

involved matters beyond the Commission's jurisdiction, contained insufficient information, or were foreclosed by settled precedent. It is unclear why the Commission had to wait for *FCC v. Fox* to dismiss complaints in several of these categories other than poor management. Astonishingly, cases were dismissed as "stale" only because the Commission had for an extended period of time failed to act on them.

In this period, Commissioner Genachowski determined that he would, without a vote of the full Commission, put a new indecency standard into effect. He ordered "the Enforcement Bureau (Bureau) to focus its indecency enforcement resources on egregious cases and to reduce the backlog pending broadcast indecency complaints." *Notice* at 1. No definition of "egregious cases" was offered in the *Notice*.

In the next paragraph, the *Notice* proceeds to ask a series of questions that seem to be seeking justifications for lowering the Commission's indecency standards and weakening its halting, erratic approach to enforcement. First, the *Notice* asks "should the Commission treat isolated expletives in a manner consistent with our decision in *Pacifica Foundation, Inc.* [citation and parenthetical comment omitted]." *Notice* at 1. Second, it then asks "[s]hould the Commission instead maintain the approach to isolated expletives set forth in its decision in *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program* [citation omitted]?" *Notice* at 1. Finally, the *Notice* inquires whether it "should the Commission treat isolated (non-sexual) nudity the same as or differently than isolated expletives?" *Notice* at 1-2.

FRC Comments on the Notice

Simply put FRC opposes everything about this illegitimate and ill-advised proceeding.

Process

FRC regards the process used to produce this *Notice* as completely unsatisfactory. Whatever one thinks of the FCC's current indecency policy, no reasonable person can believe that millions of Americans are unconcerned with the nature of the video and audio content broadcast into their homes. It is fair to say that for most Americans the FCC's enforcement – or non-enforcement – of its indecency rules is the Commission's most important function. It is this fact that makes the release of this *Notice* along with Chairman Genachowski's unilaterally-created enforcement policy so shocking and insulting.

Let us review the facts. By the date this *Notice* was released it had been ten days since the Chairman had announced he was leaving the Commission. This followed, by eight days, Commissioner Robert McDowell's announcement that he was leaving the FCC. Thus, on April 1, 2013, there really were only three commissioner's legitimately in place to issue documents, decisions, and notices of great import.

Instead of waiting for the nomination and confirmation of a new Chairman and Commissioner, Chairman Genachowski directed the agency's staff to release a public notice seeking comment

on whether important changes should be considered in the Commission's indecency policies. Stuningly, the notice opening this proceeding was released by the Enforcement Bureau and the Office of the General Counsel and not by a vote of the Commission itself. This seems completely inappropriate for a matter of this importance. This proceeding should only have been started after consideration by the full Commission when its members did not include holdovers.

Substance of the Notice

Regarding the three questions asked by the Commission in the *Notice*, FRC believes that the Commission should not deviate from the statement of its policies made to the Supreme Court in the litigation leading up to the decision in *FCC v. Fox*. There should be no weakening of the indecency standards the Commission enunciated to the Court. As Chief Justice Roberts helpfully observed in the denial of a petition for writ of certiorari in a related case, the broadcasters formally are on notice regarding the contours of the indecency policy – they have no excuses now.⁴

Frankly, it is mind-boggling that, with the *FCC v. Fox* decision now decided, it would even ask these questions or consider creating a new standard that can be litigated for another decade. A unanimous Supreme Court declined to strike down the regulation of broadcast indecency on constitutional grounds even though it was given a red carpet invitation to do so. This *Notice* gives the appearance of “throwing a fight,” in the parlance of boxing. Rather than retreating from the enforcement of its indecency policy and playing games with the public, the Commission needs to start enforcing the law by assessing complaints that have been filed and issuing penalties and fines. That said, we make the following points.

First, regarding fleeting expletives, FRC believes that the Commission's policy opposing the use of “fleeting” expletives is reasonable. Technology is available to broadcasters that allow them to delete indecent language in live programming. There does not need to be a deliberate and repetitive use of patently offensive speech to know that a broadcaster is allowing indecent language to be aired. On those occasions when something offensive slips through a broadcaster's filters, the Commission can assess whether a serious effort was made to keep such language from being broadcast before assessing penalties.

Second, regarding the Commission's query pertaining to the broadcast of “isolated (non-sexual) nudity” FRC questions the degree to which such a category really exists as a practical matter. We wish to state clearly that the *Hill Street Blues* episode considered by the Supreme Court in *Fox v. FCC* was highly sexual and disturbing.⁵ It involved a child walking in on a nude woman in a bathroom preparing to take a shower. Viewing another human being's genitals or a woman's breasts triggers certain mental associations. That seems quite basic, and the Commission was correct when it fined ABC regarding that broadcast.

⁴ *CBS Corp. v. FCC*, 663 F.3d 122 (3d Cir. 2011), cert. denied, 132 S. Ct. 2677-2678, 183 L. Ed. 2d 712-713 (U.S. June 29, 2012)(Roberts, C.J., concurring).

⁵ NYPD Blue: episode “Nude Awakening” (ABC television broadcast Feb. 25, 2003).

FRC believes that even instances of “fleeting” frontal nudity, a category the major network broadcasters would like to create, almost always have non-trivial levels of sexual content. There are virtually no instances in which we can imagine it would be appropriate to broadcast such images. Fortunately, modern technology may permit something of a compromise in this area.

Now broadcasters can easily use digital software to blur such images. Decades ago a better case could have been made that a person’s only opportunity to see a photograph or scene from a motion picture without paying a fee might have been on television, but that claim cannot be made today given the ubiquitous presence of the Internet. A reasonably competent use of an Internet browser and search engine can locate a multitude of photographs and video content in a matter of seconds – minutes at the most. We believe that broadcasters could live easily with this rule if they displayed even a little common sense.

This underscores the important role that TV broadcasting plays as a safe haven for all people who do not want to see nudity. It is especially important that broadcast TV provide an area of protection for children. FRC believes that parents should be able to rely upon their expectation that nudity will not be broadcast so they can keep such images away from their children. The availability of the Internet, non-broadcast cable channels, video-on-demand cable TV, and movie streaming (*e.g.*, Netflix, Amazon Prime, Hulu) ensures that broadcast indecency restrictions are not onerous for those wishing to view content that includes nudity.

Conclusion

FRC believes that this proceeding should be deemed a nullity, and the issues raised should only be addressed again with the consideration of the full Commission under the leadership of a new Chairman. Even then, we see no need for a re-run of this proceeding. The Commission needs to start enforcing its indecency policies including its rejection of even “fleeting” expletives and nudity.

Thank you for your consideration.

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