

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

In the Matter of)
)
FCC Reduces Backlog of Broadcast)
Indecency Complaints by 70% (More Than) GN Docket No. 13-86
One Million Complaints); Seeks Comment)
on Adopting Egregious Cases Policy)

To: The Commission

COMMENTS OF MORGAN MURPHY MEDIA

Morgan Murphy Media (“Morgan Murphy”),¹ by counsel, responds to the Federal Communications Commission’s (“Commission”) Public Notice (“Public Notice”),² which asks whether the Commission “should make changes to its current broadcast indecency policies or maintain them as they are.” In the Public Notice, the Commission announces that its Enforcement Bureau has been directed “to focus its indecency enforcement resources on egregious cases and to reduce the backlog of pending broadcast indecency complaints.”³ Morgan Murphy supports the effort to focus enforcement on only the most egregious cases and to clear the backlog of complaints. Without more, however, these steps are only a partial measure toward adopting an indecency policy that fulfills the FCC’s legal obligations and treats broadcasters fairly in light of potential abuses of the system through the filing of frivolous indecency complaints.

¹ Morgan Murphy Media includes: Television Wisconsin, Inc. (WISC-TV, Madison, WI), QueenB Radio Wisconsin, Inc. (WPVL[AM] & WPVL-FM, Platteville, WI; WGLR[AM] & WGLR-FM, Lancaster, WI; KIYX-FM, Sageville, IA), Spokane Television, Inc. (KXLY-TV, Spokane, WA); QueenB Radio, Inc. (KZZU-FM, Spokane, WA; KEZE-FM, Spokane, WA, KXLY[AM] & KXLY-FM, Spokane WA; KHTQ [FM], Hayden, ID; KVNI [AM], Coeur d’Alene, ID; KXLX[AM], Airway Heights, WA), Apple Valley Broadcasting, Inc. (KAPP-TV, Yakima, WA, KVEW-TV, Kennewick, WA), and QueenB Television, LLC (WKBT-TV, La Crosse, WI).

² *FCC Reduces Backlog of Broadcast Indecency Complaints By 70% (More than One Million Complaints); Seeks Comment on Adopting Egregious Cases Policy*, Public Notice, GN Docket No. 13-86, DA 13-581 (rel. Apr. 1, 2013).

³ *Id.*

For almost 70 years, Morgan Murphy, like other broadcasters, has taken great pride in its commitment to community service and local broadcasting. In small- and medium-sized markets in Washington, Wisconsin, Idaho and Iowa, Morgan Murphy stations have fulfilled broadcasting's core mandate as a local outlet of news and information, particularly for breaking news and for information about local emergencies. Morgan Murphy has a long-standing and clearly demonstrated commitment to localism.

Morgan Murphy makes diligent efforts to avoid broadcasting indecent content on its stations, but the Commission's current indecency policy is, at times, profoundly problematic for even the most diligent broadcasters. While Federal law prohibits the broadcast of "any obscene, indecent or profane language,"⁴ broadcasters and courts have challenged the Commission's specific enforcement of policies against indecency on Constitutional and other grounds.⁵ Broadcasters have argued before the U.S. Supreme Court that there are issues regarding sufficient notice of what conduct is specifically prohibited under the Commission's policy. The Commission has stated that for material to be indecent it must depict sexual or excretory organs or activities and be patently offensive as measured by contemporary community standards for the broadcast medium.⁶ It is challenging for broadcasters to apply context-specific legal definitions such as "patently offensive" and "contemporary community standards" to their day-to-day operations, particularly when covering live or breaking news and sporting events.

With the potential chilling effects of these broad policies, broadcasters often have to devote significant resources to screen content or run the risk of massive fines. These fines are

⁴ 18 U.S.C. §1464.

⁵ See, e.g., *FCC v Fox Television Stations*, 132 S.Ct. 2307 (2012).

⁶ The Commission has explained that it finds the following factors to be significant in making an indecency determination: "(1) [T]he explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value." *Industry Guidance on Commission's Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd. 7999, 8003 (2001).

not adjusted based on the broadcaster's financial position, so the risk disproportionately burdens smaller-market broadcasters. Broadcasters sometimes go to extraordinary and inefficient lengths to comply with the policy, despite the First Amendment protections that broadcasters should enjoy. In this respect, Morgan Murphy urges the Commission, to the extent practicable, to define broadcast indecency and its enforcement principles in a manner that gives broadcasters the clearest possible notice of proscribed content.

Even if "indecent" prohibited programming could be clearly defined, the Commission's current complaint-driven policies are overly burdensome to broadcasters. The complaint-driven process shifts significant costs to broadcasters when meritless complaints are filed, and the Enforcement Bureau's policies place significant pressure on broadcasters to sign away important rights as the cost of conducting legitimate business before the Commission. The current system permits the filing of informal indecency complaints against broadcasters without any showing that the complaint is *bona fide*, not frivolous.⁷ As Morgan Murphy and others have found, the filing of an indecency complaint with the FCC may result in the Enforcement Bureau placing a hold on applications subsequently filed by the broadcaster in the ordinary course – for example, in seeking Commission approval for a license renewal or for assignment or transfer of control of a broadcast station license. The hold often forces the broadcaster into protracted negotiations with Commission staff to clear the hold so that the broadcaster can conduct legitimate business. Often, these negotiations specifically exclude any consideration of the merits of the complaints. The Commission staff requires the broadcaster to make significant concessions to gain approval of the application, such as a consent decree (where by the station pays a penalty to resolve the complaint) or a tolling agreement (whereby the station foregoes its legal rights to challenge a

⁷ In its experience, requiring the complainant to make an affirmative showing that the complainant actually lives in the station's service area and watched the allegedly indecent broadcast would itself go a long way toward deterring abuse of the complaint process.

Commission decision on statute-of-limitations grounds). Commission inaction on indecency complaints over a protracted period greatly increases the likelihood that an informal complaint will result in an enforcement hold at the time a broadcaster must file an application for a license renewal or other application.

In light of these concerns, Morgan Murphy encourages the Commission to take the following steps:

1) The Commission should focus only on “egregious indecency cases.”

Morgan Murphy applauds the Commission’s effort to focus on “egregious cases” of broadcast indecency. Such prioritization reflects a better use of the Commission’s resources and an implicit understanding that a large number of nonactionable complaints have been filed with the Commission. The Commission itself notes the closing of complaints that were outside the limitations period, too stale to pursue, were outside the Commission’s jurisdiction, that contained insufficient information or were foreclosed by settled precedent.⁸

Moreover, Morgan Murphy believes that a broadcaster’s isolated violations of the broadcast indecency policy, however defined, should not be actionable by the Commission. This includes instances of the use of isolated expletives or nudity that otherwise could be deemed “indecent” for purposes of 18 U.S.C. §1464. Only deliberate and repetitive uses in a patently offensive manner should be deemed “actionably indecent” under the Commission’s policies. In certain cases, it is impossible for the broadcaster to reasonably prevent the broadcast of arguably indecent material, particularly in the context of live news or sports programming where members of the public are present. Indeed, with respect to news, the Commission has stated that “in light of the important First Amendment interests at stake as well as the crucial role that context plays in our indecency determinations, it is imperative that we proceed with the utmost restraint when

⁸ Public Notice at 1.

it comes to news programming.”⁹ Finding a “fleeting expletive” to be actionably indecent creates overdeterrence and puts significant station resources at tremendous financial risk in light of the potentially large penalties. Accordingly, Morgan Murphy urges the Commission to proceed cautiously and to decline to enforce its policies with respect to these isolated instances.

2) *The Commission should adopt a prompt processing policy for indecency complaints*

While the Commission invites comment on “the Commission’s substantive indecency policies,”¹⁰ such policies do not exist in a vacuum. Morgan Murphy is aware of instances where broadcast indecency complaints have languished at the Commission for many years, apparently because the Commission has declined to process them. These complaints, whether meritorious or frivolous, have required these broadcasters to devote significant resources to obtaining clearance from the Commission for ordinary business, such as license renewals and approvals of applications. In many cases, the need to expend these resources would have been eliminated if the Commission had taken reasonably prompt action to address the complaint. It is noteworthy that the Public Notice reveals that the Commission has resolved more than 1,000,000 indecency complaints in the period from September 2012 to April 1, 2013. Had these complaints been handled in a more timely manner, the Commission would have conserved significant personnel resources. Accordingly, the Commission should take prompt action to close pending complaints that are “beyond the statute of limitations or too stale to pursue, that [involve] cases outside FCC jurisdiction, that [contain] insufficient information, or that [are] foreclosed by settled precedent.”

⁹ See *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Order, 21 FCC Rcd 13229, 13327 (rel. Nov. 6, 2006), vacated and remanded by *Fox TV Stations, Inc. v. FCC*, 489 F.3d 444 (2d. Cir. 2007); vacated and remanded by *Fox TV, Inc. v. FCC*, 613 F.3d 317 (2d. Cir. 2010); vacated and remanded by *FCC v Fox Television Stations*, 132 S.Ct. 2307 (2012).

¹⁰ Public Notice at 2.

As the Commission has recognized, “consideration of meritless challenges wastes the Commission’s resources,”¹¹ and undermines the public interest.

While certain “egregious cases” may require more processing time if they raise novel or complex issues, the record shows that the Commission can dispose of a large number of complaints expeditiously simply by applying existing rules. The Commission and the broadcasting community would benefit from the Commission’s efforts to process such complaints accordingly.

Conclusion

For the above-stated reasons, Morgan Murphy requests that the Commission grant the requested relief to the extent described herein.

Respectfully submitted,

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¹¹ See Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes, Report and Order, 5 FCC Rcd 3911, 3912 (1990)(relating to Commission consideration of “abusive” petitions to deny).