Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
FCC Seeks Comment on Adopting	)	
Egregious Cases Policy for	)	**GN Docket No. 13-86**
Indecency Enforcement	)	

COMMENTS OF SUN SOUNDS OF ARIZONA, AN AUDIO INFORMATION SERVICE PART II

SUN SOUNDS of ARIZONA

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The *Waldman Report* points to two primary problems these services have encountered with respect to HD radio. For one thing, "efforts to increase power for poorly-received high-definition radio signals have been interfering with SCA broadcasts over analog channels. SCAs used by reading services operating at 67kHz are marginally harmed, while those operating at 92kHz are rendered useless for analog transmission."[17] Much SCA transmission is of notoriously poor quality, which is only getting worse as a result of this interference. If Audio Information Services are to have any future on radio, access over HD channels is the solution.

However, as the *Report* also describes,

> various Radio Reading Services are reporting difficulty migrating to digital forms of radio because they have not been able to convince their FM main-channel hosts to carry their services over digital audio broadcasting radio stations, despite the greater bandwidth available to these stations. According to those in the Audio Information Service field, the resistance seems to stem from two sources: confusion on the part of the digital channels over the copyright protections afforded materials that are translated from text to voice;[18] and concerns by those channels about the use of profanity and vulgarity during on-air broadcasts, because reading services do not typically edit or censor the printed pages read aloud for listeners. As a result, at present, Audio Information Service providers report that only one or two Radio Reading Services are being provided on digital radio sub-carriers.[19]

Similarly, the *Report* notes that

> audio materials are less likely than before to be distributed via TV transmissions. Although these services originally used the SAP channel on analog television sets, they were eventually pushed off to make room for Spanish translation and, to a limited extent, video description. After the transition to digital TV, providers of these services report that matters worsened because, like their digital radio counterparts, few stations were willing to give up the bandwidth needed to keep those services on the air.[20]

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[17] *Waldman Report*, Chapter 24, at 258.

[18] This concern can largely be alleviated by reference to section 110 of the Copyright Act, which specifically exempts reading services for the "blind and other handicapped persons,"if transmitted by a radio subcarrier or NCE broadcast station.

[19] *Waldman Report,* at 258.

[20] *Id.*

Other technology that provides access to Audio Information Services, such as telephone, internet, tablet and smart phone apps, tend to require the purchase of expensive equipment, most of which has not yet been adapted for use by persons with vision impairment. As the Commission is aware from its rulemaking proceedings for implementation of the 21st Century Communications and Video Accessibility Act (CVAA), there is still a long way to go for many of these new technological break-throughs to be readily accessible by persons with disabilities. Thus, as a practical matter, the most accessible medium for transmission of Audio Information Services is and will continue to be broadcasting.

II. The Constitutional and Administrative Law Basis for a Non-Enforcement Policy for Broadcast of Audio Information Service Content

Whether considered from the perspective of the long line of cases interpreting First Amendment protection of freedom of speech and the press in the context of print or other non-broadcast materials, or from the Commission's own cases recognizing the need for restraint and "caution with respect to news programming,"[21] a strong legal basis exists for the Commission to determine in this proceeding that the broadcast by audio information service content should, as a matter of policy, be deemed exempt from enforcement actions. The legal principles underlying both lines of cases are best served by the adoption of a policy in this proceeding that will reassure radio and TV licensees that print-based audio information content will be exempt from enforcement action under the Commission's indecency or profanity policies, whether or not those policies are modified as a result of this proceeding.

Print is foremost among those forms of speech that can be deemed "unconditionally

[21] In re Complaints Regarding Various Television Broad. Between Feb. 2, 2002 and Mar. 5, 2005, 21 FCC Rcd. 2664, 2717, ¶ 218 (hereafter, "*Omnibus Order*").

guaranteed" under these basic First Amendment principles. As then-Chief Justice Burger held for a unanimous Supreme Court in *Miami Herald Publishing Company v. Tornillo,*[22] a law requiring a newspaper to offer a Red Lion-type "right to reply" to a candidate for office who had been criticized editorially, violated the First Amendment because it "exacts a penalty on the basis of the content" of the paper. The penalty in question, even if merely the time, materials, and newspaper space required to publish a candidate's reply, could have a chilling effect, in that "editors might well conclude that the safe course is to avoid controversy. Therefore...political and electoral coverage would be blunted or reduced." Justice Burger concluded that "the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors." The *Tornillo* decision provides a clear distinction between constitutional restraints, permitted against broadcasters, that would not be tolerated in the context of print. Newspapers simply could not be subjected to the same type of content regulation as broadcast stations.[23]

As the Supreme Court subsequently ruled in *United States v. Playboy Entertainment Group*,[24] with respect to regulation of adult-content cable TV channels, laws regulating the content of protected speech will only be enforced when they can be justified by a compelling government interest, and are narrowly tailored:

> [T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn." Speiser v. Randall, 357 U.S. 513, 525 (1958). Error in marking that line exacts an extraordinary cost. It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society. It is through speech that our personalities are formed and expressed. The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control."

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[22] *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 258 (1974)
[23] The Commission, of course, abandoned the fairness doctrine a few years later.
[24] 529 U.S. 803, 813 (2000) (hereafter, "the *Playboy* decision).

The areas of constitutional concerns recognized in *Tornillo* for print, and in *Playboy Entertainment* for cable TV, the aspects of government action that may violate the First Amendment, are the fact of regulation itself, the risk of suppression (including self-censorship), and penalizing speech after the fact. There may be disagreement as to whether or to what extent these protections should be applicable to broadcasting. But there should be no question when the content that is being broadcast is, in fact, a surrogate for the more protected medium of print.

A. Constitutional Significance of Print

The majority of American citizens enjoy unregulated access to print information in the form of newspapers, magazines, and books. This same level of access to print is available even if the print contains an occasional f-bomb or other expletive, a description of sexual intercourse, or a detailed complaint about intestinal health problems. American citizens with a print disability, however, are effectively limited in their access to print – when conveyed to them through the surrogate of broadcast media – to 16 hours of content that would be deemed suitable for children. As a result, the print content available to the millions of citizens who have print disabilities is routinely subject to indecency regulation, likely to be suppressed by broadcaster self-censorship, and, potentially, punished by FCC enforcement actions.

As the Commission and its staff are well aware, any attempt by government to impose a prior restraint on print – whether in the form of newspapers, magazines, books, or T-shirts – is subjected to a First Amendment analysis that involves strict scrutiny of the government's purported justification and a near-absolute certainty that, in most cases, the restraint will be disallowed. Similarly, constitutional protections against subsequent penalties are perhaps not absolute, but the barriers to such government regulation of the press in a print or other non-broadcast context are set extremely high.

Audio Information Services and the radio and TV stations that transmit these services should not be subjected to the Commission's indecency and profanity policies because the content being broadcast is print, and because that print is being accessed – through the surrogacy of audio transmission – by citizens with print disabilities. Government policies that would restrict, limit, suppress, or punish the exercise of First Amendment rights of these citizens should be accorded the same strict scrutiny the Supreme Court has applied in cases involving print.

A recent law review article on the Commission's indecency policies pointed out that the "power to provide regulatory oversight of broadcast content" conferred on the FCC as a result of the *Pacifica* decision,[25] is limited, noting that "the concurrence by Justices Powell and Blackmun . . . stressed that the Commission does not have 'unrestrained license to decide what speech, protected in other media, may be banned from the airwaves."[26] The article quotes the prominent First Amendment attorney Robert Corn-Revere: "The ability to regulate so-called 'indecent' speech is a limited constitutional exception, not the general rule. The Supreme Court has invalidated efforts to restrict indecency in print, on film, in the mails, in the public forum, on cable television, and on the Internet."[27]

Due to the fact that the content of Audio Information Services programming is entirely print, acknowledged by the Commission's former Chairman as such, the Commission should be most careful if it would attempts to regulate, suppress, or punish this print content by focusing only on its medium of transmission. The Commission should recognize that Audio Information

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[25] *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978).

[26] Robert D. Richards and David J. Weinert, *Punting in the First Amendment's Red Zone: The Supreme Court's "Indecision" on the FCC's Indecency Regulations Leaves Broadcasters Still Searching for Answers,* 76 ALBANY LAW REVIEW 631, 641 (2013) (hereafter, "*Punting*").

[27] Richards & Weinert, *Punting* at 641, *FCC v. Pacifica; also citing* Robert Corn-Revere, *Indecency, Television, and the First Amendment*, Consumers Res. Mag., Feb 2004, at 21, 22.

Services are a print surrogate and, as such, are entitled to full First Amendment protection and strict scrutiny of government attempts to regulate, suppress, or punish.

In a series of cases that can today be lifted straight out of any Constitutional Law casebook, beginning with *Near v. Minnesota*[28] to *N.Y. Times Co. v. Sullivan*[29] to *N.Y Times Co. v. United States*[30] to *Miami Herald Publishing Co. v. Tornillo*,[31] the U.S. Supreme Court has established broad principles of protection for news, public information, and other content published in print. These cases stand for the proposition that the First Amendment protects the publication of truthful information about matters of public concern, not just from prior restraint, but also from subsequent punishment, at least in the absence of a demonstrated need to vindicate a competing government interest of the "highest order."[32] The Supreme Court has subsequently extended these same sweeping protections more recently-developed communications media, such as cable television[33] and the Internet.[34]

Furthermore, when a case involves the sexual content of books and other print materials, the standard applied is whether the material is "obscene," a much higher hurdle that the FCC's indecency or profanity policies. For the government to proscribe, censor, or penalize material for sexual content, the Supreme Court's test from *Roth v. U. S.*[35] should be applied. Although

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[28] *Near v. Minnesota*, 283 U.S. 697 (1931).

[29] *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964).

[30] 403 U.S. 713 (1971) (this, of course, is the "Pentagon Papers" case, which confirmed that the freedom of the press from prior government restraint is nearly absolute).

[31] 418 U.S. 241 (1974) (rejecting a claim to a *Red Lion*-type "fairness doctrine" right of response by political candidates to editorial criticism).

[32] *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (newspaper could not be liable for publishing the name of a juvenile offender in violation of a West Virginia law declaring such information to be private).

[33] *Turner Broadcasting v. FCC*, 512 U.S. 622 (1994),(1994); *Playboy* decision at 813.

[34] *Reno v. ACLU*, 521 U.S. 844 (1997).

[35] 354 U.S. 476 (1957).

material legally deemed "obscenity" is not within the area of constitutionally protected freedom of speech or press under the First Amendment, the standard for judging obscenity, adequate to withstand the charge of constitutional infirmity, is whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest, a standard far different from the Commission's, which for the most part disregards the literary or other value of the material, taken as a whole, in which indecency or profanity is broadcast.

Subsequently, in *Miller v. California,*[36] the Court set out the test to be applied to determine whether material should be considered obscene. The *Miller* test, applying *Roth* in the context of a state anti-obscenity measure, looks to the following factors: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest,[37] (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and ©) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

In the year 2000, the Court held, in a non-broadcast context that laws regulating the content of protected speech will only be enforced when justified by a compelling government interest, and are narrowly tailored.[38] The protections accorded speech by the First Amendment require that "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn." "that laws regulating the content of protected speech will only be enforced when justified by a compelling government

[36] 413 U.S. 15 (1973).
[37] *Roth v. United States*, 354 U.S. 476, 489 (1957).
[38] 529 U.S. at 813 (2000).

interest, and are narrowly tailored."[39] The Court went on to describe the nature of the injury suffered by citizens who are deprived of the benefits of free speech by government restrictions:

Error in marking that line exacts an extraordinary cost. It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society. It is through speech that our personalities are formed and expressed. The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control.

Unless the citizen has a print disability. These citizens – whose auditory access to print is best facilitated by audio broadcast – are limited in all the above respects, as a result of Government interference and control, to speech that the Commission deems suitable for children. American citizens who have a print disability are routinely subjected to government "regulation, suppression, and punishment, " because their access to print, when read to them by Sun Sounds' volunteers, is subject to the Commission's indecency and profanity policies, rather than the broader principles enunciated in the *Playboy* decision. If these citizens wish to read Playboy, their access to that content will certainly be regulated, will most likely be suppressed or channeled to "safe" time periods by broadcaster self-censorship, and runs the risk of being punished in the form of FCC enforcement actions.

The content of broadcast-distributed reading and information services consists primarily of newspapers, magazines, other local information sources, and books. As print itself, this content being read by Sun Sounds volunteers over KBAQ's HD 3rd Channel or other broadcast channels would never be found obscene, sanctioned, or subjected to prior restraint under the firm Constitutional standards that protect printed material. This is the exact content being read to

[39] 529 U.S. 813 (2000), *citing Speiser v. Randall*, 357 U.S. 513, 525 (1958).

persons who are blind, visually-impaired, or otherwise print-disabled – as former-Chairman Genachowski defined this content – "print-based information for individuals who are print-disabled." If these individual adult citizens who rely upon Sun Sounds volunteers to provide this access were able to read print, hold a newspaper or book, and turn pages, they would be able to read *Playboy* or other censored materials at any time of day.

The content in question includes not only newspapers but also books and magazines that have been read aloud by Sun Sounds volunteers over the years. These books include, for one example, *The Secret Life of Bees,* a highly-acclaimed best selling novel published in 2002, in which at least one character on at least one occasion uses the expression "bullshit," – hardly obscene, but actionable nevertheless if read aloud on HD radio or on a radio or TV subcarrier. If an Arizona citizen with a print-disability wanted to have any of these books read to him or her over the radio, he or she would have to wait until 10 pm, which is when Sun Sounds broadcasts its segment, "A Good Book."

Magazines read over the air on a regular basis by Sun Sounds volunteers include *Vanity Fair, Discovery, Entertainment Weekly, Scientific American, Rolling Stone*, and *Playboy* - none of which would be considered obscene under contemporary community standards.[40] But if a Phoenix citizen who has a visual impairment or print disability wants to read this month's *Playboy* through the surrogate of a Sun Sounds volunteer, he has to stay up pretty close to midnight to do so.

The recognition that the content of radio reading and audio information services is print, a form of expressing speech that is entitled to the highest degree of First Amendment protection,

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[40]Sun Sounds audience members are the only American citizens who are completely truthful when they say "I only read *Playboy* for the articles."