

statutory indecency and profanity prohibition to particular broadcast content.³ The distinctions the Commission has attempted to draw have created more uncertainty.⁴ Further compounding the problem, a tenfold increase in the potential forfeiture for broadcasting even an isolated instance of profanity has substantially increased the risk broadcasters face.⁵

The harm has been especially acute for those, like NPR, its Member stations, and other public broadcasters, devoted to offering news, public affairs, and cultural programming as a part of a mission to serve the public in all its diversity and with authentic voices and sound.⁶

- As observed by WBUR in Boston, which produces a number of nationally distributed public radio programs, “massive forfeiture amounts and inconsistent application of the current indecency policy by the Commission have created an atmosphere of uncertainty that requires WBUR to pursue our brand of public service journalism at great risk.”⁷
- The University Station Alliance, a non-profit organization representing public radio stations licensed to universities, colleges, school systems, and state agencies, similarly observed: “under the Commission’s current enforcement approach, university-licensed station programmers are sometimes faced with the prospect of massive fines

³ NPR Comments at 5-6. See, e.g., Comments of the Student Press Law Center at 1 (“An indistinct ‘fleeting expletive’ standard, with case-by-case determination of the journalistic or artistic merits of a particular program, provides insufficient guidance for all those working in broadcasting, but especially for those working in the environment of nonprofit educational broadcasting.”).

⁴ NPR Comments at 6-7. See also Comments of the Writers Guild of America, West, Inc. at 6 (“The Commission’s inconsistent rulings on indecency, particularly in the last decade, have created confusion among broadcasters.”) [hereinafter “Writers Guild Comments”].

⁵ NPR Comments at 7; Comments of Future of Music Coalition at 4-5.

⁶ NPR Comments at 1-4. See also Writers Guild Comments at 6 (“This uncertainty has had a chilling effect, leading some broadcasters to edit material, broadcast such material only after 10:00 p.m., or refrain from airing questionable content at all. This has a detrimental impact on creators and can stifle exploration of important issues.”).

⁷ Letter from Charles J. Kravetz, General Manager, WBUR at 2, filed July 17, 2013.

for producing programming that meets the information and cultural needs of their communities. This uncertainty deeply impacts programming decisions.”⁸

- The public radio regional organizations (Western States Public Radio, California Public Radio, Public Radio in Mid America, and Eastern Region Public Media), comprising 200 public radio stations across the country, commented that “the Commission’s current approach, coupled with the prospect of massive fines, creates a degree of risk and uncertainty that severely constrains the editorial judgment of local programmers, and ultimately impacts program quality.”⁹
- WAMU, serving the Nation’s Capital, commented: “Commission regulation which can target even unintentional and spontaneous uses of profane or indecent language and subject WAMU to potential forfeitures and other administrative sanctions is a threat which casts a cloud of concern over program producers.”¹⁰

As the Supreme Court has previously held, the uncertain applicability of governmental regulation of speech, combined with a threat of substantial punishment, has an obvious "chilling" effect violative of the First Amendment, regardless whether the regulation also violates the Fifth Amendment Due Process Clause on vagueness grounds.¹¹

The Commission's "zero tolerance" approach to indecency and profanity enforcement has also caused significant disruptions in what should be routine processing of broadcast license transfer, assignment, and renewal applications.¹² Stations often only learn of a pending

⁸ Comments of the University Station Alliance at 1, filed July 24, 2013.

⁹ Joint Comments of Western States Public Radio, California Public Radio, Public Radio in Mid America, and Eastern Region Public Media at 1, filed July 17, 2013 [hereinafter “PRRO Joint Comments”].

¹⁰ Reply Comments of WAMU at 2, filed August 1, 2013.

¹¹ Reno v. ACLU, 521 U.S. 844, 870-71 (1997).

¹² NPR Comments at 7-8; Comments of the National Association of Broadcasters at 23-25. See also Comments of Morgan Murphy Media at 5 (“As Morgan Murphy and others have found, the filing of an indecency complaint with the FCC may result in the Enforcement Bureau placing a hold on applications subsequently filed by the broadcaster in the ordinary course . . . often

complaint by inquiring why the Commission has failed to act on a license renewal application. As just one example, the Commission continues to hold the license renewal application of Minnesota Public Radio ("MPR") for KNOW-FM, Minneapolis-St. Paul, MN, based on a listener complaint filed in 2010.¹³ MPR only learned of the complaint after engaging legal counsel to ascertain the basis for the Commission's inaction on the KNOW license renewal.¹⁴ Making matters worse, the Commission has failed to act even though the complaint is apparently based on the listener's mishearing of a single word ("flunked") in an NPR distributed program,¹⁵ and even though the audio and transcript of the content in question have been available online since the program was broadcast.¹⁶

The inability to process indecency and profanity complaints in a timely and transparent manner may be attributable in part to the Commission staff's own uncertainty over the contours of the Commission's indecency and profanity policy.¹⁷ After all, if every potentially offensive word can potentially result in a forfeiture, the path of least resistance may be to hold complaints and station license renewals or transfers in limbo. That does not excuse the failure to act for

forc[ing] the broadcaster into protracted negotiations with Commission staff to clear the hold so that the broadcaster can conduct legitimate business.”).

¹³ Reply Comments of American Public Media Group, Minnesota Public Radio, Southern California Public Radio and Classical South Florida, at 3-4, filed July 25, 2013.

¹⁴ Id. at 3.

¹⁵ Id. at 3-4.

¹⁶ See www.npr.org/templates/transcript/transcript.php?storyId=124475421 (transcript); www.npr.org/player/v2/mediaPlayer.html?action=1&t=1&islist=false&id=124475421&m=124492947 (audio).

¹⁷ NPR Comments at 8-9.

extended periods of time, especially on complaints like the one filed against KNOW-FM, which, on their face or with modest inquiry, fail to allege a violation of the Commission's indecency or profanity policy.

Indeed, in addition to adopting a more restrained approach to policing broadcast content for indecent or profane content, the Commission should work to resolve complaints through less formal means and with greater transparency. As a routine matter, for instance, the Commission should notify broadcast licensees when a complaint is filed, share a copy of the complaint redacted to protect the complainant's anonymity, if necessary, invite licensees to provide an explanation before initiating a formal inquiry or investigation, and apprise licensees of the status of pending complaints, including their disposition. Other commenters have offered similar suggestions.¹⁸

Beyond reforming the complaint review process, the initial comments also offered important recommendations for implementing the statutory indecency and profanity prohibition in a manner that better respects broadcast speech as a Constitutional matter, while allowing the Commission to act on significant allegations of profane or indecent broadcast content. First, and foremost, there was substantial support for the Commission's proposal to focus its enforcement efforts on egregious cases.¹⁹ "Only deliberate and repetitive uses [of expletives] in a patently

¹⁸ See, Comments of the Association of Public Television Stations and Public Broadcasting Service at 8-9 [hereinafter "APTS/PBS Comments"]; Comments of Saga Communications, Inc. at 4-5.

¹⁹ E.g., Comments of Saga Communications at 2 (urging the Commission to disregard accidental or isolated utterances); Comments of KUCR(FM) at 5-6 (same).

offensive manner should be deemed ‘actionably indecent’ under the Commission’s policies.”²⁰ Or, as WAMU put it: “Private journalists and editors should produce and make judgments about news and information content, with lawyers and government involved in only extreme cases.”²¹ Such an approach simply represents a return to the indecency standard established in 1987, which operated effectively for many years until the Commission adopted a “zero tolerance” approach.²²

Second, many commenters supported clarifying the Commission’s deference to news and public affairs programming in a way that makes clear that the Commission will refrain from finding an indecency or profanity violation absent the most extraordinary circumstances.²³ As pointed out by NPR and others, the Commission’s recent decisions have failed to accord clear and consistent deference to content that is at the core of the First Amendment speech and press protections.²⁴ Indeed, the Commission accords no deference when it requires broadcasters to demonstrate that the use of particular expletives “was essential to the nature of an artistic or

²⁰ Comments of Morgan Murphy Media at 4. See also NPR Comments at 10-11 (“[A]n egregious cases approach to indecency enforcement should focus on broadcast matter that involves the deliberate use of offensive material to pander, shock, or titillate”).

²¹ Reply Comments of WAMU at 3.

²² See Public Notice at 1 (quoting Pacifica Foundation, Inc., 2 FCC Rcd. 2698, 2699 (1987)). To the extent indecency and profanity forfeitures were once considered simply a cost of doing business, see, e.g., In the Matter of Infinity Broadcasting Operations, Inc.; Licensee of Station WKRK-FM, Detroit, Michigan, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd. 6915, 6920 (2003) (dissenting statement of Commissioner Copps), Congress addressed the problem by substantially increasing the maximum forfeiture amount to \$325,000. See The Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (2006).

²³ See APTS/PBS Comments at 7-8; Comments of CBS Corporation at 23-24.

²⁴ NPR Comments at 12-14. See also Comments of the Radio Television Digital News Association at 8-9 (“But since declaring the isolated use of the word ‘fuck’ to be *per se* actionable in the *Golden Globe Awards Order*, the FCC has created substantial confusion on the part of broadcasters with respect to whether news and public affairs programming is, indeed, entitled to special respect in the indecency context.”) [hereinafter RTDNA Comments].

educational work or essential to informing viewers on a matter of public importance, or that the substitution of other language would have materially altered the nature of the work.”²⁵ News and public affairs programming is more deserving of a categorical exemption from indecency and profanity regulation,²⁶ or, at a minimum, heightened deference beyond an “egregious cases” approach accorded entertainment and other types of broadcast content.

Finally, as NPR and many other commenters observed, the Commission’s broad forfeiture authority exacerbates the uncertainty over the applicability of the Commission’s indecency and profanity policy to particular content.²⁷ A previous effort to develop a guideline-based approach to assessing forfeitures that accommodated upward and downward adjustments has given way to more *ad hoc* assertions of Commission discretion to exponentially increase a maximum per utterance forfeiture amount of \$325,000 by the number of profane or indecent utterances in a single program and by the number of owned or affiliated stations in a network.²⁸ In keeping with a more restrained approach to indecency enforcement, the Commission should declare its intention to reserve such harsh penalties for only the most egregious cases of obscene

²⁵ Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, Notices of Apparent Liability and Memorandum Opinion and Order, 21 FCC Rcd. 2664, 2685 (2006). See also Comments of ABC, Inc. at 41 (“Unfortunately, in recent years the Commission has tilted its consideration of artistic merit or programming discretion strongly against the broadcaster.”).

²⁶ RTDNA Comments at 19.

²⁷ NPR Comments at 18; Comments of Future of Music Coalition at 4-5. See also Comments of the Student Press Law Center at 4 (“The threat of financial ruin, combined with the uncertainty engendered by an unpredictable enforcement regime, has chilled collegiate broadcasters’ speech.”).

²⁸ NPR Comments at 16-18.

or indecent broadcast content and to impose far smaller forfeitures in most other cases.²⁹ For noncommercial broadcasters, in particular, a forfeiture of any significant amount threatens the broadcaster's ability to operate.³⁰ The Commission should therefore more clearly define and generally restrain the exercise of that authority.

That is not to say the record in response to the Public Notice is unanimous, but comments opposed to Commission restraint do not justify continuing further down the same flawed path. With respect to the vast majority of comments opposing moderation in the Commission's approach to indecency and profanity enforcement,³¹ the Commission should recognize that the same ease of submitting indecency and profanity complaints electronically³² is reflected in the mass filing of comments in response to the Public Notice. Some of these comments were submitted via pre-printed form and others were prompted by e-mail or other solicitation, but they share a common objective of ridding all forms of electronic mass media, whether broadcast, cable, or satellite, of all arguably offensive language or other content. No matter how compelling

²⁹ Id. at 18-19.

³⁰ See, e.g., PRRO Joint Comments at 1-2 ("As responsible broadcasters that provide a clear public benefit, public radio stations should be afforded discretion to serve their local communities without facing the prospect of crippling fines."); Comments of KUCR(FM) at 4-5 ("For a small NCE that momentary lapse is not an expensive cautionary lesson, but is fatal to its entire operation and to the valuable local service that a 'hand-made' broadcaster such as KUCR provides.").

³¹ Not all of these individual comments favor strict indecency and profanity enforcement. See, e.g., Comments of Robert M. Enger at 1, filed Aug. 1, 2013 ("I urge the commission to relax its rules on objectionable speech and content. Everyone has access to the tuning knob/channel-selector, as well as the off-switch.").

³² See Comments of NBCUniversal Media, LLC at 30-32.

the end result may seem even to a significant segment of the public, the Commission should not continue employing an ill-conceived means in the interest of achieving an impossible end.

The more substantive comments opposing any change in the Commission's approach to indecency or profanity enforcement are no more compelling. These comments misconstrue the relevant Constitutional law,³³ assume that the world has not changed since the statutory indecency, obscenity, and profanity prohibition was enacted at the dawn of radio broadcasting,³⁴ or otherwise misapprehend the challenge facing the Commission if it were to continue a "zero tolerance" approach.³⁵ Beyond the chilling effect on content producers, the administrative costs to the Commission, and the practical and financial burdens for broadcast stations, it is likely only a matter of time before a policy of punishing every arguably indecent or profane utterance results in the invalidation of the Commission's indecency and profanity policy, if not the underlying statute itself.³⁶

In that event, NPR, its Members, and other responsible broadcasters would use the same care to avoid gratuitously offending our listeners as we have long sought to do during the 10

³³ See Comments of the American Center for Law and Justice at 6 (simultaneously contending that "broadcast media should be afforded the same level of First Amendment protections given to other equally available forms of media like Satellite radio, cable television, and the Internet" and that the "broadcast media should be subject to a higher standard of review than was originally applied in *Pacifica*," as though the level of scrutiny for First Amendment purposes applies to the speaker and not the government's regulation of the speaker.).

³⁴ See Comments of Robert W. Peters, Esq. at 4-9 (discussing the unconditional nature of the statutory language, enacted in 1927).

³⁵ See generally Comments of the Parents Television Council; Comments of the Family Research Council; and Comments of Concerned Women for America.

³⁶ See Comments of TechFreedom, Public Knowledge, Electronic Frontier Foundation, and the Center for Democracy & Technology at 3 ("In short, we believe that it is simply a matter of time before the Supreme Court strikes down indecency regulation once and for all.").

p.m.-6:00 a.m. “safe harbor,” but the Commission would lack the means to sanction and deter deliberate and repeated attempts to shock, pander, and titillate. A more pragmatic and sustainable course is for the Commission to exercise greater restraint by directing its enforcement efforts to the most egregious cases, exempting or otherwise deferring broadly to news, public affairs, and cultural programming, and clarifying and limiting the exercise of its forfeiture authority.

On behalf of its Members and other public radio producers and stations, NPR urges the Commission to pursue such a course.

Respectfully submitted,

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