



## **SPECIAL REPORT**

### **The FCC: A Failure of Enforcement**

*By Martha Kleder*

On April 30, 2003, a coalition of family groups including CWA and CWA's Culture and Family Institute met with three of the five Federal Communications Commissioners (FCC) and demanded tougher broadcast decency enforcement. The groups set a June 30 deadline for seeing some action toward that end.

"Some of the commissioners seem to be getting it," said Culture and Family Institute Director Robert Knight, who attended the meeting along with this writer. "But others have a long way to go to understand the depth of the problem and their own responsibility to fix it." Knight said he was amazed that Commissioner Kathleen Abernathy said that she could not determine whether the use of the 'F' word during prime time, when millions of children are watching, was actionable or not.

"On the other hand, Commissioners Michael Copps (D) and Jonathan Adelstein (D) were very supportive of tougher enforcement of broadcast indecency laws taking a strong pro-family line, and Commissioner Kevin Martin (R) was also receptive in an earlier meeting," Knight said.

In a statement released by the Parents Television Council, President Brent Bozell said, "We are alarmed and appalled by the rampant amount of indecency on the broadcast airwaves and we are outraged that the current definition of indecency does not address nudity, foul language, gross sexual innuendo or graphically depicted violence."

"By June 30, we want the FCC to specifically and clearly define broadcast indecency, rather than leaving the definition so nebulous that it becomes unenforceable," he continued.

"For the broadcaster who consistently and flagrantly airs indecent material, the penalties must be consistent and severe enough to exact a toll. Fines must be levied and fines must be collected. Repeat offenders must know that their license can and will be revoked if they continue to air indecent broadcasts.

"In conclusion, the American public is fed up. Parents Television Council members have delivered thousands upon thousands of complaints to the FCC in the past year only to have their complaints ignored or denied. ... It is time for your actions to reflect a sincere desire to listen to the voices of millions of Americans calling on the Commission to do its

job. On July 1, we will convene to review the Commission's response to our concerns. If the Commission fails to respond to our valid complaints, then we will begin calling for congressional hearings to investigate the failure of the FCC to uphold the public's interest pertaining to indecency," he concluded.

An FCC press statement in April indicated that drastic penalties might soon be imposed if broadcasters didn't reduce the amount and perversity of broadcast indecency.

Among the actions cited in the FCC's April 3, 2003, press release<sup>1</sup> was a possible broadcast license revocation and escalated fines based on each incidence of indecency within a broadcast, rather than fines on a per broadcast basis.

These are much-needed first steps to improving the broadcast environment our children are exposed to, but they must actually be carried out and not simply threatened, if they are to work.

### **FCC: The Only Broadcast Watchdogs**

Congress charges the FCC with regulating the public airwaves. This includes not only technical issues like allocating frequencies and controlling transmitter power, but also overseeing content on the nation's 21,927 radio stations and translators and 4,439 television stations.

Courts have upheld laws allowing the FCC to enforce rules against obscenity and indecency on the airwaves. In recent years, the FCC has failed to effectively enforce the rules. Radio stations have received fines in only a handful of cases, and no TV station or network has received disciplinary action in at least 20 years. Meanwhile, content is increasingly indecent in both mediums, and, in some cases, bordering on the obscene.

The most common content regulation on broadcasters is the requirement to serve the interests of their local community, through news and public service programs. While this requirement is rarely the subject of protest, it is a content restriction nonetheless.

Since the laws regarding decency enforcement have been challenged and upheld, the case for indecency enforcement is actually stronger than the case for public service requirements.

### **Industry Guidelines**

On April 6, 2001, the FCC published industry guidelines on indecency.<sup>2</sup> The document clarifies what infractions are serious enough to justify intervention, and includes summaries of several rulings for and against stations.

Factors include:

- the explicitness or graphic nature of descriptions of sexual or excretory organs or activities;
- whether the material dwells on or repeats at length such subjects;
- whether the material appears to pander or is used to titillate;
- whether the material is presented for shock value.<sup>3</sup>

### **Handling Complaints**

On the same day the new policy was released, the FCC issued a “Notice of Apparent Liability for Forfeiture” (NAL) against WKQX-FM, owned by Emmis FM License Corp. in Chicago, for two separate complaints.<sup>4</sup>

The first complaint against the station’s “Mancow Morning Madhouse” concerned a March 20, 2000, broadcast about a telephone conversation with an adult-film actress who described “fisting” in graphic detail.<sup>5</sup>

The second complaint against WKQX was about a May 15, 2000 broadcast featuring a graphic interview with three women about their sex lives. For both incidents, Emmis FM License Corp. was fined a total of \$14,000.<sup>6</sup>

On May 17, 2001, the FCC filed another NAL against KBOO-FM, a non-commercial educational station in Portland, Oregon. The complaint centered on an October 20, 1999, broadcast of the sexual rap song “Your Revolution.” The fine was set at \$7,000.<sup>7</sup>

On June 1, 2001, the FCC made headlines when it issued an NAL against KKMG-FM, a Colorado Springs radio station owned by Citadel Broadcasting Company, for playing the Eminem song “The Real Slim Shady.” Although the station edited the track, the song contained numerous references of “unmistakable offensive sexual references. In this regard, portions of the lyrics contain sexual references in conjunction with sexual expletives that appear intended to pander and shock.” KKMG was fined \$7,000.<sup>8</sup>

The FCC continued to make waves in the broadcast industry by threatening stations with license revocation hearings in cases of repeated broadcast of indecent material. Those statements were made April 3, 2003, in conjunction with a \$27,500 fine imposed on WKRK-FM, an Infinity Broadcasting station in Detroit, Michigan, for an astoundingly vulgar broadcast featuring a discussion of how to sexually abuse women using bodily fluids, excrement and violence.<sup>9</sup>

“The Commission has now given fair notice that it can and will avail itself of a range of enforcement sanctions, including the initiation of revocation proceedings,” wrote Commissioner Jonathan Adelstein in a separate statement accompanying the April 3 press release.<sup>10</sup>

“Moreover, the Commission will, in the future, consider finding broadcasters liable for multiple violations that occur in a single program where statements can be viewed as

separate indecent utterances. Such an approach could result in substantially higher forfeiture amounts,” he concluded.

Those strong statements were echoed by a new voice for indecency enforcement at the FCC, Commissioner Kevin Martin. In his separate statement Martin said that while he agreed with the finding, he would have imposed a higher fine.

“For instance, we could have found that each time the show’s hosts solicited a new call on an indecent topic, the ensuing conversation constituted a separate violation,” he said.<sup>11</sup>

Are these cases an indication that the FCC, under the Bush administration, intends to crack down on offensive sexual content on the public airwaves? On the surface it may appear so. However, further research shows that, in its April action, the commission took only a baby step in that direction.

As proof, one need only look to the one dissenting vote on the WKRK-FM case, which came from Commissioner Michael Copps, the strongest commission voice for indecency enforcement.

“In this case, WKRK-FM in Detroit aired some of the most vulgar and disgusting indecency that I have had the misfortune to examine since I joined the Commission,” he wrote in his dissenting statement.<sup>12</sup>

“I dissent from the majority’s decision because I believe that a financial slap on the wrist does not adequately reflect the seriousness of the station’s actions. To fulfill our duty under the law, we should initiate a hearing to determine whether the WKRK-FM license should be revoked,” he continued. “Our tepid action today will not dissuade these types of broadcasts in the future.”

Indeed, with the exception of the April action, in each case, the fine was \$7,000, the lowest possible amount for violating indecency laws, based on the FCC’s fine schedule. And, according to the FCC’s new “Policy Statement on Indecency,” this is far from the final word.

“A licensee is afforded an opportunity to respond to the NAL,” said the policy statement. If the station makes a good case, the forfeiture may be reduced or even rescinded. Moreover, “the licensee also has the legal right to refuse to pay the fine. In such a case, the Commission may refer the matter to the U.S. Department of Justice, which can initiate a trial de novo in a U.S. District court.”<sup>13</sup>

But once in the hands of the Justice Department, the fines go uncollected because they are too small to pursue. Usually, the statute of limitations runs out and the fines are never collected. In addition, because no fine was paid, and no court of competent jurisdiction issued a final order that the material was indecent, the violation is not taken into account when the station’s license comes up for renewal.<sup>14</sup>

Such challenges and reductions of fines happen often. KKMG in Colorado appealed its June 1, 2001, Notice of Apparent Liability (NAL), and won. The same with KBOO in Oregon. Other appeals are still pending. So, it seems that even the toughest NAL is a toothless tiger to the nation's growing leagues of shock-jocks.

A good example is Citicasters Co. and the show "Bubba, The Love Sponge" in syndication. Just in the FCC Policy Statement on Indecency alone, Bubba was cited five times in the report, one in 1997 and four in 1998. Despite these mounting fines, Bubba remains on the air, as do his competitors, Howard Stern and the shock jock duo Lex and Terry.

The FCC investigated Tampa, Florida-based Bubba on indecency charges yet again, this time in connection to his February 27, 2001, live broadcast of the castration and slaughter of a wild boar.<sup>15</sup> The FCC took no action in this case.

On February 5, 2001, the FCC, under the leadership of Chairman Michael Powell, weakened its position on indecency enforcement still further by canceling some outstanding fines it had imposed on WXRK (92.3FM) in New York. The \$6,000 fine was imposed in 1997 for Howard Stern broadcasts that aired in October 1995 and March and June of 1996. While the WXRK case was never heard, radio stations in New Orleans and Richmond, Virginia, were fined for the very same broadcasts.<sup>16</sup>

Stations are required to keep records of the station's license, community service programming, etc., available for public inspection in the community where the broadcast is heard, during regular business hours. While this is important, it is nevertheless a matter of paperwork. Indecency violations during prime listening hours, on the other hand, involve the corruption of children.

Compare the fines imposed by the FCC for indecency violations to those imposed on stations for not properly maintaining a file for public inspection. Since January 2000, the FCC has issued NALs or Forfeiture Orders in five cases. With the exception of one NAL for \$5,000, the amounts for those start at \$7,000 and often reach \$10,000.<sup>17</sup>

For indecency NALs, the minimum fine of \$7,000 is usually imposed. Commissioner Gloria Tristani often noted in her dissents to the Commission's rejection of indecency complaints that violators of that statute may incur a fine of up to \$10,000 or an imprisonment of not more than two years, or both. The commission also has the ability to revoke the broadcast licenses of repeat offenders. But, when the FCC does act, it is rarely to that degree.

### **Only Acting Tough**

Following the release of the FCC's "Policy Statement on Indecency," Then Commissioner Gloria Tristani (D) signaled to decency advocates that this was not the warning to broadcasters they were waiting for, but simply more smoke and mirrors.

Tristani issued a strong dissent to the new FCC policy statement, claiming “the Statement perpetuates the myth that broadcast indecency standards are too vague and compliance so difficult that a Policy Statement is necessary to provide further guidance. Most importantly, this Statement diverts this Agency’s attention and resources away from the ongoing problem of lax enforcement, which is a pressing concern of America’s citizens.”<sup>18</sup>

Then Commissioner Susan Ness (D) issued separate comments on the new Policy Statement:

Understandably, the public is outraged by the increasingly coarse content aired on radio and television at all hours of the day, including times when children are likely to be listening or watching. The flood of letters and e-mails we receive reflect a high degree of anger. As a parent, I share the public’s frustration. Many parents feel that they cannot enjoy watching daytime or primetime television with their children for fear that their youngsters will be exposed to indecent material — content that just a few years ago would have been unimaginable on broadcast television.<sup>19</sup>

### **Going Unnoticed**

The three enforcement actions following the release of the Policy Statement can hardly make up for the volume of complaints rejected by the FCC. These rejections are issued quietly in the form of a letter to the complainant. For years these went unnoticed until February 2001, when Commissioner Tristani began issuing press statements on each case, drawing attention to them.

“The Bureau concluded no further investigation was needed,” Tristani said, regarding the dismissed indecency complaint against WGR-AM of Buffalo, New York’s “Bauerle and the Bull Dog” show. “However, in review of the thankfully thin case law on how to treat speech, whether video or radio, that involves urinating on others demonstrates that once again our Bureau *read the facts alleged in the complaint in the light most favorable to the broadcaster rather than the complainant.*”<sup>20</sup> [italics in original]

### **A ‘Prima Facie Case’ of Indecency**

Since February 2001, the FCC has dismissed seven indecency complaints. None is more shocking than the story of Angela Woods, a young mother from Hueytown, Alabama.

Woods was in her car one morning listening to the “Lex and Terry Show,” a program syndicated across the South but new to her radio market. She was shocked when the hosts used vulgar and obscene terms to describe female genitalia.

Woods immediately called the station to complain about the language and was ridiculed on the air by the hosts with still more vulgar and obscene language. When Woods arrived at work that morning her co-workers, who had been listening to the same station, reported that the hosts had said they “hope she has a wreck and gets killed on the way to work.”<sup>21</sup>

The FCC dismissed Mrs. Woods' complaint, noting that while the comments were "certainly offensive, they are not indecent because they are not patently offensive as measured by contemporary community standards for the broadcast medium."<sup>22</sup>

Tristani fired back at fellow commissioners: "Mrs. Woods made a prima facie case for indecency sufficient to survive dismissal. Second, a broadcaster owes a duty to handle indecency complaints from citizens without engaging in over-the-air verbal attacks that include expressing a desire for the complainant to wreck her car and die."<sup>23</sup>

The FCC also picks and chooses in what appears to be an inconsistent manner. David Smith of Chicago, Illinois, filed three complaints describing five different instances of indecency on WKQX. These incidences all occurred on February 23, 2000, during "Mancow's Morning Madhouse."

While two of the five incidents led to FCC enforcement action (mentioned earlier), what the FCC didn't take action on is eye opening.

According to the complaint, "between 7:50 and 8 in the morning, Mancow and his staff talked euphemistically and directly about the particulars of adult-child sexual intercourse. During the broadcast, Mancow sanctions statutory rape by claiming that at age 27, he had sex with a 9 year old."<sup>24</sup>

Tristani responded to the complaint's dismissal by noting, "The Commission has previously fined a station for broadcasting material similar to the material described in Mr. Smith's complaint. In 1997, the Commission fined KUPD-FM of Tempe, Arizona, for a brief on-air joke about adult-child sexual intercourse. That case provided guidance to radio stations that discussing adult-child sexual intercourse in a humorous or pandering manner is actionably indecent."<sup>25</sup>

Often the FCC dismisses indecency charges against stations saying the complainant didn't provide adequate documentation.

On January 14, 2000, Bill Johnson, president of the American Decency Association, and Florida attorney John Thompson filed indecency complaints against shock-jock Howard Stern for nine separate broadcasts. Two of those broadcasts occurred in 1998, the other seven in 1999.

The complaint was sent not only with a recording of the nine offensive broadcasts, but a typed transcript of each broadcast as well.<sup>26</sup>

To date, neither gentleman has received an acknowledgement from the FCC of the complaint, much less notice of impending indecency investigation.

That pattern has led to broadcasters not only blatantly violating indecency regulations, but also thumbing their noses at the FCC and concerned citizens. In radio, one of the

most shocking cases involves San Jose shock jock Mikey on KSJO-FM. On his July 24, 2002, broadcast, “Mikey” Esparza joked about the kidnapping of a 7-year-old Philadelphia girl who escaped from her abductors by chewing through duct tape.

Esparza joked on the air, saying, “That’s why I don’t use duct tape; that’s why I use nylon rope.” Returning from a commercial break, Esparza added, “Let’s say, for instance, you’re somebody that is a kidnapper. Think of all the nylon rope you could get at Orchard Supply Hardware [at the time sponsors of *The Mikey Show*]. Plus, they sell tarps. I’m sure they sell lye to dissolve the body.”

Clear Channel, licensees of KSJO, suspended Esparza for the comments, although he continues to broadcast from KEGF in Dallas, Texas. The FCC, however, has taken no action against him, even though Ann Simonton, director of Media Watch, filed a formal complaint.<sup>27</sup>

Esparza remains undaunted. On September 4, 2002, during afternoon drive time when children were in the audience, Esparza played a self-produced song called *The Statutory Rape Song*. The lyrics included, “Check out that cute little girl over there. Is she nine or is she twelve? Ain’t got no pubic hair. I’m feelin’ frisky, I know it’s risky. Friday night I need a bite, underage girls with some cellulite. I like them young with no pubic hair, I like them bald and I like them bare.”

Outraged listener India Weeks filed a formal complaint with the FCC. As of May 2003, no action has been taken on it. Weeks also took her case to the local press, resulting in a one-week suspension for Esparza and the loss of two of the show’s advertisers.

Upon Esparza’s return to the air on January 15, 2003, licensee Clear Channel erected a billboard along Interstate 880, close to Weeks’ home. The billboard reads, “Listen to Mikey before we fire him . . . again.” In an accompanying press release, the station added, “Mikey is all about the same things that 92 KSJO is all about.” While that online press release was quickly edited, a cached copy is available.

### **The Impact on Youth**

On April 1, 2001, *The Journal of the American Academy of Child and Adolescent Psychiatry* published “Impact of Media on Children and Adolescents: A 10-Year Review of the Research.” The study looked at media, computers, television, movies, radio, music and music videos, advertising, video games and the Internet.

The researchers concluded that “the primary effects of media exposure are increased violent and aggressive behavior, increased high-risk behaviors, including alcohol and tobacco use, and accelerated onset of sexual activity.”<sup>28</sup>

The analysis also noted that research on children and the media prior to 1990 had already documented “that children learn behaviors and have their value systems shaped by media.”<sup>29</sup>

University of Michigan researchers went a step further and followed children to their adult years. Their study, “Longitudinal Relations Between Children’s Exposure to TV Violence and Their Aggressive and Violent Behavior in Young Adulthood: 1977-1992,”<sup>30</sup> published in the March 2003 issue of the journal *Developmental Psychology*, found higher rates of aggression among adults who viewed violent programming as children.

The study linked violent TV viewing at ages six to nine to such outcomes as spousal abuse and criminal convictions in a person’s early 20s. That effect appeared in both sexes regardless of how aggressive the person was as a child.

On March 1, 2000, *The Western Journal of Medicine* published “Adolescent Sexuality and the Media: A Review of Current Knowledge and Implications.” That study concluded that adolescents are exposed to many sexual images and messages in the media, with most portrayals showing “little or no potential risks or consequences.”<sup>31</sup>

The report also notes that children and adolescents “use the media as sources of information about sex, drugs, AIDS, and violence as well as to learn how to behave in relationships.” The cognitive skills of children and adolescents are not fully developed, the study notes, to allow them to “critically analyze messages from the media and to make decisions based on possible future outcomes.”<sup>32</sup>

That is frightening given that the Kaiser Family Foundation’s 2001 biennial “Sex On TV” report noted that “two out of every three shows on TV include sexual content, an increase from about half of all shows during the ’97/’98 television season.”<sup>33</sup>

On July 26, 2001, Sen. Sam Brownback (R-Kansas) hosted a forum on the impact of explicit entertainment on children. “The average teen spends more time in front of a screen than he does in school,” Brownback stated at the forum.

“If we assume that school-based sex education will shape [teens’] attitudes towards sex, and even their sexual decisions and behavior, it makes little sense to assume that the descriptions, depictions, and assumptions surrounding sex that they get from movies, television, games, and music will have no impact at all,” he added.<sup>34</sup>

Despite the growing evidence of the harm indecent material does to children, Commissioners willing to enforce indecency are in the minority.

### **Friends and Foes**

“Whether it’s the new Commission or prior Commissions, provisions of the Communications Act banning broadcast of indecency aren’t being enforced,” Tristani told *Communications Daily*. “We have a very clear law on indecency. The law has already been upheld many times by the courts, so there’s no First Amendment issue or need for congressional action,” she said, adding, “This is about protecting our children.”<sup>35</sup>

So why is it that Commissioner Tristani, a Democrat appointee, was leading the charge on indecency enforcement at the FCC? Where were the Republicans?

Michael Powell, appointed to the FCC in 1997 by former President Bill Clinton, was chosen by Bush to become FCC Chairman. Powell said in his first press conference in early February that if parents are offended by a show, they should turn it off.<sup>36</sup>

“His view is very much that we shouldn’t be touching content,” Tristani confirmed for *The Washington Post*.<sup>37</sup>

Former Commissioner Harold Furchtgott-Roth, until recently, was the most senior Republican. He, too, was loath to enforce indecency laws, noting the rapid growth of entertainment options:

“Because of these market transformations, the ability of the broadcast industry to corral content and control information flow has greatly diminished. In my judgment, as alternative sources of programming and distribution increase, broadcast content restrictions must be eliminated.”<sup>38</sup>

These reactions come despite the fact that Common Carriers — such as telephone companies — have even less control over the content of their traffic, in fact, none. And yet, the Wire Act of 1961 effectively prohibits them from carrying traffic relating to betting on the outcome of sporting events. This means content regulation is alive and well, despite the cop-out positions of the majority of FCC Commissioners.

Commissioner Tristani stepped down from the Commission on September 7, 2001.<sup>39</sup> Joining Chairman Powell (R) are three Bush appointees. Michael Copps (D) and Kathleen Abernathy (R) were sworn in on May 31, 2001. Kevin Martin (R), a former advisor to Commissioner Furchtgott-Roth, was sworn in on July 3, 2001. Tristani’s commission seat was taken by Jonathan Adelstein (D) on December 3, 2002.

Of these new faces, Copps, Adelstein and Martin were the only commissioners to express interest in enforcing the broadcast indecency statute. Abernathy is a swing vote on the issue, but for the most part follows Chairman Powell’s lead.

“As an FCC Commissioner, I have a responsibility to ensure that the indecency laws of the United States are being enforced. I take this responsibility with the utmost seriousness,” Copps said in an April 6 press release.<sup>40</sup>

Abernathy joined Copps in an appearance at the 2001 National Association of Broadcasters Convention in New Orleans. Both urged broadcasters to take self-regulation seriously or prepare for more federal regulations.<sup>41</sup>

## **History and Structure of the FCC**

Just what powers does the FCC have in regulating speech on the public airwaves?

The Federal Communications Commission was established by the Communications Act of 1934, which was signed into law by President Franklin D. Roosevelt. It's charged with regulating interstate and international communications by radio, television, wire, satellite and cable. New Deal lawmakers saw the infant telecommunications industry as a national asset, much like railroads, that must be harnessed to serve the public good.

According to U.S. Code Title 47, Section 151, the purpose of the FCC is to insure "nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies."<sup>42</sup>

As established by that law, the agency, in one respect, mirrors the U.S. Supreme Court more than it does other federal departments. The agency is directed by five Commissioners appointed by the President and confirmed by the Senate. Unlike the lifetime appointments to the U.S. Supreme Court, however, the FCC appointments are for 5-year terms, except when a Commissioner is filling an unexpired term.

The President is charged with choosing one of the Commissioners to serve as Chairperson. Presidential discretion is limited, since only three Commissioners may be members of the same political party.

Operations at the FCC are divided by function, with seven operating Bureaus – Cable Services, Common Carrier, Consumer Information, Enforcement, International, Mass Media, and Wireless Telecommunications. Ten staff offices cover personnel, legal and administrative functions. Currently, the Commission is attempting to reorganize and restructure these Bureaus, however, those efforts will not impact the FCC's overall mission.

The Enforcement Bureau is key to the regulation of content. That Bureau is divided into two divisions; the Technical and Public Safety Division, which resolves complaints of a technical nature such as unlicensed broadcasts, compliance with the Emergency Alert System, and other operation requirements such as antenna location, lighting and operating power.

The Investigations and Hearings Division handles complaints about broadcast indecency and obscenity, as well as enforcement of public inspection file requirements, the broadcast of telephone conversations, broadcast hoaxes and station-run contests.

The FCC does not actively monitor broadcasts for indecency violations, but relies on documented complaints from citizens. The FCC has posted on its Web site guidelines for those complaints:

It is important the Commission be afforded as full a record as possible to evaluate allegations of obscene or indecent programming. In order for a complaint to be considered, the Commission's practice is that it must generally include: (1) a full or partial tape or transcript or significant excerpts from the program; (2) the date and time of the broadcast, and (3) the call sign of the station involved. Any tape or documentation of the programming, of necessity, becomes part of the Commission's records and cannot be returned. Documented complaints should be directed to the Federal Communications Commission, Enforcement Bureau, Investigations & Hearings Division, 445 12<sup>th</sup> Street, S.W., Washington, D.C. 20554.<sup>43</sup>

According to *The Washington Post*, the FCC receives an average of five to 10 complaints a week.<sup>44</sup>

### **Regulating Indecent Broadcasts**

Title 18 of the U.S. Code, Section 1464, prohibits the utterance of "any obscene, indecent, or profane language by means of radio communication." When Congress formed the FCC, it gave the agency the authority to enforce that law.<sup>45</sup>

Accordingly, the FCC statute states, "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000 or imprisoned not more than two years, or both."<sup>46</sup>

The Commission also has the ability to revoke a station license, impose a monetary forfeiture on a licensee, or simply issue a warning for the broadcast of indecent material. Obscene material, as defined by the U.S. Supreme Court's Miller decision, cannot be broadcast at any time.

Noting First Amendment concerns, the Court has said the government "must identify a compelling interest in regulating indecent broadcasts, and must choose the least restrictive means to further that interest."<sup>47</sup>

The basis for government regulation of indecent broadcasts was set forth by the U.S. Supreme Court in the case of *FCC v. Pacifica Foundation* (1978). According to the FCC's recent Policy Statement on its enforcement policies regarding broadcast indecency:

In that case, the Supreme Court held that the government could constitutionally regulate indecent broadcasts. In addition, the Court quoted the Commission's definition of indecency with apparent approval. The definition, "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs," has remained substantially unchanged since the time of the *Pacifica* decision.<sup>48</sup>

The *Pacifica* decision has been upheld in subsequent constitutional challenges, and was even affirmed in *Reno v. ACLU* in 1997. In that case, while the U. S. Supreme Court struck down an indecency standard for the Internet, it didn't question the constitutionality of the FCC broadcast indecency standard.

### **The FCC'S Determinations of Indecency**

According to the FCC's recent policy statement, in order for material to be found indecent, it must describe or depict sexual or excretory organs or activities.

It must also be found to be *patently offensive* as determined by contemporary community standards for the broadcast medium. The "community" in question is not a geographic one, but a very general one, that of the average broadcast viewer or listener and not the sensibilities of any individual complainant.<sup>49</sup>

The gauge used by the FCC to determine what is *patently offensive* is the full context of the broadcast. "It is not sufficient, for example, to know that explicit sexual terms or descriptions were used, just as it is not sufficient to know only that no such terms or descriptions were used. Explicit language in the context of a *bona fide* newscast might not be patently offensive, while sexual innuendo that persists and is sufficiently clear to make the sexual meaning inescapable might be."<sup>50</sup>

As noted in the U.S. Supreme Court's *Pacifica* decision, "a 'pig' is offensive in 'the parlor' but not the 'barnyard.'"<sup>51</sup>

The report gives many examples. For instance, "Candy Wrapper" is a song that was broadcast on KGB-FM in San Diego. The song told the story of sexual encounters, replacing graphic language with the names of popular candy bars. Despite an absence of objectionable language, the FCC found the song to be indecent.

"Notwithstanding the use of candy bar names to symbolize sexual activities, the titillating and pandering nature of the song makes any thought of candy bars peripheral at best."<sup>52</sup>

The FCC's Policy Statement contrasts that with examples of offensive words being used in a context that is found not to be indecent.

One example is the National Public Radio broadcast "All Things Considered." The news report, preceded by a listener warning, featured excerpts from a wiretap of telephone conversations in which organized crime figure John Gotti used the "F" word 10 times in seven sentences.

The FCC said in that case that it did "not find the use of such [coarse] words in a legitimate news report to have been gratuitous, pandering, titillating or otherwise 'patently offensive' as that term is used in our indecency definition."<sup>53</sup>

## What About Television?

For television, there are few examples of any FCC inquiry or action with regard to indecency. The only exception is the prime-time television broadcast of “Schindler’s List.” The FCC ruled in 2000 that full frontal nudity within the film’s context — World War II wartime atrocities — was not indecent.<sup>54</sup>

In another case, while the FCC took no official action, Commissioner Tristani sent a letter to FOX Television owner Rupert Murdoch protesting the repeated advertising of the show “Temptation Island” during hours when children were likely to be watching.

“In light of the recent report on the deliberate marketing of violent movies to children and the movie industry’s voluntary agreement to cease such advertisements, I urge FOX to respond similarly to these parents and re-evaluate its advertising scheme for ‘Temptation Island,’” Tristani’s letter said.<sup>55</sup>

The Parents Television Council (PTC) has noted the decline of broadcast standards. In the Council’s report “Family Hour Goes from Bad to Worse,” the PTC noted a “huge increase in coarse language” during the 8:00 to 9:00 p.m. hour on broadcast television. The report added that “much of today’s Family Hour sexual content deals with topics, such as oral sex and pornography, which just a few years ago were rarely touched on even in 10 p.m. shows, let alone 8 p.m. fare.”<sup>56</sup>

That decline has since been accentuated by full frontal, but strategically hidden, female nudity in the presence of a child on ABC’s *NYPD Blue*, and the use of the “F” word — which the network failed to bleep — in the family hour during the January 2003 broadcast of the Golden Globe Awards on NBC. Reality television has also brought the medium to a new low, making vulgar language, partial nudity, bedroom and hot tub scenes as common as car chases.

The state of broadcast television has even drawn the attention of those outside the pro-family community.

“What’s really happening now is a transformation to the daily normalization of this,” Robert Thompson, professor of media and pop culture at Syracuse University, told *The New York Times*. “It’s commonplace to hear erection jokes on *Friends* at 8 o’clock; even gentle little programs like *Everybody Loves Raymond* have the kind of stuff that, when it played on ‘Three’s Company’ 20 years ago, made the PTA go completely ballistic.”<sup>57</sup>

The article also noted that broadcasters were aiming to make the fall 2001 television lineup even worse, with the inclusion of every kind of foul word and regular features of partial nudity.

Yet, the FCC has said the number of indecency complaints involving television remained negligible and had taken no action against stations for network programs in 2001.<sup>58</sup>

“Perhaps there are so few TV indecency complaints because the public is not aware that the FCC has jurisdiction over TV indecency,” said Robert Peters, president of Morality in Media, in an open letter to President Bush. “How could they know, when to our knowledge, no TV station in the continental U.S. has paid an indecency fine in over 20 years?”<sup>59</sup>

“Furthermore, for over a decade the FCC has been dismissing virtually all indecency complaints that do not include a tape of the program,” Peters added. “Since most TV viewers aren’t taping programs when they or their children are assaulted by indecent content, this practice has virtually ensured that there will be few if any indecency actions instituted against TV licensees.”<sup>60</sup>

That lack of action continues, as the FCC has failed to find the Golden Globes “F” word incident indecent, and has failed to act against either ABC’s or CBS’s broadcasts of *The Victoria’s Secret Fashion Show*, despite receiving viewer complaints topping the 18,000 mark for each.

## **Solutions**

Commissioners and decency advocates have called for revamping the FCC’s procedures for handling indecency complaints, and suggested that stronger congressional oversight of the FCC is needed.

Suggestions for improving indecency enforcement include:

- Requiring stations to maintain recordings or transcripts of broadcasts, relieving citizens of the burden of daily monitoring offensive shows.
- Pressing both House and Senate Committees overseeing the FCC for hearings on the lack of indecency enforcement.
- Passage of federal legislation prohibiting the broadcast of indecent and violent programming during the hours when children are likely to be in the audience. Such restrictions are currently voluntary.
- Passage of federal legislation requiring basic cable channels to comply with the same indecency regulations as broadcast channels.
- Congressional revision of the FCC’s fine structure to allow the commission to impose larger, more meaningful fines on offending licensees.
- Creation of a unit within the FCC dedicated to indecency complaints and reporting directly to the commissioners.

Commissioner Copps has become the lead proponent for enforcing indecency rules. He has echoed suggestions made by former Commissioner Tristani that the FCC’s complaint procedures should be revamped.

“The process by which the FCC has enforced these laws places an inordinate responsibility on the complaining citizen. It seems to me that when enforcing the indecency laws of the United States it is the Commission’s responsibility to investigate

complaints that the law has been violated, not the citizen's responsibility to prove the violations."<sup>61</sup>

The FCC, he said, should consider requiring stations to keep recordings of live broadcasts. Most larger stations tape those shows, but those tapes often disappear once the FCC inquires about an alleged indecency.

Commissioners Copps and Abernathy gave the broadcast industry the strong suggestion that they should begin voluntarily keeping transcripts of aired programs.

"If something is said on the public airwaves, it ought to be part of the public record," Copps told the annual National Association of Broadcasters (NAB) convention in New Orleans. "You ought to have recourse to know what the facts are."<sup>62</sup>

Abernathy joined Copps in presenting this idea to broadcasters. She added that stations should start by monitoring and recording the programs of "inflammatory personalities," or those personalities that spark listener complaints.<sup>63</sup>

Such practices were once common among stations wishing to protect themselves legally. NAB President Eddie Fritts indicated to *The Washington Post* that broadcasters may reinstitute the practice once again for their own self-interest.

"Voluntary transcripts would be better than an intrusive action (by the FCC)," Fritts said.<sup>64</sup>

Both commissioners strongly hinted to those at the NAB convention that such federal action would be forthcoming if broadcasters failed in self-policing efforts.

Former Commissioner Tristani agrees on this path to effective indecency enforcement.

"Since the question of whether particular speech is indecent or not is a question of fact, we should be developing better records rather than summarily dismissing complaints. The ineffectiveness of prior warnings, combined with the invasive nature of broadcast media, means post-broadcast factual investigations and enforcement decisions are based on full records. Following this approach we avoid the suppression of legitimate speech and reduce the likelihood of the erroneous deprivation of constitutional rights," she noted.<sup>65</sup>

In the case of indecency on television, Morality in Media's Peters suggests the FCC should acquire copies of allegedly indecent programs from the show's producers, rather than simply dismissing citizen complaints.

"TV programmers tape their programs, and the FCC can obtain those tapes when it has a purpose for doing so. The FCC can also monitor programs known for 'pushing the envelope,'" said Peters.<sup>66</sup>

Another avenue is for concerned citizens to lobby Congress, and particularly members of the House Energy and Commerce Committee, which oversees the FCC.

This may be the best avenue, since pro-decency commissioners are asking for stiffer fines against offenders. Higher fines can be enacted only by Congress.

Congressional action would also serve to prod Commission Chairman Michael Powell into taking a stronger stand on the issue. Early in his term as Chairman, Powell expressed aversion to indecency enforcement.

Powell told *Television Digest* that the FCC's role in "social policy," such as indecency enforcement, is "whatever Congress tells us. The debate is best left to institutions that directly represent the public." That comment belies knowledge of the current state of statutory law relating to broadcast indecency as well as the *Pacifica* decision — both of which Congress has charged the FCC with enforcing.

He added it was better that "a decision that reverberates throughout the nation" be made by the majority of 535 federal legislators acting on a bill signed by the President rather than a decision made by three FCC commissioners — the majority needed to enforce a judgment.<sup>67</sup>

Powell's aversion to enforcing the indecency statutes already set forth by Congress — while at the same time reducing regulations preventing cable and broadcast monopolies — might be better understood when seen in light of comments he made on his first visit to Capitol Hill as FCC Chairman. There, Powell referred to telecommunications corporations — broadcast, cable and Internet conglomerates — as "our clients."<sup>68</sup>

But increasing pressure from the public and increasing levels of broadcast indecency have led Powell to moderate his views. Following the Commission's action against WKRC in Detroit, Powell told *The Hollywood Reporter*, "Our rules run to the licensee," when asked about the commission's willingness to go to the mat over indecency. "At some point, enough is enough."<sup>69</sup>

The trend toward indecency on the nation's airwaves and basic cable has also warranted attention from Sen. Joe Lieberman (D-Connecticut).

In a September 6, 2001, *NewsMax.com* article, Lieberman said he was considering holding Senate hearings on the broadcast industry's public interest requirement.

Lieberman said he hopes to ask whether "the networks, in their outlook, are meeting their legal obligation to serve the public interest by putting on so much objectionable, inappropriate and harmful content."<sup>70</sup>

The September 11 terrorist attacks prevented those Senate hearings from being scheduled.

The House Commerce Committee, chaired by Rep. Billy Tauzin (R-Louisiana.), also has jurisdiction over the FCC. However, its oversight has been more concerned with “heel-dragging” in regard to the approval of mergers and deregulation than it has the public interest and indecency enforcement.<sup>71</sup>

During the last congressional session, legislation was pending before both houses of Congress to amend the Communications Act of 1934. It would have required that excessively violent television programming be banned from hours when children are likely to be in the audience.

“The Children’s Protection from Violent Programming Act,” H.R. 1005 in the House and S. 341 in the Senate, would have given the FCC power to fine and even revoke the licenses of stations that air violent programming during prime viewing hours. Under this bill, violent programming could air only during prime-time hours if the producers provide the necessary v-chip rating to give parents the ability to block it.

That legislation, was drafted by pro-family Rep. Ronnie Shows (D-Missouri). The Senate sponsor is Sen. Ernest Hollings (D-South Carolina). Both versions died without action and have not been revived in the current Congress.

Meanwhile, broadcast networks continue to use the offerings of cable television — not held to the same indecency standards — as an excuse to push the envelope in their programming.

“If Congress means business about protecting children from indecent TV content, it will enact much-needed legislation restricting indecency on at least basic cable TV channels,” added Morality in Media’s Peters.<sup>72</sup>

## **Conclusion**

The FCC has a mandate to maintain decency on the airwaves, but the evidence reveals that it has not lived up to its purpose. The Senate should make indecency enforcement a litmus test in any FCC nominee’s confirmation hearing.

The House and Senate should hold hearings on the FCC’s lack of indecency enforcement. Such hearings are needed to send a signal to both the federal agency and to broadcasters that if they don’t comply with current laws, stronger and more restrictive ones may be forthcoming.

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*Martha W. Kleder, a veteran broadcast journalist, is a writer and policy analyst for the Culture and Family Institute, an affiliate of Concerned Women for America.*

## **Endnotes**

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- <sup>2</sup> *Industry Guidance On the Commission's Case Law Interpreting 18 U.S.C., § 1464 and Enforcement Policies Regarding Broadcast Indecency*, File No. EB-00-IH-0089, Adopted: March 14,2001, Released: April 6, 2001.
- <sup>3</sup> *Ibid*, 4.
- <sup>4</sup> *Emmis FM License Corp. of Chicago, 200132080029, Licensee of Station WKQX (FM), Chicago, Illinois*, File No. EB-00-IH-0401, Facility ID #19525, Adopted: April 5,2001, Released: April 6, 2001.
- <sup>5</sup> "Fisting" is putting the forearm inside someone else's body.
- <sup>6</sup> *Emmis*.
- <sup>7</sup> *The KBOO Foundation, 200132080056, Licensee of Noncommercial Educational Station KBOO-FM, Portland, OR*, File No. EB-00-IHD-0079, Facility ID #65755, Adopted: May 14,2001, Released: May 17, 2001.
- <sup>8</sup> *Citadel Broadcasting Company, 200132080057, Licensee of Station KKMGM (FM), Pueblo, Colorado*, File No. EB-00-IH-0228, Facility ID #11229, Adopted: May 31,2001, Released: June 1, 2001.
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- <sup>11</sup> *Ibid*.
- <sup>12</sup> *Ibid*.
- <sup>13</sup> *Industry Guidance On the Commission's Case Law Interpreting 18 U.S.C., § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 18.
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- <sup>17</sup> Requirement to Maintain a Public Inspection File, <http://www.fcc.gov/eb/broadcast/pif.html>.
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- <sup>19</sup> *Ibid*, 19.
- <sup>20</sup> Press Statement of Commissioner Gloria Tristani Re: Enforcement Bureau Letter Ruling on WGR (AM) Buffalo, New York Indecency Complaint, February 28, 2001.
- <sup>21</sup> Press Statement of FCC Commissioner Gloria Tristani Re: Enforcement Bureau Letter Ruling on WRLR (FM), Homewood, Alabama Indecency Complaint, February 13, 2001.
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- <sup>23</sup> *Ibid*.
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- <sup>25</sup> *Ibid*.
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- <sup>43</sup> *Ibid*.
- <sup>44</sup> Ahrens, February 20, 2001, C01.
- <sup>45</sup> Enforcement Bureau - Obscene & Indecent Broadcasts, <http://www.fcc.gov/eb/broadcast/obscind.html>.
- <sup>46</sup> See 18 U.S.C. § 1464; see also 47 U.S.C. §§ 312 (a)(6), 312 (b)(2), and 503 (b)(1)(E) (1970 ed. And Supp. V) (FCC may impose civil penalties because the Communications Act incorporates §1464); see 47 U.S.C. §§ 312(a)(6), 312(b)(2), and 503(b)(1)(E).
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- <sup>48</sup> *Industry Guidance On the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 2.
- <sup>49</sup> *Ibid*, 3.
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- <sup>51</sup> *FCC v. Pacifica*, 438 U.S. 726, 748 (1978) 7. See, e.g., *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) (observing “[e]ach medium of expression . . . may present its own problems.”); see also *Denver Area Education Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 774 (1996) (SOUTER, J., concurring) “Reviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said,” *Id.* 518 U.S. at 803 (1996) (KENNEDY, J., concurring and dissenting) “Emphasizing the narrowness of its holding, the Court in *Pacifica* conducted a context-specific analysis of the FCC’s restriction on indecent programming during daytime hours.” The Court has repeatedly recognized special factors as justifying regulation of the broadcast media: the history of extensive government regulation of broadcasting, see, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 399-400; the scarcity of available frequencies at its inception, see, e.g., *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 637-638; and its “invasive” nature, see *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 128.
- <sup>52</sup> *Industry Guidance On the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 7.
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<sup>65</sup> Press Statement of Commissioner Gloria Tristani, Re: Enforcement Bureau Letter Rulings on WLAN, (FM), Lancaster, Pennsylvania, and WBZZ (FM), Pittsburgh, Pennsylvania, Indecency Complaints, April 5, 2001, [www.fcc.gov/Speeches/Tristani/Statements/2001/stgt132.html](http://www.fcc.gov/Speeches/Tristani/Statements/2001/stgt132.html).

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