

along with the valuable public service it provides. Despite planning and training, accidents may happen, but they should not put a station at risk of extinction.

Consequently, in its Comments, KUCR urged the Commission to adopt a more flexible indecency standard by: broadening the concept of “context” to take into account factors such as station’s noncommercial status and the nature of its programming in determining whether material is “patently” or “egregiously” offensive. It urged the Commission to temper its indecency policy by adopting a standard more akin to negligence than strict liability, on grounds that such a standard would better comport with First Amendment principles by allowing for good-faith human error and giving “breathing room” to protected speech. And it urged the Commission to take the same factors into account in assessing any forfeiture. KUCR’s position is hardly unique. For example, KUCR’s Comments are consistent with those submitted by National Public Radio and other representatives of NCE stations.

While KUCR cannot exhaustively survey the extensive record in this proceeding, KUCR’s position will be set in sharper relief by contrasting it with the position outlined in the comments of the National Religious Broadcasters (“NRB”). NRB urges the Commission to adhere to current policy with certain “necessary clarifications.”¹ It opposes adoption of a policy that would apply only to “egregious cases,” and opposes an exemption for fleeting expletives and momentary nudity. It supports a standard that would be universally applied to all stations on grounds that “Pollution at one end of the stream will affect all broadcasters”²

And yet, despite its staunch defense of the Commission’s current indecency policy, NRB offers a number of thoughtful recommendations for making that policy clearer, more objective, and more sensitive to First Amendment concerns. For example, NRB suggests that in

¹ NRB Comments, p. 4.

² NRB Comments, p. 3.

determining “contemporary community standards for the broadcast industry,” the Commission take cognizance of industry standards and best practices by the broadcast industry.³ It proposes elimination of the rigid three-factor indecency analysis, in favor of an analysis that considers “the totality of all relevant circumstances.”⁴ It supports carve outs for live news coverage and sporting events if the broadcaster can demonstrate that a “spontaneous utterance” could not have been prevented by the exercise of reasonable care.⁵ And it proposes that otherwise indecent material should be “not actionable if it constitutes only a small part of a broadcasted work with serious artistic, literacy, social, political or scientific value for children”⁶

Although NRB and KUCR remain far apart in their views of the FCC’s indecency policy, they identify many of the same flaws in current policy: in particular, the “uncertainty”⁷ and lack of notice;⁸ the inherently arbitrary nature of applying “contemporary standards for the broadcast medium” created *ad hoc* by the FCC rather than based upon an “objective standard” known in advance;⁹ and the failure of the current policy to permit – much less encourage – the broadcast of works with serious, literacy, social, political or scientific value if the work contains *any* indecent material.¹⁰

Although KUCR and NRB start from different positions, and rely on different rationales for their proposed modifications of current policy, it is notable that they agree on many of the

³ NRB Comments, p. 5.

⁴ See *In the Matter of Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd. 7999 (2001) and NRB Comments at p. 5.

⁵ NRB Comments, p. 6.

⁶ NRB Comments, p. 6.

⁷ NRB Comments, p. 13.

⁸ NRB Comments, p. 14.

⁹ NRB Comments, p. 16.

¹⁰ NRB Comments, p. 18.

basic flaws in current policy. Legal flaws commonly identified by parties who start from radically different positions are entitled to considerable weight.

KUCR urges the Commission to address these flaws by modifying its current indecency policy to place it on a more secure constitutional basis and to encourage NCE stations such as KUCR to continue providing vibrant programs of social value and great artistic merit.

Respectfully submitted,

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