

**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

**JOINT REPLY COMMENTS
OF THE NAMED STATE BROADCASTERS ASSOCIATIONS**

**THE NAMED STATE BROADCASTERS
ASSOCIATIONS**

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Alabama Broadcasters Association, Alaska Broadcasters Association, Arizona Broadcasters Association, Arkansas Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Georgia Association of Broadcasters, Hawaii Association of Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, MD/DC/DE Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Jersey Broadcasters Association, New Mexico Broadcasters Association, The New York State Broadcasters Association, Inc., North Dakota Broadcasters Association, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, Radio Broadcasters Association of Puerto Rico, Rhode Island Broadcasters Association, South Carolina Broadcasters

Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Washington State Association of Broadcasters, Wisconsin Broadcasters Association, and Wyoming Association of Broadcasters (collectively, the “State Associations” or “Associations”) by their attorneys in the matter, hereby file these Joint Reply Comments in response to the Commission’s Public Notice released April 1, 2013.¹

Introduction and Summary

As the opening comments of so many parties well illustrate,² this proceeding will test whether the Federal Communications Commission (“FCC”) is truly committed to honoring and protecting the constitutionally guaranteed freedom of speech rights of every free, local, over-the-air, commercial and noncommercial radio and television broadcaster throughout our nation. At its core, the act of broadcasting is the same as the act of speaking, albeit to the public at large through sound in the case of radio, and through sound and images in the case of television. Those sounds and images may be produced by the station owner, by the station’s employees, or by third parties whose broadcast material the station has aired. Each broadcast station licensee is not unlike an individual standing on a street corner using a radio antenna, rather than a bull horn, so that the speaker can be heard far and wide. An individual’s freedom to express himself with a bull horn, or by passing out papers containing words or images, is deeply honored and broadly protected by the First Amendment. Sadly, however, if the same person were to use a broadcast station to express himself, that freedom of expression is not as deeply honored nor adequately

¹ See Public Notice entitled “*FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (More Than One Million Complaints); Seeks Comment on Adopting Egregious Cases Policy*,” DA 13-581 (the “Public Notice”).

² Attached hereto as Exhibit A is an extensive list of “pro broadcaster free speech” parties in this proceeding and their respective positions.

protected by the FCC. That must change and it is this proceeding, the State Associations submit, which is the timely and appropriate vehicle for effectuating that change.

Discussion

The State Associations share the same legal and regulatory concerns that have been so eloquently expressed in this proceeding by numerous commercial and noncommercial broadcast station owners, the major television broadcast networks, the television affiliates associations, the National Association of Broadcasters, the Association of Public Television Stations, PBS, Writers Guild of America, the Radio Television Digital News Association, the ACLU, and many others, all of whom believe that the Commission's enforcement policies and practices in the area of indecency need to change substantially and without delay.³ The State Associations also submit that those enforcement policies and practices violate the letter or spirit of both (i) Section 326 of the Communications Act of 1934, as amended, which prohibits the FCC from "censoring" broadcast material,⁴ and (ii) the free speech protections guaranteed to broadcasters under the First Amendment.

Rather than repeat in the text of these Joint Reply Comments the legal analyses of the many "pro-broadcaster free speech" commenters, these Joint Reply Comments are limited to identifying certain actions that the Commission should take immediately, as well as over the longer term, in order to fully extricate itself from the First Amendment and statutory infringements that its current enforcement policies and practices have and continue to cause.

³ See generally, Exhibit A hereto.

⁴ See 47 U.S.C. § 326 ("Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.").

At the outset, it should be understood that the State Associations favor doing away with broadcast regulation of speech that is indecent. However, we are concerned that so long as Section 1464 of Title 18 of the United States Criminal Code remains federal law,⁵ any “enforcement void” created by the FCC’s withdrawal as a national enforcer will place broadcasters in the position of having to operate under a patchwork quilt of arbitrary, inconsistent, ambiguous, and chilling First Amendment rulings by numerous courts throughout the land, and that broadcast stations whose service areas cover multiple jurisdictions will have to operate at the mercy of whichever local enforcer, on any given day, is the most politically and otherwise critical in matters of artistic and editorial taste. Accordingly, for purposes of these Joint Reply Comments, the State Associations have assumed, but only *arguendo*, that centralized, national enforcement of broadcast indecency will continue to reside within the Commission -- albeit dramatically altered consistent with these Joint Reply Comments and the comments of the other pro-broadcaster free speech commenters.

The State Associations urge the Commission in this proceeding first to focus on implementing immediate or near-term changes to its enforcement policies and practices in this area and then later, with the benefit of a more fully developed notice and comment rulemaking record, consider and adopt longer-term enforcement-related changes, all as described below.

The State Associations submit that the current legal and factual record in this proceeding supports Commission adoption of the following proposals, whether in a single, collective order, or in multiple, separate orders:

1. Promptly declare that the FCC will no longer undertake enforcement action against any broadcast station, based on a pending or future filed complaint, that the station aired

⁵ See 18 U.S.C. § 1464 (“Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.”).

either a fleeting expletive as a remark or gesture (including “profanities”), isolated nudity or mere suggestion of sexual activity, or any sound and/or image that is alleged to have been indecent when broadcast during, including but not limited to, a live or taped radio or television, newscast, interview, documentary, public affairs, sports or entertainment programming (“**Proposal #1**”).⁶ *Rationale:* This proposal enjoys wide support and, the State Associations submit, adoption of it is dictated by the First Amendment and Section 326 of the Communications Act.⁷ Furthermore, the change in Commission policy should reduce considerably the number of indecency-based complaints that the Commission has struggled over the years to rationally and lawfully adjudicate as well as reduce, although not entirely eliminate, the risk of potentially unlawful, future Commission infringements of the First Amendment rights of broadcasters.⁸

2. Promptly dismiss all pending complaints which would not be enforceable under the action taken pursuant to **Proposal #1** above, giving priority for dismissal actions first to complaints that are holding up the processing of assignment and/or transfer applications, then to those complaints that are holding up the processing of renewal applications, then to those complaints that are the subject of a current indemnification and/or escrow

⁶ The Commission should also make clear that it will no longer entertain any complaint that a broadcast station aired material that is alleged to be “profane.” The term is rooted in religion and in any event is too ambiguous. *See* Comments of NBCUniversal Media, LLC at 39-40, Docket No. 13-86 (filed June 19, 2013). Furthermore, in order to reduce the chances of confusion, the State Associations urge the Commission to modify its on-line complaint form to eliminate the reference to the term “profane.” The form currently states that it wants complainants to include “as many details about the program as possible in order to help the FCC determine whether the material was obscene, *profane*, and/or indecent (such as specific words, language, images, etc.)” (emphasis added).

⁷ *See* U.S. Const. amend. I; 47 U.S.C. § 326.

⁸ As mentioned, this proposal enjoys wide support. *See, e.g.*, Comments of CBS Corporation at 20-24, Docket No. 13-86 (filed June 19, 2013); Comments of ABC, Inc. at 25, Docket No. 13-86 (filed June 19, 2013); Comments of Fox Entertainment Group, Inc. and Fox Television Holdings, Inc. at 22-26, Docket No. 13-86 (filed June 19, 2013); Comments of NBCUniversal Media, LLC at 39, Docket No. 13-86 (filed June 19, 2013); Comments of the Radio Television Digital News Association at 15-23, Docket No. 13-86 (filed June 19, 2013); Comments of National Public Radio at 11, Docket No. 13-86 (filed June 19, 2013); Comments of the National Association of Broadcasters at 31-34, Docket No. 13-86 (filed June 19, 2013).

agreement with the Commission, and so on (“**Proposal #2**”).⁹ *Rationale:* This will go a long way toward removing the most tangible adverse effects of the Commission’s current enforcement policies and practices in this area.

3. Promptly declare that the specific program material that is alleged, in any complaint that is not eligible for dismissal under **Proposals #1** and **#2** above, to be indecent will be evaluated on the public record during the course of this proceeding, but solely (no enforcement action contemplated) for this important but limited purpose: the FCC will use the program material that is alleged in those complaints to be legally indecent to discuss, on the public record and with the opportunity for public comment, how it might rule taking into consideration various presented or assumed facts and factors. The overarching purpose of that “discussion” is to determine whether the Commission will be able, as a matter of law, to provide broadcasters and the public with a clear, consistent, predictable, and otherwise lawful, understanding of what broadcast material in the future will be deemed legally actionable and what broadcast material will not be considered legally actionable, consistent with the limitations contemplated under **Proposal #1** above. (“**Proposal #3**”). *Rationale:* This proposal contemplates a longer-term, fully public evaluation process that is necessary because there is a serious question whether the Commission will be able to draw sufficiently lawful and clear lines between what is legally actionable and what is not. Depending upon whether the Commission is successful as a legal and practical matter, such a developing record will either justify the

⁹ The dismissal of any complaint that provided the basis for such indemnification/escrow agreements should be promptly followed by the issuance of an order terminating such agreements and instructing that all escrowed funds be promptly released and returned.

Commission remaining an enforcer, or dictate its withdrawal as an enforcer, of broadcast indecency.¹⁰

4. Promptly declare that any complaint alleging that a station has aired obscene or indecent material must use the Commission's online complaint form or the equivalent, including the following certification which the Commission should add to its online form

(“**Proposal #4**”):

“I certify that I personally heard and/or viewed over the station that I have identified in my complaint the material that I am complaining about, and that it is my personal belief that the material is obscene and/or indecent as I have explained in my complaint. The statements made in this complaint are true, complete, and correct to the best of my knowledge and belief, and are made in good faith. I acknowledge that all statements in the complaint are considered material representations, and that willful false statements made in this complaint are punishable by fine and/or imprisonment (U.S. Code, Title 18, Section 1001).”

¹⁰ For examples of the difficulty the Commission has encountered when trying to draw lines between what is actionable and what is not, compare *Complaints Against Various Television Licensees Regarding Their Broad. On Nov. 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 FCC Rcd. 4507, 4512, ¶ 14 (2005) (repeated use of expletives were central to the “realism and immediacy” of the fictional account of WWII soldiers in “Saving Private Ryan”) with *Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005,* 21 FCC Rcd. 2664, 2684-85, ¶¶ 73-78 (2006) (“*Omnibus Order*”) (use of the same expletives as in “Saving Private Ryan” were not “essential to the nature of an artistic or educational work” in documentary “The Blues”); compare *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, Memorandum Opinion and Order,* 19 FCC Rcd 4975, 4980 ¶ 12 (2004) (“*Golden Globes II*”) (Performer Bono's spontaneous declaration that winning Best Original Song was “really fucking brilliant, really, really great” was actionably indecent) with *FCC Overlooks Ortiz's passionate, profane speech to Red Sox Fans,* USA Today (April 21, 2013) (where FCC declined to take action against broadcasters who aired baseball player David Ortiz's remark, “this is our fucking city, and nobody is going to dictate our freedom” because he “spoke from the heart”); compare Memorandum Opinion and Order, *Complaint Against Various Broadcast Licensees Regarding Their Airing of the UPN Network Program "Buffy the Vampire Slayer" on Nov. 20, 2001,* 19 FCC Rcd 15995, 15998 at ¶ 6 (2004) (FCC ruled that a scene in which one character straddles and kisses another in a sexually suggestive fashion was “not sufficiently graphic or explicit to be deemed indecent”) with *Omnibus Order,* 21 FCC Rcd at 2735-2736 ¶¶ 11, 13 (FCC ruled that a scene in CBS's “Without a Trace” was indecent because one character straddles another and the “movement, sounds and comments contained in the scenes [were] highly sexually charged”).

By filing the complaint using the form available on the Commission's website or its equivalent, the filer will be deemed, as a matter of law, to have made the certification.¹¹ *Rationale:* The purpose of this suggested language is to force complainants to accept the responsibility that their complaint must be based on first-hand, personal knowledge and be a considered decision by them, rather than one that is simply a response to a hearsay letter writing campaign inspired by a third-party. The resources of the Commission, and the First Amendment rights of broadcasters, are too important to be unduly and inappropriately burdened or impaired by the current, lax, complaint enforcement regime that wallows in complaints filed by anyone alleging anything about any material broadcast over a station without even having to hear or see the material first-hand.

5. Expediently adopt new procedures for consideration of obscenity/indecency-based complaints, including the following: (a) within thirty (30) days of receiving an obscenity/indecency-based complaint, the Commission will decide whether or not the complaint is *prima facie* actionable within the narrower focus set forth in **Proposal #1** above, and, if not, will promptly dismiss the complaint and provide the targeted station with a copy of the decision; (b) within the same time period, if the Commission determines that the complaint is not subject to dismissal per **Proposal #1** above, and is otherwise *prima facie* actionable, the Commission will mail and email a true and complete copy of the complaint, including any attachments, redacted only to the extent necessary to prevent the complainant's identify from becoming known, to the licensee of

¹¹ As part of **Proposal #4**, the Commission should revise its online complaint form by adding the proposed certification as well as making clear that if a person does not want to use the form, the person's complaint must be equivalent in terms of the information provided and the certification made.

the affected station and request a response to be filed within thirty (30) days of the Commission's transmittal; and (c) the Commission will issue an order resolving such complaint within one-hundred and twenty (120) days of the date of receipt of the affected licensee's response and will promptly mail and email a copy of the decision to the affected station ("**Proposal #5**"). *Rationale:* The Commission's past history of not resolving for many years well over a million indecency-based complaints, as well as generally not disclosing to affected stations the existence of such complaints, has impaired the ability of affected licensees to defend themselves and, where warranted, to timely prevent re-broadcast of offending material. The State Associations completely understand the Commission's decision to defer action on the millions of indecency-based complaints that were pending during a period when the courts were considering the constitutionality of certain indecency-related enforcement actions taken by the Commission. However, if the Commission considers a complaint to be serious enough that the complaint should not be dismissed, the Commission needs to avoid depriving the affected station of the opportunity to conduct its own timely review and, where warranted, sanction internally unacceptable conduct. Every indecency-based complaint creates its own chilling effect. Any delay in resolving such complaints exacerbates that harmful effect. The proposed timetable for Commission is ample on its face.

6. Promptly make clear that for an obscenity/indecency complaint to be considered *prima facie* actionable, the complaint must (i) be received by the Commission using its online complaint form (omitting the term "profane" and including the certification, as proposed above) or the equivalent, (ii) contain all of the information contemplated by the online form, (iii) demonstrate that the station aired material that was obscene or indecent within

the legal definition of those terms (where the use of a word or image was clearly intended in the sexual or excretory sense), and (iv) that in the case of material alleged to be indecent the broadcast did not fall within the bounds of **Proposal #1** above (“**Proposal #6**”). *Rationale:* Given the inherent subjectivity of these types of content-related allegations, and the First Amendment rights of broadcasters, the State Associations believe that it is both fair and appropriate for the Commission to establish a clear threshold standard when determining whether to take further action with respect to obscenity/indecency-based complaints. This is fair to (i) all listeners and viewers, including complainants, all of whom are the beneficiaries of the program diversity that can only exist where a broadcaster’s freedom of expression is adequately protected, (ii) the affected licensee which is the intended beneficiary of the protections afforded under the First Amendment, and (iii) the Commission itself, taking into consideration the content-related deference it is required to observe under Section 326 of the Communications Act of 1934, as amended, and the First Amendment, as well as the limited resources the Commission possesses to adjudicate matters of content that are inherently subjective and context determinative, thus justifying strong governmental deference to the editorial judgments of broadcasters.

7. Promptly confirm that not until this proceeding has been completed will the Commission, or any of its Bureaus, impose an “enforcement hold” where an obscenity/indecency-based complaint would have previously prompted the Commission to place an “enforcement hold” on a station’s pending or future applications (“**Proposal #7**”). Subject to the outcome of this proceeding, if consideration of “enforcement holds” is found warranted once again, the Commission will follow these procedures:

- a. Where (i) an application, not involving an assignment of license or transfer of control, is pending before the FCC, and (ii) an obscenity/indecency complaint that is not subject to dismissal under **Proposal #1** above is pending against the station on whose behalf the application was filed, the Commission will decline to impose or *promptly* release, as the case may be, any “enforcement hold” on the application in consideration of the FCC imposing the following condition on the grant of the station’s application: “The grant of this application is without prejudice to any action that the FCC may take with respect to a complaint received by the FCC on [insert date] contending that the station broadcast material that the complainant alleges was obscene and/or indecent” (**Proposal 7A**). *Rationale:* This proposal is intended to eliminate the FCC’s current practice of requiring a licensee to waive the protections afforded under applicable statutes of limitations in order to persuade the FCC to lift (or not impose) an “enforcement hold” as well as to ensure the timely processing of the licensee’s application. Such change in procedure will promote the dispatch of the FCC’s docket as well as reduce regulatory uncertainty for licensees, *e.g.*, inordinately long pending applications, without prejudicing the FCC’s authority to rule on obscenity/indecency complaints, albeit within a time frame dictated by applicable statutes of limitations.
- b. Where (i) an application involving an assignment of license or transfer of control is pending before the FCC, (ii) an obscenity/indecency complaint that is not subject to dismissal under **Proposal #1** above is pending against the station on whose behalf the application was filed, and (iii) the seller will, after

closing, continue to own at least one station, the Commission will *promptly* (i) enter into a mutually acceptable agreement for the seller to assume any liability, and (ii) decline to impose or release, as the case may be, any “enforcement hold” on the application in consideration of the FCC imposing the following condition on the grant of the station’s application: “The grant of this application is without prejudice to any action that the FCC may take with respect to a complaint received by the FCC on [insert date] contending that the station broadcast material that the complainant alleges was obscene and/or indecent” (**Proposal 7B**). *Rationale:* This seeks to address the delays many stations have experienced in moving through the process.

- c. Where (i) an application involving an assignment of license or transfer of control is pending before the FCC, (ii) an obscenity/indecency complaint that is not subject to dismissal under **Proposal #1** above is pending against the station on whose behalf the application was filed, and (iii) the seller will, after closing, not own at least one station, the Commission will *promptly* (i) enter into a mutually acceptable agreement for the seller to assume any liability and (ii) decline to impose or release, as the case may be, any “enforcement hold” upon a mutually agreeable escrow agreement having been entered into between the seller and an escrow agent of the FCC’s choosing and a mutually agreeable sum of money having been placed with such escrow agent, it being understood that the amount of such fund shall be the absolute minimum amount appropriate in the circumstances and the fund shall be released to the parties if the Commission has not, within one (1) year after the grant of the

underlying application, adopted at least a notice of violation (“**Proposal 7C**”).

Rationale: This seeks to address the delays many stations have experienced in moving through the process, the out-of-proportion amount of escrow funds required in some transactions, and the length of time that it takes the FCC to decide what to do about complaints that caused the FCC to withhold, or threaten to withhold, action on an assignment/transfer of control application.¹²

- d. In all cases where the Enforcement Bureau is inclined to place, or has placed, an “enforcement hold,” on the pending application of a station which is the subject of an obscenity/indecency complaint that is not subject to dismissal under **Proposal #1** above, the Commission will *promptly* notify the licensee of the affected station and provide the licensee, if it has not already done so under the timetable contained in **Proposal #5** above, with a complete copy of the pertinent complaint(s) redacted only to the extent necessary to prevent the complainant’s identify from becoming known (“**Proposal 7D**”). *Rationale:* Too often a station only finds out about an enforcement hold, and the nature of a pending complaint, after it learns that one of its applications is being held up, thereby delaying the period when a dialogue with the Commission’s staff could have been fruitfully begun and concluded.

¹² The Commission needs to address the issue of proportionality when it comes to issuing fines for violations of its indecency rule. If a broadcaster’s conduct were evaluated under the criminal indecency statute, the requisite scienter would have to be shown before the broadcaster could be found guilty. It is highly doubtful a broadcaster would be found guilty under the statute where, during a live broadcast, an entertainer utters in a fleeting way an “F bomb.” However, under the way the Commission has been enforcing its indecency rule, for the same offense the station could be fined as much as \$325,000. The State Associations submit that the lack of the need for scienter and proportionality in such First Amendment-centric matters also raise serious due process issues that need to be addressed.

EXHIBIT A

I. CBS Corporation

A. ***Egregious cases only:*** CBS urges the FCC to permanently adopt an approach where it takes enforcement action only in the most egregious cases. The FCC should proceed only against broadcast indecency when elements of graphic explicitness, “dwelling or repetition,” and a context evincing lack of serious purpose are all present. In light of First Amendment protections, the goal of assisting parents in parents limiting what their children may be exposed to cannot be pursued with such single-mindedness as to “reduce the adult population to...only what is fit for children.” Broadcasting is no longer “uniquely pervasive” and V-Chip technology exists as a less restrictive alternative to indecency regulation. The Commission must at least try to minimize the tension between its regulation of broadcast and the First Amendment, because application of the rule to non-obscene broadcast speech will inevitably be struck down in the absence of Commission restraint.

1. ***No enforcement against fleeting expletives, isolated nudity, or suggestions of sexual activity:***

- a. The Supreme Court’s decision to uphold the FCC reprimand of WBAI-FM¹³ in *Pacifica* did not envision the FCC policing the airwaves for every stray expletive uttered by anyone during a live broadcast. The Commission’s pre-*Golden Globes* policy of not taking action against fleeting expletives worked well enough for more than twenty-five years without making vulgar language commonplace in broadcast television. Nor have expletives become commonplace in post-10 p.m. “safe harbor” broadcasts.
- b. Scripted broadcasts should not be treated differently than live broadcasts. A government agency should not be distinguishing between an isolated expletive used in a police drama or stronger language in an Academy Award winning movie or a Peabody Award winning documentary.
- c. The FCC should treat isolated (non-sexual) nudity the same as an isolated expletive. The 2004 Super Bowl incident demonstrates what results from a contrary, zero-tolerance policy: a breast exposed for a fraction of a second was followed by eight years of Commission and court proceedings.
- d. The FCC is not the correct entity to decide, in the absence of extrinsic evidence, whether the mere suggestion of sexual activity in a broadcast exceeds what “community standards” will tolerate.

¹³ For George Carlin’s “Filthy Words” monologue.

Undertaking such an impossible task will inevitably result in arbitrary and inconsistent enforcement decisions.

- B. ***Transparent and Expeditious Decisionmaking:*** Regulation by uncertainty and intimidation is not permitted by the First Amendment. To cure this defect, the FCC must provide expeditious, written decisions, dismissing or sustaining complaints so that licensees will know what the Commission believes is required of them and have the opportunity to seek judicial review where appropriate. Adopting the substantive standards suggested by CBS (above) will allow for summary dismissal of many complaints.

II. ABC, Inc.

- A. ***Abandon broadcast indecency regulation:*** The media and marketplace have undergone remarkable changes since *Pacifica*, rendering obsolete the basic assumptions upon which the Supreme Court approved differential treatment for broadcast indecency. The V-chip and other blocking technologies provide a less restrictive alternative to direct government regulation of speech.¹⁴ ABC is concerned with the vagueness of the term “egregious.” Simply “adding another subjective and conclusory term like ‘egregious’ into the mix of the current ad hoc balancing of subjective criteria” would not deter the chilling effect of the rule or provide meaningful clarity to broadcasters.
- B. ***At a minimum, return to the 2004 policy:*** If the FCC continues to regulate broadcast speech, ABC urges the FCC to return to its pre-2004 policy and abandon enforcement action against fleeting, spontaneous expletives and nudity in live programming. Live sports broadcasting, for example, is one broadcasting’s most valued services. Inevitably, background sounds may from time to time include an expletive or other untoward remark or gesture. For decades, the Commission has accepted this as a tolerable by-product of live broadcasting. Abandoning this approach has imposed tremendous burdens on broadcasters and compromised the ability of broadcasters to provide live programming. Blocking technology cannot cure these burdens because it is expensive and susceptible to human error.
- C. ***Abandon the “artistic necessity” standard and establish clear exemptions for bona fide news, documentary, and public affairs programming:*** The Commission should treat broadcasters’ artistic and editorial choices with great deference, and not put the burden on broadcasters to prove that challenged material is “essential” or “integral.” The “artistic necessity” standard invites the agency to substitute its artistic and editorial judgments for the broadcasters’. The Commission’s expertise does not extend (and is constitutionally prohibited from) second guessing decisions as to whether content is “essential” to dramatic, comic,

¹⁴ See *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 815 (2000) (“if a less restrictive means is available for the Government to achieve its goals, the Government must use it.”).

or journalistic work. Further, the FCC's current *ad hoc*, subjective determinations leave broadcasters guessing whether the Commission will find material sufficiently "important," "integral," or "serious," causing broadcasters to withhold broadcasts of culturally significant content for fear of massive indecency fines.

- D. ***Clarify that material is not indecent unless it is both highly graphic and sustained/repeated:*** By not restricting its indecency findings to material that is both highly graphic and sustained, the Commission's decisionmaking has been entirely unpredictable, casting a chill on broadcasters.

III. **Fox Entertainment Group, Inc. and Fox Television Holdings, Inc.**

- A. ***Abandon broadcast regulation:*** For materially similar reasons as ABC.

- B. ***Return to historically restrained approach:*** The *Golden Globes* policy is contrary to the First Amendment. It is impossible to enforce consistently and is unconstitutionally vague. Moreover, the *Golden Globes* policy is not narrowly tailored: it is exceedingly broad (penalizing for unscripted fleeting expletives); fatally under-inclusive (allowing expletives if "artistically necessary" or appear in an FCC-defined "news" show); and grossly over-inclusive (less than one-third of American TV households have children under 18-years-old). The current enforcement policy does not further any legitimate governmental interest.¹⁵ If the FCC must enforce an indecency rule, it should abandon efforts to regulation beyond sexual or excretory content that amounts to "shock treatment." This would at least restore a bright light approach, giving broadcasters notice. In no event should the Commission attempt to sanction content during live programming or during news or public affairs programming.

- C. ***Dismiss all pending indecency complaints:***

1. ***Lack of fair notice:*** The lack of fair notice resulting from the FCC's arbitrary and inconsistent enforcement approach makes it constitutionally impermissible to find past broadcasts actionably indecent.¹⁶ First, the FCC's flip-flopping on what constitutes actionably indecent material has deprived broadcasters of affirmative notice. Next, no broadcaster could have had fair notice that a pending complaint against a news or current affairs program could lead to an indecency sanction. This same uncertainty extends to unintentional broadcasts of fleeting expletives during live programming.
2. ***Lack of scienter in live programming:*** Additionally, any pending complaint against coverage of a live event must fail because no

¹⁵ *FCC v. Pacifica Found.*, 438 U.S. 726, 761 (1978) (Powell, J., concurring) (courts cannot assess "which speech protected by the First Amendment is most 'valuable'").

¹⁶ *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2319 (2012).

broadcaster could be found to have the necessary scienter to violate 18 U.S.C. § 1464 with respect to content appearing during live coverage. The Supreme Court has clarified that “the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct.”¹⁷ Consequently, the FCC should dismiss these cases and make clear that to violate § 1464, one must act with some degree of knowledge with respect to the utterance of offending language.

D. ***Provide stringent procedural safeguards and prompt access to judicial review:***

1. ***The FCC should require complaints be filed by bona fide viewers and FCC staff provide efficient adjudication*** of complaints coupled with prompt access to judicial review. Efficient administration would cabin the FCC’s “opportunity to rely on its own unreviewed forfeiture decisions in setting standards for decency, reducing the tendency for one unconstitutional decision to beget another.”¹⁸ The possibility of a five-year wait for judicial review of whether a broadcast is indecent, the possibility of additional regulatory consequences in the meantime, and the lack of official guidance on what material the FCC may deem indecent threaten to turn the FCC’s current enforcement regime into one of *de facto* prior restraint.¹⁹ Further, the Commission’s current practice of using unadjudicated indecency complaints to hold up license renewals has turned the FCC’s enforcement scheme into an unconstitutional system of informal censorship. Exacerbating the problem is the FCC’s failure to abide by its own *Indecency Policy Statement*, instead initiating indecency investigations without *bona fide* viewer complaints and relying on form complaints generated by online filing campaigns. Thus, it takes no time or cost to file a complaint but imposes significant burdens on the Commission’s limited resources to process each one.
2. ***More transparency is needed:*** Basic information about indecency complaints remains opaque, such as when they were filed, whether they remain pending, and how they are disposed of. In the rare cases the FCC discloses a complaint, it redacts identifying information, making it impossible for a broadcaster to determine the complaint’s validity or even what program prompted the complaint.

¹⁷ *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994); *see also Mishkin v. New York*, 383 U.S. 502, 511 (1966) (“The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity.”).

¹⁸ *Actions for Children’s Television v. FCC*, 59 F.3d 1249, 1259 (D.C. Cir. 1995) (“*ACT IV*”).

¹⁹ *Id.* at 1260-61.

IV. NBC Universal

A. ***The Commission should initiate a rulemaking to reconsider the basis and scope of its authority to impose a broadcast-specific indecency regime:*** The new regime must, at a minimum, address the most serious constitutional infirmities of the FCC's existing approach. The Commission's case-by-case adjudications and *ad hoc* rulings have only made the problems worse, making it clear that the FCC cannot cure the constitutional defects of its policy without notice and comment rulemaking.

1. **Substance:**

- a. ***Exempt news, public affairs and live sports from indecency enforcement***
- b. ***Abandon enforcement regarding expletives that are not deliberate and repetitive***
- c. ***Return to prior policy regarding profanity:*** Under the prior policy, profanity meant "blasphemy," which can no longer be regulated due to religious freedom protections.²⁰
- d. ***Tailor safe harbor hours to primetime schedules in different time zones:*** Primetime evening periods in Central and Mountain Time zones are the hours between 7 p.m. and 10 p.m. A safe-harbor that begins after primetime ends in large segments of the country (including Chicago, Dallas, Houston, Minneapolis/St. Paul, St. Louis and Kansas City) deprives millions of adult Americans of programming suitable for the willing viewers among them.

2. **Process:**

- a. ***Consider only bona fide complaints:*** The complainant should be required to certify that s/he:
 - (i) Viewed the programming on the date and at the time stated in the complaint;
 - (ii) Received the programming via that station's over the air signal and not through MVPD service, the internet, or other online service;
 - (iii) Viewed the programming in the company of a minor child; and

²⁰ *Raycom America, Inc.*, 18 FCC Rcd 4186, 4187 (2003).

- (iv) Viewed the programming at a time outside the safe-harbor hours of 10 p.m. to 6 a.m. (with appropriate adjustments for Central and Mountain Time zones)

The Complainant should also have to explain why s/he believes the broadcast to be indecent, provide a video recording (or at least a detailed written description) of the broadcast, and file a complaint within 30 days after the allegedly indecent material was broadcast.

The Commission should dismiss, with prejudice, all complaints that fail to provide this basic information. Enforcing such a process could enable the FCC to take enforcement action within the confines of the First Amendment, help the Commission deploy more effectively its own limited resources, and avoid the significant delays and disruptions associated with the current complaint process.

- b. ***Focus on trends/patterns instead of each individual complaint:*** The Commission is authorized to exercise discretion by proceeding only in cases that most warrant enforcement action. Prudence would be consistent with the restrained approach *Pacifica* endorsed.
- c. ***Establish enforceable deadlines by rule:*** The FCC should codify the deadlines by which it must either take action on complaints or deny or dismiss complaints to reduce the constitutional infirmities of its current procedural treatment of pending complaints and forfeiture proceedings. Deeming complaints denied or dismissed unless the Commission issues an NAL or takes other substantive action within one year may eliminate the routine, years-long delays of broadcast license renewals. Additionally, all NALs should be deemed cancelled after six months of issuance if the FCC fails to issue a forfeiture order or take other substantive action.
- d. ***Clarify non-precedential value of NALs:*** NALs are not legal precedent and parties and the Commission may not rely on NALs or consider the existence of NALs with regard to license renewals unless and until the NAL has been affirmed by a final forfeiture order.

- B. ***The Commission should suspend enforcement of its current policy pending the outcome of the rulemaking:*** Because the current policy is in tension with the First Amendment, suspending enforcement would avoid impermissible infringement of constitutional rights.

V. National Association of Broadcasters

A. *At a minimum, revise policy to comport with restraints articulated in Pacifica*

1. *Confine regulation to material that actually falls within its indecency definition:* (i.e., words with sexual or excretory meanings).
2. *Clarify that fleeting expletives and images are not actionably indecent*
3. *Ensure indecency policies are consistent, predictable, and clear and defer to the artistic judgment and editorial discretion of broadcasters and program providers*

B. *Reform enforcement practices to comport with the First Amendment and the Communications Act:* The following reforms would further the Commission's obligation to "choose the least restrictive means" of enforcing section 1464²¹:

1. Due process requires that stations not be required to disprove inadequately supported allegations of indecency. The FCC should pursue only those complaints (i) submitted by a complainant who actually watched/listened to the programming at issue; and (ii) that present sufficient information and supporting documentation as to the particular station concerned, the specific material aired and the time the program aired

A prima facie case of licensee misconduct requires such "specific evidentiary facts," and "requiring a substantial *prima facie* case before proceeding against a broadcaster"²²

1. The FCC should notify broadcasters of both the filing and dismissal of indecency complaints.
2. The FCC should quickly dispose of patently non-meritorious complaints (e.g., those complaining of material aired during the safe harbor, those that contain insufficient information, those not filed by a *bona fide* viewer, or those foreclosed by precedent).
3. The FCC should act on reconsideration petitions and responses to NALs in a timely fashion so affected parties can exhaust their administrative remedies, obtain a final order, and bring adverse FCC decisions to the court for review.

The FCC should ensure that broadcasters are not improperly prejudiced by the existence of NALs or the pendency of complaints. Title 47, Section

²¹ *Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999, 8000 ¶ 3 (2001).

²² *U.S. v. FCC*, 652 F.2d 72, 89 (D.C. Cir. 1980); *Galloway v. FCC*, 778 F.2d 16, 23 (D.C. Cir. 1985) (requiring a substantial *prima facie* case "reflects an appropriate respect for First Amendment Values.").

504(c) of the U.S. Code provides that an NAL “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.

VI. CBS and NBC Affiliates

- A. ***Abandon the Golden Globes policy:*** For the same reasons outlined above; it is not narrowly tailored and does not further a substantial governmental interest. Content-based restrictions are not narrowly tailored unless the government demonstrates that a “plausible, less restrictive alternative...will be ineffective to achieve its goals.”²³

VII. National Public Radio, Inc.

- A. ***Limit enforcement to egregious cases***

- B. ***Adopt other policy clarifications***

1. ***Adopt a more explicit and expansive safe harbor for news and public affairs oriented matter:*** A presumption in favor of news and public affairs programming would be consistent with a long line of Commission precedent emphasizing a restrained approach to such programming.²⁴
2. ***Clarify the implementation of its statutory forfeiture authority to reduce uncertainty and the corresponding chilling effect:*** The Commission should provide clearer guidance regarding the forfeiture amount that may be assessed in any particular case. Combined with the potential for extremely large forfeiture amounts and the possibility of multiple violations within a single program, the lack of predictability that comes with the Commission’s reliance on a case-by-case approach has a chilling effect on broadcast speech. The FCC can reserve discretion by taking into account various upward and downward escalating factors, but should limit the current scope of its discretion to reduce opportunities for arbitrary decision-making. Following the suggestions below, the Commission can reserve severe penalties for broadcasters who blatantly ignore the restrictions on broadcasting while protecting broadcasters who make good faith efforts to work with the Commission’s rules from the heaviest fines.
 - a. The Commission should reserve the \$325,000 statutory maximum for only the most egregious, intentional, and repeated instances of obscene or indecent speech used to pander, shock, or titillate.

²³ *Playboy*, 529 U.S. at 816.

²⁴ See *Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005*, Order, 21 FCC Rcd. 13299, 13337 (2006).

- b. The Commission should limit the amount of a forfeiture in most cases to the same level as other § 503(b) forfeitures, which are capped at a statutory maximum of \$25,000.
- c. The Commission should adopt a per-program approach for determining how many violations a licensee has committed instead of a per-utterance approach; the FCC should reserve multiple penalties for violations within a single program for especially egregious circumstances (e.g., the broadcaster knew or should have known of the potential consequences of broadcasting the material in question).

VIII. Association of Public TV Stations and PBS

- A. ***Defer to broadcasters' good faith, reasonable, editorial judgment:*** Public television stations are owned and operated by state and local governments, colleges, and other locally run, not-for-profit entities that are rooted in and responsive to their local communities. Consequently, public television states understand what artistic, scientific, historical, and social issues are most important to their viewers. Public television stations have a track record of meeting otherwise unserved programming needs with high editorial standards, earning PBS and its member stations ratings as the country's most trusted national institutions for more than a decade.²⁵ The chilling effects of the FCC's current enforcement policy have undermined the ability of public television stations to fulfill their public interest mission, causing broadcasters to self-censor culturally significant content.²⁶ Viewers have expressed concern that such self-censorship prevents a full and fair exploration of topics the programming is intended to portray.²⁷ Even where the FCC finds that a licensee incorrectly determined material to be appropriate for broadcast, the FCC should consider the broadcaster's good faith efforts before issuing a forfeiture.
- B. ***Update complaint process to enable staff to more quickly dismiss meritless complaints:*** Stale, meritless complaints cause unfair delay in licensing renewals and create a significant backlog of indecency complaints. The process should be updated as follows:
 - 1. As part of the *prima facie* review, FCC staff has express authority to dismiss complaints that are incomplete, involve content broadcast during

²⁵ See, e.g., Press Release, *PBS and Member Stations Mark 10 Years as America's Most Trusted Institution and an "Excellent" Use of Tax Dollars* (Feb. 21, 2013), available at <http://www.pbs.org/about/news/archive/2013/pbs-most-trusted>.

²⁶ For examples of the rule's chilling effects on public television, see Exhibit A to the Comments of The Association of Public TV Stations and PBS, Docket No. 13-86 (filed June 19, 2013).

²⁷ For examples of viewer complaints, see Exhibit B to the Comments of The Association of Public TV Stations and PBS.

the safe harbor, do not involve content describing sexual or excretory organs or activities, or otherwise fail to meet minimum thresholds.

2. If the complaint survives initial review, FCC staff will ask the broadcaster to submit either a digital or taped copy of the complained of content so that the staff can determine the accuracy of the complaint's description.
3. If the staff concludes that the complaint does not accurately describe the broadcast, or the content is clearly not indecent, the staff shall dismiss the complaint without requiring further response from the broadcaster.
4. If the complaint survives the review of the recorded content, FCC staff shall issue a LOI seeking response from the broadcaster.
5. Until the LOI is sent, the broadcaster shall not be unfairly prejudiced by the complaint, including licence renewal delay.
6. The timeline for the entire process shall span no more than a few months of the date the complaint is filed. A defined timetable will be provided to prevent the process from taking years.

IX. **Saga Communications**

A. ***Return to Pacifica Enforcement***

B. ***Triage for Indecency Complaints:*** The FCC should adopt a triage system to discourage frivolous, unsubstantiated, and “cookie-cutter” indecency complaints which clog the system and waste the Commission’s limited enforcement resources. Under such system, the FCC should review complaints as they come in and separate them into the following categories:

1. Those that are not likely to result in a sanction, or are unsupported by probative evidence, even if the underlying facts are true; and
2. Those that are likely to result in a sanction, if the underlying facts are true and supported by probative evidence
 - a. Those that are serious enough to merit an “enforcement hold” on the station; and
 - b. Those that merit a sanction, but are not so serious to merit an enforcement hold.

The FCC can dismiss complaints in the first category without any other action. This would significantly reduce the Commission’s backlog of complaints and allow the FCC to deal with complaints in the second category more expeditiously.

- C. ***Notify broadcasters of meritorious complaints:*** If an indecency complaint is meritorious, the affected station should have the right to promptly respond to the allegations so the Commission can adjudicate the matter.
- D. ***Refer egregious cases to the U.S. DOJ for prosecution under 18 USC § 1464:*** If the FCC redirected its enforcement efforts on the broadcast of obscene, indecent and profane language to the DOJ, it could free up its resources to prosecute cases that severely impact the public (e.g., pirate broadcasting). If the broadcast is not indecent enough to merit criminal prosecution in the federal courts, perhaps it is not important enough to justify the loss of a federal license or the imposition of forfeitures.

X. **Radio and TV Broadcasters**²⁸

- A. ***Provide fair notice of what content is actionably indecent before resuming enforcement of indecency policy:*** The *Public Notice* seeks comments on the FCC’s “current” policy regarding indecency without clearly explaining what the FCC believes its current policy is. Further, the FCC has not defined the term “egregious,” leaving broadcasters with no guidance as to what the Commission will deem actionably offensive.
- B. ***Adopt a restrained approach to enforcement:*** Fleeting expletives and isolated nudity should be non-actionable. Neither *Pacifica* nor any other judicial precedent authorizes the policy the Commission began to enforce in 2004.
- C. ***Revise enforcement procedures:*** Any revised policy should require prompt initial determination of whether a complaint is facially valid. Potentially meritorious complaints should be processed within a set timeframe while providing the broadcaster a reasonable window for response. The FCC should commit to notifying broadcasters of pending complaints and the agency’s conclusions. These actions will decrease the likelihood that complaints will become stale and increase the likelihood that actually indecent material is not rebroadcast.

XI. **Joint Broadcasters**²⁹

- A. ***FCC should return to a policy requiring more than a mere allegation of indecent programming, more than an assertion of the word “indecent,” before pursuing complaints.*** An enforcement policy that fails to address insufficiently documented complaints has increased broadcasters’ administrative and operational expenses and legal fees, not to mention the cost of having a “cloud”

²⁸ Emmis Communications Corporation, Mission Broadcasting, Inc., New Vision Television, Nexstar Broadcasting, Inc., and Radio One, Inc.

²⁹ Allbritton Communications Company, Block Communications, Inc., Cordillera Communications, Inc., Cox Media Group, LLC, First Media Radio, LLC, FoxCo Acquisition, LLC, GoodRadio.TV, LLC, Granite Broadcasting Corporation, Local TV Holdings, LLC, Media General, Inc., Meredith Corporation, Midwest Television, Inc., Palm Beach Broadcasting LLC, and WNAC, LLC.

hanging over their license. This is in addition to the chill imposed on speech. The FCC should return its prior procedural standard: Before a complaint can be considered, it must include (i) a full or partial tape or transcript or significant excerpts of the program; (ii) the date and time of the broadcast; and (iii) the call sign of the station involved. Otherwise, the FCC should dismiss the complaint by a letter to the complainant advising of the deficiency.

XII. **Joint Commenters**³⁰

- A. ***The need to regulate broadcast indecency is mooted by blocking technology and the plethora of diverse programming sources***
- B. ***At a minimum, return to constraints of Pacifica***
- C. ***Revise procedural policies:*** The FCC should only entertain complaints from *bona fide* viewers and listeners. Complaints unsupported by documentation should be dismissed. The FCC must also take action to promptly process and dispose of complaints to avoid burdensome license renewal delays. Lastly, the FCC should consider the chill on speech such large fines can cause.

XIII. **Writers Guild of America, West, Inc.**

- A. ***Phase out application of indecency regulations, particularly during primetime hours:*** Changes in television distribution challenge the need for regulation.
- B. ***At a minimum, provide clear guidelines:*** the Commission should clarify that nonsexual nudity and the use of expletives in a non-excretory context are not actionably indecent. The current lack of clarity has a chilling effect on content.

XIV. **Future of Music Coalition**

- A. ***FCC policy should pronounce a clear standard for assessment of liability:*** The current vague regime has a chilling effect on noncommercial radio stations. Noncommercial radio stations have limited budgets and generally offer more program variety, but are the least equipped to deal with hefty fines. In addition to adopting an egregious cases policy, the FCC should promulgate a well-defined penalty system for violations so that radio stations affected by the policy are well aware of their potential liability. Otherwise, community-based, noncommercial stations will shy away from broadcasting controversial content for fear of incurring indeterminate fines that could result in station shut down.

³⁰ Americom, L.P., Americom Las Vegas L.P., Beasley Broadcast Group, Inc., Broadcasting Licenses, L.P., Calkins Media Incorporated, Eagle Creek Broadcasting of Laredo, LLC, Entercom Communications Corp., Galaxy Communications, L.P., Greater Media, Inc., Journal Broadcast Corporation, Lincoln Financial Media Company, Mountain Licenses, L.P., Ramar Communications, Inc., and Stainless Broadcasting, L.P.

- B. ***FCC should adopt a policy that promotes a range of expression through competition and diversity at the local level:*** Indecency decisions should be made at the local level. Accountable bodies comprised of community members are better capable of addressing specific programmatic concerns. Localized channels that are financed through public funds are commonly subject to supervision by a local supervisory board. Locally accountable nonprofit programming control systems make it unlikely that local standards of patently offensive programming will be broadcast to children.

XV. Radio Television Digital News Association

- A. ***FCC must clarify its indecency policies before it may resume enforcing them.***
- B. ***FCC must defer to the reasonable good faith judgment of broadcasters when considering whether programming constitutes news and public affairs:*** The FCC's past decisions have sent conflicting messages to broadcasters concerning the degree to which the Commission will engage in *post hoc* evaluations of whether a program is properly considered news or public programming. A recent report of the FCC's "Future of Media Working Group" on the "Information Needs of Communities" recognized that the First Amendment constrains the FCC's ability to limit offensive speech when presented in the context of news.³¹ The report noted that a regulatory scheme in which the Commissions assigns itself the task of "defining what counts as news" poses "difficult issues" under the First Amendment.
- C. ***At a minimum, the Commission should exempt news and public affairs programming from indecency regulation:*** The need of the FCC to defer to the good faith judgment of licensees is heightened in the case of news, public affairs, and sports programming. A policy of imposing penalties for expletives and nudity in news and public affairs programs threatens to dilute first-hand, eyewitness images, sounds, and accounts unique to broadcast journalism, resulting in a deprivation of information to the public. The goal of protecting children from rare, potentially offensive language that occurs in a news story cannot justify a policy of eviscerating live broadcast. Additionally, public events sometimes produce offensive speech in circumstance which there is no opportunity for journalistic editing. It would be unfair to hold a licensee responsible for indecent language in such instances.

XVI. Sun Sounds of Arizona

- A. ***Audio Information Service (AIS) print content should be exempted from enforcement actions.*** Because print material is freely available without censorship to sighted persons, as a matter of principle, Sun Sounds and other

³¹ *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age* at 253 (June 2011), available at http://transition.fcc.gov/ops/inc-report/The_Information_Needs_of_Communities.pdf.

Audio Information Service entities are committed to reading such material aloud verbatim. The confusion surrounding existing indecency enforcement policies has deprived persons with print disabilities (e.g., the visually impaired or cognitively disabled) of access to constitutionally-protected print when that content is read aloud and broadcast. To date, only one FM radio station has been willing to make an HD channel is available to an AIS -- every other radio licensee has been unwilling to accept responsibility for the audio broadcast of uncensored print due to the FCC's indecency policies. Sun Sounds encourages the FCC to adopt an egregious cases only policy, but regardless, urges the Commission to exempt AIS readings of print material from enforcement action.

XVII. KUCR (FM)

- A. *Return to pre-2004 policy*
- B. *Differentiate between commercial and noncommercial broadcasters:* KUCR, a college radio station, asks the FCC to go beyond a return to its pre-*Golden Globes* policy and consider the context in which a broadcast occurs. Rather than apply the same forfeiture standards to commercial and noncommercial stations alike, the FCC should consider factors such as: limited operating budgets, heavy reliance on unpaid or volunteer staff, high turnover in on-air personnel, and a focus on education and culture rather than profitability.

XVIII. Student Press Law Center

- A. *FCC should not apply the “fleeting expletives” standard to student-run nonprofit educational stations:* Consistent with the FCC's recent determination that student-run nonprofit educational stations should receive special consideration regarding forfeitures for recordkeeping violations, such stations should receive special solicitude in the application of the “fleeting expletives” enforcement standards so that low budget educational broadcasters can continue to offer live programming.

XIX. ACLU

- A. *The FCC can only constitutionally enforce 18 USC § 1464 against legally obscene speech:* The Supreme Court has repeatedly held that the First Amendment permits restrictions upon the content of speech in only a few limited areas and does not “include a freedom to disregard those traditional limitations.”³² Those categories – obscenity, defamation, fraud, incitement, fighting words, and speech integral to criminal conduct – have never included indecency.

³² *Playboy*, 529 U.S. at 812-813.