Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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

REPLY COMMENTS OF THE WRITERS GUILD OF AMERICA, WEST, INC.

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Introduction

Writers Guild of America, West, Inc. (WGAW) is pleased to submit reply comments to the Federal Communication Commission's (FCC) Public Notice, "FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (More Than One Million Complaints); Seeks Comment on Adopting Egregious Cases Policy," released on March 28, 2013, GN Docket No. 13-86.

As an organization that represents more than 8,000 professional writers working in film, television and new media, including news and documentaries, the WGAW has a special interest in the Commission's indecency regulations because of their direct effect on writers. We would like to take this opportunity to expand on our initial comments and respond to comments filed by other groups, including Parents Television Council (PTC). As outlined in our initial filing, the WGAW believes that the dramatic changes in the video distribution market that have occurred since 1978 require modernization of the FCC's indecency regulations. In these reply comments we offer further evidence to support our position that indecency regulations should be phased out of application, particularly to programming broadcast during primetime hours.

Use of Contemporary Community Standards to Evaluate Indecency Complaints is Vague and Ripe for Abuse

Broadcast indecency is defined as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities." Although a "contemporary community" standard allows what constitutes indecent content to evolve as mores and tastes change, it remains too vague and susceptible to manipulation. In an enforcement regime that

focuses on egregious cases, such as the one in place at the Commission since September 2012, silence may be taken as community approval while complaints would be evidence that content violates a community standard. Such measurements of community standards, however, are inherently unreliable in an age of coordinated e-activism, where organizations with an agenda, such as Parents Television Council, can send out an e-blast resulting in several thousand of its base submitting an electronic complaint to the FCC. In this scenario the most vocal minority, which may or may not have even watched the program, exercises what NBC Universal appropriately labels a "heckler's veto." [1]

In reviewing the Commission's data on indecency complaints, we note that complaints are not increasing on an annual basis. Instead, complaints have fluctuated over a 10-year period between 2002 and 2012, peaking with the Super Bowl incident in 2004 and recently dropping to 2,181 complaints in 2012. In 2004, *MediaWeek* reporter Todd Shields submitted a Freedom of Information Act request and found that 99.8% of complaints filed in 2003 came from the Parents Television Council.[2] While the Commission does not disclose the source of the complaints, quarters having a high volume of complaints do seem to coincide with specific PTC mobilizations, such as a March 2009 campaign against *Family Guy*.[3] These campaigns are professional mobilizations of a membership already sympathetic to the issue; they are not an authentic measure of audience reaction or an accurate expression of community standards.

[1] See comments of NBCU in Docket 13-86 at 3.
[2] Ken Fisher, "Activist organization responsible for 99% of FCC Complaints," *Ars Technica*, December 7, 2004, http://arstechnica.com/uncategorized/2004/12/4442-2/
[3] Joe Flint, "Fox's 'Family Guy raking in the indecency complaints," *LA Times*, February 25, 2010, http://latimesblogs.latimes.com/entertainmentnewsbuzz/2010/02/fcc-family-guy-fox-complaints-draft.html

Radio and Television Broadcast Indecency Complaints[4]					
Year	**1st Quarter**	**2nd Quarter**	**3rd Quarter**	**4th Quarter**	**Year Total**
2012	1,023	414	446	298	2,181
2011	829	617	538	723	2,707
2010	130,651	23,472	958	1,152	156,233
2009	181,080	12,940	1,827	6,475	202,322
2008	120,931	25,058	37,458	26,743	210,190
2007	149,457	4,368	368	433	154,626
2006	275,131	52,067	162,170	30,962	520,330
2005	157,016	6,161	26,185	44,109	233,471
2004	693,080	272,818	121,688	317,833	1,405,419
2003	144	351	19,920	146,268	166,683
2002	242	141	93	97	573

Further, while PTC has always campaigned against sexual content on television, throughout the late 1990's and early 2000's the organization specifically targeted same-sex partnerships. Under the leadership of past president Brent Bozell, PTC advocated against the inclusion of lesbian, gay, bisexual and transgendered (LGBT) characters and relationships on broadcast television. In response to a gay character revealing his sexuality on an episode of *Dawson's Creek* in 1999, Mr. Bozell said the episode was, "wholly distasteful…When you know that your audience is young, you have to know presenting them with such difficult questions is wrong. But that is very much an agenda in Hollywood to advance the cause of homosexuality as

[4] Federal Communications Commission, Quarterly Reports-Consumer Inquiries and Complaints, last modified June 14, 2013, http://www.fcc.gov/encyclopedia/quarterly-reports-consumer-inquiries-and-complaints

normal behavior by making those who think otherwise the deviants."[5] In 1999 the PTC ranked *Will & Grace* third among the ten worst television shows for offering a "sentimental presentation of homosexuality."[6]

While PTC no longer publicly takes this antigay position, if the organization had been successful in its campaign ten years ago, broadcast television might not be as inclusive as it is today. And with only 97 characters identified as LGBT out of 701 series regulars in the 2012-2013 broadcast television season, and white characters representing the majority of all broadcast characters, many would argue that broadcast television still has a long way to go in reflecting the diversity of its audience.[7] Since the Commission relies on community input in the indecency complaint process, the "heckler's veto" can give a vocal minority disproportionate power to target content that they disapprove of, which may or may not be indecent. The ability to manipulate the complaint process contributes to the lack of clarity on indecency standards, which has a chilling effect on content. To allow federal enforcement policy to be driven by prejudices of private citizens and groups may even implicate constitutional equal protection norms. *See United States v. Windsor*, 133 S.Ct. 2675, 2693 (2013) ("The Constitution's guarantee of equality must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group"). Given the vagueness of community standards and the opportunities for abuse of the complaint process, WGAW believes phasing out indecency regulations during primetime is an appropriate action.

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[5] "Character on 'Dawson's Creek' Comes Out," *Orlando Sentinel* (Florida), February 23, 1999, Living Section, p E6, LexisNexis.
[6] "TV's best and worst Parental discretion advised," *Catholic Insight*, November 1, 1999, p 10, vol. 7, LexisNexis.
[7] "Where We Are on TV: 2012-2013 Season," GLAAD, p 1-2, http://issuu.com/glaad/docs/wherewareontv12?e=6038659/2646627

Indecency Regulations Can Have a Disproportionate Impact on People of Color

As noted in our initial comments, the subjective nature of indecency regulations may have the unintended consequence of bias. FCC rulings that expletives in *Saving Private Ryan* did not violate indecency regulations while expletives in *The Blues,* a documentary largely about African-American culture, were indecent suggest that these regulations may have a detrimental impact on the exploration of diverse topics and experiences.[8] The continued application of indecency regulations to only broadcast stations also has a disproportionate impact on people of color.

While the number of television households that rely on over-the-air broadcasts has shrunk to 9.2% of households[9], people of color and lower income households are over-represented in that cohort. Research conducted by market research firm GfK found that 28% of Asian households, 23% of African American households, and 26% of Latino households were broadcast only homes in 2012. According to GfK's study, people of color represented 44% of broadcast only homes in 2012.[10] As the ACLU noted in its filing, restrictions that target the broadcast medium disproportionately impact these populations.[11] Given this reality and the potential chilling effect indecency regulations have on diverse content, the Commission should phase out application of indecency regulations.

Conclusion

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[8] Brief for Fox as Amicus Curiae, *ACLU, et al., Federal Communications Commission, et al., v. Fox Television Stations*, et al., 132 S. Ct. 2307 (2012). Amicus brief available from ACLU at http://www.aclu.org/files/assets/10-1293_bsac_american_civil_liberties_union.pdf .

[9] The FCC estimates there are 10.97 million Broadcast-only households. Federal Communications Commission, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 15th Report, MB Docket 12-203, July 22, 2013, Table 17 at 94.

[10] National Association of Broadcasters, "Over-the-air TV Viewership Soars to 54 Million Americans," June 18, 2012, https://www.nab.org/documents/newsroom/pressRelease.asp?id=2761

[11] See comments of the ACLU, GN Docket 13-86, at 8.

The vagueness of indecency regulations, the potential for abuse of the complaint process and the disproportionate impact of regulations on diverse audiences lend further weight to our argument that the Commission's rules must be modernized. There is undeniable social value in content some might consider indecent, and such content has a place on broadcast television. The broadcast networks still reach the largest number of viewers and many diverse viewers only have access to broadcast television. Using technology and information available today, parents and viewers can make informed decisions about what content they and their families watch. Phasing out indecency regulations in primetime hours on the broadcast networks strikes an appropriate balance between concerns about children's access to content and free expression.