

**Commentary Regarding Federal Communications Commission
Public Notice DA 13-581, GN Docket No. 13-86**

**FCC REDUCES BACKLOG OF BROADCAST INDECENCY
COMPLAINTS BY 70% (MORE THAN ONE MILLION
COMPLAINTS); SEEKS COMMENT ON ADOPTING EGREGIOUS
CASES POLICY**

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The following is intended to illustrate my perspective on a change in decency standards for broadcast media as proposed by the Federal Communications Commission (FCC). In this commentary, I will briefly outline my understanding of the situation the FCC is attempting to address in the context of the events and documents referenced in this public notice. I will then demonstrate that the changes proposed therein are indeed reasonable and acceptable given the premises that the public notice outlines. Finally, I will supplement my answer with a number of suggestions, caveats, and other factors to consider, should the FCC decide to take a course of action that in any manner favors such a change. Additionally, what I hope to achieve with this commentary is a rational and objective counterbalance to the myriad of editorials that have appeared since April 1 that not only criticize the FCC's proposition, but also exaggerate it greatly, claiming a far more drastic change than is actually being considered.

The public notice specifically mentions four documents; a 2012 Supreme Court (SCOTUS) case, two FCC memoranda offered as points of reference, and by proxy the Bill of Rights. The SCOTUS case, *FCC v. Fox Television Studios, Inc.* (132 S. Ct. 2307 [2012]), which prompted the policy review and subsequent public notice, dealt with two broadcast television stations that had committed decency violations during the early 2000s. Fox had been in violation due to “fleeting expletives” present in comments made by U2 lead singer Bono during the 2003 Golden Globe Awards and by Nicole Richie during the Billboard Music Awards later the same year. ABC was in violation due to a scene portraying rear female nudity that was included for seven seconds in a 2003 airing of *NYPD Blue*. The Court's ruling echoed that of the Second Circuit, holding that the

FCC “failed to give [them] fair notice prior to broadcasts” that such content “could be actionably indecent.” In other words, it was held that Fox and ABC, under the Fifth Amendment, both had a right to “fair notice of what conduct is required.” The key factor in the ruling, though, was that the FCC is “free to modify current policy in light of determination of public interest and applicable legal requirements¹,” hence the public notice now in question.

The other two documents referenced are memoranda that serve largely as points of reference. The first, issued in 1987, allows an exception in the FCC’s decency standards for the use of “fleeting expletives” (i.e. expletives that are unscripted or isolated and not dwelt upon). The second, issued in 2004, revokes this exception².

Now, the FCC’s chairman is instructing his staff to review its decency policies in light of the aforementioned ruling, the primary question being as to whether said policies are “fully consistent with First Amendment principles”³. To the public, the FCC directs two questions: 1) Should the FCC remove its restriction on fleeting expletives as per 1987 standards, or keep them actionably indecent as per 2004 standards; and 2) should the FCC allow or disallow isolated, nonsexual nudity in a similar fashion?

In order for me to give proper, relevant answers to either question, I must point out that these questions are given in the context of the First Amendment. The FCC seems to require answers to the two public questions in order to answer the one addressed to the staff; though from my perspective, it ought to be the other way around.

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So, how does freedom of speech relate to broadcast media? Seeing that, since the Bill of Rights was first ratified, freedom of speech has been extrapolated to encompass

freedom of expression in general, what constitutes expressive television and radio programming? If a case for looser standards is to be made based on freedom of speech, it would seem that television and radio programs would have to be considered, essentially, an art form. If that is the case, then would this apply to only dramas or live events as well? For our purposes, let us interpret the free speech clause in absolute terms. During a live broadcast (e.g. of an awards program such as the Golden Globes), any attempt to censor a person's statement—whether scripted or unscripted—could potentially be construed as a suppression of the person's true character, a lack of fidelity towards the intended effect. On the other hand, one could argue that even if expletives are censored, many adults can almost invariably determine by context clues alone exactly which word was used; therefore, the character of what is said is still retained for those who are still able to interpret it. Nevertheless, I would argue that a change back to pre-2004 standards regarding profanity would be more in line with First Amendment principles because its isolated, "fleeting" nature facilitates potential for its use for dramatic effect.

Nudity may be somewhat more difficult to approach than fleeting expletives in terms of free speech since speech is not necessarily directly involved. This point has been reinforced most recently by a Federal Court case in which US District Court Judge Edward Chen opined, "...[N]udity in and of itself is not inherently expressive⁴," regarding San Francisco's restrictions on public nudity that had been implemented by its city council earlier this year. On the other hand, due to factors similar to those mentioned in the previous paragraph, nudity in dramas may be more likely protected by free speech than nudity on a street corner. Thus, the question to consider for both

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profanity and nudity is, do the ideas and dramatizations of a screenwriter constitute protected free speech or expression? If they do, then it follows that any effort to censor either is an infringement on the screenwriter's freedom of speech. Since the purpose of free speech is ostensibly to not only facilitate the exchange of ideas but also to protect unpopular ones, it would seem rather capricious for an exception to be made based on the medium by which said ideas happen to be transmitted. Therefore, under the free speech clause, the proposed change in decency standards is in fact consistent with First Amendment principles.

Some may believe that the only First Amendment clause relevant to decency laws is the one dealing with free speech, consequently assuming that any reference the FCC makes to the First Amendment must be a synecdoche for that particular clause. However, freedom of the press is also an important clause to consider, since radio and television have become—though not for long thanks to the Internet—the main media for modern press.

We often define freedom of the press as control by civilian journalists over the medium and content of their reports without any threat of government censorship. Besides the occasional slipup by various local head anchors, the only way profanity could find its way into broadcast news is via interviews with witnesses to a story being covered. We know this because these interviews are promptly saved, edited, and auto-tuned by various popular vloggers, much to the delight of millions. It could appear in the form of the interviewee's own candor, the interviewee repeating something someone else had said (e.g. during a robbery), or Vice President Biden gaffing about some landmark piece of legislation. While two out of three of the above examples actually

were censored, I have also seen expletives go without censorship in print publications such as online editorials, a university's newspaper, and another university's magazine. It would seem that there already exists in this country a perspective of freedom of the press that encompasses even the nature of its vocabulary—though not everywhere. Given that press organizations are commonly judged by their content and conduct already, I see no reason why the inclusion of a fleeting expletive would constitute any abuse of their First Amendment Rights.

There are also a number of ways in which nonsexual nudity could appear in news broadcasts. One example that has already taken place is in the context of health. In October 2009, WJLA⁵, an ABC station, and MSNBC⁶ aired the same uncensored demonstration of self-examination of the female breasts as part of their respective segments on breast cancer. Despite some suspicions about the demonstration's airing taking place during Sweeps Week, the original purpose of this footage was to educate, to spread awareness on a preventative measure a woman can take against a very dangerous disease. The woman demonstrating the self-examination does so in a professional and reserved manner, and the anchors treat said footage very pragmatically. In other words, what we have here is basic journalism, and regardless of the public's sensibilities, the First Amendment clearly defends basic journalism.

Obviously, the freedoms to assemble and petition do not factor into this proposal. Neither does freedom of religion, but since there are undoubtedly many—mostly socially conservative Republicans—who are insisting that the proposed change is a threat thereto, we will address it. There is only one reason why these people think this is the case: simply that fleeting expletives and nonsexual nudity as broadcast material are

offensive to their personal sensibilities. It is irrelevant whether they learned this mentality from their clerics, their parents, or their own interpretation of the scriptures of their respective faith traditions. What these people are really saying is that the material that would be allowed by proposed change simply makes them uncomfortable, effectively pretending the material already allowed never does. There is no proposition of an established state religion present in the public notice; neither is there any religious basis for the proposal therein, nor does it propose any restriction on free exercise.

What these social conservatives fail to realize is that this is not a matter of religion, but rather a matter of personal responsibility. Those who are worried about their freedom of religion can rest assured that they will possess all the free exercise they need in the form of mastering the proper operation and maintenance of a remote control. What else do they do in response to offensive material that is already allowed? If they become offended so frequently that they fear their children may encounter the material, or that they simply tire of having to deal with it, they may install a parental filter. If they cancel their television service and disconnect their broadcast equipment, they will soon find themselves with an extra \$50 per month that they could be spending on ideas they actually support. Such a move would be much more in line with American conservatism than railing against what basically amounts to a deregulation of broadcast businesses. Yet, figuratively speaking, they continue to ask, “But who will build the roads?” They forget that there is more than one set of gatekeepers. If I may be frank for a brief moment, the FCC is not as relevant as people tend to think it is. If the FCC goes through with this deregulation, it will be upon the broadcast businesses to make their own decisions in the realm that the deregulation leaves vacant (Nickelodeon, though not

a broadcast network, so far has refused to run anything with a rating stronger than PG). They could even delegate those powers to regional stations if they wish to avoid an across-the-board change. These decisions, of course, will be partly subject to the advertisers, but largely subject to the desires of the citizenry—their customers. I believe this phenomenon is commonly referred to as “capitalism.”

Theoretically, it would be reasonable to leave this commentary where it is as the above arguments could be and ought to be a strong enough case for the proposed change. Reluctantly, I must admit that it is not that simple, the main reason being that what the FCC is proposing is not a *complete* deregulation of broadcast material. This inevitably raises a number of questions and considerations concerning where the new boundaries would be drawn and how actionably indecent material would be redefined. Chief among these considerations, however, is one of the FCC’s favorite phrases, “contemporary community standards¹.” This is where the paradox begins: in order for certain content not to be shocking or offensive by contemporary community standards, it must become commonplace, but in order for it to become commonplace, contemporary community standards must allow for such an expansion. Obviously, the whole point of the public notice is to find out what those standards are exactly; regardless, there is no easy way out of this paradox. I could cite the wild popularity among my generation of HBO specials such as *Dexter*, *True Blood*, and *Game of Thrones* as a sign that these standards are changing, except I do not watch any of those myself (or an awful lot of television for that matter), and it is not quite what the Enforcement Bureau is asking for. Rather, I have a few suggestions on important factors to consider should the FCC move forward with deregulation.

In regards to fleeting expletives, one must keep in mind an important fact about language itself. Language, by its very nature and definition, is dynamic and arbitrary. It is how we wind up with slang, dialects, and eventually, the division of one language into two. Even between the American and British dialects of English, words such as “knob” seem totally harmless in the US, but rather offensive in the UK⁷. Before we know it, we have come back around to contemporary community standards, which in this case may be ironically the most objective basis we have. My solution to this problem is a middle ground of sorts. Today, we already have restrictions on freedom of speech that outlaw such things as libel and slander. If a fleeting expletive were to be used in an act of libel or slander and exacerbates what the target would have otherwise considered a forgivable offense, the FCC could potentially be partly blamed because of its deregulation. To avoid such a fiasco, I suggest allowing fleeting expletives, but with one caveat—that they are not directed at any person or group for the purpose of libel, slander, insult, or defamation. Bono’s candor during his acceptance speech, under this provision, would not be considered actionably indecent. Responsibility for any controversy that results would fall on the station and the speaker himself where it belongs.

If the FCC also decides to allow nonsexual nudity, then the primary question is obvious. How are we to define it? Thanks to the ever-present provision for contemporary community standards, we may safely skip defining nudity itself. There are two angles from which the FCC can and should approach determining nonsexual status.

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The first is very simple and has to do with the activity being depicted. If a sexual or suggestive act is being portrayed, then it is easy to say that the nude scene in question

is, by definition, not nonsexual. Conversely, there are several activities that may involve nudity but not sex besides performing the aforementioned self-exam. These include swimming, sunbathing, using a sauna, breastfeeding, posing for an art class, and even filming a documentary on an equatorial primitive tribe that does not care much for clothing. None of these activities, if portrayed with clothing, have anything to do with sex, and if portrayed nude, they hardly surpass the scene from *NYPD Blue* in terms of suggestiveness.

The second angle is somewhat more difficult and has to do with context. What is the purpose of such portrayal on either side of the fourth wall? In other words, one must look at not only the intended effect of the portrayal on the target audience, but also the intended effect on other characters encountering the nudity in question. Even if it is not “repeated” or “dwelt upon” as per the FCC’s original premise, there are several other criteria. Using our swimming example, let us imagine we are filming a brief scene for a documentary or drama at a clothing-optional beach. What sort of music is used? If people are shown undressing for a swim, do they do so in a candid or titillating manner? If candid, then is there any voyeuristic element? Is the activity or contemporaneous conversation the main focus of the scene, or the fact that the participants are nude? Where is the camera centered? The Enforcement Bureau absolutely must answer such questions as these in order to competently move forward with the proposed deregulation.

Wait a minute—so our scene has passed both the activity test and the context test and is ready for airing, but what if the scene still sexually excites someone in the audience? Simple; it does not matter because it is no longer the FCC’s problem, it is the

businesses'. This may seem to contradict my advice about avoiding involvements in allegations of slander; however, speech laws are federal whereas laws dealing with nudity tend to be more localized. As I have already said before, this is where we will see capitalism in action. Moreover, it is already perfectly legal to air broadcasts depicting men and women in states of dress already considered immodest by some traditions, Islam and Orthodox Judaism for example—where is the outrage from those communities? That is not to say, though, that the FCC actively sanctions a majority religious viewpoint; it is clear that this is not the case. Besides, body taboos are not exclusively a result of religious traditions. Culture, business interests, and mass media play an important part as well, but to go into detail on that matter would be too far off topic.

There is one more important point I would like to make regarding both profanity and nonsexual nudity. It is admittedly predicated on the assumption that the broadcast companies will decide to include the type of material in question. It is seemingly almost counterintuitive.

It may well be that once this deregulation is implemented, the use of bleeps, blurs and black boxes will no longer be acceptable tools of censorship. If we stop using these tools in the contexts to which the public notice refers, then to continue using them in all other contexts would become patently futile (I suspect that this is the same reason why some may fear a slippery slope resulting from the change—fortunately, such a problem is avoidable). Fleeting strong expletives must become the only strong expletives, and nonsexual nudity must become the only nudity. It is no longer sufficient to blur or crop out sexual or suggestive nudity; it must be cut from the broadcast altogether. For lack of

a more dignified example, the film *Titanic* comes to mind—in its unedited form, the drawing scene shows nudity, but the sex scene does not. As for live broadcasts, should someone break into an angry, profanity-laden tirade, then a simple protocol would be to cut off the audio feed (today, we see a form of this protocol practiced already through the use of deliberate broadcast delay). Shift the attention from words and body parts to intent and context, keep it firmly and strictly rooted there, and we can theoretically avoid the slippery slope.

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The FCC and its Enforcement Bureau have presented to the public a unique opportunity. They invite us to begin a new discussion not only on broadcast profanity as is usually the case, but also our societal taboos regarding the human body.

Unfortunately, at the time of this commentary, I have not yet seen such discussion outside of the reactionary faction of the blogosphere. What is being proposed is, despite what the reactionaries insist, compatible with First Amendment principles.

Additionally, when we look at it from an economic standpoint, we see that it constitutes a deregulation of broadcast businesses, giving them more responsibility and their customers more potential control. I can confidently conclude that I do support this deregulation, for both types of content, but with exceptions. Due to the limited nature of this deregulation, the Enforcement Bureau will be faced with the difficult task of redefining its boundaries. Fortunately, once they do, any offense brought on by the newly permissible content will become the broadcasters' problem instead. It will not happen overnight in this country, but if done correctly, this new standard absolutely can work.

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