom Act established the framework for content-based ratings. Now political pressure will force the FCC to adopt such a system. Aside from the principles of First Amendment case law, Congress has overlooked that parents are the best judges as to what a child should be exposed. In mandating a television ratings system, Congress has provided itself with an unconstitutional method of control, while masquerading these impositions as "voluntary" rules.

Respectfully submitted,

A handwritten signature in cursive script that reads "Andrew Bronsnick". The signature is written in black ink and is positioned above the typed name.

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