

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

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

To: The Commission

**Curtis J Neeley Jr REPLY TO COMMENTS OF THE
TechFreedom, Public Knowledge, Electronic Frontier Foundation,
and the Center for Democracy & Technology on
Broadcast Indecency Policy
GN Docket No. 13-86**

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1. These organizations often differ on many questions facing the FCC but joined together in late 2011 for a nearly frivolous amicus briefings to urge the Supreme Court to strike down FCC's indecency regulations as a relic of a bygone era when Americans had few choices for video programming, and little control over content allowed into homes. These nearly frivolous filings had absolutely no impact except in donations encouragement. Broadcasting has exponentially increased as a harmful force "*intruding in the home*" in a multitude of unsafe and unregulated media. The government's recent common-sense efforts to censor obscene, indecent, and profane content broadcast to the unwitting public per 47 USC §1464 are as firmly grounded as the right to free speech and any other fundamental human right. Regulating the First Amendment rights with respect to the associated duties of broadcasting speech to the potentially unwitting public has always been mandated by the Communications Act.²

2. In *Fox v. FCC*, the Supreme Court acknowledged the FCC's regulations in this area but ruled these changes lacked fair notice.³ This was the latest litigation that has dragged on for nearly eight years at enormous cost, leaving the broadcast industry confessed due to lack of common-sense and leaving a key question unresolved. Shouldn't ALL media used for communications now be made to conform to the Communications Act as written as well as the authorization to regulate broadcasting to the unwitting public acknowledged to be constitutional limitations of free speech in *Pacifica*?

¹ Brief of the CATO Institute, Center for Democracy & Technology, Electronic Frontier Foundation, Public Knowledge, and TechFreedom as Amicus Curiae, *FCC v. Fox Television Stations*, 132 S.Ct 2307 (2012), available at http://www.wired.com/images_blogs/threatlevel/2011/11/fox_indecency_amicus.pdf. See also Berin Szoka, Time for the Supreme Court to End FCC Indecency Censorship, Huffington Post (Jan. 11, 2012), http://www.huffingtonpost.com/berin-szoka/fcc-indecency-censorship-_b_1200015.html.

² The Supreme Court has generally held that obscenity is not protected speech. *Roth v. United States*, 354 U.S. 476 (1957). According to this reasoning, the First Amendment simply does not apply to obscenity. However, the FCC policies in question here do not deal with obscenity, but with indecency—a category of speech protected by the First Amendment when not *per se* disturbing public safety. Indecency has been subject to much attempted regulation and an exceeding attempt to gain inappropriately unqualified First Amendment protection.

³ *FCC v. Fox Television Stations*, (10-1293)(2012). “**First**, because the Court resolves these cases on fair notice grounds under the Due Process Clause, it need not address the First Amendment implications of the Commission’s indecency policy or reconsider *Pacifica* at this time. **Second**, because the Court rules that Fox and ABC lacked notice at the time of their broadcasts that their material could be found actionably indecent under then-existing policies, the Court need not address the constitutionality of the current indecency policy as expressed in the Golden Globes Order and subsequent adjudications. **Third**, this opinion leaves the Commission free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements and leaves courts free to review the current, or any modified, policy in light of its content and application.” <<< TEXT Wholly ignored but included in the Electronic Freedom Foundation et al frivolous 13-86 filing.

3. Right now, RF broadcasters have no certainty as of indecency enforcement laws because many are like the Electronic Freedom Foundation, et al and are unwilling to apply common-sense. A recent example of twisting facts by Electronic Freedom Foundation, et al highlighted this: Former FCC Chairman Julius Genachowski declined to begin indecency enforcement action against broadcasters airing Boston's David Ortiz's clearly indecent remark after the Boston Marathon bombing. Such applicability of the law depending on common-sense leaves organizations like Electronic Freedom Foundation, et al obviously confused. FCC Commissioner's common-sense judgment of Ortiz's "speaking from his heart," would apply only to excuse live coverage and would obviously not excuse recorded replay of the indecent incident.⁴ Whatever the FCC's rules of indecency become these should be made exceedingly clear for even elderly justices beginning to face issues of senility. Electronic Freedom Foundation, et al believe these should be spelled out specifically and not be left depending on common-sense. The First Amendment portion of the freedom Mr Ortiz inappropriately "abused" with indecent speech used before children demands no less than common-sense decisions with ultimate criminal punishments left to juries. A \$1000.00 fine to Mr Ortiz would be appropriate.

4. The Commission's proposal to only address "egregious" incidents of indecency is a step in the right direction as was recent dismissal of more than a million non-meritorious complaints against broadcasters. This demonstrates renewed attention to the Communications Act and rights and RESPONSIBILITIES of broadcast speakers. When the full Commission formulates any explanations of existing indecency policies, the Commission must recognize changes in media landscape underscore traditional arguments supporting limits of broadcasters' First Amendment rights with respect to the safety mandated regulated by the FCC by the Communications Act for interstate and world-wide communications used in commerce when broadcast to the unwitting public, regardless of media.

5. Broadcast indecency rules should require only common-sense to understand or debate. The statutory basis for indecency censorship is unrelated to the archaic Supreme Court 1978 Pacifica explanation of the Communications Act. None of the three justifications listed for indecency regulation remain valid though ensuring public safety is a bedrock foundation that easily supports ALL media censorship when made to the unknown and potentially unwitting public.

6. In short, Electronic Freedom Foundation, et al comment hoped the FCC would cease indecency regulation like supports anonymous pornography consumption “online” while the weighty question of indecency trafficking is being resolved. Broadcast speakers should not have to defend themselves against vague and subjective accusations without a method to confront the accusers.

7. Electronic Freedom Foundation, et al took no position in 13-86 and wasted FCC time. Electronic Freedom Foundation, et al urged the FCC to remember the Supreme Court's archaic admonition written before the Lord Most Honorable John Paul Stevens had retired but after Lord Most Honorable John Paul Stevens first invented the mysterious [sic] “*internet*” medium that was always simple wire communications by saying, “[I]t is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.”⁶

⁴ Elizabeth Titus, FCC Chairman Julius Genachowski Tweets on David Ortiz F-bomb, Politico (Apr. 20, 2013), <http://www.politico.com/story/2013/04/fcc-julius-genachowski-david-ortiz-twitter-90376.html>.

⁵ *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000).

⁶ *Playboy*, 529 U.S. At 824.

⁷ RF used herein as radio and television transmissions using radio frequencies

8. Over-the-air RF broadcasting⁷ faces significant challenges from new media and increasing demands for spectrum used for Wi-Fi wire communications. Radio and television spectrum sharing with Wi-Fi depends, in part, on choices made by Congress and the FCC. New technologies are challenging the business model of RF broadcasting and most RF broadcasters are changing business models in response. Whatever the future of RF broadcasting might be, there is no question that broadcasters have the same First Amendment rights and duties to respect public broadcasting as all other speakers.

Failure is impossible,
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