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MORALITY IN MEDIA, INC.
475 Riverside Drive, New York, NY 10115 • (212) 870-3222 • Fax: (212) 870-2765

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March 14, 2000

Magalie Roman Salas
Commission Secretary
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

Dear Ms. Salas:

Enclosed please an original and nine copies of the Formal Comments of Morality in Media, In the Matter of Public Interest Obligations of TV Broadcast Licensees, MM Docket No. 99-360. These comments are submitted in response to a FCC Notice of Inquiry, FCC 99-390. Please distribute a copy to each of the Commissioners.

Please note that copies of these comments have also been sent on diskette to Wanda Hardy, Paralegal Specialist, Mass Media Bureau, Policy and Rules Division; and to International Transcription Service, Inc.

PJM/lsh

Sincerely,

Paul J. McGeady
General Counsel

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

In the Matter of Public Interest Obligations of TV Broadcast Licensees	} } }	MM Docket No. 99-360

COMMENTS OF MORALITY IN MEDIA

The Notice of Inquiry seeks comment (1) On how broadcasters can best serve the public interest during and after the transition to digital technology (2) How broadcasters could better serve their communities of license and finally (3) Other proposals that would serve the public interest. Morality In Media, in these comments, suggests that the present Kingdom of T.V. Broadcasting is not oriented to serving the public interest in the Realm of decent programming nor does the Federal Communications Commission (FCC) serve the public interest by its present regulatory approach.

I. The Public Interest Requirement of Punishing Indecent Programming on Broadcast TV is Mandated By Congress

As the NOI notes, currently, broadcasters must comply with a number of affirmative public interest programming and service obligations. Among these, says the NOI, "Broadcasters are prohibited from airing programming that is obscene, and restricted from programming that is "indecent" during certain times of the day" (quoting 18 U.S.C. 1464 and 47 CFR Section 73.3999).

In fact, the FCC has for decades recognized that compliance with 18 U.S.C. 1464 is integral to a licensee's obligation to serve the public interest. If we turn to Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978), we see that the Commission found a power to regulate indecent broadcasting not only in the specific prohibition of 18 U.S.C. 1464 but also in 47 U.S.C. 303(g) which, in the words of the Pacifica Court (at 731):

> "requires the Commission to 'encourage the larger and more effective use of radio in the public interest.'"

It is the position of Morality In Media, and the main theme of these Comments, that in the critical matter of broadcast indecency, the FCC has failed in meeting its obligation to regulate television licensees in the public interest and has not kept faith with the American public to protect them from this evil.

We say this for the following two reasons:

1. Enforcement of the broadcast indecency law in general is obviously not a priority with the current Commission; and with respect to television licensees, the FCC "policy" for the past two decades would appear to be "see no evil, hear no evil and think no evil."

2. The FCC's requirement that a concerned member of the public must produce a tape or transcript of the indecent programming, combined with the FCC's refusal:

   * to request a tape or transcript from a licensee;
   * to use its subpoena power to obtain a tape;
   * to initiate an inquiry on its own motion;
   * to monitor programming on its own and make tapes as evidence of violations; and
   * to require licensees to make tapes of programs and provide tapes to the FCC upon request

   virtually ensures that 18 U.S.C. 1464 and 47 CFR 73.3999 will not be effectively enforced in general and, in particular, against television licensees.

II. The Indecency Law is Constantly Being Violated by Broadcast TV Stations

The word "Indecent", as used in 18 U.S.C. 1464, was defined by the United States Supreme Court in the Pacifica case, when is said:

> "The normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality". [Underline added]

The FCC, in the Pacifica proceeding (and as later modified), adopted a sub-genus of the indecency definition for purposes of 47 CFR 73.3999, which did not exhaust the perimeters of the Supreme Court definition, reading as follows:

> "Language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities". (See Media Bureau Publication 8310-100).

It is also clear that the 1st and 3rd prongs of the Miller test, viz. prurient appeal and serious value, are not part of either the Supreme Court definition or the FCC approach.

Material that is indecent, even under the FCC restrictive use of that term, is so prevalent on broadcast TV that the FCC can candidly take administrative notice of that fact. Nevertheless, we

will quote from others who have documented its existence.

On August 31, 1999, the Parents Television Council released a "Special Report" entitled, "The Family Hour: Worse Than Ever and Headed for New Lows." It reads in part as follows:

> "At the close of the century that ushered in TV, the medium's early promise has been erased by the rapid degeneration of...program content. Today, even shows airing in the earliest prime time hour, are sexually explicit, vulgar and violent. Further, all indications are that, despite the growing consensus regarding the media's influence on behavior-especially among the young-this trend-is not only continuing, but accelerating".

The PTC Report continues:

> "The study reviews broadcast network programming that aired between 8 and 9 p.m. eastern time during a two week period in May 1999 coinciding with the 'sweeps' weeks...Among statistical highlights of the study:
>
> > "In just a year and a half since the PTC's last study of the family hour, the amount of objectionable material in every category--foul language, references to sexual activity, and depictions of violence--has risen significantly.
> >
> > "The combined per-hour average of objectionable content has risen 75%, to a rate of nearly seven incidences per hour of programming.
> >
> > "Among the networks, Fox was the clear leader in frequency of offensive material, with a average of 11 instances per hour, while 100% of its shows during the family hour contained offensive elements. NBC with 9.63 instances per hour, was the second most offensive network overall, while CBS (3.62 per hour) was the least offensive...
> >
> > "References to <u>sex acts during the family hour</u> have increased dramatically--by 77%--in the past year and a half. Fox led with an average of 6.8 references per hour, while NBC came in a close second with 6.38 references per hour. [Underline added]
> >
> > "More than two thirds of shows (68%) in the family hour contained sexual material.
> >
> > "Foul language reached an average of 1.44 instances each hour, a jump of 58%."

The PTC Report further states:

> "The PTC maintained its traditionally high threshold for characterizing material as sexual for terms of this study. Activities or dialogue had to be directly and manifestly related to genital sexual activity to be included. In other words, allusions to actual sexual activity or arousal, past, present or future or sex organs had to be involved to be clarified as 'sexual.' Other sex related activities not directly referencing actual sexual conduct, such as kissing, flirtation and ambiguous suggestiveness, are not included...Regarding profanity...words like 'butt,' 'damn' and 'hell' are so common that they are not counted in the PTC's studies calculating foul language on TV." [Underline added]

The PTC study gives us examples of sexual material and sexual content. These examples are attached as Exhibit No. 1.

III. FCC Policy of Requiring Dismissal of Indecency Complaints as 'Defective' Unless Accompanied by a Tape or Transcript of Programming Violates Letter and Spirit of 18 U.S.C. 1464 and 47 U.S.C. 303(g).

There is nothing in these statues that anticipates, suggests or requires that the onus for enforcing the Broadcast Indecency law fall on the ordinary citizen -- and not the FCC. But this is the net effect of the FCC's requirement that an ordinary citizen produce the evidence that the indecency law has been violated before the FCC will investigate a well founded, articulate complaint. Contrary to its indecency enforcement policy in the 1970's, the FCC refuses to request a tape of a program from a licensee, to initiate inquiries on its own motion and to monitor persistent violators.

This is, in our opinion, a clear abdication of the responsibility placed on the FCC by Congress to enforce 18 U.S.C. 1464 and 47 U.S.C. 303(g); and, as a consequence of this policy, broadcast TV standards continue on their downward spiral -- cheapening the quality of life for all Americans; causing untold grief to adults unwillingly subjected to indecency in the privacy of their homes; and adversely affecting our nation's youth.

Much of the blame for this downward spiral falls on the TV Networks for pursuing high ratings with little sense of their responsibility to serve the public interest. Much of the blame also falls on the FCC for what can be clearly labeled as a "Net Effect Non-Enforcement" Policy.

As previously indicated, a looming obstacle to effective

enforcement of the broadcast indecency law is the FCC policy of requiring viewers to provided a tape or transcript. Very few viewers who make complaints are in a position to submit a tape or transcript of the program -- because most viewers are surprised by the assault and are not taping the program. The Pacifica Court itself recognized that these assaults on decency occur unexpectedly, when it said at 726 U.S. 749:

> "Because the broadcast audience is constantly tuning in and tuning out, prior warnings cannot completely protect the listener or viewer from unexpected program content". [Underline added]

Notwithstanding this clear, unambiguous statement by the Supreme Court, the FCC persists in requiring viewers to set up a tape in advance of any knowledge that he or she will be assaulted by the program content. This is an unreasonable burden mandated by the FCC Policy. In other words the FCC wants the public to do much of the job that Congress assigned to the FCC.

In most cases tapes of TV programs -- and, in particular, tapes of entertainment programs (which are often syndicated) -- do exist; and the refusal of the FCC to take steps that are within its powers, to obtain a tape, even when it possesses information indicating a probable violation of law, is purely arbitrary.

It is not the position of Morality in Media that the FCC should investigate every complaint about profanity, sex or excretion, but the FCC's refusal to investigate complaints of obvious merit, simply because the complainant was unable to provide a tape or transcript, does not fulfill the Congressional mandate.

IV. When 'Should' Really Means 'Must'

The official FCC indecency enforcement policy, as it appears on the FCC website (www.fcc.gov/mmb/enf/indecl.html), reads:

> "Complaints should be directed to the Federal Communications Commission...and should include: (1) a tape or transcript of the program or of significant excerpts (2) the date and time of the broadcast, and (3) the call sign of the station involved. [Underline added]

On its face, this statement appears reasonable. The words "should include" imply that the complainant should, when possible, supply the requested information. But in most cases, viewers aren't taping the program; and licensees seldom, if ever, voluntarily provide tapes to irate viewers.

As far as we know (or can determine), however, few, if any,

complaints unaccompanied by a tape or transcript "of the program" or a tape or transcript "of significant excerpts" will be entertained. In fact, our own experience, combined with examination of the commentators, indicates that a tape or transcript is a sine qua non and that for all practical purposes, should in the policy, really means must.

On October 26, 1989, the FCC issued a News release announcing its action on 95 indecency complaints. The release said in part:

> "Fourteen complaints...were dismissed as defective, because they lacked certain elements required to make a prima facie case of indecency (i.e., identification of station, date and time the allegedly indecent material was broadcast, or a tape, transcript of significant excerpt of the material)." [Underline added]

Reporting on the disposal of the 95 complaints, *Broadcasting* magazine ("How Indecency Process Works at FCC," 10/30/89) wrote:

> "The Commission's release of the material associated with the enforcement actions demonstrates the determination of complainants to get the commission's attention. They identify the station, give the date and time of the material and a transcript or tape of the offending material. The staff said complaints against 14 stations were dismissed because they failed to provide that information." [Underline added]

In the March 2, 1992 issue of *Broadcasting* magazine, we find the following in an article by Harry Jessell ("FCC Puts Broadcasters on Notice for Indecency"):

> "The FCC receives thousands of complaints each year from viewers and listeners, but considers only the relative handful each month that are substantiated by tapes or transcripts." [Underline added].

In the August 31, 1992 issue of *Broadcasting*, we find the following in an article, "How Indecency Process Works at FCC:"

> "It all starts in the [Mass Media] bureau with Tom Winkler, an investigator in the complaints and investigations branch of the enforcement division. Whether any one of the hundreds of indecency complaints pour into the FCC each year results in an investigation or fine probably has more to do with the way Winkler feels about it than anything else. Ensconced in a crowded eighth-floor office in the FCC annex at 2025 M Street in Washington, Winkler makes the first cut, sorting through 'substantiated' complaints (those supported by a tape or some sort of transcript) and deciding which should be dismissed and which may merit action." [Underline added]

In a study reported in the *Fed. Comm. Law Jrnl.* (Milagros Rivera-Sanchez, "How Far is Too Far? Line Between 'Offensive' and 'Indecent' Speech," Vol.49, No.2, March 1997) the author describes the FCC's "Complaint Investigation Process" in part as follows:

> "The FCC requires that a complaint include the station's call letters, the date and time of the broadcast, and either a copy of the program or a partial transcript...If the complaint lacks any of the elements, the commission usually asks the complainant to supply the missing information. If the complainant is unable to do so, FCC staff dismisses the complaint as `defective'". {underlining added}

Morality In Media doubts that the FCC "usually asks the complainant to supply the missing information." In February 1996 MIM made a detailed indecency complaint, unaccompanied by a tape or transcript, and in return received a copy of the FCC enforcement policy and a letter suggesting that by reading it we would understand "why a commission inquiry would not be warranted." We have, in our file, similar rejection letters to others.

The upshot of the FCC policy is that thousands of complaints each year go uninvestigated to the detriment of the public. Such a policy gives a green light to those in the industry who continue to "push the envelope". This policy is ineffective. The FCC is in part a law enforcement agency and should adopt an approach that will effectively and vigorously accomplish that purpose. The present policy fails to do. It is just not working.

We suggest that the FCC recognize that there is a serious problem and that its present policy is outmoded. Things are moving fast and furious. Old approaches are no longer sufficient in this rapidly changing telecommunications age. We refer the Commission to the Denver Area Consortium case, 518 U.S. 727 (1996) where at page 742 the Supreme Court (quoting Pacifica) says:

> "The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change, solutions adequate a decade ago are not necessarily so now..."

We would also refer the Commission to its own *Second Report and Order, Deregulation of Radio*, 96 FCC2d 930 (1984)], in which the Commission attempted to eliminate the requirement that broadcast licensees maintain program logs -- reasoning in part that petitioners to deny in license renewal proceedings. . . :

> "Could provide their own documentation by monitoring the service of the station. Any need for such monitoring would impose some burden on petitioners...However, if experience in the future indicates that the public interest would be served by easing the documentation burdens of petitioners..., we can

revisit this issue" (at 940-941, par. 26). [Underline added]

Morality in Media asserts that the time is long overdue for the Commission to ease the "documentation" burden that it has unilaterally imposed on ordinary citizens to monitor TV programming and to provide the FCC with tapes or transcripts. The time for the FCC to "revisit" its present ineffective policy on enforcement of the broadcast indecency law is long, long overdue.

V. The FCC's requirement that a concerned member of the public must produce a tape or transcript of the indecent programming, combined with the FCC's refusal to

* **Request a tape or transcript from a licensee;**
* **Use its subpoena power to obtain a tape;**
* **Initiate an inquiry on its own motion;**
* **Monitor programming on its own and make tapes as evidence of violations; and**
* **Refusal to require licensees to make, maintain and provide tapes to the FCC upon request**

virtually ensures that 18 U.S.C. 1464 and 47 CFR 73.3999 will not be effectively enforced in general and, in particular, against television licensees.

As previously indicated, Morality In Media believes that the refusal to entertain complaints which are of obvious merit, unless accompanied by a tape or transcript, does not comply with the Congressional mandate to enforce the broadcast indecency law and to regulate broadcast TV in the public interest.

Combined with other self-imposed impediments to enforcement of the indecency law, the current FCC enforcement policy virtually ensures that few if any TV industry violators will be held liable.

Refusal to request tapes from licensees

Morality in Media knows of no statute or decided case that prevents the FCC from requesting a tape or transcript from the station. Nor is it aware of any written policy that the FCC will not request a tape or transcript from a licensee. But Morality in Media is also unaware of any case in the last two decades in which the FCC has requested a tape or transcript in order to investigate an indecency complaint. It was not always thus.

In Pacifica, the FCC received a complaint from a citizen who was riding in his car. The written complaint was not accompanied by a tape or transcript. The FCC nevertheless requested that the licensee "forward a recording or complete transcript of the program

in question." (*Opinion and Order, Citizen Complaint Against Pacifica Foundation Station WBAI*, 56 FCC2d 94 (1975)].

Morality in Media is not requesting the FCC to do something it hasn't done before. We ask the FCC to return to its prior laudable policy of requesting, when necessary, tapes or transcripts.

We note that in the United Kingdom, persons who feel they have been unfairly treated by a broadcast may make complaints to the Broadcasting Complaints Commission, which has the right to demand a recording or video of the program in question.

We also note that according to the FCC's own **Mass Media Bureau Publication** 8310-100, *FCC and Broadcasting* [Part III, 5(c)]: "In general, licensees are not required to...provide to the general public, scripts, tapes or summaries of material broadcast." When a licensee possesses the only tape of a program, only the FCC will normally be in a position to obtain it.

Refusal to use subpoena power

Morality in Media knows of no statute or decided case that prevents the FCC from using its subpoena power to obtain a tape or transcript in an indecency inquiry. Moreover, we believe that a subpoena can be directed either to the licensee or to others.

The Commission has broad subpoena power which is codified in title 47 of the U.S. Code at section 409(e). It is axiomatic that the Commission can subpoena a licensee [see, e.g., *Order, Inquiry into Alleged Broadcasts...of Obscene, Indecent or Profane Material by Licensees*, 40 FCC2d 105 (1973)] and has been upheld even against a non-licensee third party. In *FCC v. Ralph M. Cohn, Vice President and General Manager, Screen Gems, Inc., et. al.*, 154 F.Supp. 899, at 906 (SDNY 1957) we find:

> "This power is, of course, not confined to those over whom it may exercise regulatory jurisdiction, but to any persons from whom it can obtain information and documents which are relevant and material to its inquiry".

It is worthy of note that if a licensee or other "person" is a corporation, the privilege afforded by the Fifth Amendment to refuse to respond and testify is not available.

In an Order released October 27, 1999 [*In the Matter of Establishment of the Enforcement Bureau and Consumer Information Bureau*, FCC 99-172, at p.7], the Commission specified that one function of the Enforcement Bureau is to:

> Identify and analyze complaint information, conduct investigations...and collect information, including pursuant to

sections...409(e)-(k) of the Communications Act, in connection with complaints, on its own initiative or upon request of another Bureau or Office. [Underline added]

Refusal to monitor programming

The FCC's current indecency enforcement policy sheet, available on the FCC's web site, states that the FCC does not "independently monitor broadcasts for indecent material."

Morality in Media does not expect the FCC to monitor every broadcast TV program, but Morality in Media is unaware of any constitutional or other valid reason for the FCC to refuse to monitor any TV program -- no matter how much evidence it has either from viewer complaints or from news reports or studies describing the sexual content or vulgarity in a particular program or genre of program (e.g., daytime soaps, daytime talk shows, professional wrestling, sitcoms during the family hour, etc.).

The FCC did not always refuse to monitor any programs. In fact, Morality in Media is aware of two cases in the 1970s in which the FCC either monitored a single radio station or several radio stations for possible violations of the broadcast indecency law:

> *Notice of Apparent Liability, Eastern Education Radio*, 24 FCC2d 408, at n.2 (1970) ("While the licensee states that it received no complaints..., the Commission had received several...; it therefore did monitor the broadcast, and specifically that of January 4th."); and
>
> *Opinion and Order, Sonderling Broadcasts Corp*, 41 FCC2d 777, at 779 (1973)("In recent months, however, the Commission has received increasing numbers of complaints alleging that broadcast licensees...have presented offensive program material. A frequent subject of complaints has been the radio format known in the trade press as 'topless radio,'...In reaction to these complaints, the Chief of the Complaints and Compliance Division...first asked the Field Engineering Bureau to tape several programs in a number of cities in which the incidence of complaints was high...These tapes along with several others which had been volunteered to the Commission by the complainants provided the staff with approximately 61 hours of recorded programs from eight stations around the country. Attorneys for the Complaints and Compliance Division reduced the 61 hours into a tape of about 22 minutes playing time. The staff...played the tape for the Commission...After hearing the tapes, the Commission instructed the staff to prepare a Notice of Apparent Liability for violation of Section 1464 against Sonderling Broadcast Corp.").

According to a news item in *Broadcasting & Cable* ("Kids TV

crackdown," 5/25/98), the FCC's Mass Media Bureau announced that:

> [I]t is going to start watching some TV to ensure that stations comply with FCC limits on commercials aired during children's programming. Regulators say a review of current license renewal applications shows that 26% of the station's have exceeded the limit. "This level of noncompliance is unacceptable and must be remedied," the Bureau said in a public notice [**Released 5/20/98**]. Plans call for an audit program of unannounced, off-air monitoring of commercial stations and tabulations of commercials aired during children's programming.

If the FCC can now monitor programs to protect children against too many ads, it can now monitor to protect children [and unconsenting adults] from programs known to be grossly vulgar or to include explicit sex talk, sexual activity or nudity.

Refusal to initiate inquiry on own motion

The official FCC indecency enforcement policy, as it appears on the FCC website, states that the FCC's "enforcement actions are "based on documented complaints of indecent or obscene broadcasting received from the public." [Underline added]

The Commission, however, is not required to wait to receive the perfect complaint from an ordinary citizen -- before it acts to investigate for possible violations of the indecency law. If the Commission has in its hands a meritorious complaint or complaints or other information of possible violations of the law, it can begin an investigation on its own motion. Section 403 of the Communications Act of 1934, As Amended, states:

> "The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made...or relating to the enforcement of any provisions of this Act...[and] shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by a complaint."

In the 1970's, the FCC, in response to "information and complaints from the public that certain broadcast licensees...may have broadcast obscene, indecent or profane material" instituted an inquiry, on its "own motion," to determine "whether any licensee, permittee...or any principal...has engaged in the above-described practice" [*Order, Inquiry into Alleged Broadcasts...of Obscene, Indecent or Profane Material by Licensees*, 40 FCC2d 105 (1973)].

Refusal to require licensees

to make, maintain and provide tapes to the FCC upon request

We direct the FCC to its own **Mass Media Bureau Publication** 8310-100, "The FCC and Broadcasting" (Part III, 5(c)):

> "When a station broadcasts a personal attack or a political editorial endorsing or opposing a candidate or public office it must provide a script or tape of the attack or editorial."

If such a requirement is not unconstitutional, it would appear that a similar requirement that licensees make, maintain and provide to the FCC, upon request, scripts or tapes of broadcast programming containing depictions or descriptions of sexual or excretory activities or organs would also not be unconstitutional.

The justification for such a regulatory requirement can be found in the obligation of the FCC to efficiently enforce the indecency statute and regulation and in its public interest role. It is obvious that such a regulatory provision need not and should not encompass every TV broadcast, but only those that depict or describe "sexual or excretory organs or activities." Tapes would only have to be maintained by the licensee for a reasonable period of time to permit the FCC to act on an indecency complaint.

There is no "censorship" or prior restraint because the FCC would not request the material until after publication (See e.g., Pacifica, 438 U.S. at 735-738). In fact, in Pacifica, the FCC requested a copy of the offending programming after it aired.

We also refer the Commission to its *Second Report and Order, Deregulation of Radio*, 96 FCC2d 930 (1984), *vacated and remanded, Office of Communications of United Church of Christ*, 779 F.2d 702, (D.C.Cir. 1985), in which the Commission attempted to eliminate the requirement that licensees maintain program logs -- reasoning in part that citizen groups "could provide their own documentation by monitoring the service of the station" (96 FCC2d at 940-941). The D.C. Circuit rejected this attempt to shift the burden from licensees to citizens groups, reasoning that the Court had already addressed the "burdensome character" of requiring citizens to monitor programming (779 F.2d at 710, n.10).

VI. Requiring Ordinary Citizens to Make a *Prima Facie* Case of Indecency Does Not Find Favor in the Law

On October 26, 1989, the FCC issued a News release announcing its action on 95 indecency complaints. The release said in part:

> "Fourteen complaints...were dismissed as defective, because they lacked certain elements required to make a prima facie

case of indecency (i.e., identification of station, date and time the allegedly indecent material was broadcast, or a tape, transcript of significant excerpt of the material)." [Underline added]

In *Monroe Communications v. FCC,* 900 F.2d 351 (D.C. Cir., 4/10/90), the Court of Appeals ruled that the FCC's refusal to consider, in a license renewal proceeding, an "ordinary" citizen's obscenity complaint because it did not set forth a "prima facie" case of obscenity was "arbitrary." Said the Court (at p. 359):

> "[T]he Commission acknowledged that it had received some contemporaneous complaints..., but it found those complaints insufficiently specific to warrant further investigation. The Commission explained that...it would only investigate allegations of obscenity that alleged sufficient facts about a specifically identified program to allow the Commission to determine that a violation may have occurred...We agree that the Commission should not be required to investigate every generalized complaint alleging...obscene programming. However, to require ordinary citizens to...set forth allegations constituting a prima facie case of obscenity...is arbitrary...[A]mong the complaints the Commission declined to consider...was a timely letter from a resident who reported being shocked to see a broadcast ...clearly depicting adults engaged in sexual acts. The letter specified the date and time of the broadcast...To ignore this complaint..., without at least learning more about the broadcast, because the complaint did not make out a legally sufficient claim of obscenity was arbitrary. [Underline added]

In an FCC proceeding [*Video 44 II,* 3 FCC Rcd 757, at 760 n.5 & n.6 (1988)] leading up to the *Monroe* case, the Commission noted:

> "In order to initiate an investigation into a possible obscenity violation, Commission practice has required a prima facie showing by a complaining party...We follow this approach in our enforcement of indecency...violations."

VII. The Rating System Proposed by the TV Industry and Adopted by FCC Should be Amended to Require Clarification of the Symbols and Disclosure of the Meaning of the Symbols on the TV Screen

Here again Morality in Media is concerned with the cultural decline caused by the Industry practice of "Pushing the Envelope". We must remember that the rating given to a particular program is not determined by an impartial body. It is determined by the producer and not even, as in the MPAA, by a group of industry-picked parents. This is unsatisfactory because the temptation exists to

give a rating that the producer thinks will either attract the largest audience or not scare off sponsors. The FCC should reopen its original inquiry in order to label such a "be your own judge of the harm to children" approach unsatisfactory.

In addition, the FCC should also require the full explanation of the symbolism to appear on the TV screen both before the program begins and after breaks for sponsor advertising. We say this because a parent or other adult cannot judge from the symbol (e.g., **PG-14**) or a letter following (e.g., **PG-14-V)** what can be shown as within the broad perimeters of such a designation.

In addition, the FCC should require the Industry to define some of the terms used to describe the various symbols/letters. In elaboration of our objections, Morality in Media examines the categories as submitted by the TV industry to the FCC:

TV-Y ("all children"): The industry tells us, "whether animated or live-action, the themes and elements in this program are specifically designed for a very young audience, including children from ages 2-6. This program is not expected to frighten younger children." The difficulty with this classification is that it is not further explained and interpretation will vary from producer to producer. Will violence be depicted? And if so, is it animated or live? What are the criteria by which "the themes and elements" are selected? Can there be sexual themes in the **TV-Y** programming? Can there be vulgar language? This should not be left to speculation. There is no central authority making a determination of suitability for this classification. Without parents having in front of them a detailed description of what **TV-Y** programs may actually portray, they are at the mercy of an interested party's purely subjective determination that it's "Okay for Kids". A brief description of any potentially inappropriate or disturbing scenes or a warranty by the programmer that "this program contains no violence [specify type(s)], no sexual situations or activity and no vulgar or profane language" would help solve the parental dilemma of wondering what really does this program contain??

TV-Y7 ("older children"), **TV-Y7-FV** ("fantasy violence"): This rating suffers from the same difficulties as above. It is even more subjective since it talks about "mild fantasy or comedic violence," which is not defined. We need more detail. The same is true of the phrase "may frighten children under the age of 7." Why will it frighten children under the age of 7? What objective standards are they going to use to make that determination? The criteria are vague and not sufficiently informative. The purpose of the rating system is to give parents the ability to choose or block. The Industry should also be required, if such is the case, to put up on the TV screen, the words "no sexual situations or activity and no

vulgar or profane language."

TV-G ("general audience -- Most parents would find the program suitable for all ages"): Who in the Industry is competent to determine what "most parents" would find?? Give parents objective standards so they can make that determination. The further description of this category as "little or no violence, no strong language and little or no sexual dialogue or situations" leaves a hole in the ratings big enough to drive a truck through. The words "little" and "strong" give those in the industry who want to "push the envelope" the ability to present explosive imitative violence, raw language and explicit sex talk or behavior and still have the benefit of the enhanced Nielson ratings that this category brings and the sponsorship of companies that might avoid the program if they knew the facts. This category should be modified to require specific descriptions of the types of violence, language and sex talk and situations that may be included on a screen legend at least at the beginning of the program.

TV-PG ("parental guidance suggested -- ...contains material that parents may find unsuitable for younger children" [underline added]): Given the fact that the words "older children," as used in the **TV-Y7** category, mean children 7 and above, do the words "younger children," as used here, mean children under 7. If so, how did the Industry determine that all or most parents would find programming suitable for children 7 and above that contains "one or more of the following: moderate violence (V), some sexual scenes(S), infrequent coarse language (L) or some suggestive dialogue (D)." And what do the undefined words "moderate," "some," "infrequent," "sexual scenes," "course language" and "suggestive dialogue" mean? Aside from the fact that many parents would find such programming unsuitable for children 7 and above, the FCC should require that the nature of what is to be shown be described with greater specificity. This category assumes that parents know that **TV-PG** means that the program may contain sexual scenes, coarse language and/or suggestive dialogue. Producers who wish to push the envelope will find adequate room to hide behind the **TV-PG** symbol.

TV-14 ("This program contains some material that many parents would find unsuitable for children under 14 years of age"): Here again the Industry (not parents) has made a decision to draw a line at age 14 (really age 13). This is unacceptable. They suggest in this rating that children over 13 can suitably watch (unattended) programs containing "intense violence", "intense sexual situations," "strong coarse language" or "intensely suggestive dialogue". This is an affront to American parents. Much of this material is unsuitable for children ages 14-17. It seems to describe what in some cases could be "indecent" under 18 USC 1464. We propose that the FCC

reopen the inquiry and reject this category, as currently defined, as against public policy. In addition, this category is wide open and will in effect become the "R" rated category (i.e., **TV-Adult)** that is often obscene for minors. Furthermore, the words "intense", "strong," "coarse" and "suggestive" are not objectively defined and leave room for irresponsible programmers to show whatever they want.

TV-MA ("specifically designed to be viewed by adults and therefore may be unsuitable for children under 17"): We suggest that the Commission reopen the inquiry and flatly reject this category. You will recall that the word "indecent" does not require the Commission to evaluate the program as a whole or to find that it lacks serious literary, artistic, political or scientific value. What the Industry appears to be proposing is that they be permitted to show "indecent" material, provided they label it "TV-MA". We analogize this category to "X" or "NC-17" rated and the Commission should recognize it as such. Again the Industry has not defined the words "graphic," "explicit" or "crude" and practically admits in the word "indecent" that they intend to test the limit of the statute and the patience of the FCC.

VIII. 'V-Chip' Is Not a Substitute for Indecency Law

In response to a February 1998 Wirthlin survey question, **"Do you think the [TV] industry rating system is an effective alternative to enforcing the broadcast indecency laws or do you think that the FCC needs to work harder to enforce the existing indecency laws?"**, 59% of adult Americans replied: ***FCC WORK HARDER***.

We think that's good advice, because while the "V-chip" may help some parents, others will not use it at all or will not use it wisely. As former FCC Commissioner Andrew Barrett said: "The...V-chip is great for responsible parents, but it will [not] have any significant influence with kids whose parents are not responsible" ("Parents' Responsibility," *Broadcasting & Cable*, 8/26/96, at 24).

As the *Pacifica* Court indicated (438 U.S. at 749), the government has an independent interest in the "well being of its youth," apart from its valid interest in assisting responsible parents' "claim to authority in their own household." The V-chip clearly furthers the latter interest -- but not always the former.

Furthermore, very few TVs now in U.S. homes are equipped with a V-chip; and, according to *Broadcasting & Cable* magazine ("The V-chip gets a ho-hum reception from consumers," 2/7/2000), "few customers have shown any interest" in the V-chip.

And, according to the TV Ownership Survey, conducted in 1996 by

Statistical Research, 71% of U.S. homes also have two or more TV sets. Does the FCC really expect most parents to rush out in the near future and buy two or more TV sets with V-chips??

But even if every parent soon replaces every TV in the home, uses the V-chip and uses it wisely, and ensures that children never watch TV outside the home -- there is still a problem for parents.

As noted above, it is TV producers who apply the vague "age-based" ratings to determine whether a program is appropriate for a particular age group. Since broadcast TV programs seldom get a TV-MA rating, these producers apparently think that almost every program is suitable for children ages 14 and above. Since most prime time broadcast programs are rated PG, they apparently also think that most prime time programs are suitable for all children ages 7 and above. We don't think most parents would agree.

There is yet another problem with the TV rating system, for those who argue that it is an adequate substitute for enforcement of the broadcast indecency law. The rating system is designed for children, but in *Pacifica* (438 U.S. at 749-750), the Supreme Court pointed out that the indecency law has another purpose:

> Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. Because the broadcast audience is constantly tuning in and out prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.

The TV rating system is not intended to protect adults, and it is not based on the "indecency" standard. Even if a rating was based on the indecency standard, the FCC has no authority to delegate enforcement of the indecency law to a nongovernmental agency (i.e., the TV industry) accountable to no one but itself.

IX. CONCLUSIONS

The precipitous decline of standards of decency on broadcast TV has cheapened the quality of life for all Americans; caused untold grief to adults unwillingly subjected to indecency in the privacy of their homes; and adversely affected our nation's youth.

Much of the blame for the downward spiral falls on the TV networks, for pursuing high ratings with little sense of their responsibility to serve the public interest. Much of the blame also

falls on the FCC, for failing to enforce the broadcast indecency law [18 USC 1464] against TV stations.

A big part of the FCC's problem is its policy of requiring viewers who complain about indecent programming to provide a tape or transcript of the program. Very few complaints about TV indecency include tapes, because most viewers who make complaints were surprised by the assault and weren't taping the program.

In most cases, however, tapes of TV programs exist; and the FCC's refusal to take the steps that are within its power to obtain a tape, even when it possesses information indicating that the law has or is being violated, is arbitrary. The FCC can also:

* Initiate an inquiry on its own motion;
* Monitor programming on its own; and
* Require licensees to make, maintain and provide tapes.

It is not Morality in Media's contention that every profanity or mention of sex on TV is indecent, but it stretches the imagination to believe that little if any of the vulgarity, adult sex talk, and promiscuous sexuality on TV is indecent.

To refuse to investigate all (or virtually all) complaints unaccompanied by a tape or transcript does not fulfill the Commission's responsibility to "execute and enforce" the provisions of the Communications Act of 1934, as amended.

The refusal to investigate complaints unaccompanied by a tape or transcript hamstrings enforcement of the indecency law in two ways. First, it guarantees that the vast majority of complaints are not investigated by the FCC. Second, it discourages many viewers from making indecency complaints, because they know that complaints unaccompanied by a tape will be ignored by the FCC.

Government has a compelling interest in protecting adults in the privacy of their homes and children from indecent broadcast TV programming. It is the FCC's job, not that of viewers or parents, to enforce the indecency law. For the FCC to say, "We will consider protecting the home and children from unwanted TV indecency -- but only if a viewer is able to do all the necessary preliminary work for us" -- is at best arbitrary.

SUMMARY OF COMMENTS

To recapitulate, Morality in Media's Public Interest suggestions are summarized as follows:

1. The FCC should face up to the fact that the problem of

indecent programming on TV is serious and getting worse and that it's present "enforcement" policy is not working. The situation continues to deteriorate.

2. The Commission must recognize that the primary burden for investigating violations of the indecency law (18 U.S.C. 1464) is on the FCC, not on the general public.

3. This burden is effectively being avoided by the FCC policy of insisting that complainants provide a tape or transcript of the program or of significant excerpts (i.e., a prima facie case) before the FCC investigates. Requiring ordinary citizens to make a *prima facie* case of indecency does not find favor in the law.

4. This non-investigative policy is further exacerbated by the Commission's refusal to (1) request or subpoena a tape of the program (2) monitor programming on its own; and (3) initiate inquiries on its own motion; and (4) require licensees to make, maintain and provide tapes or transcripts to the FCC upon request.

5. These failed policies must be abandoned in the Public Interest in order that the FCC meet the mandate of Congress to enforce the Law in this rapidly evolving Telecommunications Age.

6. The FCC must revisit the Rating System by opening up another Notice of Inquiry, based on the fact that the present symbols are inadequate to warn parents as to what is or can be shown under the various symbols and that a legend on the screen of what is really in the program should precede the broadcasting of the same.

7. The V-chip is not a substitute for enforcement of the broadcast indecency law.

Respectfully Submitted,

Paul J. McGeady
General Counsel
Morality in Media
475 Riverside Drive
New York, NY 10115
(212) 870-3222

Robert W. Peters
President
Morality in Media

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Examples of Sexual Material from Parents Television Council, Special Report

Fox

- Ryan: "Is sex all that matters to you, Lexi?"
  Lexi: "No, there's always love, and I love having sex with you. Now take off your clothes."
  Ryan" "No. You take off my clothes."
  Lexi: "Alright honey, that's more like it. How do you want it, slow or fast?"
  Ryan: "Fast."
  She rips open his shirt, and they begin kissing passionately, he sits her up on the counter with her legs straddling his waist. After Megan walks in on them having sex in the restroom, she explains what she saw to Michael, who thinks his wife, Jane, is Cheating on him.
  Megan: "Well, did you see their flesh flapping, their bodies slapping, 'cause I did."
  Michael: "Wait a second. You saw Jane and Alex having sex? Megan, how is that possible?"
  Megan: "No, Ryan and Lexi, here, in the lounge . . . Oh, Michael. That is stone cold proof, half naked bodies. You don't have stone cold proof like that."
  Michael: "Oh why, because I didn't catch her in the act . . . well I saw it in her eye. . ."
  Megan: "It's not the same thing, Michael. Writhing bodies, oh if you'd seen what I saw, groaning, moaning, the mirror shaking. . ." (*Melrose Place*)

NBC

- Paul takes Viagra and walks around Manhattan with an obvious erection. His cousin Ira suggests he "relieve [him]self." Paul responds, "I ain't wasting this [erection] on a picture of Steffi Graf." (*Mad About You*)

ABC

- Dharma: "Well, you are going to teach him about sex, right?"
  Greg: "Yeah, When the time is right, I'll leave a book on his dresser."
  Dharma: "No, not that slot 'a', tab 'b' stuff. I'm talking about the whole sexual experience. About how to please your partner. Like you could teach him about that whistle thing you do."
  Pete: "When do you do that?"
  Jane: "It's not when, you moron. It's where."
  Greg: "How does she know."
  Dharma: "I was bragging." (*Dharma & Greg*)

UPN

- Discussing a couple who are having sex for the first time:

Amber: "How long have they been up there?"
Cher: "About an hour"
Amber: "Wow. . . That's about 59 minutes longer than I would have expected."
(*Clueless*)

WB

- Jen gets really drunk, and goes upstairs with two guys. Dawson finds her partially undressed and making out with the guys at once. (*Dawson's Creek*)

- Faith: "I'm about ready to pop. Are you up?"
  Xander: "I'm suddenly very up."
  Faith: "Just relax and take your pants off."
  Faith rips Xander's shirt off and they begin to kiss. They get into bed and have sex. Faith's body is seen on top of Xander in the reflection on the TV. (*Buffy the Vampire Slayer*)

CBS

- Royal: "Connie, how about you, does 'Whispering Penis' sound like a hotel to you?"
  Connie: "No Royal, to me it sounds like a difficult and rare party trick."
  (*Payne*)