FCC MAIL SECTION
DOCKET FILE COPY ORIGINAL
JUL 8 4 09 AM '04

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

In the Matter of:	)	
	)	
Retention by Broadcasters of Program Recordings	)	MB Docket No. 04-232
	)	

NOTICE OF PROPOSED RULEMAKING

Adopted: June 21, 2004 **Released: July 7, 2004**

Comment Date: July 30, 2004
Reply Comment Date: August 30, 2004

By the Commission: Commissioner Copps issuing a statement.

I. INTRODUCTION

1. In this *Notice of Proposed Rulemaking* ("*NPRM*"), we propose to require that broadcasters retain recordings of their programming for some limited period of time (*e.g.*, 60 or 90 days) in order to increase the effectiveness of the Commission's process for enforcing restrictions on obscene, indecent, and profane broadcast programming.

2. It is a violation of federal law to broadcast obscene, indecent, or profane programming. Specifically, Title 18 of the United States Code, Section 1464, prohibits the utterance of "any obscene, indecent, or profane language by means of radio communication."[1] Congress has given the Federal Communications Commission the responsibility for administratively enforcing 18 U.S.C. § 1464. In

[1] 18 U.S.C. § 1464. Indecency is defined as 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. *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999 (2001) ("*Indecency Guidelines Policy Statement*"). In construing community standards, the Commission has stated that "[t]he determination as to whether certain programming is patently offensive is not a local one and does not encompass any particular geographic area. Rather the standard is that of an average broadcast viewer or listener and not the sensibilities of any individual complainant." *WPBN/WTOM License Subsidiary, Inc.*, 15 FCC Rcd 1838, 1841 ¶ 10 (2000). As for profanity, the Commission recently stated that it "will not limit its definition of profane speech to only those words and phrases that contain an element of blasphemy or divine imprecation, but, depending on the context, will also consider under the definition of 'profanity' the "F-Word" and those words (or variants thereof) that are as highly offensive as the "F-Word," to the extent such language is broadcast between 6 a.m. and 10 p.m." *See Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd 4975 ("Golden Globe"). The Commission also held that its definition of profanity includes material that "denotes certain of those personally reviling epithets naturally tending to provoke violent resentment or denoting language so grossly offensive to members of the public who actually hear it as to amount to a nuisance." *Id.* at 4981.

doing so, the Commission may, for example, revoke (or decline to renew) a station license or impose a monetary forfeiture for the broadcast of such prohibited material.[2]

3. The Commission's enforcement policy under Section 1464 has been shaped by a number of judicial and legislative decisions. In particular, because the Supreme Court has determined that obscene speech is not entitled to First Amendment protection, obscene speech cannot be broadcast at any time.[3] Indecent speech is protected by the First Amendment and cannot be outlawed completely,[4] but, pursuant to Commission regulations, implementing a subsequent statute and court decision, the airing of such programming is restricted to the hours of 10:00 p.m. to 6:00 a.m., when children are less likely to be in the audience.[5] The courts have consistently upheld the Commission's authority to regulate indecent speech, albeit with certain limitations. In this *NPRM*, we seek comment on enhancing our enforcement processes through proposed program recording retention requirements for broadcast stations in order to improve the adjudication of complaints.

II. BACKGROUND

4. The Commission's current procedures for the filing and consideration of complaints were articulated in its *Indecency Guidelines Policy Statement*.[6] The Commission does not independently monitor broadcasts for obscene, indecent, or profane material. Its enforcement actions are based on documented complaints received from the public. Given the sensitive nature of these cases and the critical role of context in a determination, it is important that the Commission be afforded as full a record as possible to evaluate allegations of objectionable programming. In order for a complaint to be considered, our practice is that it must generally include: (1) a significant excerpt from the program or a full or partial tape or transcript of the program; (2) the date and time of the broadcast; and (3) the call sign of the station involved. Although a complainant is not required to provide a tape or transcript, he or she must provide

[2] *See, e.g.*, 47 U.S.C. §§ 312(a)(6) and 503(b)(1)(D). Although Section 1464 is a criminal statute, the Commission has authority to impose civil penalties for the broadcast of indecent material without regard to the criminal nature of the statute. *FCC v. Pacifica Foundation*, 438 U.S. 726, 739, n.13 (1978); *see also Action for Children's Television v. FCC*, 852 F.2d 1332, 1335 (D.C. Cir. 1988) (Commission has authority to sanction licensees for broadcast of indecent material). The Department of Justice is responsible for prosecution of criminal violations of the statute.

[3] *See Miller v. California*, 413 U.S. 15 (1973), *reh'g. denied*, 414 U.S. 881 (1973); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989); 47 C.F.R. § 73.3999(a). Obscene speech is defined by a three-part test: (1) an average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient interest; (2) the material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable law; and (3) the material, taken as a whole, must lack serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. at 24.

[4] *See Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) ("*ACT III*").

[5] 47 C.F.R. § 73.3999(b) (implementing Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16a, 106 Stat. 949, 954 (1992). In *ACT III*, the D.C. Circuit court affirmed, with modification, the Commission's safe harbor rules. *Action for Children's Television v. FCC*, 58 F.3d 654. In a later ruling, the D.C. Circuit court rejected a facial challenge to the Commission's procedures for imposing forfeitures for the broadcast of indecent material. *Action for Children's Television v. FCC*, 59 F.3d 1249 (D.C. Cir. 1995) ("*ACT IV*"), *cert. denied*, 116 S. Ct. 773 (1996). The Commission has also provided a safe harbor for profane programming aired between 10 p.m. and 6 a.m. *See Golden Globe*, 19 FCC Rcd at 4981.

[6] *See Indecency Guidelines Policy Statement. See also Infinity Broadcasters Corp. of Los Angeles*, 7 FCC Rcd 9892 (2002).

sufficient information regarding the content at issue to place it in context.[7] The amount of information provided need not be extensive.

5. The staff reviews each complaint to determine whether the relevant material may violate the obscenity, indecency or profanity standards and, in the case of indecency and profanity, whether the material was broadcast outside the safe harbor hours. If there is sufficient information in the complaint that the facts, if true, suggest a violation may have occurred, the staff will commence an investigation by issuing a letter of inquiry ("LOI") that, among other things, requires the licensee to produce a recording or transcript of the program, if it has one. Otherwise, the complaint is generally dismissed or denied. If, based on the complaint, the licensee's response to the LOI and other facts in the record, it appears that a violation has occurred, the staff or the Commission will take enforcement action, such as issuing a Notice of Apparent Liability ("NAL") proposing a forfeiture or potentially an order to show cause to revoke the station's license.

III. DISCUSSION

6. We seek comment on steps the Commission could take to improve our complaint process and better enforce our existing standards by requiring broadcasters to retain recordings of their broadcast for a limited period of time. Because the specifics and context of the broadcast are critical to the determination of whether material is obscene, indecent, or profane, the more information the Commission can have in its possession about a program when it concludes an investigation and decides whether or not to initiate an enforcement proceeding, the more informed a decision it can make. Many complainants are able to provide enough detail for us to determine that enforcement action is warranted, even if the licensee has no transcript or recording of the program to provide in response to an LOI. In other cases, however, the Commission may lack a sufficient record where the licensee is unable to provide a tape or transcript in response to an LOI.[8]

7. Accordingly, we propose to improve our indecency complaint process by requiring broadcasters to retain a recording of all material they air during the hours of 6 a.m. and 10 p.m., when children are likely to be in the audience, for a limited period of time. This approach would ensure that the Commission has a complete record before it in deciding whether to initiate enforcement proceedings after an investigation. We seek comment on this proposal, including the proper length of time a copy of programming should be retained by a licensee, such as 60 or 90 days. Our goal is to establish a retention period that is long enough to ensure that the recording will be available in response to a LOI, but not so long that it imposes unreasonable burdens.[9] We also seek comment on whether the proposed record retention requirements should be crafted so that they can be useful to enforcement of other types of complaints based on program content. For example, the proposed record retention requirements may aid

[7] *See Citicasters Co., Licensee of Station KSJO(FM), San Jose, California*, 15 FCC Rcd 19095 (EB 2000) (forfeiture paid) ("While the complainant did not provide us with an exact transcript of the broadcast, we find that she has provided us with sufficient context to make the determination that the broadcast was indecent."). *See also Emmis Radio License Corp.*, FCC 04-62 (rel. Apr. 4, 2004).

[8] For the period between 2000 and 2002, the Commission received 14,379 complaints covering 598 programs and denied or dismissed 169 complaints for the lack of a tape, transcript, or significant excerpts. *See* Letter from Chairman Michael K. Powell to the Hon. John D. Dingell, March 2, 2004.

[9] We have held that in cases in which a licensee can neither confirm nor deny the allegations of indecent broadcasts in a complaint, we have held that the broadcasts occurred. *See, e.g., Clear Channel Broadcasting Licensees, Inc.*, 19 FCC Rcd 1768 (2004). Under such circumstances, broadcasters may find it in their interest to retain recordings for a longer period than the proposals above suggest. We also note that a broadcast station may currently retain recordings on a voluntary basis in the absence of a mandate from the Commission.

us in enforcing our children's television commercial limits[10] and sponsorship identification requirements.[11] We seek comment on whether there have been problems in enforcing those requirements that justify imposition of a retention requirement, as well as whether the benefits of this additional enforcement tool justify requiring broadcasters to record their programming 24 hours a day, rather than only 6:00 a.m. to 10:00 p.m., the hours when indecent programming is prohibited. We seek comment on how the proposed record retention requirement should apply to digital television and radio stations. Should the proposed rules apply to all digital streams, including programming offered on a subscription basis?

8. We seek comment on whether the proposed requirements should affect our established broadcast complaint process. Currently, we generally require a complainant to submit a tape, transcript, or significant excerpt before we will consider a complaint so that we have some sense of whether the material broadcast may have violated the law before we commence an inquiry. We ask whether we should change this policy if we were to require records to be retained. For example, a complaint containing a general description of the relevant broadcast programming may be adequate to trigger Commission action because we could obtain the actual recording from the station. We seek comment on this matter as well as other possible revisions to our current complaint process.

9. The proposed record retention requirements will affect the record-keeping practices of broadcast stations. We seek comment on the financial burden the proposals may impose. What are broadcasters' current practices in terms of recording programming and retaining copies of the recordings? What steps would a broadcast station have to take to comply with the proposed requirements? How much would it cost to keep programming for 60 days, 90 days? Does the development and increased use of digital recording and storage reduce the costs? We recognize that it may be more costly to retain high definition television content because of the equipment required to record such material. We propose that it would be permissible for such content to be recorded at a lower bit rate so that it is not as expensive to retain. We seek comment on this proposal. Are there any other means to reduce the financial costs of complying with the proposed requirements? We seek specific comment on the impact that retention rules may have on small broadcasters.

10. We are mindful that we must be cautious in our enforcement of Section 1464 with respect to indecency and profanity because free speech rights are involved. We therefore seek comment on whether our proposals raise any First Amendment issues.

11. We also seek comment on how the proposed record retention requirements may affect parties other than broadcast stations. For example, would the retention of third party commercial material, such as broadcast advertisements or infomercials, raise copyright or contractual issues? What other issues should we consider in this context? Although we seek comment on approaches for improving our enforcement process, we do not raise for comment in this proceeding our substantive standards for indecency or any other rules that may be implicated. Any comments beyond the scope of this *NPRM* will not be considered.

[10] 47 C.F.R. § 73.670.

[11] 47 C.F.R. § 73.1212.

IV. ADMINISTRATIVE MATTERS

A. Filing Requirements

12. *Ex Parte* Rules. This proceeding will be treated as a "permit-but-disclose" proceeding subject to the "permit-but-disclose" requirements under Section 1.1206(b) of the Commission's rules.[12] *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.[13] Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

13. Comments and Reply Comments. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties must file comments on or before **July 30, 2004**, and reply comments on or before **August 30, 2004**. Comments may be filed using the Commission's Electronic Comment Filing System ("ECFS") or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998). Accessible formats (computer diskettes, large print, audio recording, and Braille) are available to persons with disabilities by contacting Brian Millin, of the Consumer & Governmental Affairs Bureau, at (202) 418-7426, TTY (202) 418-7365, or at brian.millin@fcc.gov.

14. Comments filed through the ECFS can be sent as an electronic file via the Internet to http://www.fcc.gov/e-file/ecfs.html. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

15. Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Best Copy and Printing, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at Suite CY-B402, 445 12th Street, Washington, D.C. 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail, should be addressed to 445 12th Street, SW, Washington, DC 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

B. Initial Regulatory Flexibility Analysis

16. The Regulatory Flexibility Act of 1980, as amended ("RFA"),[14] requires that a regulatory flexibility analysis be prepared for notice and comment rule making proceedings, unless the agency

[12] 47 C.F.R. § 1.1206(b), as revised.

[13] *See id.* § 1.1206(b)(2).

[14] The RFA, *see* 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[15] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[16] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[17] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[18] By the issuance of this *NPRM*, we seek comment on the impact our suggested proposals would have on small business entities. The complete regulatory flexibility analysis is attached as Appendix A.

C. Paperwork Reduction Act Analysis

17. This *NPRM* contains proposed information collection(s) subject to the Paperwork Reduction Act of 1995 ("PRA"), Public Law 104-13. It will be submitted to the Office of Management and Budget ("OMB") for review under the PRA. OMB, the general public and other Federal agencies are invited to comment on the proposed information collections contained in this proceeding. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

18. Written comments on the proposed new and modified information collections must be submitted on or before 60 days after date of publication the Federal Register. In addition to filing comments with the Secretary, a copy of any Paperwork Reduction Act comments on the information collection(s) contained herein should be submitted to Leslie Smith, Federal Communications Commission, Room 1-A804, 445 12th Street, SW, Washington, DC 20554, or via the Internet to Leslie Smith@fcc.gov, and to Kristy L. LaLonde, OMB Desk Officer, Room 10234 NEOB, 725 17th Street, N.W., Washington, DC 20503 via the Internet to Kristy L.LaLonde@omb.eop.gov or by fax to 202-395-5167. For more information concerning the information collection(s) contained in this document, contact Leslie Smith at 202-418-0217, or via the Internet at Leslie Smith@fcc.gov.

D. Additional Information

19. This document is available in alternative formats (computer diskette, large print, audio record, and Braille). Persons with disabilities who need documents in these formats may contact Brian Millin at (202) 418-7426 (voice), (202) 418-7365 (TTY), or via email at bmillin@fcc.gov. For additional information on this proceeding, contact Ben Golant, ben.golant@fcc.gov, of the Media Bureau, Policy Division, (202) 418-7111.

---

[15] 5 U.S.C. § 605(b).

[16] 5 U.S.C. § 601(6).

[17] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[18] 15 U.S.C. § 632.

V. ORDERING CLAUSES

20. Accordingly, **IT IS ORDERED** that, pursuant to the authority contained in sections 1, 2, 4(i), 303, and 307 of the Communications Act of 1934, 47 U.S.C. §§ 151, 152, 154(i), 303, and 307, this *Notice of Proposed Rulemaking* **IS ADOPTED**.

21. **IT IS FURTHER ORDERED** that the Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene H. Dortch
Secretary

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA")[19] the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the *Notice of Proposed Rulemaking*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Notice of Proposed Rulemaking* provided in paragraph 13. The Commission will send a copy of this entire *Notice of Proposed Rulemaking*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[20] In addition, the *Notice of Proposed Rulemaking* and the IRFA (or summaries thereof) will be published in the Federal Register.[21]

2. **Need For, and Objectives of, the Proposed Rules.** This rulemaking proceeding is initiated to obtain comments concerning the Commission's proposals to enhance the indecency enforcement process by requiring television and radio broadcast licensees to retain recordings of their programming for some limited period of time.

3. **Legal Basis.** The authority for this proposed rulemaking is contained in Sections 1, 2, 4(i), 303, and 307, of the Communications Act of 1934, 47 U.S.C. §§ 151, 152, 154(i), 303, and 307.

4. **Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply.** The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules.[22] The RFA generally defines the term "small entity" as encompassing the terms "small business," "small organization," and "small governmental entity."[23] In addition, the term "small Business" has the same meaning as the term "small business concern" under the Small Business Act.[24] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").[25]

5. **Television Stations.** The proposed rules and policies will apply to television broadcasting licensees, and potential licensees of television service. The Small Business Administration defines a television broadcasting station that has $12 million or less in annual receipts as a small business.[26]

---

[19] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[20] *See* 5 U.S.C. § 603(a).

[21] *See* 5 U.S.C. § 603(a).

[22] 5 U.S.C. § 603(b)(3).

[23] 5 U.S.C. § 601(6).

[24] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[25] 15 U.S.C. § 632.

[26] NAICS Code 513120.

Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services.[27] Included in this industry are commercial, religious, educational, and other television stations.[28] Also included are establishments primarily engaged in television broadcasting and which produce taped television program material.[29] Separate establishments primarily engaged in producing taped television program materials are classified under another SIC number.[30] As of December 31, 2003, there were 1,733 full power television stations in the United States. There were also 605 Class A television stations and 2,129 low power television stations. Therefore, the rules we may adopt in this proceeding will likely affect nearly 4,500 television station licensees.[31]

6. **Radio Stations.** The proposed rules and policies potentially will apply to all AM and FM radio broadcasting licensees and potential licensees. The SBA defines a radio broadcasting station that has no more than $5 million in annual receipts as a small business.[32] A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.[33] Included in this industry are commercial, religious, educational, and other radio stations.[34] Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included.[35] However, radio stations which are separate establishments and are primarily engaged in producing radio program material are classified under another SIC number.[36] As of December 31, 2003, official Commission records indicate that 11,011 radio stations were in operation, of which 4,794 were AM stations.[37] Thus, the proposed rules will affect over 11,000 radio stations.

7. **Description of Projected Reporting, Recordkeeping and Other Compliance Requirements.** The proposed rules would impose additional reporting or recordkeeping requirements on existing television and radio stations. We seek comment on the possible cost burden these requirements would place on small entities. Also, we seek comment on whether a special approach toward any

[27] Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92-S-1, Appendix A-9 (1995) ("Appendix A-9").

[28] *Id. See* Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual (1987), at 283, which describes "Television Broadcasting Stations (SIC Code 4833)" as:

> Establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Included in this industry are commercial, religious, educational and other television stations. Also included here are establishments primarily engaged in television broadcasting and which produce taped television program materials.

[29] *See* Appendix A-9.

[30] *Id.*; SIC 7812 (Motion Picture and Video Tape Production); SIC 7922 (Theatrical Producers and Miscellaneous Theatrical Services (producers of live radio and television programs).

[31] FCC Public Notice--Broadcast Station Totals as of December 31, 2003 (totals rel. Feb. 24, 2004).

[32] 13 C.F.R. § 121.201, SIC 4832.

[33] Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual (1987), SIC 4832.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] FCC Public Notice--Broadcast Station Totals as of December 31, 2003 (totals rel. Feb. 24, 2004).

possible compliance burdens on small entities might be appropriate.

8. **Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered.** The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[38] The Commission seeks comment on alternative timeframes for record retention in order to lessen the regulatory burden on broadcast television and radio stations. Specifically, we propose relatively short time frames in order to minimize the burden on broadcasters. We are also cognizant of the difficulties associated with recording high definition content, and for that reason propose to allow broadcasters to record programming at a lower bit rate. The Commission also seeks specific comments on the burden our proposals may have on small broadcasters. There may be unique circumstances these entities may face and we will consider appropriate action for small broadcasters at the time when a Report and Order is considered.

9. **Federal Rules Which Duplicate, Overlap, or Conflict With, the Commission's Proposals.** None.

[38] 5 U.S.C. § 603(b).

STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: Retention by Broadcasters of Program Recordings, Notice of Proposed Rulemaking

The process by which the FCC has enforced the indecency laws has for too long placed inordinate responsibility upon the complaining citizen. When someone sends in a complaint, he or she is usually told to supply a recording of the program or a transcript of the offending statement, or the complaint will be dismissed. This policy ignores that it is the ***Commission's*** responsibility to investigate complaints that the law has been violated, not the citizen's responsibility to prove the violations.

That is why I have long suggested that broadcasters retain tapes of their broadcasts for a reasonable period of time. Many broadcasters already retain such recordings. That way, when someone complains about what went out on the public airwaves we can have a record to see how those airwaves were used -- or abused. Yet, over the past years, broadcasters continue to respond to FCC letters of inquiry that they do not have a tape or transcript of what they broadcast.

I am pleased that my colleagues seem to be coming around to the idea that we need to address this issue. I am also pleased that the Commission appears to be accepting the idea that a tape or transcript from the complaining citizen may no longer be necessary, especially if we can obtain the record of the broadcast from the station.

Today's NPRM is a step forward towards reforming the complaint process. I hope we will complete this proceeding expeditiously.