

Comments to FCC, docket no. 13-86

From Decency Enforcement Center for Television (Decent TV), by Thomas North, President

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Decent TV is a Michigan nonprofit corporation with IRC 501c3 status, incorporated in 2007 for the express corporate purpose of advocating for the continuation and enforceability of public decency laws, especially those for broadcast television and radio. Decent TV has served as an amicus curiae in support of the FCC in numerous federal court cases, in the U.S. Supreme Court, U.S. Courts of Appeals for the Second and Third Circuits, and U.S. District Court for the District of Columbia. All of those cases involved appeals by television broadcasters of rulings of the FCC, as to indecency issues. In the two rounds of Fox Television v FCC and one round of ABC TV v FCC that were considered by the U.S. Supreme Court, that court has ruled consistently with Decent TV's arguments, as posed in its amicus briefs, across the board. The Courts of Appeals and District Court also ruled 100% of the time in a manner consistent with the briefs and arguments of Decent TV. Decent TV has won every one of the eight cases it has been involved in as amicus. The legal staff of the FCC, as well as the Solicitor General and Department of Justice, also accepted and incorporated into their briefs and arguments in those cases, legal points and citations provided directly to them by Decent TV, in winning those cases on the constitutional arguments. (Decent TV was only involved in the broader constitutional and administrative law arguments in the cases, and did not take a position on specific television programs found to be indecent by the FCC).

Against that backdrop, Decent TV now submits its public comments in the above FCC file, in which the Commission is proposing to only enforce broadcast indecency complaints in "egregious" instances.

Decent TV is MOST STRONGLY AGAINST the Commission's proposal for the following reasons:

- I) Current FCC broadcast indecency policy, known as the "Golden Globe" policy, has been recently confirmed by the U.S. Supreme Court to be

both constitutional and enforceable. Despite strong challenges by all four major U.S. broadcast TV networks, Fox, ABC, CBS, and NBC, the Supreme Court in June, 2012 declined to even consider or address any of those challenges or arguments, and only ruled against the FCC as to specific findings, on the procedural technicality that inadequate notice was given of the change to the current policy. But the Supreme Court left in place, as constitutional, its 1978 *Pacifica* ruling, the federal indecency statute, and current FCC policy. Justice Roberts, writing for the majority in *CBS v FCC*, said that the procedural challenge is not available ever again for broadcasters, who are “now on notice” that the policy is constitutional and enforceable.

The FCC attorneys, as well as Solicitor General and DOJ, did an excellent job in their briefs and arguments. This was a court battle fought since 2006, when Fox Television appealed indecency findings and hinted at a constitutional challenge to current FCC policy. Innumerable tax dollars were spent by the above agencies in successfully and necessarily defending the current policy against the legally unwarranted constitutional challenges by the networks.

Our organization, along with Morality in Media and Parents’ Television Council, consistently supported FCC in all the court cases throughout. In the Supreme Court, we obtained additional amicus support from other organizations, including Alliance Defense Fund, Family Research Council, Focus on Family, and Jay Sekulow’s American Center for Law and Justice. We all spent money that is nearly impossible to raise in today’s economy, in supporting the FCC and federal laws.

Now, it is totally incomprehensible and nonsensical for the FCC to just inexplicably propose to hand at least half of that hard fought victory right back to the broadcasters, against all interests of the American public, for no reason that has been stated!!!

- II) The proposal flat out violates federal law that FCC is charged with enforcing. A statute passed by the American people through their

congressional representatives prohibits broadcast indecency. Thanks to the counterproductive actions of the FCC back in the 1970's, that law has been watered down, to only apply during 6 a.m. to 10 p.m. hours. That is what the Supreme Court has left in place at this time. That leaves FCC under a CONGRESSIONAL MANDATE to enforce the broadcast indecency statute during those daytime hours. The proposal to only enforce against "egregious" incidents violates the law, which does not contain any such term as "egregious." The FCC proposal literally thumbs the nose of the agency at Congress!!!

- III) The FCC must leave its current policy in place at this time. To adopt the proposal would contradict both the Supreme Court decision and Congressional will as contained in the statute. It would also be contrary to the earlier (1978) *Pacifica* ruling of the Supreme Court, which is unchanged, that Americans "need not take ANY first blow of indecency" (emphasis added).
- IV) The proposed new policy invites new court challenges by broadcasters, and unnecessarily at that. Even though the proposal would be more lenient to broadcasters, they have proven over the past several years that they challenge EVERY law and rule 100% of the time, rather than conforming with any of them. They are definitely, with absolute certainty, looking for excuses to file more court challenges. After a six year expensive court battle, why would FCC invite more of the same?

If the proposal is adopted, this is what WILL happen if it is then applied: a broadcaster will file a court challenge arguing that its indecency was not "egregious" as found by the FCC, a Court of Appeals will stay enforcement of the policy in that circuit or rule in a manner that has the same result, the FCC will hold off on any and all indecency enforcement in the entire nation (unnecessarily so, as it did during *Fox and ABC v FCC*), the cases will take several years to wind through the courts, and during that time, the nation will once again have NO indecency enforcement going on. The networks will coordinate all of that, so that during that time, they will again exponentially increase their indecency,

so that they can then turn around in court and argue that those laws are outdated and unnecessary. It all would become a self fulfilling prophecy. So, once again, the FCC would be muddying up the legal landscape that was just firmed up by the courts.

- V) The use of the term “egregious” itself violates the law. There is no reference in federal broadcast indecency law to this term. The use of it by the FCC is therefore illegal!! Further, the FCC has not even attempted to define the term, even as it seeks public comment on it, leaving it as a totally subjective term. That makes it 100% arbitrary and capricious by administrative law, which further invites court challenges that are likely to be successful.
  
- VI) Regarding its proposal as to broadcast television nudity, the FCC notice does not even make any sense. The notice contains the phrase “isolated (non-sexual) nudity”, as if there is some correlation between whether nudity is sexual, and for how long it is broadcast! That is completely nonsensical. “Isolated” and “non-sexual” are TWO TOTALLY DIFFERENT issues, which are unrelated to one another, and not the least bit analogous. This is not even apples and oranges; it is like comparing apples to rocks!! Nudity can be sexual AND isolated. For example, if a TV network shows an isolated (e.g., not part of a pattern) clip from an XXX rated movie, for example, an adult’s sex organs up close during oral sex (which it is noted, is NOT OBSCENE under federal court rulings) that is sexual and isolated. Nudity can also be non-sexual. We submit the fact that is only true if either 1) it is nudity of a pre-puberty child in a nonsexual context, like child birth, or 2) it is partial (e.g., rear) nudity of an adult in a nonsexual context. (ALL frontal nudity of an adult that shows a SEXUAL organ is SEXUAL by nature and definition that is beyond any intelligent dispute). But if nudity is nonsexual because within 1) or 2) above, that is unaffected by whether it is isolated or part of a pattern. And, the “egregious” proposal complicates all of that further. The law requires FCC to enforce against isolated nudity, as well as nonsexual nudity that is nevertheless indecent if it meets that definition in the FCC regulations.

In the alternative, if the “egregious” proposal is adopted, it must be only as to profanity, and not to the infinitely more harmful broadcast of actual nudity.

- VII) We believe it is o.k. for the FCC to internally prioritize indecency investigations and proceedings by whether it deems them to be “egregious” etc. But the problem is in proposing a POLICY that would not even attempt to enforce against non-egregious indecency, plus sets up illegal findings and court challenges, precisely because they would flow from policy.
  
- VIII) The core central function of the FCC remains broadcast indecency enforcement. Indeed, that is the reason Congress created the FCC, and the reason it continues to even exist. The FCC’s dismissal of over a million indecency complaints admittedly was because many of them were beyond the Statute of Limitations or otherwise “stale.” But the reason they were so old was not due to any court impediment, except those that came out of the Second and Third Circuits, a small portion of the nation. They got old because the FCC didn’t do its job of processing them, and for no legal reason! This was despite written urgings from Decent TV and Parents Television Council to perform its legal duty while the Supreme Court proceedings were pending, as to complaints from all other circuits in which courts were not even involved.
  
- IX) The current chair of the FCC, Julius Genachowski, repeatedly and publicly vowed to enforce the indecency law to the “full extent of the law.” But now he has initiated this proposal that would violate the same laws, and has not fined a single incident of television indecency during his entire term in office, despite the thousands of such incidents that have occurred and been complained of during that time! We hold he and the FCC to those public promises.
  
- X) There is NO reason for the proposed policy change, and none is stated by the FCC. The only possible implication is that the FCC is trying to

avoid doing the job it is paid by the taxpayers to do. If the proposal is adopted, the FCC will probably just subjectively say that zero of the indecency complaints it receives involve “egregious” indecency and dismiss them, so as to not have to do anything. FCC appears, MOST DISTURBINGLY, to be headed back to its laissez de faire days of the 1970’s and 1980’s, when it was the Master of Avoidance in considering broadcast indecency complaints it received, especially as to television. The author has personal knowledge that during those decades, and into the 1990’s, the FCC did procedural backflips to avoid finding television indecency, at any cost, even to the point of directly contradicting itself to reach that result as to different complaints. In other words, the FCC interpreted the law one way to try to justify dismissing complaints, and interpreted the same law in the opposite way when that would also result in dismissal, so that it NEVER fined a single television broadcaster until almost the year 2000!!

For all of the above, reasons, we most strongly urge the FCC to abandon the proposal, and to do its job of enforcing its current policy for broadcast indecency.

Although the FCC has invited further comment on any other aspect of its substantive indecency policies, and we are most tempted to comment (because of the vast improvements that could be made in STRENGTHENING those policies against indecency), we believe the FCC needs at this time to focus on processing the hundreds of thousands of indecency complaints that remain pending, using the CURRENT GOLDEN GLOBE POLICY upheld by the Supreme Court. We reserve the right to comment on substantive indecency policies in the future as part of other proceedings.