

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

In the Matter of )  
  )     GN Docket No. 13-86  
Substantive Indecency Policy            )  
  )

**Curtis J Neeley Jr's Reply to  
COMMENTS BY CHRISTOPHER M. FAIRMAN**

Curtis J Neeley Jr is a severely brain injured pauper who is paralyzed but will not stop litigation against the FCC until the clearly idiotic mistake of never regulating [sic] “internet” wire communications and [sic] “internet” radio communications resolve to nothing but another regulated broadcast media per the Communications Act and until search engines stop trafficking pornography to the anonymous as is the most profitable activity on Earth and has been illegal since the first day done.

The FCC was given the mission of regulating communications safely in 1934 or roughly sixty-three years before Lord Most Honorable John Paul Stevens created the improper term [sic] “internet” in 1997 at age (77) and alleged this to be a *“unique and wholly new medium”* exempt from regulation supported by the Communications Act but explained with archaic thirty-five year old language from before the explosion of media technology started with cable wires communicating unregulated communications used in interstate and world-wide communications used in commerce.

Failure is impossible,  
/s/ Curtis J Neeley Jr  
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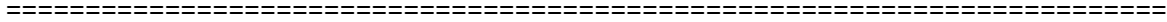
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## SUMMARY

“Professor Fuck” wished for the Commission to abandon regulation of broadcast indecency per §1464 or the core mission of the Agency and entered an over fifty-page demonstration of law schools failing to educate or even pretend to respect US law.. The Commission and the Supreme Court once explained indecency regulation inadequately based on the unique, pervasive presence of broadcast media and the need to protect children from unsupervised access to it. This convoluted legal basis for explaining enforcement of §1464 is no longer needed and has only subverted the intentions of Congress. Thirty-five years of technological change make RF broadcasting of television/radio only one tired singer in the loud chorus of media that now surround the public in homes and most everywhere else. Technological blame-shifting HOAXES deluded parents with the V-chip and similar tools to believe controlling access to ALL media was possible prior to Wikileaks and revelation of NSA technique. Indecency regulation should now occur regardless of the venue used for broadcast including ALL audio, video, and [sic] “internet” broadcasting of communications.

The obvious reasons for Commission revision of indecency proscription policy abound. Unregulated broadcasting of indecent language has changed United States culture and demonstrated that children and adults repeat what is heard or seen – even if indecent. The Commission must uses citizen complaints as one manner for determining contemporary community standards by the affected public audience of broadcasting as is proper. The Commission must now universally proscribe all broadcasting of indecency to the anonymous as is constitutionally sound and has become such obviously needed that failure is impossible.

The Commission should rebuild the broken regulatory clock and universally apply indecency proscription made clear in *Golden Globe II*. The agency should further explain the *per se* rule and return to recognizing the irrelevance of sexual and nonsexual uses of “fuck” and similar language. Fleeting expletives and naked displays should be proscribed and profanity as an independent violation should depend wholly on the community standards of the intended or exposed broadcast audience.

Failure is impossible,  
/s/ Curtis J Neeley Jr

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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Substantive Indecency Policy )

) GN Docket No. 13-86

To: The Commission )

1

**Curtis J Neeley Jr's Reply to**  
**Comments By Christopher M. Fairman**

“Professor Fuck” at the Michael E. Moritz College of Law at The Ohio State University has focused on the term “fuck” for over ten years. “Professor Fuck” professes “scholarly” fascination with law and indecent language. The broadcast indecency policy of the Federal Communications Commission (FCC or Commission) is one of the key reasons “Professor Fuck” uses the term “scholarly” to flavor morbid curiosity as acceptable. “Professor Fuck” previously published an “*article*” expressing morbid curiosity about regulation of indecent language in a “law” review article, *Fuck*, 28 CARDOZO L. REV. 1711 (2007), and in a recent book, F\*CK: WORD TABOO AND PROTECTING OUR FIRST AMENDMENT LIBERTIES (Sourcebooks 2009). In addition, “Professor Fuck” has a forthcoming article entitled *Institutionalized Word Taboo: The Continuing Saga of FCC Indecency Regulation*, 2013 MICHIGAN ST. L. REV. forthcoming 2013).<sup>1</sup> Because of pervasive morbid curiosity, “Professor Fuck”, was described by the NEW YORK TIMES as the “nation’s leading authority on the legal status of the word “fuck.”<sup>2</sup> The views expressed in these publications, as well as the public commentary entered are personal for “Professor Fuck” but have been used to provide form and flavor for this reply that is entered personally by Curtis J Neeley Jr, the Plaintiff in *Neeley Jr v FCC, et al*, (5:12-cv-5208) (13-1506). That may be dismissed due to the tenor of Mr Neeley filings that offend misbehaving elder members of the oligarchy refusing to retire and clinging to king-like power despite changes in culture and technology and aging far beyond usual retirement ages for Americans as is clearly NOT “during good behavior”.

Failure is impossible,  
/s/Curtis J Neeley Jr

2 **Historical and Procedural Background of *Pacifica* and Policy of Intentional Nonfeasance by FCC to Avoid a Culturally Irrelevant Oligarchy.**

Title 18 U.S.C. § 1464 provides clear statutory authority for the Commission's regulation of indecent language. It states that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both." The FCC mission is enforcement of safe communications. Although the Commission had the authority to regulate indecent broadcasts under §1464 since 1948, the FCC did not begin until common popularity of radio broadcasting reached a "critical mass" in the late 70's.

The Commission's current policy debate about regulating broadcast indecency has its genesis in *FCC v. Pacifica Foundation*. Following New York City radio station WBAI's broadcast of George Carlin's "Filthy Words"<sup>7</sup> routine at 2:00 p.m. on Tuesday, October 30, 1973, a lone citizen complained as is as significant as one citizen being raped.

This provided a test opportunity for FCC's interpretation of indecency. Prior to *Pacifica*, the Commission had relied substantially on the definition of obscenity. The Supreme Court had, however, recently refined its obscenity definition to include an appeal-to-the-prurient-interest standard.

Wanting to divorce indecency from exclusively obscenity, the Commission announced what should have read as follows: "the concept of 'indecent' is intimately connected with the exposure of children to language that describes, in terms patently offensive to contemporary community standards for the broadcast medium [...made] at times of the day when there is a reasonable risk that children may be in the audience."

From its inception, special regulation of broadcast indecency was explained due to intrusive presence of radios in the home and accessibility of radios by unsupervised children.<sup>13</sup> The Supreme Court oligarchy described Commission's authority to regulate broadcast indecency as constitutional under the First Amendment in *Pacifica* before cable wired television.

Understanding permissible indecency regulation motivated careful dissection of the oligarchy opinions because the majority parts ways on the First Amendment analysis. Justice Stevens, joined by Chief Justice Burger and Justice Rehnquist, based analysis on the relative value of the content of the speech. Stevens wrote that "patently offensive references [...] and activities [...] surely lie at the periphery of First Amendment concern."

On the central question of whether the First Amendment permitted any restriction on indecent speech, Stevens characterized Carlin's monologue as "no essential part of any exposition of ideas" and "of such slight social value," with any benefit being "clearly outweighed by the social interest in order and morality."

Stevens recognized that broadcasting indecency required special treatment. First, broadcast media was different because of its "pervasive presence." Patently offensive, indecent material broadcast "over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."

Additionally, broadcasting is uniquely accessible to children. Stevens claimed that "*Pacifica's* broadcast could have enlarged a child's vocabulary in an instant."<sup>19</sup> Consequently, the FCC's special treatment for indecent broadcasting was reasonable under the circumstances. Nonetheless, Stevens emphasized the narrowness of the holding. Of particular importance, Stevens made clear that the Court had "not decided that an occasional expletive in either setting would justify any sanction."

Justice Powell, joined by Blackmun, concurred with the protection of children rationale. Powell agreed that the FCC was primarily concerned with preventing the broadcast of indecent speech from reaching the unsupervised ears of children. Similarly, Powell agreed about the uniqueness of broadcast media and its ability to invade the privacy of the home, “the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds.”<sup>23</sup> and this clearly supports regulation of [sic] “internet” broadcasting.

He also reiterated the limited nature of the case: “The Commission’s holding, and certainly the Court’s holding today, does not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent here.”<sup>24</sup>

Properly understood, the holding in *Pacifica* is quite narrow. The majority of the Court holds that the FCC should regulate broadcast indecency because of the pervasive presence of broadcast media and the potential impact on unsupervised children per §1464. The five Justice majority underscored the holding does not apply to the occasional, isolated expletive used in private “two-way radio”<sup>25</sup> communications indicating broadcasting to anonymous unknown parties uninvited as was barely addressed after *Pacifica* due the improper fixation on medium.

Given the inarticulate explanation of FCC authority given by the Court in *Pacifica*, the FCC began nonfeasance by near non-enforcement for over a decade. First, it limited its focus to the broadcast of the seven taboo words at issue in *Pacifica*.<sup>27</sup> Additionally, it created a safe harbor for indecent broadcasts between the hours of 10:00 p.m. And 6:00 a.m.<sup>28</sup> The FCC continued to coddle indecency broadcasters such that “fleeting” uses of indecent language were only subjected to enforcement actions if vociferous complaints were received. As a result, the FCC took no action against a broadcaster for indecency from 1975 until 1987.<sup>30</sup>



### **Infinity Order and Policy Statement.**

In 1987, the FCC began its shift away from nonfeasance by issuing the Infinity Order—a ruling affirming three broadcasts as indecent.<sup>31</sup> The FCC explained no longer taking the nonfeasance to view finding of indecency required the use of one of the seven “dirty words” used in Carlin’s monologue.<sup>32</sup> The FCC said it made no legal or policy sense to regulate the Carlin monologue but not “material that portrayed [...] in [] patently offensive a manner[s]” simply because of avoiding certain words.<sup>33</sup> The FCC instead would use the generic definition of indecency articulated in its prior decision in *Pacifica*.

Under the Commission’s definition, “indecent speech is language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium[...].”<sup>34</sup> The FCC reaffirmed to avoid litigation that fleeting expletives would not generally be actionable.<sup>35</sup> The FCC preserved the distinction between literal and nonliteral uses of evocative language; deliberate and repetitive use was a requisite to a finding of indecency when a complaint focused solely on the use on nonliteral expletives.<sup>36</sup> Nonfeasance and mitigation of porn-hounds avoided costly litigation and once-again facing an aging oligarchy regarding technological issues not the least bit a part of these aging jurors lives.

The uncertainty generated after the Infinity Order by the changes in United States culture and spreading plague of addiction to [sic] “internet pornography” led the FCC to issue a Policy Statement in 2001 to provide guidance to the broadcast industry on enforcement of §1464.<sup>37</sup> The Policy Statement restated the nonfeasant definition indecent broadcasting. First, the material must depict sexual or excretory organs or activities.<sup>38</sup> If so, then the FCC determines if the material is patently offensive as measured by community standards for the broadcast medium.<sup>39</sup> To provide a framework for determining what it considered patently offensive, the FCC explained that three factors proved significant:

“(1) the explicitness or graphic nature of the description or depiction[...]; (2) whether the material dwells on or repeats at length descriptions of [explicit or graphic] activities; [and] (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.”<sup>40</sup>

With regard to the second factor, the FCC improperly explained that repetition of and persistent focus on material had been cited consistently as factors that exacerbated the potential offensiveness of broadcasts.<sup>41</sup>

## ***Golden Globe II.***

Despite the Policy Statement attempting to avoid litigation before an aging oligarchy refusing to behave and retire against indecency promoters, the FCC’s approach to indecency changed dramatically following NBC’s broadcast of the Golden Globe Awards on January 19, 2003. Bono accepted the award for Best Original Song in a Motion Picture<sup>43</sup> and exclaiming with excitement: “This is really, really fucking brilliant.”<sup>44</sup> The statement was delivered live on the East Coast, but was bleeped later on the West Coast.<sup>45</sup> There were 234 total complaints to the FCC.<sup>46</sup> FCC Enforcement Bureau Chief David Solomon issued a decision of no liability on the part of the broadcasters because the Policy Statement, as a threshold matter, inappropriately required indecent speech to describe sexual or excretory organs or activities.<sup>47</sup>

Solomon concluded that Bono used “fucking” as an adjective or expletive, not to describe sex or excretory matters<sup>48</sup>, as would never have made any difference to a common juror during trial. Moreover, a fleeting and isolated use of “fuck” was considered nonactionable under FCC precedent of<sup>49</sup> of nonfeasance begun to avoid litigation with the ACLU.

The Parents Television Council helped organize the public and lobbied the Commissioners to reverse Solomon’s [ignorant] decision [because almost any use] of the word “fuck” on broadcast television<sup>50</sup> is patently offensive as “Professor Fuck” should realize by now.

On March 18, 2004—over a year after the Golden Globe Awards—the Commission granted the Parents Television Council application for review and concluded that Bono’s use of “fucking” was not only indecent, but also profane<sup>51</sup> as had been obvious to millions of United States citizens for over a year, if not obvious since early childhood for most citizens.

To reverse the Enforcement Bureau, the Commissioners made three subtle and common-sense driven departures from the previous nonfeasant policy. The Commissioners acknowledged that most any use of the word “fuck” is *per se* indecent or profane: “[W]e believe that, given the core meaning of the ‘[Fuck],’ any use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first [mitigation] prong of our [inadequate] indecency definition.”<sup>53</sup> To reach this result, the Commissioners risked facing litigation again before the aging oligarchy that was recently unable to understand bi-medium communications and had therefore called these “a unique new medium” instead of the wire communications and radio communications these always were.

The second: “While prior Commission and staff action have indicated that isolated or fleeting broadcasts of the ‘F-Word’ such as that here are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law.”<sup>56</sup> The third update was explained as another §1464 broadcast speech restriction—profanity. §1464 applies to “obscene, indecent, or profane language.”<sup>57</sup> The FCC had never yet used profanity as a basis for speech regulation.<sup>58</sup> and perhaps relied on common sense when laws prohibit three things with disjunctive language. The Commissioners recognized that the “limited case law on profane speech had focused on what is profane in the sense of blasphemy.”<sup>59</sup>

The Commissioners declared that “fuck” was profane on the strength of common knowledge that profanity meant “vulgar, irreverent, or coarse language,”<sup>60</sup> a stale Seventh Circuit case that predated the *Pacifica* ruling made by stale jurors,<sup>61</sup> and Black’s Law Dictionary.<sup>62</sup>

By 2004, the FCC's approach to indecency enforcement finally bore little resemblance to the nonfeasant policy of restraint exercised post-*Pacifica*. Under *Golden Globe II*, the FCC was now free to can fleeting expletives, any use of "fuck," and profanity. The target of enforcement included incidents of indecency that happened prior to *Golden Globe II*. This in turn spawned the *Fox* litigation as was surely expected .

## ***Fox* Litigation and the Return of Increased Nonfeasance.**

With the intention of providing substantial guidance about the types of broadcasts that were impermissible on February 21, 2006, the FCC issued an Omnibus Order resolving various complaints against several television broadcasts.<sup>63</sup> In one part of the Omnibus Order,<sup>64</sup> the FCC found four programs indecent and profane under the policy announced in *Golden Globe II* because of indecent language used. The objectionable programs were: Fox's 2002 Billboard Music Awards where, in her acceptance speech, Cher stated: "People have been telling me I'm on the way out every year, right? So fuck 'em";<sup>65</sup> Fox's 2003 Billboard Music Awards where Nicole Richie, a presenter on the show, stated: "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple";<sup>66</sup> ABC's *NYPD Blue* where in various episodes, Detective Andy Sipowitz and other characters used certain expletives including "bullshit," "dick," and "dickhead";<sup>67</sup> and CBS's *The Early Show* where during a live interview of Twila Tanner, a contestant from CBS's reality show *Survivor: Vanuatu*, the interviewee referred to a fellow contestant as a "bullshitter."<sup>68</sup>

In finding these programs indecent and profane, the FCC affirmed its decision in *Golden Globe II* that any use of the word “fuck” was presumptively indecent and profane.<sup>69</sup> The FCC then concluded that any use of the word “shit” was also presumptively indecent and profane because it is “a vulgar, graphic, and explicit description of excretory material” and “[i]ts use invariably invokes a coarse excretory image, even when its meaning is not the literal one.”<sup>70</sup> Turning to the second part of its indecency test, the FCC found that each of the programs were “patently offensive” because the material was explicit, shocking, and gratuitous.<sup>71</sup> The FCC declined to issue a forfeiture in these four cases because the broadcasts occurred before the decision in *Golden Globe II*, and thus “existing precedent would have permitted this broadcast.”<sup>73</sup>

The networks sought review of the Omnibus Order in the court of appeals.<sup>74</sup> The Second Circuit granted the FCC a voluntary remand to permit the agency to consider the networks’ arguments.<sup>75</sup> After soliciting public comments, the FCC issued a new Remand Order replacing the entire section of the Omnibus Order that dealt with the four broadcasts previously found indecent and profane.<sup>76</sup>

The Remand Order reaffirmed its conclusion that the 2002 and 2003 Billboard Music Award programs were both indecent and profane.<sup>77</sup> With regard to the 2003 Billboard Music Awards, the FCC found that it would have been indecent even prior to the decision in *Golden Globe II* because Nicole Richie used “two extremely graphic and offensive words” that were “deliberately uttered” because of “Ms. Richie’s confident and fluid delivery of the lines.”<sup>78</sup> With regard to the 2002 Billboard Music Awards, the FCC acknowledged that “it was not apparent that Fox could be penalized for Cher’s comment at the time it was broadcast.”<sup>79</sup> In both cases, the FCC rejected Fox’s argument that fleeting expletives were not actionable/ The FCC still declined to impose a forfeiture in either case<sup>81</sup> using these as fair notice.

The FCC reversed its finding against The Early Show concluding that, while “there is no outright news exception to our indecency rules,” the language was part of a news interview where it was “imperative that we proceed with the utmost restraint.”<sup>82</sup> FCC deferred to “CBS’s plausible characterization of its own programming.”<sup>83</sup> Accordingly, the FCC now denied the complaint because “regardless of whether such language would be actionable in the context of an entertainment program,” it was “neither actionably indecent nor profane in this context.”<sup>84</sup> The Remand Order also dismissed on procedural grounds the complaint against NYPD Blue. The sole complainant resided in the Eastern time zone where NYPD Blue was broadcast during the recognized safe harbor period after 10:00 pm<sup>85</sup> making the complaint frivolous.

Fox, CBS, and NBC (the “Networks”), of course, challenged the Remand Order in the Second Circuit,<sup>86</sup> raising administrative and constitutional law arguments.<sup>87</sup> The Second Circuit found the FCC’s new fleeting expletives policy arbitrary and capricious because it made “a 180-degree turn” without “a reasoned explanation justifying the about-face.”<sup>88</sup> Holding the FCC’s change in policy on fleeting expletives arbitrary and capricious, the slim majority did not decide the constitutional issues though this had been obvious for decades.

The Supreme Court reversed the Second Circuit on law principles. Justice Scalia, writing for the majority, explained that while it is well settled that under the Administrative Procedure Act (APA) the courts may set aside agency action that is arbitrary and capricious, this was a “narrow” standard of review.<sup>89</sup> The Second Circuit erred by “requiring a more substantial explanation for agency action that changes prior policy.”<sup>90</sup>

Judged under the proper standard, the majority found the FCC's new indecency enforcement policy was neither arbitrary nor capricious.<sup>91</sup> Having found the FCC's action to be neither arbitrary nor capricious, the Supreme Court remanded the case to the Second Circuit to rule on the constitutionality of the FCC's orders.<sup>92</sup>

On remand, the Second Circuit addressed the constitutional questions that it had reserved from the prior decision. In an expression of poor behavior the panel was unanimous that the FCC's indecency policy was unconstitutionally vague and therefore invalid in its entirety.<sup>93</sup> The court of appeals identified the FCC's inconsistency in determining words to be patently offensive, such as the conclusion that "bullshit" in an NYPD Blue episode was patently offensive but "dick" and "dickhead" were not.<sup>94</sup> The Second Circuit rejected the FCC's argument that it needed a flexible standard because it could not anticipate how broadcasters would attempt to circumvent the prohibition on indecent speech rather than follow it.<sup>95</sup>

The court also found the FCC's presumptive prohibition on the words "fuck" and "shit" impermissibly vague due to the application of two exceptions. According to the court, the FCC could not even articulate much less apply the "bona fide news exception."<sup>96</sup> Thus, the FCC found the use of the word "bullshitter" on CBS's The Early Show to be "shocking and gratuitous" because it occurred "during a morning television interview," before reversing itself because the broadcast was a "bona fide news interview."<sup>97</sup> "In other words, the FCC reached diametrically opposite conclusions at different stages of the proceedings for precisely the same reason—that the word bullshitter was uttered during a news program."<sup>98</sup>

Similarly, the court criticized application of the FCC's artistic necessity exception, in which fleeting expletives are permissible if they are "demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance."<sup>99</sup>

The court compared the disparate treatment of *Saving Private Ryan*<sup>100</sup> and the documentary *The Blues*. The FCC decided that the words “fuck” and “shit” were more integral to the realism and immediacy of the film experience for viewers in *Saving Private Ryan*, “a mainstream movie with a familiar cultural milieu,” than such words were in *The Blues*, which “profiled an outsider genre of musical experience.”<sup>101</sup> While the FCC argued that a context-based approach was necessary, the court lacked any discernible standards by which individual contexts are judged.<sup>102</sup> According to the Second Circuit, there was ample evidence that the FCC’s indecency policy chills protected speech.<sup>103</sup>

Following the Second Circuit’s decision in *Fox II*, the court had the opportunity to apply its holding to fleeting nudity in *ABC, Inc. v. FCC*.<sup>104</sup> Displays of buttocks fell within the category of displays of sexual or excretory organs because the depiction was “widely associated with sexual arousal and closely associated by most people with excretory activities.”<sup>107</sup> The FCC deemed the scene patently offensive as measured by contemporary community standards and the nudity was presented in a manner that clearly panders to and titillates the audience.<sup>108</sup> The FCC then imposed a forfeiture of \$27,500 on each of the (45) ABC-affiliated stations that aired the indecent episode.<sup>109</sup> Finding no significant difference between this case and *Fox*, and bound by that panel’s decision striking down the FCC’s indecency policy in its entirety, the Second Circuit vacated the forfeiture order in a summary opinion.<sup>110</sup>

The Supreme Court granted certiorari in both cases and consolidated them for argument.<sup>111</sup> Once again the Court managed to resolve the case while dodging the central question of whether the First Amendment protects broadcasting of indecent language. The Court made clear the FCC was not free to change indecency regulation without notice.



Justice Sotomayor recused and Ginsburg concurred in the judgment only), the Supreme Court held that the FCC's fleeting expletives and nudity policy was unconstitutionally vague because it failed to give proper notice to broadcasters.<sup>112</sup> Justice Kennedy, writing for the Court, noted that the regulatory history "makes it apparent that the Commission policy in place at the time of the broadcasts gave no notice to Fox or ABC that a fleeting expletive or a brief shot of nudity could be actionably indecent; yet Fox and ABC were found to be in violation."<sup>113</sup>

The Court set aside the FCC orders for vagueness as applied to the Fox and ABC broadcasts and made clear just how limited its decision was. The Court resolved the cases on a failure to provide fair notice under the Due Process Clause, so that it was unnecessary to reach the First Amendment implications of the FCC's indecency policy or reconsider *Pacifica*.<sup>114</sup> The Court ruled that Fox and ABC "lacked notice at the time of their broadcasts that the material they were broadcasting could be found actionably indecent under then-existing policies."<sup>115</sup> It was unnecessary for the Court to address the constitutionality of the current indecency policy as expressed in the *Golden Globe II* and subsequent orders.<sup>116</sup> The opinion left the FCC "free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements" and "courts free to review the current policy or any modified policy in light of its content and application."<sup>117</sup>

While *Fox II* was working its way through the courts, the FCC essentially stopped pursuing all indecency complaints. By the time the Supreme Court handed down its decision in June 2012, the FCC had approximately 1.5 million indecency complaints pending, involving about 9,700 broadcasts<sup>118</sup> as should reveal the burgeoning demand for media decency. In September 2012, the Justice Department dropped a lawsuit complaining of indecent nudity in a 2003 Fox broadcast of *Married by America*.<sup>119</sup>

Chairman Genachowski ordered the Enforcement Bureau to “focus its resources on the strongest cases that involve egregious indecency violations” to reduce the backlog of pending complaints<sup>120</sup> as was an admission of nonfeasance. Three months later in December 2012, the Enforcement Bureau had already reduced the backlog to approximately a half million complaints involving about 5,500 broadcasts.<sup>121</sup> As of April 1, 2013, the Enforcement Bureau had now reduced the backlog by 70% dismissing more than one million complaints.<sup>122</sup> These dismissed complaints were described as “complaints that were beyond the statute of limitations or too stale to pursue, or involved cases outside FCC jurisdiction, containing insufficient information, or that were foreclosed by settled precedent.”<sup>123</sup>

This massive dump of complaints was apparently in response to Chairman Genachowski’s directive to reduce the pending backlog. The Commission has not yet identified an example of an “egregious indecency case” or provided any further guidance but this comment reply period will resolve this once and for everyone.

On April 1, 2013, the FCC’s Enforcement Bureau and Office of General Counsel issued a Public Notice requesting comment on whether the full Commission should make changes to its current broadcast indecency policy.<sup>125</sup> The National Association of Broadcasters (NAB) filed a request to extend the deadlines for filing comments and reply comments by 30 days.<sup>127</sup> Recognizing “the importance of affording all interested parties sufficient time to prepare their comments,” the Commission granted the request and extended the deadline for filing comments until June 19, 2013 and reply comments until July 18, 2013.<sup>128</sup>

### **3. The Commission Should Universally Enforce Regulations Proscribing Broadcast of Indecent Communications in ANY Media**

When elderly Justices at opposite ends of the judicial spectrum, such as Ginsburg and Thomas, both call for the reevaluation of *Pacifica* and its special treatment of broadcast media, its days are obviously numbered. Eventually, the Court will confront the fact that *Pacifica* is a relic that contributed to the obvious mistake of *Reno v ACLU*, (96-511) causing failure to recognize wire communications where computers replaced telegraph and facsimiles. There is little dispute that the media landscape of today is nothing like the 1970s. These changes have permanently eroded the Court's justifications in *Pacifica* for limiting regulation of broadcast indecency and the error of *Reno v ACLU*, (96-511) creating the imaginary construct of medium called [sic] "internet". The Commission should candidly recognize that all venues of media must now be regulated according to clear United States law passed by Congress.

#### **The Legal Foundation for Limiting Indecency Regulation to RF broadcasting No Longer Exists and ALL Media Including the [sic] "Internet" Must be Regulated.**

The Commission based regulation of broadcast indecency on the intrusive presence of radio waves in the home and accessibility by unsupervised children. The *Pacifica* Court adopted this view generally explaining regulation on the qualities of the radio broadcasting media. In one of his first opinions, Justice Stevens noted that broadcast media was "uniquely pervasive presence."<sup>130</sup> Not only was it pervasive, but also intrusive because material broadcast "over the airwaves confronts the citizen, not only in public, but also in the privacy of the home where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."<sup>131</sup> A younger Justice Stevens saw the listener or viewer as someone constantly tuning in and out searching for content because access was limited to chiefly broadcast media <sup>132</sup> in 1978 because Lord Noble Honorable John Paul Stevens had not yet created the mysterious new medium of [sic] "internet" during bad behavior as a (77) year old oligarch refusing to retire.

A majority for regulation was only achieved with support of Justice Powell agreeing about the uniqueness of broadcast media and its ability to invade the privacy of the home, “the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds.”<sup>133</sup> The Constitution obviously permitted government regulation of public speech to temper the effects of broadcast media intrusiveness. The Constitution has not changed nearly as much as the intrusive nature of media making regulation of ALL intrusive media clearly constitutional including the mysterious “unique and wholly new medium” of computers attached to wires and radios for wire and radio communications called [sic] “internet” by the aging (77 year-old) author of (1978) *Pacific* in his *Reno v ACLU*, (96-511)(1997) mistake.

**The pervasiveness of broadcast RF media no longer serve as justification for indecency regulation of only RF radio but both radio and wire communications defined in 47 USC §153 ¶(59) long before the *Reno v ACLU* (96-511) mistake.**

Broadcast media is still a pervasive presence in our homes and most elsewhere else we go. The Second Circuit observed that “[t]he past thirty years has seen an explosion of media sources, and broadcast television has become only one voice in the chorus.”<sup>134</sup> Today, only a tiny portion of households still rely on over-the-air broadcast radio signals for video programming. In 1978, almost the entire television viewing public relied on such broadcasts due to preceding development of cable television compared to 15% at most and perhaps as low as 8% today.<sup>135</sup> Percentages this low are “rare,” not “pervasive”. Traditional over-the-air broadcasts have been displaced. With almost 87% of households subscribing to a cable or satellite service, most viewers can alternate between broadcast and non-broadcast channels with a click of their remote control.<sup>137</sup> Let us not forget the omnipresent Internet offering access to everything from “viral” videos to feature films and, yes, even broadcasting of obvious “*indecency*”.

Minor consumers increasingly access new video content through cable, telephone, and satellite operators such as Comcast's Xfinity, EchoStar's DISH Network, AT&T's UVerse, Verizon's FIOS, and DirecTV and over [sic] "Internet" on popular websites such as YouTube, iTunes, and Hulu and PornHub; by online video streaming through services such as Netflix; and through DVD purchases and rentals.<sup>139</sup> All of these forms of media come into the home both as invited guests and as intruders that must now be regulated by the Communications Act.

One of the main factors *Pacifica* cited to justify regulation of broadcast television in 1978 was that broadcasting was a medium uniquely accessible to children.<sup>140</sup> The FCC itself acknowledges that children today "live in a media environment that is dramatically different from the one in which their parents and grandparents grew up decades ago."<sup>141</sup> Indeed, children are leading the shift away from broadcast television to a variety of improperly unregulated new media outlets and technologies such as websites, blogs, social networking services, tablet computers, MP3 players, smart phones, other mobile devices, and cable and satellite networks.<sup>142</sup> The young lead in use of concurrent wire and radio usage of [sic] "Internet".

87% of U.S. children ages twelve to seventeen use [sic] "Internet".<sup>143</sup> When children do watch broadcast content, they do so increasingly using non-broadcast devices.<sup>144</sup>

*Pacifica* concluded that broadcasting deserved only limited First Amendment protection because it was an uncontrolled medium that intruded into the privacy of one's own home. Thirty-five years later, technological innovation has created a landscape where broadcasting is no longer uniquely pervasive but is still intrusive via all media. With these facts cemented into place, limited First Amendment protection for broadcast speech should finally be obvious enough for even "Professor Fuck" to finally understand though he will never accept this.

**The need to protect children from unsupervised access to ANY broadcast media should finally be clear to even “Professor Fuck”.**

According to the (58 Year old )Stevens plurality in *Pacifica*, a corollary to the pervasive presence of broadcast media was its easy accessibility to children. Lord Stevens feared that widely available broadcast media, such as *Pacifica*'s broadcast, “could have enlarged a child’s vocabulary in an instant.”<sup>145</sup> Justice Powell agreed that the FCC was primarily concerned with preventing the broadcast of indecent speech from reaching the unsupervised ears of children.<sup>146</sup> It was a “cruel reality” that “latchkey children” from single-parent families or those with working mothers had widespread, unsupervised access to radio and television during the day.<sup>147</sup> The pervasiveness of television and radio and their reach into the home precluded an effective choice by the family to control access to unwanted programming.<sup>148</sup>

Once again technology deludes parents with blame-shifting to avoid universal regulation required by the Communications Act. Children may shield themselves from content their parents deem undesirable using tools that are never always effective.<sup>149</sup> Every television, thirteen inches or larger, sold in the United States since January 2000 contains a V-chip allowing some parents to block programs based on a standardized rating system.<sup>150</sup> Since June 11, 2009, when the United States made the transition to digital television, anyone using a digital converter box also has access to a V-chip.<sup>151</sup> The rating system uses age-based designations and several specific content descriptors (for coarse language, sex, and violence) allowing parents the ability to tailor the programming they want children to have access to<sup>152</sup> -- though avoiding media blocks is trivial for most children and always will be with the current limitations.

Cable and satellite subscribers can filter or block unwanted broadcast programming using set-top boxes that offer locking functions for individual channels and by password protecting access to channels.<sup>153</sup> Parental controls are blame shifting hoaxes but are usually available, such as DirecTV's "Locks & Limits" feature built into its equipment, which allows parents to block specific movies, lock out entire channels, and set limited viewing hours.<sup>154</sup> In addition, specialized remote controls can limit children to channels approved by their parents<sup>155</sup> requiring only getting up to change channels to avoid. Screening tools such as TVGuardian offer a "Foul Language Filter" that can filter out profanity from broadcast signals based on closed captioning.<sup>156</sup>

There are a large number of tools available to parents allowing attempts to exercise control over unregulated access to [sic] "Internet" broadcast of pornography in their own homes. Many internet service providers such as Comcast, Verizon, and Charter provide an array of OPTIONAL parental control HOAXES to subscribers.<sup>157</sup> The rise in use of DVD players, digital video recorders (DVRs), and video on demand (VOD) services provide an additional way for parents to create libraries of approved programming.<sup>158</sup> Using these tools, households are told of the elusive ability to tailor programming to their specific needs and values if accepting the blame-shifting and allowing these pervasive media to intrude.

The clear fact that parents are powerless to keep content they deem objectionable 100% away from children is obvious. Just as with broadcast media's pervasive presence, technological innovation only shifts blame from the FCC to parents for concerns over parental control and, with that, the judicial justification for denying broadcast speech full First Amendment protection is cemented into common law.

## **The Commission Should Universally Impose Regulation of Broadcasting Due Clear Evidence of Harm from Pornography and Indecent Language.**

The Commission assumes that exposure to indecent language is somehow harmful to children. As the Supreme Court oligarchy noted in *Fox I*, the FCC has “adduced no quantifiable measure of the harm caused by the language.”<sup>161</sup> Much scholarly literature exists on profanity and swearing from the fields of communication, sociology, psychology, and pediatric medicine.<sup>164</sup> To justify speech regulation, the Commission needs to demonstrate that the scientific literature shows evidence of harm as could be easily done as the harm of pervasive broadcast by media is obvious. The failure to quantify harm is unrelated to the absence of a need for evidence to support these harmful areas but obvious simply by the changes in culture.

What of the SCOTUS suggestion that children mimic behavior they observe, so programs with one-word indecent expletives produce children who may use them? In other words, will children use expletives heard on television? While it is certain that children will learn some expletives watching broadcast media, it remains the duty of parents to raise children and demand protection required already by US law for ALL broadcasting.

Continued Use of Current Policy as Enforcement  
moves to Proscribe Indecency Broadcast in ANY  
Public Media, will Protect the Natural Right  
to be Secure in the Person

Continued use of the FCC’s current indecency policy guarantees one result: some indecent speech will be prevented or chilled - brr. Broadcasters will choose between airing indecent programming and fear that the Commission or audience will agree and find the broadcast objectionable and seek sanctions and fines. Faced with this conflict, broadcasters will all too often behave and frustrate “Professor Fuck”.. This chilling effect on indecent speech is compounded by its disproportionate impact on radio/television broadcasts compared to Google Inc continual broadcasts of obviously indecent but unregulated pornography.



The Commission has been aware of the risk of chilling protected speech since the advent of indecency regulation. In the WUHY-FM action, Commissioner Cox foreshadowed that the case would cause other stations “not to carry programming they would otherwise have broadcast, out of fear that someone will be offended, will complain to the Commission, and the latter will find the broadcast improper.”<sup>200</sup> This prediction is precisely what should happen today. As the Second Circuit put it, “Under the current policy, broadcasters must choose between not airing or censoring controversial programs and risking massive fines or possibly even loss of their licenses, and it is not surprising which option they choose.”<sup>201</sup> This is pure consequences for actions and is why many citizens file taxes and obey other laws.

**The Commission Should Strengthen the New “First Blow”  
Standard with Regard to Fleeting Expletives  
and Momentary Nakedness.**

In *Golden Globe II*, the Commission articulated a new less nonfeasant policy refusing to exempt the “first blow” of indecent language. The Communications Act and Congress but not not the archaic interpretations by a misbehaving oligarchy controls this area of law. “The Commission’s holding, and certainly the Court’s holding today, does not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent here.”<sup>251</sup> The holding in *Pacifica* is therefore firm in obsolescence. This changed with *Golden Globe II* where the Commissioners resumed enforcement when demanded by citizens. “While prior Commission and staff action have indicated that isolated or fleeting broadcasts of the ‘F-Word’ such as that here are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law.”<sup>257</sup> The FCC continues to support this policy change in the *Fox* Litigation.<sup>258</sup> The Commission was given authority to make this change by the Communications Act. *Pacifica* NEVER AUTHORIZED ANYTHING and only explained FCC regulations in language that was relevant but inadequate even thirty-five years ago.

***The Commission Should Update Its New Profanity  
Doctrine Stating Linguistics are Irrelevant and the FCC  
Will Only Follow Laws Passed by Congress.***

Indeed, *Golden Globe II* even recognized that the Commission's own "limited case law on profane speech has focused on what is profane in the sense of blasphemy."<sup>262</sup> Based on this understanding, the Commission refrained from regulating speech on the basis of profane language in the one particular case.<sup>263</sup>

*Golden Globe II*, altered this course and created a new profanity doctrine on the strength of "common knowledge" that profanity meant "vulgar, irreverent, or coarse language."<sup>264</sup> Then FCC Chairman Michael Powell noted that this "decision clearly departs from past precedent."<sup>265</sup>

"'Profane' is, of course, capable of an over-broad interpretation encompassing protected speech, but it is also construable as denoting certain of those personally reviling epithets naturally tending to provoke violent resentment or denoting language which under contemporary community standards is so grossly offensive to members of the public who actually hear it as to amount to a nuisance."<sup>268</sup> This is slim support for the shift in regulatory policy but is clear support. The Commission reinforced this stale authority with the last definition of profane from Black's Law Dictionary.<sup>269</sup> Given this record, the Commission should redin the realization of profanity proscription doctrine and return to a more clear *Golden Globe II* definition that should be expanded and would probably fit on one page and include this for ALL usage in any media.

## CONCLUSION

The Commission has the opportunity to correct the mistakes of the past decades of nonfeasance and lack of decency regulation. In 1978, the ruling Justice Stevens had not yet created the [sic] “internet” medium construct and justified special treatment of broadcast video and audio communications. No need for justification exists today beyond the Constitution. Broadcast networks are now merely members of the chorus intruding into the home and everywhere else. The technology that transformed media also deluded parents with the V-chip and similar tools alleging to control all access to unwanted material, as is impossible except at the source. The Commission’s current reliance on citizen complaints is a good way to measure community standards once complaints are made immediately public and require sworn statements. The result of the update is safe interstate and world-wide communications sought provided by the Communications Act. At a minimum, the Commission must protect all media with the more sensible policy developing since *Golden Globe II* and served in *Neeley Jr v FCC, et al*, (5:12-cv-5208) accessible now by unregulated wire communications from the FCC website that will eventually make [sic] “internet” broadcasting safe for the public and better protect free speech.

[http://works.bepress.com/curtis\\_neeley/](http://works.bepress.com/curtis_neeley/)

^^3<sup>rd</sup> Amended Complaint. *Neeley Jr v FCC, et al*

[http://www.curtisneeley.com/FCC/47/232/47\\_USC\\_%C2%A7232\\_FCC\\_GN\\_13-86.htm](http://www.curtisneeley.com/FCC/47/232/47_USC_%C2%A7232_FCC_GN_13-86.htm)

^^Rules for Safe Wire Communications from Mr Neeley's tracking Website.

[http://www.curtisneeley.com/FCC/Neeley-Jr\\_v\\_FCC-et-al.htm](http://www.curtisneeley.com/FCC/Neeley-Jr_v_FCC-et-al.htm)

^^Docket Mirrors for *Neeley Jr v FCC, et al*, (5:12-cv-5208)(13-1506)

<http://apps.fcc.gov/ecfs/document/view?id=7022124410>

^^Rules for Safe Wire Communications from FCC Comment Website.

This Reply Comment follows the general form of the absurd comment of “Professor Fuck” but should diametrically oppose the support for unregulated free speech or the pipe dream used by “Professor Fuck” to pander “law” articles and books to other pornography aficionados in perpetual pursuit of unqualified free speech as should NEVER have existed but does “online”. The pursuit of this will continue selling books and “law” articles. The footnotes are attached as end notes but all talk of [sic] “internet” and other broadcast media filtration is removed since these clear HOAXES do not warrant any more reply besides this sentence.

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