

**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's Reply To
COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS**

This Reply to the lengthy comments entered by the NAB follows the ridiculously long format but migrated the footnotes to end notes and did not check any listed references but retains them as close as possible without purchasing additional software. These comments address every portion of the comments entered, but does not mention the fact that Defendants Google Inc and Microsoft Corporation in *Neeley Jr v FCC et al* as well as every other owner of a website is simply another broadcaster concurrently using the wire and radio mediums to broadcast their speech. Concurrent use of these two mediums is the mysterious “*wholly new medium for human communications*” invented or constructed by Lord Honorable John Paul Stevens failing to recognize these as wire communications listed in the Communications Act before WW II and before nuclear weapons or personal computers were invented.

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SUMMARY

1. The Federal Communications Commission is reviewing broadcast indecency policy and enforcement. In particular, the Commission asked about maintaining the approach to banning isolated expletives adopted in the *Golden Globe* decision or changing this approach and whether the treatment of isolated nakedness should conform to treatment of expletives consistent with *Pacifica*. In the comments made by the National Association of Broadcasters (“NAB”) the NAB demonstrates misunderstanding the Commission’s indecency policy public notice. Curtis J Neeley Jr herein suggests procedures that should be modified to comply with First Amendment, Communications Act, and administrative law requirements.

2. In the 35 years since the Supreme Court’s decision in *FCC v. Pacifica*, the archaic rationale for preventing broadcast of communications of “indecent” speech have been unenforced due to changes in technology and media consumption. The government’s concern that children may be exposed to adult-oriented or otherwise inappropriate material has inappropriately focused on RF broadcasting of content only and ignored other broadcasting. Children in particular enjoy unfettered access to content via devices carried in pockets and backpacks — with access that usually involves no subscription or parental involvement. In this current unsafe environment, the enforcement of RF broadcasting-only prohibition of indecent communications is clearly against the current law and the rulings explained in *Pacifica*.

3. The Commission's broadcast indecency policies must, regardless of media, adhere to the Communications Act and must vigorously protect ALL media. *Golden Globe* and subsequent decisions focusing on fleeting expletives and isolated nudity led to reductions in nonfeasance in enforcement of over-relaxed indecency policies that inadequately regulated broadcaster speech to the unwitting public. Policies going forward not only must be cautious and protective, as the Communications Act requires, they also must become predictable, consistent and clear and be applied to individual parties who abuse public broadcasts for personal benefit or for maliciousness. Ms Jackson and her accomplice would not have broadcast indecency during the 2004 half-time if facing mandatory imprisonment because Ms Jackson and her accomplice were the violators of §1464.

4. NAB discussed several steps needed to create additional clarity and predictability. The Commission should explain the otherwise obvious *Golden Globe* holding and clearly state that fleeting and isolated expletives and indecent images are often *per se* indecent. The Commission also must reaffirm that challenged material falling within the scope of the refined indecency definition that should be explained as communication of video or audio used to shock, surprise, and otherwise offend the intended audience's community values. These actions would be consistent with *Pacifica and the progeny* despite years of bad policy.

5. NAB believes that merely focusing enforcement on "egregious" indecency cases is not sufficiently clear. In revising indecency standards, the Commission must use language that is as precise as possible and provide relevant examples and context in its policies and explain prior decisions further. The f-word is inappropriate description of "fuck" and "fucker" or "fuck-off".

6. To be consistent with both the First Amendment and the statutory prohibition on censorship, the Commission must protect the unwitting audience community in the contexts of both live and scripted programming. Rather than impose penalties based solely on broadcasters' and programmers' failing to consider audience community values, the Commission should act given the past significant abuse of discretion resulting in indecent broadcasts.

7. Finally, procedural reforms to indecency enforcement practices are needed. In particular, the Commission should: (i) dispose of clearly non-meritorious complaints very quickly and fine non-meritorious complaints; (ii) proceed with enforcement inquiries when complaints have been submitted due to knowledge of the programming at issue containing sufficient information and supporting documentation and sworn assertions; (iii) increase transparency by notifying public of both the filing of indecency complaints and the dismissal of complaints; (iv) address and resolve complaints in a timely manner so that license renewal and other applications are not unduly delayed; and (v) take swift action on reconsideration petitions and responses to notices of apparent liability so as to reach final decisions and permit court review.

8. Although the Commission cannot resolve all problems with vagueness and predictability in the indecency context based on community values, the actions proposed above would make indecency policy more compatible with the Communications Act and less intrusive to broadcasters and audiences. These actions must, however, address unresolved questions about the underlying rationale for disparate regulation of "indecent" broadcaster speech and how such regulation of ALL communications broadcasting must comply with the statutory prohibition against censoring broadcast content and the First Amendment protection clearly only provided to protected speech where indecent speech broadcasts are not protected for all potential broadcast receivers.

/s/ Curtis J Neeley Jr

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I. Changes in Technology and Media Consumption Eliminate the Basis for Broadcaster-Specific Limits on “Indecent” Speech

The indecency statute in existence today became part of the criminal code in 1948 and began as provisions to the Radio Act of 1927 and has been neither substantively, nor adequately revised over time. The statutory prohibition of indecent broadcasting is nearly 90 years old, existing before television was invented. When the Supreme Court last directly addressed the constitutionality of the statute thirty-five years ago, the Court upheld indecent broadcast regulation facing First Amendment attack on the grounds that broadcasts were completely “pervasive” in the American home and was pervasively “accessible” to children.⁹ These pillars remain solidly standing if not cemented even more securely due to becoming clear common facts known by most people and rejected in morbid hopes seen by other commenters that unregulated free speech that is patently unsafe for the public will continue on broadcast radio because of commenters basing their belief in a right to find and see or hear anything via improperly unregulated [sic] “internet” broadcasts by wire communications.

Changes in the Ways Americans Access Audio and Video Have Destroyed the Rationale for Limiting Pacifica Support to Broadcast Regulations of RF Broadcasts Only and Now Demands Regulation of ALL Media INCLUDING [sic] “internet” Wire Communications

A.

1. Upholding the Commission’s authority to regulate indecent content on broadcast platforms, the Supreme Court emphasized the pervasive nature of broadcasting made it more difficult to protect children from indecent material on broadcast outlets than on static non-broadcast indecent material in bookstores or movies observing that “[o]ther forms of offensive expression may be withheld from the young without restricting the expression at its source.”¹¹ The court concluded the ease with which children could access broadcasts of adult material, coupled with governmental interests in promoting the well-being of the nation’s youth and supporting parents’ authority in the household “*justify special treatment of [any and all] indecent broadcasting.*”¹²

2. The supporting rationale relied upon in *Pacifica* have expanded across other mysterious new media because of changes in the way Americans consume media. In addition to RF broadcast outlets, consumers today access audio and video content via computers, tablets, and smartphones, from their own personal collections of content stored electronically, and from subscription audio and video services whether purchased or discovered unsecured.¹³

3. The growth of [sic] "internet" access is particularly relevant to the issue of minor's accessing inappropriate content. As of October 2012, 72.4 percent of American households have high-speed [sic] "internet" access at home and the number is growing.¹⁴ Sixty-seven percent of Americans have a Wi-Fi network setup in their homes facilitating the use of the [sic] "internet" to access video and audio content on multiple devices in the home.¹⁵

4. Indeed, [sic] "internet" access via Wi-Fi is readily available to anyone with a smartphone or tablet. One aggregator of Wi-Fi hotspot location data reports that there are 130,616 hotspots in the U.S, 81.7 percent of which are free hotspots.¹⁶ The FCC has observed that Wi-Fi hotspots "are being deployed by mobile wireless companies, cable companies, businesses, universities, municipalities, households and other institutions" and "have proliferated in places accessible to the public such as restaurants, coffee shops, malls, train stations, hotels, airports, convention centers, and parks."¹⁷ More than 11,500 McDonald's restaurants now offer free Wi-Fi,¹⁸ as do all company-owned Starbucks stores¹⁹ and 2/3 of American hotels.²⁰ In addition, a number of American municipalities offer unregulated and free public Wi-Fi.²¹ Wi-Fi access is by far the preferred method of [sic] "internet" connectivity for tablet users, with only six percent of data sessions on tablets taking place over cellular networks.²² Nearly 90 percent of iPads sold are equipped only for Wi-Fi connectivity, and several tablets, such as the Amazon.com Kindle Fire and Google Nexus 7, are offered with Wi-Fi only and have no option for wired connectivity.²³

5. Children are using this [sic] "internet" access to consume unregulated indecent audio and video content despite the Communications Act. Even as early as 2009, 81 percent of 8 to 18 year-olds used the [sic] "internet" to watch a video, 48 percent had used [sic] "internet" to watch a TV show, 28 percent had listened to radio online, and 62 percent had downloaded music from the [sic] "internet".²⁴ With young viewers tuning in at high rates, many online video offerings seek to appeal to children with special programming and packages. Younger Americans also are more likely to watch television by streaming or downloading programming to their televisions, computers, tablets, or cell phones. [sic] "Internet" radio also is gaining momentum. A recent survey estimates that online radio reaches approximately 120 million Americans—or 45 percent of the U.S. population aged 12 and older—every month.²⁷ The survey also found that 54 percent of smartphone owners listen to downloaded music and 44 percent use the device to listen to online radio,²⁸ with nearly 1/3 listening to downloaded music via smartphones daily.²⁹

6. Adolescent ownership of smartphones is on the rise: sixty percent of Americans aged 12-17 own smartphones, up from 54 percent in 2012.³⁰ Adolescents and children are also becoming avid tablet users, with an estimated 23 percent of Americans aged 12-17 owning tablets.³¹ Indecency is often only a ([click](#)) away.

7. Seventy percent of tablet-owning households with children under 12 reported allowing children to use tablets, including to watch television shows and movies.³² Parents and child development experts are actively debating the impact of increasing use of iPads and other tablets to consume pornography.³³ Overall, 95 percent of teens aged 12-17 access the [sic] "internet" and 74 percent do so using mobile devices—with one quarter of teens accessing the [sic] "internet" *mostly* via mobile phones.³⁴

8. Clearly, the myriad of unregulated audio and video broadcast platforms are now used by children through devices that need no subscription or parental involvement to access pornographic content. Indeed, many American children literally carry these around in pockets and backpacks.³⁵ In such a world, there is no principled way to single out one RF broadcasting venue as the uniquely accessible means by which children may view or listen to indecent or otherwise inappropriate pornographic material.

9. Unlike parents in 1978, parents in the twenty-first century are concerned about minors' access to online broadcasting of content and not just RF broadcast material.³⁶ Many parents of young children fear their children may become "addicted"³⁷ to mobile devices like smartphones and tablets to consume pornography.

10. In today's multichannel, multi-platform media environment, the "special treatment"³⁸ of broadcasting—i.e., the imposition of limits on RF broadcast of speech alone—is outdated. Moreover, in recent years, RF broadcasters have documented and courts have observed significant chilling effect from RF-only broadcast restrictions.³⁹ Given both the explosion of the obviously incomplete factual predicate demonstrated by inadequate impact on indecent public speech, RF-only broadcast indecency restrictions are outdated and must be corrected to the FCC now protecting EVERY media venue.

B. Courts Already Question Illogical *Pacifica* Enforcement in Light of Changing Communication Venues

1. Although the Supreme Court has not yet resolved questions of all broadcast media indecency regulation under the First Amendment, the courts have expressed strong doubts about the continuing validity of limiting *Pacifica*. The underlying rationale is insufficient in light of technological developments and shifts in media broadcasting with respect to pervasiveness. The Second Circuit concluded that “[c]able television is almost as pervasive as [RF] broadcast,” and “[t]he [sic] “internet”[] has become omnipresent, offering access to everything from viral videos to feature films and broadcast television programs”⁸⁶ and broadcasts of **naked female breasts**.

2. Even before widespread use of the [sic] “internet”, the Supreme Court had begun to recognize that the limited underpinnings of *Pacifica* no longer held true. In 1996, before inventing the [sic] “internet” the Supreme Court acknowledged broadcast television was no longer uniquely pervasive or uniquely accessible to children:

“Cable television broadcasting ...is as ‘accessible to children’ as over-the-air broadcasting Cable television systems... ‘have established a uniquely pervasive presence in the lives of all Americans.’”⁸⁷

The pervasiveness and accessibility of cable and satellite television today is even greater.⁸⁸ With respect to accessibility to children specifically.

3. Parents today sometimes have unreliable technological choices for controlling minor access to broadcast television signals, whether viewed over-the-air or via a cable wire or satellite system. These could never supplant the Communications Act.⁴³

4. Individual Justices more recently questioned the continuing limitations of *Pacifica*. Justice Thomas, now (79), has said he is “open to reconsideration” of *Pacifica*, noting that “*dramatic technological advances have eviscerated the facts underlying*” the decision, and that “*traditional broadcast television and radio are no longer the ‘uniquely pervasive’ media forms they once were.*”⁴⁴ Similarly, Justice Ginsburg, now (80), has said “[t]ime, technological advances, and the Commission’s untenable rulings in the cases now before the Court show why *Pacifica* bears reconsideration,”⁴⁵ and that the Court’s remand in *Supreme Court Fox II* “affords the Commission an opportunity to reconsider its indecency policy in light of technological advances and the Commission’s uncertain course since this Court’s ruling since *FCC v. Pacifica Foundation*....”⁴⁶

5. Commission enforcement of §1464 must take account of changes in technology and pervasive media consumption and the significant continuous impact of the unregulated broadcast of unsafe speech.

II. Current Commission Policy Does Not Protect ALL Pervasive Media Accessible to Children like Articulated as Warranting Regulation in *Pacifica*

FCC indecency policies and procedures clearly must, at the very least, comply with the intentions of *Pacifica*. As Justice Lord Most Honorable Stevens, author of the *Pacifica* opinion, recently stated, changes in technology and the marketplace since that time “*certainly counsel a restrained approach to indecency regulation*”⁴⁷ starting in 2004 with the *Golden Globe* decision. The Commission must apply the indecency policies of *Golden Globe* and its progeny with no respect whatsoever to the media used to broadcast indecency to minors.

A. Today's Indecency Policies Do Not Comport With the "Common-Sense" Protections Mandated by *Pacifica*

1. The Commission's indecency policy of recent years stands to direct enforcement of regulation approved in *Pacifica* and generally practiced by the Commission for decades. Such a sweeping indecency policy passed muster under *Pacifica*, though must be expanded to ALL media for continuing constitutional validity.

2. The Supreme Court explicitly emphasized the broadcast-only holding of *Pacifica*:

It is appropriate, in conclusion, to emphasize the narrowness of our holding. This case does not involve a *two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy*. We have not decided that an occasional expletive in either setting would justify any sanction.⁴⁸

Justices Powell and Blackmun, whose concurrences provided votes for upholding the Commission, relied on the fact that "*the Commission's order was limited to the facts of this case, ... [and] the Commission may be expected to proceed cautiously, as it has in the past.*"⁴⁹ They also emphasized that "*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].*"⁵⁰

3. Over time, the Supreme Court reiterated that *Pacifica* was an "*emphatically narrow holding.*"⁵¹ Justice Stevens, the 1978 author of *Pacifica*, confirmed that "*[o]ur holding was narrow in... critical respects...We did not decide whether an isolated expletive could qualify as indecent....And we certainly did not hold that any word with a sexual or scatological origin, however used, was indecent.*"⁵² The D.C. Circuit, in upholding 1987 modifications to the Commission's policy against a subsequent First Amendment challenge, relied in part on the fact that "*the potential chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy.*"⁵³

4. For many years, the Commission did proceed with a nonfeasant, “cautious”, and “restrained” indecency policy. On reconsideration of its own *Pacifica* decision, the Commission indicated that it would “be inequitable for us to hold a licensee responsible for indecent language” in the context of “public events” that “are covered live, and there is no opportunity for journalistic editing.”⁵⁴ Shortly after the Supreme Court opinion in *Pacifica*, the Commission said as follows creating much of the current pornography morass plaguing the entire Earth:

We intend strictly to observe the narrowness of the Pacifica holding. In this regard, the Commission's opinion, as approved by the Court, relied in part on the repetitive occurrence of the “indecent” words in question. The opinion of the Court specifically stated that it was not ruling that “an occasional expletive... would justify any sanction...” Slip Op. at 22. Further, Justice Powell's concurring opinion emphasized the fact that the language there in issue had been “repeated over and over as a sort of verbal shock treatment.” Concurring Slip Op. at 2. He specifically distinguished “the verbal shock treatment [in Pacifica]” from “the isolated use of a potentially offensive word in the course of a radio broadcast.”⁵⁵

The Commission declined to take action against programming that included, among other things, the words “shit” and “bullshit,” as well as alleged nudity, because the programs “differ[ed] dramatically from the concentrated and repeated assault involved in *Pacifica*.”⁵⁶ Indeed, until 1987, the Commission “limited its enforcement efforts to the specific seven words involved in *Pacifica*, that is, the words broadcast in George Carlin's indecent monologue”⁵⁷ and thereby gave indecency trafficking a strong foothold

5. When the FCC finally expanded its indecency policy beyond the “seven dirty words” of 1987 after demanded by millions of citizen complaints, the Commission inappropriately reiterated that “speech that is indecent must involve more than an isolated use of an offensive word,” and “[i]f a complaint focuses solely on the use of expletives, we believe that under the legal standards set forth in *Pacifica*, deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency”,⁵⁸ as *Fox II* has advised as clearly mistaken.

6. The Commission inappropriately held formerly that “[human nakedness] itself is not *per se* indecent”⁵⁹ and continued nonfeasance and an overly-cautious non-approach for nearly two more decades despite millions of citizen complaints. Then, in 2004-2006, the Commission, in what the Supreme Court called an “abrupt” departure from decades of malfeasance-filled *Pacifica* non-practice,⁶¹ adopted its current indecency policy, under which fleeting expletives,⁶³ as well as momentary human nakedness,⁶⁴ are usually found indecent as was obvious for decades to millions if not most United States' citizens.

7. Current Supreme Court rulings provide expanded factual justification for broadcast indecency regulation beyond even the Commission’s stricter new policy though advising of proper notice of policy change requiring for broadcasters, individuals or groups abusing reasonable broadcaster precautions for protection of public safety.

B. More Restrictive Policies Adopted in 2004 Led to Inconsistent Yet Generally Constitutional Though Wholly INSUFFICIENT Enforcement

1. Consistency and predictability are critical to all administrative agency decision-making under the Administrative Procedure Act. The inconsistent treatment of similar material, unpredictable decisions, and reversals in FCC cases following *Golden Globe* left broadcasters attempting to comply with undisclosed indecency rules. These inconsistent and unpredictable policies burden broadcasters and program creators yet do not ensure the safety of the public using ANY or ALL broadcast media.

2. Based on the opinion that deleting the expletives from “Saving Private Ryan” would have “altered the nature of the artistic work,”⁶⁹ but that the utterances in “Golden Globe” had no such redeeming social, scientific, or artistic value,⁷⁰ the Commission found that “Saving Private Ryan” was neither indecent nor profane. Common-sense herein prevailed.

3. A year later, an order purporting to “provide substantial guidance to broadcasters and the public about the types of programming that are impermissible,” actually created more confusion.⁷¹ Among other things, this *Omnibus Order* determined that the use of expletives in a Martin Scorsese-produced documentary entitled “The Blues: Godfathers and Sons” was indecent and proposed a \$15,000 fine against a non-commercial educational station licensed to a community college.⁷² “The Blues” decision found that, unlike the use of expletives in “Saving Private Ryan,” the use of expletives in “The Blues” was not “essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.”⁷³ The Commission acknowledged the program had educational purpose but believed that this purpose “could have been fulfilled and all viewpoints expressed without the repeated broadcast of expletives.”⁷⁴

4. The FCC’s determinations that expletives were essential to the artistic value of a dramatic film, but not to the artistic or educational purpose of a scripted documentary provide clear guidance for broadcasters and content providers making fundamental decisions about the airing and/or creation of programming.

5. The Commission reached opposite conclusions about content creators in “*Saving Private Ryan*” and “*The Blues*”. These and other FCC decisions are consistent but not well described. All of these cases placed the Commission in the regulatory driver’s seat substituting FCC judgment for unsafe decisions of the speaker. In each decision, there was an intensive focus on—and lengthy evaluation of—the social, artistic, political or educational value of the programming, followed by an FCC assessment as to how critical the purportedly indecent speech was to that artistic/educational value. “The Blues” decision went so far as to complain that not all of the interviewees who used expletives were blues performers (some were record label producers and hip-hop artists) as though the identity of individual speakers at the time the speech was made determined whether the words spoken were actionably indecent⁷⁷ [returning to common-sense valuation.]

7. Following *Golden Globe*, the Commission must realize the Supreme Court has stressed, value-based such judgments constitutionally are for “individual[s] to make, not for the Government to decree”⁷⁸ leaving punishment for abuses of discretion the clear purview of the FCC.

C. Inconsistent and Changing Indecency Regulation Do NOT Best Prevent Unsafe and Malicious Free Speech

1 There are obviously examples of broadcasters choosing to abandon certain indecent material over uncertainty about application of the indecency rules and this rational should be made less arbitrary and mysterious.

2. As the Court of Appeals for the Second Circuit observed, uncertainty surrounding indecency policy led to broadcasters’ decisions not to air the Peabody Award-winning documentary “9/11” because it contained expletives; not to go forward with a planned reading of Tom Wolfe’s novel, “I Am Charlotte Simmons” because of adult language; not to air a live political debate because one of the local politicians involved had previously used expletives on air; and not to broadcast live coverage of a memorial service for Pat Tillman, a football star and soldier killed during the war in Afghanistan, because of language used by his family to express their grief.⁸⁰

3. There are numerous other instances where commercial and noncommercial broadcasters made editorial decisions based not on their best judgment, but on their uncertainty about indecency regulation. PBS offered its affiliates only an edited version of a documentary that follows an Iraq War regiment, requiring any affiliates that wanted an unedited version to sign a waiver acknowledging that PBS would not indemnify the station in the event that the program was found to violate FCC indecency policy requiring individual determinations based on community values as is appropriate.⁸¹

4. Broadcasters have been forced to rethink whether and how to present local and national news and sports programming due to concerns that live coverage of newsworthy events such as arraignments, trials, emotionally charged political demonstrations, or breaking news such as disasters, will place their stations at risk for costly investigations and fines.

5. Even routine live sports reporting, such as locker room interviews, presents regulatory land mines. NAB has received inquiries from member stations in small markets concerned about providing coverage of live events, including local fairs. The result is self-censorship that inhibits what viewers and listeners can obtain from their leading providers of news and information. Rather than providing live coverage of “Occupy Wall Street” protests, for example, some broadcast journalists aired sanitized coverage of the protests and deleted language that, in their sound editorial judgment, might otherwise have been included to present the most accurate and informative account of events.⁸² According to another report, a radio station in Philadelphia broadcast children speaking on the street about a stolen car and bleeped some of the language.⁸³

6. Broadcasters' concerns extend beyond the possibility of fleeting expletives to shifting inadequately announced regulatory policy on nakedness. This is perhaps best illustrated by local stations' approach to coverage of an attack on the Paul Gauguin masterpiece, "Two Tahitian Women," at the National Gallery. Stations reporting on the event either blurred or cropped their shots of the painting to avoid showing the bare breasts of the women in the painting as required only common-sense.⁸⁴

7. Of course, these and other examples represent only the tip of the prevented indecent speech iceberg. It is impossible to discern how much indecent content is not being aired and how greatly editorial/artistic judgments are being altered due to uncertainty engendered by the FCC's judgments and fear of FCC enforcement actions. Unsurprisingly, the FCC's altered indecency policies have also led to numerous court appeals by broadcasters and court losses for the Commission on inadequate fair-notice grounds.⁸⁶

D. Agency Enforcement Practices Have Exacerbated Indecency Regulation

1. Certain FCC enforcement practices have exacerbated the arbitrary nature of its indecency policies. The Commission will not act upon applications for the renewal of a license that has a pending indecency complaint associated with it until the complaint has been investigated and resolved – even in cases where the complaints are not meritorious. The pendency of such complaints creates a cloud of uncertainty that can have a direct financial impact on broadcasters as should be recoverable from non-meritorious complainers. For example, such delays inhibit the assignment or transfer of licenses, because licenses cannot change hands until they are renewed. Where the FCC permits a license renewal to go forward by means of a tolling agreement, the unresolved complaints have a negative impact on license valuation and can inhibit a license owner's refinancing and recapitalization. The impact of the FCC's tolling policy is even more severe when the subject licenses are being assigned: in such cases, the Commission has in the past required the assignor to place into escrow the maximum fine for a potential indecency forfeiture. This practice effectively imposes a monetary penalty without any finding as to the validity of a complaint, which would appear to be beyond the scope of the Commission's authority and must now cease to occur.
2. Practices such as delaying action on license renewals, tolling agreements, and escrow requirements place undue weight on unreviewed and unadjudicated complaints that are made without any liability or sworn statement, as is unjust. The practices thus contravene the statutory directive of Section 504(c) of the Communications Act, which expressly provides that when a notice of apparent liability for forfeiture has been issued by the Commission, that fact "shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued" unless the fine has been paid or payment has been finally ordered.⁸⁹

2. In the indecency context, broadcasters have been and are being prejudiced by the existence of unscrutinized, unmeritorious complaints, without any action approaching notices of apparent liability.⁹⁰In addition to its improper treatment of pending complaints, the FCC also frequently fails to take timely action on petitions for reconsideration of indecency decisions or oppositions to enforcement notices so that affected parties can exhaust their administrative remedies, obtain a final order, and bring adverse FCC decisions to court for review.⁹¹These practices are ineffective in the constitutionally sensitive area of public speech regulation. The courts have repeatedly emphasized the importance of procedural safeguards in regulatory schemes that provide a regulator with power to suppress speech.⁹² Reform of enforcement practices is critical to the continued constitutionality of Commission indecency policies.

III.⁹³ At the Very Least, Indecency Policies Must Be Revised to Comport with the Protection Demands Articulated in *Pacifica*

As the *Public Notice* states, the FCC's "indecency policies and enforcement" must be "fully consistent." Thus, for reasons set forth above, the Commission cannot continue to exclusively apply its current indecency policies to only the RF broadcast media. Maintaining the current policies will only propagate the continued unregulated broadcast of indecent pornography in other media resulting in a continuing egregious negative impact on children and families. As the Court emphasized in *Supreme Court Fox II*, its opinion "leaves the courts free to review the current policy or any modified policy in light of its content and application."

A. The Commission Must Confine Regulation to Material Actually Falling Outside Clear Published Boundaries of Permissible Community Values

1. An initial matter, the Commission must reaffirm that, to be actionably indecent, challenged material must fall within the scope of the new more clearly described indecency definition after modernized to include indecency determined using the community standards of the potential audience of the particular broadcast medium.

2. *Golden Globe* and its progeny insufficiently explained this assuming, as Honorable Justice Stevens explained in *Supreme Court Fox I*, “there is a critical distinction between the use of an expletive to describe a sexual or excretory function and the use of such a word for an entirely different purpose, such as to express an emotion.” The Commission adopted a common-sense interpretation of indecency that attempted to modernize what the archaic *Pacifica* justification first contemplated. Post-*Golden Globe* decisions regarding images updated the inadequate decency protection authorized in *Pacifica* by finding sexually suggestive material containing no complete nakedness to be actionably indecent.

3. The Supreme Court has expressly recognized the obvious fact that expletives do not always have sexual meanings. For example, in *Cohen v. California*, the court considered whether a man could be lawfully convicted for disturbing the peace for wearing a jacket bearing the words “Fuck the Draft” without anything else. The Court observed that use of the word “fuck” in this manner is not characterized as “erotic.”⁹⁹

4. The Court in *Cohen* also recognized the clear “emotive function” of words in communicating messages¹⁰⁰ though even this manner of message broadcast can still be inappropriate and may therefore be prohibited if accompanied by an action. This distinction is not merely an academic or legalistic one though a severely split decision. This was recently illustrated by Boston Red Socks player David Ortiz’s using of an expletive during a pregame ceremony on April 20, 2013.

5. The first major Boston event following the bombings that killed three and injured hundreds during the Boston Marathon. An emotional Mr Ortiz received the first pitch from a bombing victim, praised law enforcement officers, and incited the crowd with closing remarks with “This is our fucking city, and nobody’s going to dictate our freedom!” Chairman Julius Genachowski acknowledged this as an expression of raw emotion¹⁰¹ thereby drawing a clearly obvious post-*Pacifica* distinction between actionably indecent material and words used to convey emotion but reflect how people actually communicate and helps ensure that updated indecency regulation does not run counter to common-sense and is sensitive to First Amendment concerns.¹⁰²

B. The Commission Must Now Clearly Describe When Fleeting Expletives and Human Naked Images are Action-ably Indecent

Next, the FCC must clearly state *when* the agency will treat fleeting or isolated expletives and naked human images as actionably indecent. This action would give proper notice of updating standards after *Pacifica* and years of pre-2004 FCC policy, including the *2001 Policy Statement*, which inappropriately stressed whether material was dwelt on or repeated at length as an important factor in indecency determinations that clearly were never adequate in protecting the public.¹⁰³ This current manner of public notification of change in enforcement policy will produce consistent decisions by the agency and reduce the effect on broadcasters and the public. Broadcasts of live programming (including but not limited to on- location news and sports reporting) where the unexpected may arise should now result primarily in liabilities to the violating parties if these “unexpected wardrobe malfunctions” occur. Janet Jackson and Justin Timberlake should have each faced a charge with two years in prison as a consequence, consistent with §1464. Mandatory time behind bars should now be required.

Indecency Policies Must Be Consistent, Predictable, and Clear and and Must Never Rely Only on Judgment or Editorial

C. Discretion of Broadcasters and Program Providers and Should Protect the Public as Mandated by the Communications Act

1. The Commission must be predictable and clear in indecency standards and as consistent as possible in enforcement. Broadcasters must only have clear notice as to the obligations under the indecency rules.¹⁰⁴ The Supreme Court has repeatedly stressed the necessity for clarity in speech-related regulations and has frequently opined about the problems of regulatory vagueness in this area.¹⁰⁵

2. Simple adjectives like “egregious” clarify indecency standards because such words would be defined differently by different people depending on community standards. References to examples that the Commission generally would regard as “potentially or often considered egregious,” and/or stating that certain material (e.g., material that is suggestive or imply sexuality in nature) would not be regarded as egregious only if broadcast to the unwitting public. The Commission cannot remove all problems with vagueness and predictability, but must use language that is as precise as possible and provide relevant examples and context in its indecency policies and decisions. If the Commission establishes “sufficiently clear” indecency regulations so that broadcasters know “what is expected” of them, then Commission “impos[itions] civil or criminal liability” on broadcasters or individuals will result in a quick safe [sic]”internet” and safe distant communications.¹⁰⁶

3. The distinctions drawn between challenged material in other cases became must not become incomprehensible and fail to “give[] broadcasters notice of how the Commission will apply” its indecency standards in the future.¹¹⁰ The disparate treatment of the movie “Saving Private Ryan” and the Public Broadcasting Service documentary “The Blues: Godfathers and Sons”¹¹¹ further underscores past inconsistency and unpredictability of the prior post-*Golden Globe* standards and highlights the Commission attempts to impose judgments on broadcasters and program creators with insufficient public notice.

4. Taking an approach to indecency regulation that shows significant respect for, and reluctance to second-guess, the judgments of complainers regarding community standards violations would be more consistent with the Commission's constitutional obligations and statutory regulations approach to indecency. As the Supreme Court has recognized in the broadcasting context: "*For better or worse, editing is what editors are for; and editing is selection and choice of material.*"¹¹⁴

5. Moreover, the Commission is expressly forbidden by statute from engaging in "censorship" or from promulgating any regulation "which shall interfere with the [broadcasters'] right of free speech." 47 U.S.C. § 326. The FCC is well aware of the limited nature of its jurisdiction, having acknowledged that it "has no authority and, in fact, is barred by the First Amendment and [§ 326] from interfering with the free exercise of journalistic judgment."... Indeed, our cases have recognized that Government regulation over the content of broadcast programming must be narrow, and that broadcast licensees must retain abundant discretion over programming choices.¹¹⁵

6. In the past, the Commission improperly stressed reliance on editorial discretion in the indecency context as well, stating that *Pacifica* should be construed consistent with the importance attached to encouraging free-ranging programming and editorial discretion by broadcasters fully aware of potential audience morality and resultant complaints to the FCC.

7. The Commission indirectly influences editorial/programming discretion of broadcasters with indecency cases. For example, in finding that multiple uses of the word "fucking" in the context of a recording played as part of a news story was not indecent, the Commission stated that "we traditionally have been reluctant to intervene in the editorial judgments of broadcast licensees on how best to present serious public affairs programming to their listeners."¹¹⁷

8. Even in connection with the better public safety protection of recent indecency policy enforcements, the Commission recognized the need for caution with respect to complaints about editorial misjudgment on broadcast licensee choices in presenting news and public affairs broadcasts. These matters are core tenets of the First Amendment's free press guarantee that must be assured, but only after public safety is assured.

9. The Commission has correctly not exposed the public to the lacking editorial and inadequate artistic discretion judgments by licensees and program creators in terms of free speech choices regarding which programs to air and which events to broadcast live unedited to the unwitting public. The Commission deems such prior unsafe discretion allowances to have been significantly abused. The Commission duty to enforce indecency regulation under the First Amendment by the least restrictive means to further the "compelling" if not completely obvious governmental interest the Commission acknowledges it must protect.

The Commission's Indecency Enforcement Practices Must Be Reformed
D. to Protect Public Consumers of ALL media while Respecting the First Amendment and Still Enforcing the Communications Act

1. Finally, the Commission must modernize the enforcement practices and procedures. As an initial matter, the Commission should pursue only those complaints (i) submitted by complainants encountering the programming at issue or having legal responsibility for minors who could have been exposed; and (ii) presenting sufficient information and supporting documentation about the particular venue concerned, the indecent material broadcast and the time or URL the indecency polluted with indecent broadcasting; and (iii) a sworn statement given on penalty of perjury. *Prima facie* cases of licensee misconduct should require such clear facts. Basic due process requires that broadcast venues not be required to disprove inadequately supported allegations of indecency given frivolously.

2. Greater transparency of complaints must be required. Broadcast licensee must immediately know of indecency complaint filings concerning broadcast venues. Recovery of costs must be available when action on license renewal are stalled because of complaint found to be frivolous. The FCC must now reform procedures to notify broadcasters and the public of both the *filing* of indecency complaints and the *dismissal* of complaints real-time “*online*” where the public and broadcasters may both take notice.

3. The Commission must address and resolve indecency claims publicly in a timely manner so license renewal, assignment, and transfer applications are not subjected to costly undue delays. The Commission should now dispose of patently non-meritorious complaints (e.g., those that complain of material broadcast during the safe harbor, those that contain insufficient information or lack sworn statements, those that were not filed by someone in the viewing or listening audience and without vulnerable minors, or those foreclosed by settled precedent) very quickly.

IV

CONCLUSION

The changes discussed above would make the Commission’s indecency policy more closely follow the Communications Act in light of *Pacifica* and the subsequent cases and be less susceptible to broadcasters’ and content creators’ misjudgments. The First Amendment, after all, protects only the qualified right to freedom of expression that must be exercised in a manner not causing *per se* danger to those receiving the speech as required only common-sense but was missed for almost half-a-century.

Failure is impossible,
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