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July 14, 2000

Via U.S. Mail

Secretary  
Federal Communications Commission  
Washington, D.C. 20554

Re: In re Petition of Earl W. Jackson, Sr. and Christian Legal  
Defense Fund – Petition for Rulemaking 5 U.S.C. § 553

Dear Sir or Madam:

Enclosed is the original and 14 copies of a Petition for Rulemaking to be filed with the Federal Communications Commission. Please file the original and copies with the Commission in accordance with 5 U.S.C. § 553.

I have also enclosed two face pages of the Petition. Please conform both copies and return them to me in the enclosed, self-addressed, stamped envelope.

Should you have any questions, please do not hesitate to contact me at the above telephone numbers. Thank you for your courtesy and cooperation.

Very truly yours,

*Dawn C. Desuacido*

Dawn C. Desuacido, Esq.

/encl.

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FCC Case No.:

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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION

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In re Petition of:

EARL W. JACKSON, SR., and CHRISTIAN LEGAL DEFENSE FUND

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**PETITION FOR RULEMAKING**

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## INTRODUCTION AND SUMMARY OF FILING

1. Pursuant to Title 5 of the United States Code § 553 (e) and Title 47 of the Code of Federal Regulations §§ 1.401, et seq., Petitioners Earl W. Jackson, Sr. (“Petitioner Jackson”) and the Christian Legal Defense Fund (“CLDF”) respectfully submit this Petition for Rulemaking to the Federal Communications Commission (the “Commission” or “FCC”).

2. Petitioners bring this petition to repeal the current enforcement policy rule for 18 U.S.C. § 1464, (the statute prohibiting obscene and indecent television broadcasting) and to replace it with Petitioners’ proposed rule. Among other things, Petitioners seek to eliminate the requirement that a complainant under 18 U.S.C. § 1464 must provide a tape or transcript of the indecent or obscene broadcast before the FCC will investigate the complaint.

3. Petitioner Jackson and CLDF members recently wrote letters of complaint to the FCC about an episode of the program Dawson's Creek. Petitioners found this episode indecent and patently offensive. This episode was broadcast during the family hour and featured homosexual kissing and extolled the "virtues" of promiscuous, non-marital sex. The FCC's response to Petitioner Jackson's letter was non-responsive in that it did not address Petitioner Jackson's complaint of indecency.

4. Petitioners believe that the FCC’s enforcement policy is ineffective and as currently implemented, violates Petitioners' fundamental rights to petition the government for redress of grievances and access to the courts. Petitioners also believe that the enforcement policy is a rule which was made not in accordance with the Administrative Procedure Act and is thus, invalid. The tape/transcript requirement is virtually impossible to comply with since most people exposed to indecency in television programming in the normal course are not anticipating subject matter which gives rise to a complaint to the FCC. Therefore, they have no need to

record the program. Yet the FCC will not investigate an indecency complaint without a tape or transcript. This requirement has resulted in television broadcasting which is prevalent with sexual and profane language and excessive violence.

5. The FCC has the sole power and authority to enforce 18 U.S.C. § 1464. In contradistinction, Petitioners and the general public have no private right of action for 18 U.S.C. § 1464 violations. The public must, by necessity, rely upon the FCC to respond to their complaints about indecent television programming. Should the FCC fail to act on indecency complaints, citizens have no remedy whatsoever for the actual harm caused by such programming.

6. Petitioners Jackson and the CLDF represent a community of people similarly situated who seek to protect their children and home privacy from the intrusiveness of indecent television programming. Petitioners' parental rights to instill values and beliefs that will promote their children's emotional, intellectual and moral health are constantly assaulted by the violence, sexual talk and profanity seen during the family hour.

7. The FCC's enforcement policy has a chilling effect in discouraging Petitioners and the public when it comes to reporting violations of 18 U.S.C. § 1464. The results of the FCC's enforcement policy is that decency standards in television broadcasting will further decline invading the privacy of homes and exposing children to images and language that will have long lasting detrimental effect.

8. For the foregoing reasons, Petitioners respectfully submit this Petition for Rulemaking.

#### **TEXT OF THE PROPOSED RULE**

Petitioners respectfully request that the FCC initiate proceedings to enact and promulgate

a rule that reads as follows:

“(a) Any person may file a citizen complaint against a licensee of a television broadcast station for broadcasts prohibited by 18 U.S.C. § 1464 and/or 47 C.F.R. §§ 73.3999, 73.4165 and 73.4170 and/or other similar statutes, rules and regulations.

(b) The complaint shall be in writing and should contain:

- (1) The name, address and telephone number of the complainant,
- (2) the name of the television broadcast licensee against which the complaint is made,
- (3) a complete statement of the facts tending to show that such television broadcast licensee committed the alleged violation,
- (4) the date, time, geographical location and TV station (or network or channel) where the allegedly improper television broadcast occurred or was viewed, and
- (5) a request that an investigation and eventual enforcement action be undertaken.

(c) A citizen complaint should be mailed and addressed to: Federal Communications Commission, 445 12th Street, S.W., Complaints and Political Programming Branch, Enforcement Division, Mass Media Bureau, Washington, D.C., 20554.

(d) The Commission will forward a photocopy of the citizen complaint to the appropriate television broadcast licensee and demand by subpoena or other appropriate means that a videotape of the allegedly improper television broadcast for investigation. The television broadcast licensee will, within 20 days thereafter, comply with the Commission’s demand, or provide a written reply of its refusal or inability to do so.

(e) In all cases, the Commission will contact the complainant regarding the television broadcast licensee’s response, the action taken by the Commission, and the disposition of the matters raised.

(f) If the complainant is not satisfied by the television broadcast licensee’s response, the action taken by the Commission, and the disposition of the matters raised, he or she may file a formal complaint pursuant to the procedures set forth at 47 C.F.R. § 1.720.

(g) None of the procedures in this rule foreclose upon the Commission’s right to prosecute the television broadcast licensee to the full extent that the law allows.

(h) All policy statements issued previously by the Commission which conflict with this rule in whole or in part are hereby expressly revoked and rescinded.”

## STATEMENT OF FACTS IN SUPPORT OF THE PETITION

1. The Commission's policy statement regarding enforcement of 18 U.S.C. § 1464<sup>1</sup> violations is found on the FCC's web site at [www.fcc.gov/mmb/enf/indecl.html](http://www.fcc.gov/mmb/enf/indecl.html):

"The Commission will act on all documented complaints of indecent or obscene broadcasting that it receives. Given the sensitive nature of these cases, it is important that the Commission be afforded as full a record as possible. . . . Complaints . . . 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. The tapes. . . must become part of the Commission's records and cannot be returned. [Underlining added]

2. The United States Supreme Court has defined "indecent" in television programming in the *FCC v. Pacifica Foundation*, 483 U.S. 726 (1978):

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

For the purposes of 47 CFR 73.3999,<sup>2</sup> the Commission adopted a sub-genus of the indecency 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."<sup>3</sup>

3. On May 24, 2000 at 8:00 PM on the WB Network in Chesapeake, Virginia, Petitioner Jackson and members of the Christian Legal Defense Fund watched a show named "Dawson's Creek." ("Dawson's episode"). This Dawson's episode featured homosexual kissing and extolled the "virtues" of non-marital sex. Petitioner Jackson and the CLDF members found

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<sup>1</sup> Title 18 U.S.C. 1464 provides: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000 or imprisoned not more than two years, or both."

<sup>2</sup> 47 C.F.R. § 73.3999 adopted by the Commission in August 28, 1995 extends enforcement of 18 U.S.C. § 1464 to television and radio broadcast aired between 6:00 a.m. and 10:00 p.m.

<sup>3</sup> See Media Bureau Publication 8310-100.

this broadcast indecent and patently offensive. Furthermore, the program aired during the family hour, a time when indecent programming is prohibited.

4. On and before June 1, 2000, Petitioners Jackson and individual members of the CLDF sent letters to the FCC complaining about "Dawson's Creek."<sup>4</sup> Those letters informed the FCC that the Dawson's broadcast was indecent, patently offensive and that its airing violated parental rights to supervise and protect their children from such harmful television programs. The letters requested that the FCC take action against such indecent programming. True and correct copies of these letters are attached as Exhibit A and incorporated herein by reference.

5. Petitioner Jackson and CLDF members found the Dawson's episode indecent and offensive in several respects. The episode featured homosexual kissing and affirmation of the homosexual lifestyle. The episode featured teenagers involved in and extolling the "virtues" of non-marital sex. The Dawson's episode also contained twisted and illogical dialogue where one female teenage character, (who had been sexually promiscuous) tells her love interest that she was "more of a virgin" than him because she had never before "slept" with a man for love.

6. CLDF members received a form letter from the FCC responding to their complaints. The FCC letter is attached as Exhibit B and is incorporated herein by reference. The FCC letter was non-responsive to Petitioner Jackson's complaint regarding the indecent broadcast of Dawson's Creek. Rather, the letter acknowledged Petitioner Jackson's letter by including certain cable regulations that were not pertinent to petitioner's complaint.

7. Petitioner Christian Legal Defense Fund is a non-profit organization incorporated in the State of Virginia. Its mission is to promote biblical principles and values in the culture and to oppose the broadcast or publication of material which its members and other Christians find to

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<sup>4</sup> CLDF members who wrote letters are Alva Thomas, Aaron Bridges, Karen Perroti, Carl F. Thomas, and LaJuana Chandler Burks. These CDLF members are not parties to this Petition for Rulemaking.

be morally or spiritually offensive. Petitioner Jackson is the President of the Christian Legal Defense Fund.

8. Petitioners represent a community of citizens similarly situated who found the Dawson's episode patently offensive and indecent in that the show promoted promiscuous sexual lifestyles and exposed their children to the image of two men engaging in a homosexual kiss. Petitioners' rights to prevent their children from such images and propaganda have been violated. Furthermore, such images broadcast during the family hour expose children to concepts and ideas that can only be intellectually and emotionally confusing for adolescents.

9. By this Petition for Rulemaking, Petitioners seek to vindicate several rights and interests. Petitioners want to protect the privacy of their home and their children from intrusive indecent broadcasting. Petitioners seek to uphold community standards of decency by amending the enforcement policy so that those broadcasters who violate the decency laws can be punished. Finally, Petitioners seek to vindicate their First Amendment rights to *meaningfully* petition the Government for redress of grievances and access to the courts.

## LEGAL ARGUMENTS IN SUPPORT OF THE PETITION

### **I.**

#### THE COMMISSION HAS SOLE POWER AND AUTHORITY TO ENFORCE 18 U.S.C. § 1464 YET INDECENY IN TELEVISION BROADCASTING IS PREVALENT DUE TO THE COMMISSION'S TAPE/TRANSCRIPT REQUIREMENT

1. Congress has given the Commission a broad mandate to enforce 18 U.S.C §1464. The Commission is not required to wait for the perfect complaint from a citizen. 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. The Commission 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. . .”

2. Similarly, the Commission's Enforcement Bureau which investigates broadcast indecency complaints, has a broad mandate to prosecute 18 U.S.C. §1464 violations. 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."

3. Compliance with 18 U.S.C. §1464 is integral to a licensee's obligation to serve the public interest. In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), 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.’”

4. Material that is indecent under the *Pacifica* definition is prevalent in broadcast television today exposing the viewing public to vulgarity, adult sex talk and violence. This decline is attributable to the Commission’s policy of requiring that a citizen provide a tape or transcript of the indecent broadcast before the Commission will investigate. Although the Commission’s official policy states that a citizen should submit a tape or transcript, in actuality, the Commission deems an indecency complaint facially defective without a tape or transcript. The Commission routinely rejects such complaints.

5. This fact is documented in a February 9, 2000 memorandum by Morality in Media ("MIM") entitled “*Memorandum in Support of Request for Congressional Hearings Regarding FCC Failure to Enforce the Broadcast Indecency Law Against TV Stations.*”<sup>5</sup>. This memorandum is attached hereto as Exhibit C and incorporated herein by reference. The memorandum shows that MIM submitted a broadcast indecency complaint without an accompanying tape or transcript. In the Commission's January 30, 1991 rejection letter to the complaint, Edythe Wise (then chief of the Commission’s Complaints and Investigation Branch) stated:

In order to make reasoned judgments concerning possibly indecent material, the staff requires: (1) tape recordings or transcripts. . . [Underline added]<sup>6</sup>

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<sup>5</sup> Robert Peters and Peter Knickerbocker, President and Vice President, respectively, of Morality in Media prepared this memorandum.

<sup>6</sup> *Memorandum in Support of Request for Congressional Hearings Regarding FCC Failure to Enforce The Broadcast Indecency Law Against TV Stations*, p. C-7

6. Moreover, the MIM memorandum documents the rejection of a complaint filed by a Maryland citizen to the PBS airing of *Moll Flanders* in October 1996. The PBS production showed *Moll Flanders* engaging in sex with her five husbands (one of whom turned out to be her half-brother). The actors were fully nude and featured in full length. The PBS production featured bigamy, incest, prostitution and lesbianism. *Moll Flanders* aired at 9:00 p.m. on Sunday night and 9:00 p.m. on Monday night. The Maryland resident taped 8 scenes (which totaled 6 minutes) between the hours of 9:00p.m. to 10:00 p.m. The Commission rejected the complaint stating:

“[W]e cannot fully evaluate it from the brief excerpts you have provided. Your complaint does not provide sufficient context to enable us to determine whether the programming meets the Commission’s definition of indecency.<sup>7</sup>”

The MIM memorandum noted that based on the tape excerpts provided, the Commission could have easily requested a copy of the program from PBS.

7. The result of such a policy is that decency standards in television programming have progressively deteriorated. The Parents Television Council ("PTC") issued a report entitled *"What A Difference a Decade Makes - A Comparison of Prime Time Sex, Language, and Violence in 1989 and '99"* ("PTC Study"). This report is attached hereto as Exhibit D and incorporated herein by reference. The PTC Study quantifies the increase in sex talk, violence and profanity during that decade.

8. Tables I through III are summaries of the PTC Study. The tables compare the rise in references to 1) sexual acts, 2) foul language, and 3) violence between the 1989 and 1999 television seasons. The type of sexual and violent references and the specific foul language further distinguishes these categories.

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<sup>7</sup> MIM memo attached as Exhibit C, at p. C-6

8. Table I compares the amount and types of sexual references between 1989 and 1999 television seasons. The overall number of sexual references per hour during prime time went up by over 300%.

**Table I - Sexual References in Television**

<b>Category - Sex</b>	<b>1989</b>	<b>1999</b>	<b>Rate of Increase (per hour of programming)<sup>8</sup></b>
Total References to Sex	36	342	
-Oral Sex	0	20	
-Pornography	7	28	300%
-Masturbation	2	17	700%
-Kinky	13	60	357%
-Homosexual	4	125	2,650%
-Genital	10	92	650%

9. Table II quantifies the rise of foul language between the 1989 and 1999 seasons. Overall, the use of foul language increased by over 500%.

**Table II - Incidences of Foul Language<sup>9</sup>**

<b>Category - Foul Language</b>	<b>1989</b>	<b>1999</b>
-"hell"	56	298
-"damn"	52	220
-"ass"	12	265
-"bitch"	2	60
-"son of a bitch"	12	54
-"bastard"	15	43
-"crap"	5	41
-"sucks"	0	40

<sup>8</sup> Rate of increase is based on 180.5 hours of 1989 programming and 235.5 hours of 1999 programming.

<sup>9</sup> Table II - Although there was 30% more programming between the 1989 season and the 1999 season, the increase in each category of foul language easily exceeded that figure.

**Table III - Incidences of TV Violence**

<b>Category - Violence</b>	<b>1989</b>	<b>1999</b>
Types of Violence		
-Violence used by Villains	81	18
-Sexual Elements Combined with Violence	6	15
-Blood	35	42
-Guns	130	69
-Death/or Bodies Depicted	77	64
-Sadism or Torture	5	9
-Occult	-	17
-Graphic	4	23

10. Although Tables I through III quantify sexual and profane language and violence out of the context of their respective broadcasts, the cumulative effect of such references cannot help but have a detrimental effect in our culture, home life and on our children. The proliferation of such indecency, presents a burdensome task on Petitioners and the general viewing public in lodging complaints with the FCC. There is so much indecent television programming that the average citizen could not possibly keep up with a complaint process.

11. Furthermore, because of the downward trend in broadcasting standards, the term “community standards” is becoming more and more meaningless. As our culture immerses itself in accepting the profane and sexual talk and violence on television, community standards inevitably are lowered where we indeed find ourselves “defining deviancy down.”

## **II.**

### **THE FCC’S ENFORCEMENT POLICY IMPOSES AN UNCONSTITUTIONAL BURDEN ON THE RIGHTS OF CITIZENS TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES AND OF ACCESS TO THE COURTS.**

#### **A. Substantive Fundamental Rights**

1. Americans clearly have the right to protect themselves against obscene, indecent

or profane language and images. In *Bloss v. Paris Township*, 380 Mich. 466, 157 N.W.2d 260 (1968), the court held that a drive-in movie theater could be sued on a state law cause of action for nuisance for displaying obscene pictures that could be seen by children who were not on the theater's premises. However, no private right of action against obscene or indecent television broadcasts exists under state law. The courts have held that any state regulation of television broadcasts is invalid since the subject of television broadcasting is within Congress' power to regulate because of the cumulative impact on interstate commerce. *Allen B. Dumont Laboratories v. Carroll*, 86 F.Supp. 813 (E.D.Pa. 1949), aff'd 184 F.2d 153, cert. denied 340 U.S. 929, 71 S.Ct. 490, 95 L.Ed. 670. See also, *Gagliardo v. U. S.*, 366 F.2d 720 (9th Cir. 1966).

2. Under the Communications Act of 1934 (of which 18 U.S.C. § 1464 is under) no private right of action exists to sue a licensee for broadcasting obscene or indecent material. *Daley v. Columbia Broadcasting System, Inc.*, 309 F.2 83 (7<sup>th</sup> Cir. 1962); *Brafman v. National Broadcasting Co.*, 6 Media Rep. 1189 (S.D.N.Y., April 30, 1980). The Communications Act of 1934 also prohibits any private right of action for damages or injunctive relief. *New England Tel. & Tel. Co. v. Public Utilities Com'n of Maine*, 565 F. Supp. 949 (D. Me. 1983).

3. Congress had good cause to prohibit the broadcast of obscene, indecent or profane matters (see 62 Stat. 769, ch. 645 (1948)), as the Supreme Court has recently said with regard to television broadcasts:

**“[M]any adults themselves would find the material highly offensive; and when we consider the further circumstance that the material comes unwanted into homes where children might see or hear it against parental wishes or consent, there are legitimate reasons for regulating it.”** (*U.S. v. Playboy Entertainment Group, Inc.*, 120 S.Ct. 1878, 1885 (2000) [emphasis added]; see also, *FCC v. Pacifica Foundation*, 438 U.S. 726, 749-750, 98 S.Ct. 3026, 3040-3041, 57 L.Ed.2d 1073 (1978) [regarding radio broadcasts of indecent language].)

4. Consequently, private citizens have no alternative but to rely *solely* upon FCC enforcement for the vindication of their interest in not having to be subjected to the offensive intrusion of obscene, indecent or profane matters into the privacy of their homes, as well as their interest in not allowing children to see or hear such matters against parental wishes or consent. However, as shown herein, the FCC has imposed an undue burden on the ability of citizens to call upon the FCC for such enforcement.

**B. Right to Petition for Redress of Grievances**

5. The First Amendment to the U.S. Constitution guarantees the right “to petition the Government for a redress of grievances.” Pursuant to this protected right, citizens have the right to file complaints with the FCC where a television broadcaster violates the laws against indecency and obscenity. However, the withholding of a complaint from FCC enforcement officials simply because there is no accompanying videotape or transcript presents an undue burden on this First Amendment right.

6. The courts have held that the constitutional right to petition the government for redress of grievances covers the filing of a legitimate criminal complaint with law enforcement officials. *U.S. v. Hylton*, 558 F.Supp. 872, 874 (S.D.Tex. 1982), *aff’d* 710 F.2d 1106 (5th Cir. 1983). In *Lamar v. Kern*, 349 F.Supp. 222 (S.D.Tex. 1972), the court held that a sheriff who withholds written correspondence between an inmate and his or her attorney infringes upon the inmates’ right to petition government for redress of grievances. The Supreme Court has also generally held that just as the right to due process includes the right to a *meaningful* opportunity to be heard, so too, persons must be afforded the right to present meaningful petitions to the government for redress of grievances. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).

7. Therefore, for all practical purposes, citizens who are aggrieved by obscene, indecent or profane television broadcast matter do not have the ability to provide a videotape or a transcript of the offending broadcast to the FCC. Consequently, in substance, the enforcement policy posted by the FCC essentially tells Americans that the FCC will not accept complaints about obscene, indecent or profane broadcasts.

8. It is unheard of for a law enforcement organization to demand that citizen complaints be accompanied by evidence sufficient for its entire case-in-chief, which is what a videotape would amount to, when such evidence could more easily be obtained by the law enforcement organization. Would the victim of an environmental polluter, or of a sham stockbroker, or of a mere purse snatcher be required to obtain evidence sufficient for the entire case-in-chief even before the citizen complaint is lodged? In short, the enforcement policy imposes an intolerable burden on the right to petition for redress of grievances, especially since the FCC can easily obtain the videotape or transcript needed for a prosecution.

9. In light of the fact that Congress and the U.S. Supreme Court have recognized the validity of the underlying reasoning for banning obscene, indecent or profane broadcasts, and have enacted and enforced laws against such conduct, the FCC cannot follow a policy that effectively shuts down the law enforcement process. The FCC cannot, by means of issuing an administrative policy, deprive Americans of its last hope for a remedy for injury caused by offensive programming. The FCC must “faithfully execute” the laws of the United States (U.S. Const., Art. II), as must all agencies of the Executive Branch of the federal government.

**C. Due Process Right of Access to Courts**

10. The United States Supreme Court has long recognized that a constitutional right of access to the courts for all persons inheres in the concept of due process. *Boddie v.*

*Connecticut*, 401 U.S. 371, 375-377, 91 S.Ct. 780, 784-785, 28 L.Ed.2d 113 (1971). The right of due process includes access to all courts, both state and federal, without regard to the type of petition or relief sought. *Hooks v. Wainwright*, 352 F.Supp. 163, 167 (M.D.Fla.1972). The courts have often recognized the rights of crime victims in this regard. See, e.g., *Johnson v. Texas*, 509 U.S. 350, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993); *Fajardo v. County of Los Angeles*, 179 F.3d 698 (9th Cir. 1999).

11. Citizen must be able to lodge a meaningful criminal complaint. Anything beyond this puts an undue burden on the citizens' due process rights under the Fifth Amendment to the U.S. Constitution.

### III.

**THE FCC'S ENFORCEMENT POLICY AMOUNTS TO A "RULE" WHICH WAS NOT ENACTED IN ACCORDANCE WITH THE ADMINISTRATIVE PROCEDURES ACT, AND THUS INVALID.**

1. The Administrative Procedures Act states at 5 U.S.C. § 553 in relevant part as follows:

“(b) General notice of proposed rulemaking shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include-

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates

the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.”

2. The FCC’s enforcement policy amounts to a purported rule which is invalid because there were no proceedings for notice and comment which preceded the issuance of the such policy. See, *Carter v. Blum*, 493 F.Supp. 368 (S.D.N.Y. 1980). The word “rule” is defined by statute at 5 U.S.C. § 551(4) as:

“the whole or a part of an agency statement of general or particular applicability and future effect designed to *implement*, interpret, or prescribe law or policy or describing the organization, *procedure*, or practice requirements of an agency . . . .”

3. The enforcement policy is indeed a FCC statement of general applicability designed to implement the laws against indecency and obscenity and describing the required procedures for initiating an investigation of 18 U.S.C. § 1464 violations. Therefore, since the enforcement policy is an invalid exercise of rulemaking, a new rulemaking procedure should be instituted to correct and supersede the substantive and procedural deficiencies in the enforcement policy.

### CONCLUSION

Petitioners bring this Petition for Rulemaking to repeal the Federal Communications Commission’s current enforcement policy rule for 18 U.S.C. §1464 and replace it with Petitioners’ proposed new rule. The requirement that a complainant of an 18 U.S.C. §1464

violation provide a tape or transcript of the alleged indecent broadcast is virtually impossible to comply with. Petitioners have a right to not have indecent broadcasts pervade the privacy of their home, and Petitioners have a right to supervise and protect their children from such harmful programs. Petitioners also seek to vindicate their right to meaningfully petition the government for redress of grievances and access to the courts. Petitioners, therefore, respectfully request that the Federal Communications Commission institute a public hearing for rulemaking pursuant to 5 U.S.C. § 553

Dated: July 14, 2000

  
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