

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

COMMENTS OF JOINT BROADCASTERS

The broadcast companies and licensees set forth on Attachment A (“Joint Broadcasters”), by their counsel, hereby submit comments in response to the Public Notice issued April 1, 2013, seeking input on whether the FCC should make changes to its current broadcast indecency policies or maintain them as they are.¹

Joint Broadcasters commend the FCC for tackling this difficult issue, one fraught with constitutional concerns. Given these constitutional issues and technological developments over the last several decades, it is highly conceivable that the FCC may not be able to derive a judicially sustainable indecency enforcement policy. In making the attempt, the FCC will need to take into account two key points. First, as the U.S. Supreme Court made clear in *Fox II*, any new substantive policy must be absolutely clear in what it proscribes.² Second, with the availability of multiple blocking technologies, such as the V-chip and services like TiVo’s KidZone, parents today have options to curb their children’s accessibility to video programming.

¹ FCC Public Notice, “FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (More Than One Million Complaints); Seeks Comment on Adopting Egregious Cases Policy,” DA 13-581, GN Docket No. 13-86, released April 1, 2013 (“*Public Notice*”). By *Order* of May 10, 2013, the FCC extended the deadline for the filing of initial comments until June 19, 2013.

² *FCC v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2317-20 (2012).

Crafting a clear policy that does not impermissibly curtail speech, one that will survive court review, will be extremely difficult.³

In light of these challenges, Joint Broadcasters suspect that, even if the FCC is able to craft a defensible indecency policy, it will be many years before the core substantive issues are resolved. In the interim, as detailed below, Joint Broadcasters urge the FCC to return to the complaint processing policy that it followed for decades, one requiring more than a mere allegation of indecent programming, more than assertion of the word “indecent,” before a complaint receives subject matter review. Any processing policy short of this will continue to subordinate broadcasters’ First Amendment rights to political fervor, cause the FCC’s files to fill again with a million-plus complaints like many it just dismissed, and divert FCC enforcement resources better devoted to well-documented and well-supported violations of the agency’s rules.

Background. For the past dozen or so years, the filing of a complaint alleging indecent programming, even if simply a postcard with skeletal information, has had a significant effect on the station at issue in the filing. The mere pendency of such a complaint, no matter how little documentation it included, has meant the issuance of an “Enforcement Bureau Hold,” preventing any license renewal application the licensee may file from being granted. In the latest renewal application cycle that began June 2011 for radio and June 2012 for television stations, hundreds

³ Joint Broadcasters reserve the right to comment on such proposed policies as they develop. In devising any substantive indecency policy, the FCC must take into account the operations and resources of *all* broadcasters, heeding the concern that even “smaller independent broadcasters, including many public service broadcasters,” not find themselves disadvantaged by any new requirements. *See FCC v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1835 (2009) (Kennedy, J., concurring in part and concurring in the judgment).

of stations entered the process with their renewal applications from the previous cycle not granted due to such a “Hold.”⁴

With renewal applications pending, broadcast owners have also been unable to assign licenses or transfer control of their licensees because the underlying license had not been renewed. Even if a renewal had already been granted prior to the filing of an indecency complaint, that complaint still resulted in a “Hold” being placed on the processing of any non-*pro forma* assignment or transfer application.

No matter whether a renewal or sale application has been involved, broadcasters faced with such “Holds” and needing to transact business have had no choice but to take the time and expense to negotiate, usually through counsel, and execute tolling agreements giving the FCC additional time to prosecute complaints which the broadcaster had never been allowed to see in the first place. With issuance of the *Public Notice*, broadcasters have now learned that many of these complaints “involved cases outside FCC jurisdiction, . . . contained insufficient information, or . . . were foreclosed by settled precedent.”⁵

“Holds” based on such undisclosed complaints also have frequently made refinancings and other investment transactions that did not require FCC approval much more costly for broadcasters. “Holds” must be explained to and documented for lenders, detailed in schedules to

⁴ The pendency of renewal applications for so many years created confusion over the term to be covered in the subsequent renewal applications, causing the FCC to address the issue in a Public Notice. See FCC Public Notice, “Media Bureau Announces Revisions to Television License Renewal Procedures,” DA 12-380, released March 12, 2012, at 2 (advising licensees to file new renewal application even if previous one is still pending and addressing period to be covered in application responses); FCC Public Notice, “Media Bureau Announces Revisions to Renewal Procedures and Form 303-S; Radio License Cycle To May 2, 2011,” DA 11-489, released March 14, 2011, at 1 (same).

⁵ *Public Notice* at 1.

financing documents, and addressed in legal opinion letters -- all at significant increased expense.

In addition, the pendency of undisclosed indecency complaints has had a day-to-day operational impact on broadcasters. From a practical standpoint, the pendency of an indecency complaint and the “Hold” it generates for a station’s renewal application mean that the station has had to retain and ensure the availability of a large number of station and public file records not just for eight, but for as many as 16, years. Included in these documents are quarterly issues/programs lists, quarterly Children’s Programming Reports, and EEO public file reports.⁶ Records management and staffing policies have had to take account of this growing volume of material.

For broadcasters, the upshot of an indecency enforcement policy that fails to address insufficiently documented complaints has been increased administrative and operational expenses and legal fees, not to mention the unquantifiable cost of having a “cloud” hanging over their licenses. Equally significant, if not more important from a constitutional perspective, has been the chill imposed on the speech of broadcasters who understandably have wanted to ensure that they did everything in their power to avoid, in the first place, the expense, risk, and uncertainty of indecency “Holds.”⁷

⁶ Earlier this year, when television stations faced a deadline for uploading material to their online public files, the FCC did waive the need to upload issues/programs lists from prior renewal terms at issue in previous pending renewal applications; the FCC still made clear that such records needed to be retained and made available to the public. *Memorandum Opinion and Order, Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, MM Docket No. 00-168, DA 13-128, released Jan. 31, 2012, at ¶¶ 6-7 (Chief, Media Bureau). The order *exempted* only issues/programs lists.

⁷ As the Commission is well aware, effective July 20, 2007, broadcasters’ potential forfeiture liability for each violation or for each day of a “continuing” violation increased from \$32,500 to \$325,000, with a \$3,000,000 cap for any continuing violation. *Increase of Forfeiture Maxima for Obscene, Indecent, and Profane Broadcasts To Implement the Broadcast Decency*

Procedural Reform. For years -- in the 1980s, 1990s, and the first part of this century -- the FCC processed and addressed indecency-based complaints in a more accelerated fashion that did not involve subjecting extensive numbers of broadcast renewal and sale applications to enforcement “Holds.”

This processing typically involved two steps -- first a procedural review and then a substantive evaluation. Given the constitutional protection afforded allegedly indecent speech as well as the critical role that context played in indecency determinations, the FCC insisted that complainants provide as full a record as possible for its evaluations of indecency allegations.⁸

For a complaint to avoid dismissal, the FCC applied the following procedural standard:

In order for a complaint to be considered, our practice is that it must generally include: (1) a full or partial tape or transcript or significant excerpts of the program; (2) the date and time of the broadcast; and (3) the call sign of the station involved If a complaint does not contain the supporting material described above, . . . it is usually dismissed by a letter to the complainant advising of the deficiency.⁹

In dismissing procedurally deficient submissions, the FCC reminded complainants that “prior to Commission inquiry concerning an alleged violation of the rules, a complainant must provide *prima facie* evidence of a violation.”¹⁰

Enforcement Act of 2005, 72 Fed. Reg. 33,913 (June 20, 2007). Any concern that broadcasters felt about “clouds” on their licenses or any hesitancy or “chill” that they experienced because of unclear Commission policies was magnified once this much higher forfeiture amount went into effect.

⁸ *Policy Statement, Industry Guidance on the Commission’s Case Law Interpreting 18 USC § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 23 Com. Reg. (P&F) 857, 867-68 (2001) (“2001 Policy Statement”).

⁹ *Id.* at 867.

¹⁰ *See, e.g.*, Letter of Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, to Mr. & Mrs. Matt Olson, EB-00-IH-0187/RBP, *appended to* Press Statement of Commissioner Gloria Tristani, 2001 FCC LEXIS 1914, April 5, 2001.

The FCC did not apply this policy in draconian fashion. In multiple instances, the FCC found substantive violations of its indecency policy even if the complainant had not submitted a tape or a transcript, determining that the complainant's description constituted a sufficiently "significant excerpt."¹¹

While the Commission undertakes the lengthy process of attempting to define appropriate substantive standards for any indecency policy, it is time to return to the procedural rigor required by the FCC's own precedent. During this pending proceeding, the FCC staff should, at a minimum, evaluate each indecency complaint that the agency receives against this standard -- does it include a tape, transcript, or significant excerpt; does it provide the date and time of the broadcast; and does it provide the call sign of the station involved? As it has done more recently, the FCC should also ensure that the complainant is a resident of the listening or viewing area of the affected station.¹² Given this requirement that the complainant be local, it is also important that the tape be recorded from a local station, or a transcript or excerpt similarly show evidence of listening or actual viewing by the complainant. (To ensure that a complainant is "local" to the station's service area, the Commission may want to require a declaration, consistent with Section 1.16 of its rules, attesting to the fact that the complainant actually listened to or watched the broadcast allegedly aired by the specified station.) Absent such an approach in this sensitive

¹¹ See, e.g., *Emmis Radio License Corp.*, 32 Com. Reg. (P&F) 228, 232 (2004); *Citicasters Co.*, 15 Rcd. 19095, 19096 (Chief, Enf. Bur. 2000); *Nationwide Communications Inc.*, 6 Rcd. 3585 (Chief, Mass Med. Bur.). In *Nationwide*, a radio case that found a tape or transcript unnecessary since the complaint involved the airing of a commercially available recording, the FCC noted that, in television cases by contrast, it would "normally require the submission of a tape of the actual broadcast" because television station broadcasts of pre-recorded videos could involve different "cuts" of such videos, and stations "may themselves make further edits." *Id.* at 3697 n.2.

¹² *Forfeiture Order, Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married By America" on April 7, 2003*, 23 FCC Rcd. 3222 n.2 (2008) (and cases cited therein).

First Amendment area and prompt dismissal of procedurally deficient complaints, stations are likely to find their applications -- and their interest in unfettered speech -- held hostage to unsubstantiated complaints during the lengthy policy review.¹³

¹³ Although not required by precedent but definitely consistent with constitutional concerns in ensuring unfettered speech and allowing defense of challenged speech, the FCC should consider making a copy of any indecency complaint available to the affected broadcaster. *See 2001 Policy Statement*, 23 Com. Reg. (P&F) at 869 (Separate Statement of Commissioner Susan Ness).

Joint Broadcasters urge the FCC to follow existing precedent and dismiss as insufficient any indecency complaints that lack a tape, transcript or significant excerpt from the complainant's locally observed broadcast; the date and time of the allegedly indecent broadcast; and the call sign of the station.

Respectfully submitted,

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Cordillera Communications, Inc.
Cox Media Group, LLC
First Media Radio, LLC
FoxCo Acquisition, LLC
GoodRadio.TV, LLC
Granite Broadcasting Corporation
Local TV Holdings, LLC
Media General, Inc.
Meredith Corporation
Midwest Television Inc.
Palm Beach Broadcasting LLC
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ATTACHMENT A

Allbritton Communications Company

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Cox Media Group, LLC

First Media Radio, LLC

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