

FCC ENFORCEMENT BUREAU

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September 21, 2006

Marlene H. Dortch
Secretary
Federal Communications Commission
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

INVESTIGATION
SECTION

Re: Court Remand of Section III.B of the Commission's March
2006 Omnibus Order Resolving Numerous Broadcast
Indecency Complaints

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Dear Ms. Dortch:

On behalf of the ACLU, a non-partisan organization with hundreds of thousands of activists and members and 53 affiliates nation-wide, we submit our comments in response to the Commission's September 7 call for comment (FCC DA 06-1739) regarding certain indecency decisions relating to the fleeting use of expletives on broadcast television, which have been remanded to the Commission by the U.S. Court of Appeals for the Second Circuit. The Omnibus Order, which purports to clarify the Commission's findings regarding indecency, instead makes abundantly clear that the Commission's indecency regime is vague, flawed, and unnecessary.

At issue is Section III.B of the Commission's Omnibus Order finding that four television programs (*NYPD Blue*, *The Early Show*, *2002 Billboard Music Awards* and *2003 Billboard Music Awards*), because of the fleeting use of an expletive, violated the prohibitions of broadcasting indecent and profane material. The Commission did not propose any fines or other consequences such as consideration of the finding during license renewal proceedings. In a subsequent appeal, several parties complained they were not provided an opportunity to be heard by the Commission prior to adoption of the findings in Section III.B. The Commission asked the court hearing the appeals to remand the case to allow interested parties to submit comments.

The ACLU has long been a guardian of First Amendment values. Our concern with the Commission's indecency regime, and particularly with Section III.B of the Omnibus Order, is that it is vague and shifting. This creates the effect of turning down the thermostat on free speech, chilling artists and broadcasters. What is acceptable today may not be acceptable tomorrow. While the Commission decided today to forego penalties for these fleeting expletives, it may not do so in the future. The Commission has also made clear that its determinations will be based on a "contextual" analysis

rather than any clear rules. This merely adds to the confusion and increases the chill on speech.

The ACLU recommends that the Commission reverse its findings and return to the standard that existed for nearly thirty years: fleeting use of expletives is not actionable. The Commission should also examine, perhaps in another proceeding, whether the indecency regime is even necessary or legally sustainable.

In this comment, we will explain how the Commission's vague indecency standard breeds uncertainty that chills free speech. We will then show that the need for the Commission to enforce indecency standards is unnecessary. The actual number of programs drawing complaints has decreased, and parents now have the tools to protect their children from objectionable content. Finally, we will explain why the Commission's authority to regulate indecency is on shaky constitutional grounds.

The Commission's Vague Standards Have Resulted in Uncertainty About What Constitutes "Indecency."

The uncertainty inherent in the Commission's indecency standard is already having a chilling effect on speech that is clearly protected under the First Amendment. For example, the WB network this March censored an episode of "The Bedford Diaries" over objections by its creator because of fears that the FCC would impose fines over language and situations contained in the show. Also this year, some CBS affiliates refused to air a documentary on the September 11 terrorist attacks because of concerns about language used by firefighters portrayed in the movie. In 2004, various ABC affiliates refused to air "Saving Private Ryan" over concerns that the repeated use of certain expletives would result in fines.

Paradoxically, the Commission found that "Saving Private Ryan" (a fictional work) did not violate indecency standards even with its repeated use of expletives, but found indecent a documentary entitled "The Blues: Godfathers and Sons" in which the interviewees used various expletives. It is little wonder that broadcasters are wary.

Adding to the confusion is the Commission's change in practice regarding "fleeting" uses of expletives. For nearly thirty years, the Commission appropriately found that the broadcast of a fleeting expletive did not implicate the indecency rules. This was in accord with the Supreme Court's observation in *FCC v. Pacifica Foundation*: "We have not decided that an occasional expletive . . . would justify any sanction. . ."¹ The Commission, however, took a position at odds with the Supreme Court in its *Golden Globe Awards Order* when it concluded that a single utterance of the F-word

¹ *FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978).

constituted “profane language.” Shortly thereafter, various ABC affiliates refused to air “Saving Private Ryan.” When a complaint was filed against the broadcasters who televised the movie, the Commission found that multiple uses of the F-word were not indecent or profane. The Commission has emphasized, however that “such words may not be profane in specified contexts.” Thus, broadcasters are left with little guidance as to what the Commission will decide about whether particular contexts make certain expletives “profane.”

The result of this patchwork, *ad hoc* contextual examination is massive uncertainty about what constitutes indecency or profanity.

Uncertainty as to what is “indecent” leads to a chilling of speech.

As the examples above illustrate, vagueness and uncertainty demonstrably lead to a chilling of speech. Guessing incorrectly whether a program is or is not “indecent” can have important ramifications for a broadcaster, including huge fines and possibly loss of its broadcasting license. Vague laws and interpretations create traps for broadcasters because they are unsure what conduct or speech will constitute indecency. Rather than have broadcasters act at their peril, the law favors reasonable notice of what conduct will give rise to legal consequences, so that the speaker or broadcaster may act accordingly. Vagueness chills communications that may well NOT be indecent or profane, simply because the cost to the broadcaster of being wrong is too great.

Vagueness encourages silence instead of robust debate. “Uncertain meanings inevitably lead citizens to ‘steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked.”² The bottom line is that broadcasters enjoy First Amendment protection. The uncertainty inherent in the definition (or lack thereof) of “indecency” inevitably leads broadcasters to avoid certain speech. To do otherwise risks a finding of “indecency” and potentially disastrous liability.

All of this is fundamentally inconsistent with the “uninhibited, robust, and wide-open”³ debate contemplated by the First Amendment. This is not just a matter of prohibiting certain words that some might find objectionable. The Supreme Court has noted, “we cannot indulge in the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.”⁴ The Commission’s increased enforcement increases the risk of stepping over a blurry and ill-defined line.

² *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

³ *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

⁴ *Cohen v. California*, 403 U.S. 15 at 26 (1971).

The Alleged Increase in Complaints Do Not Evidence An Increase in “Indecency.”

The Commission notes in its Omnibus Order that complaints against indecency have dramatically increased,⁵ apparently in an attempt to justify increased indecency enforcement. However, much of the alleged increase results from the change in the way the Commission counts complaints.

Prior to the summer of 2003, the Commission aggregated together identically worded form letters or computer-generated electronic complaints and counted them as a single complaint. Some time during the summer of 2003, without any public notice to announce the change, the Commission quietly changed its methodology to count group complaints as individual complaints.⁶ In early 2004, the Commission began counting *identical* indecency complaints multiple times according to how many Commissioner’s offices and other divisions of the Commission receive the complaint.⁷ Examination of the complaints reveals that the vast majority of complaints are duplicate emails generated against a handful of programs targeted by activist groups.⁸ Because of these changes, between 2002 and 2004, complaints grew by more than 100 times. However, the *number* of programs that were the subject of complaints actually *dropped* by 20% over the same two-year period.⁹ Thus, the “dramatic” rise in complaints appears *not* to be the result of a rampant “increase” in indecency on broadcast television.

Parents Already Have Sufficient Tools to Protect Their Children

As President Bush has previously noted, parents are the appropriate parties to make decisions about protecting their children. Technology has made many tools available that apply to broadcast media as well. For example, approximately 85% of households receive their broadcast television through cable. All of the tools available to cable (channel blocking, program blocking, and so forth) are available for broadcast television.

TV Watch, a coalition of 27 prominent individuals and organizations representing more than 4 million Americans, sponsors initiatives such as the

⁵ Paragraph 1 of the Omnibus Order.

⁶ Thierer, Adam, “Examining the FCC’s Complant-Driven Broadcast Indecency Enforcement Process,” available at <http://www.pff.org/issues-pubs/pops/pop12.22indecencyenforcement.pdf>

⁷ Id.

⁸ Id.

⁹ Id.

“1-2-3 Save TV” tool kit for parents.¹⁰ These types of initiatives help educate concerned parents about the tools available.

Between technology and education, dramatic advances have occurred. Parents have the tools and the power to protect their children. There is little justification for the Commission acting as the nation’s “nanny.”

The Foundation of the Commission’s Authority to Regulate Indecency Has Crumbled.

In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Supreme Court allowed some limited regulation of an allegedly indecent broadcast (George Carlin’s “Seven Dirty Words” Monologue). Despite the Commission’s claims that this case provides its authority to regulate indecency, great caution should be exercised in attempting to rely upon this 28-year-old case as precedent for deciding what broadcasts are indecent or the ability to impose draconian penalties.

Initially, it is important to note that, unlike obscenity, indecent speech is protected under the First Amendment. *Id.*, at 746 (“Some uses of even the most offensive words are unquestionably protected. . . . Indeed, we may assume, *arguendo*, that this monologue would be protected in other contexts.”) The ability to regulate indecency in the broadcasting medium is an exception rather than the general rule. In many other contexts, the Supreme Court has invalidated efforts to restrict indecency.¹¹ In *Pacifica*, the Court applied a slightly different standard for broadcasting, but that decision cannot be read too broadly.

First, the decision was a fragmented one (5-4) that neither approved a particular standard for indecency, nor upheld a substantive penalty against the licensee.¹² Since *Pacifica*, the Supreme Court has acknowledged that the

¹⁰ Thierer, Adam, “Parents Have Many Tools to Combat Objectionable Media Content,” available at <http://www.pff.org/issues-pubs/pops/pop13.9contenttools.pdf>

¹¹ Print medium: *Butler v. Michigan*, 352 U.S. 380, 383 (1957); *See also Hamling v. United States*, 418 U.S. 87, 113-114 (1974) (statutory prohibition on “indecent” or “obscene” speech may be constitutionally enforced only against obscenity); Film: *United States v. 12 200-ft. Reels of Film*, 413 U.S. 123, 130 n.7 (1973); In the mails: *Bolger v. Youngs Drug Products Corp.* 463 U.S. 60 (1983); In the public forum: *Erzoznik v. City of Jacksonville*, 422 U.S. 205 (1975); Cable Television: *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000); the Internet: *Reno v. ACLU*, 521 U.S. 844 (1997).

¹² *See Pacifica*, 438 U.S. at 743 (plurality op.) and at 755-56 (Powell, J., concurring) (“[t]he Court today reviews only the Commission’s holding that Carlin’s monologue was indecent ‘as broadcast’ at two o’clock in the

FCC's definition of indecency was not endorsed by a majority of the Justices, and has repeatedly described the decision as an "emphatically narrow holding."¹³

Second, the rationale for the *Pacifica* decision, that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans,"¹⁴ is highly questionable in this era of cable, satellite and the Internet, all of which compete with broadcast television. Despite the pervasiveness of all media in general, the government has only been allowed limited content regulation of the broadcast media.

Third, and perhaps most importantly, the law itself has evolved since 1978. In *Pacifica*, three justices who joined the plurality opinion suggested "indecent" speech was subject to diminished scrutiny because it was "low value" speech.¹⁵ Approximately twenty-two years later, the Supreme Court rejected that notion, holding that "indecent" speech is fully protected under the First Amendment, and not subject to diminished scrutiny as "low value" speech.

The Court stressed that "[t]he history of the law of free expression is one of vindication in cases involving speech that many citizens find shabby, offensive, or even ugly," and that the government cannot assume that it has greater latitude to regulate because of its belief that "the speech is not very important."¹⁶ Additionally, the Court since *Pacifica* has invalidated government-imposed indecency restrictions on cable television, despite its "pervasiveness." While *Pacifica* noted the pervasiveness of broadcast television as part of its rationale, the Court in striking down such regulation in the cable television context found specifically that "[c]able television broadcasting, including access channel broadcasting, is as 'accessible to

afternoon, and not the broad sweep of the Commission's opinion"). *See also Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 559 (2d Cir. 1988) ("[t]he *Pacifica* Court declined to endorse the Commission definition of what was indecent"); *ACLU v. Reno*, No. Civ. A. 96-963, 1996 WL 65464 at *3 (E.D.Pa. Feb. 15, 1996) (Buckwalter, J.) ("it simply is not clear, contrary to what the government suggests, that the word 'indecent' has ever been defined by the Supreme Court").

¹³ *Reno*, 521 U.S. at 866-867, 870; *Sable*, 492 U.S. at 127; *Bolger*, 463 U.S. at 74.

¹⁴ *Pacifica*, 438 U.S. at 748.

¹⁵ Only Justices Stevens, Rehnquist, and Chief Justice Burger joined in that part of the opinion asserting that indecent speech lies "at the periphery of First Amendment concern." *Pacifica*, 438 U.S. at 743.

¹⁶ *Playboy Entertainment Group*, 529 U.S. at 826.

children' as over-the-air broadcasting, if not more so."¹⁷ Thus, the rationale in *Pacifica* is undercut by the Court's later decision.

Finally, in *Reno v. ACLU*, the Court for the first time subjected the indecency definition (in the Internet context) to rigorous scrutiny, and by a vote of 9-0, found it to be seriously deficient.¹⁸ *Reno* and other decisions subsequent to *Pacifica* undercut *Pacifica*'s rationale and raise serious questions about its vitality. *Pacifica*'s logic and subsequent developments no longer support the Commission's authority to regulate indecency.

Conclusion

Former Commission Chairman Reed Hundt has described the current Commission's indecency enforcement as "the biggest threat to the First Amendment faced by the electronic media since the McCarthy era, because it seeks to limit television viewers' freedom of choice."¹⁹

Technology and education give parents the tools to protect their children from programs they believe are indecent, regardless of how the Commission defines "indecency."

The current "indecency" regime as administered by the Commission is vague, leading to confusion among broadcasters and speakers. This leads to a widening chill on First Amendment speech, and a restraint on programs from broadcasters and artists to willing listeners. Finally, technology and legal advancements seriously undermine the Commission's authority to regulate "indecency."

The remand of the litigation pending before the Second Circuit provides the Commission an important opportunity to reexamine its approach to "indecency" enforcement, particularly when it comes to fleeting expletive cases.

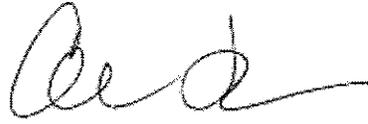
¹⁷ *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 717, 744 (1996).

¹⁸ 521 U.S. at 871-881. In the context of obscenity which is not protected under the First Amendment, the work must be reviewed as a whole, the effect of the material is judged based on the average person, and material that has literary, artistic, political or scientific value cannot be restricted. None of these findings are required in determinations of indecency, although indecent speech is protected under the First Amendment. If the Supreme Court requires such findings before speech can be deemed obscene, it makes little sense to apply a lesser standard to speech that is, in fact, protected.

¹⁹ Hundt, Reed, "Regulating Indecency: The Federal Communication Commission's Threat to the First Amendment," 13 *Duke Law and Technology Review*, 2005, Paragraph 4.

We recommend that the Commission reverse its findings of apparent liability in Section III.B, and declare once again that an occasional broadcast of a fleeting expletive does not constitute actionable indecency or profanity. Finally, the Commission should undertake, either in this or in another proceeding, an examination of its authority to regulate indecency at all in today's technological climate.

Sincerely,

A handwritten signature in black ink, appearing to read 'Caroline Fredrickson', written in a cursive style.

Caroline Fredrickson
Director, Washington Legislative Office

A handwritten signature in black ink, appearing to read 'Marvin J. Johnson', written in a cursive style.

Marvin J. Johnson
Legislative Counsel