Separate Statement of Commissioner Harold W. Furchtgott-Roth

In the Matter of Guidance on the Commission's Case Law Interpreting 18 U.S.C. Section 1464 and Enforcement Policies Regarding Broadcast Indecency

The Commission is obliged, under a settlement agreement, to issue guidance on its broadcast indecency policies. As the courts have noted, there is a certain "vagueness inherent in [this] subject matter."[1] I find that the policy statement establishes necessary boundaries for this elusive and highly subjective area of the law.

I must note, however, that Commission action to enforce the indecency guidelines would set the stage for a new constitutional challenge regarding our authority to regulate content. To be sure, *Red Lion v. FCC*[2] and its progeny, *FCC v. Pacifica*,[3] have not yet been overruled. Nevertheless, their continuing validity is highly doubtful from both an empirical and jurisprudential point of view.[4]

If rules regulating broadcast content were ever a justifiable infringement of speech, it was because of the relative dominance of that medium in the communications marketplace of the past.[5] As the Commission has long recognized, the facts underlying this justification are no longer true.[6] Today, the video marketplace is rife with an abundance of programming,[7] distributed by several

[1]*Action for Children's Television v. FCC*, 852 F.2d 1332, 1338 (1998) (internal quotation and citation omitted).

[2]395 U.S. 367 (1969).

[3]438 U.S. 726 (1978).

[4]Since *Pacifica*, the Courts have repeatedly struck down indecency regulations and other content-based restrictions. *See, e.g., United States v. Playboy Entertainment Group, Inc*., 120 S.Ct. 1878 (2000) (striking down statutory adult cable channel scrambling requirements); *Greater New Orleans Broadcasting Ass'n v. U.S.*, 527 U.S. 173 (1999) (striking down the statutory and regulatory bans on casino advertising for broadcast stations); *Reno v. ACLU*, 117 S.Ct. 2329 (1997) (striking down statutory internet indecency requirements); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (striking down certain statutory indecency requirements for commercial leased access and public access channels on cable television systems); and *Sable Communications v. FCC*, 492 U.S. 115 (1989) (striking down a ban on indecent telephone messages). *See also*, *Time Warner Entertainment Co. v. FCC*, __ F.3d. __ (D.C. Cir. 2001) (striking down FCC cable ownership cap and channel occupancy limits); and *Charter Communications v. County of Santa Cruz*, __ F.Supp. __ (N.D. Cal. 2001) (striking down local cable franchise transfer requirements).

[5]*See, e.g., FCC v. Pottsville Broadcasting Co*., 309 U.S. 134, 137 (1940) (ownership rules justified by "a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination"); *see also Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (justifying, at that point in history, a "less rigorous standard of First Amendment scrutiny" on the basis of "spectrum scarcity").

[6]*See 1985 Fairness Report*, 102 FCC 2d 145, 198-221 (1985); *Syracuse Peace Council*, 2 FCC Rcd 5043, 5053 (1985).

[7]There are well over two hundred channels of video programming developed by the cable and broadcast industries. In addition, hyper-localized programming, produced by public, educational and governmental entities, is now available on cable systems throughout the United States. Also, dozens of pay-per-view (continued….)

types of content providers.[8] A competitive radio marketplace is evolving as well, with dynamic new outlets for speech on the horizon.[9] Because of these market transformations, the ability of the broadcast industry to corral content and control information flow has greatly diminished.[10] In my judgment, as alternative sources of programming and distribution increase, broadcast content restrictions must be eliminated.

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programming options exist for cable and satellite subscribers. Finally, internet users have access to tens of thousands of audio programming sources and streaming video technology will soon advance to the point that broadcast quality television will be available to anyone connected to the world wide web.

[8]Cable operators, cable overbuilders, OVS operators, internet service providers, wireless video systems, SMATV, common carriers, and satellite carriers are just some of the possible outlets for distributing video content. The promise of multiplexed digital television signals, available to everyone over-the-air, adds even more video programming choices for the American public.

[9]Satellite radio will debut soon and digital audio broadcasting holds out much promise for the future of terrestrial radio transmission. Both types of services will offer listeners more channels of programming at higher quality levels than is available today. Moreover, hundreds of radio stations are currently streaming content over the internet, with thousands of more to follow.

[10]*See* Joint Statement of Commissioners Powell and Furchtgott-Roth, *In re Personal Attack and Political Editorial Rules*, FCC Gen. Docket No. 83-484, at 5 and n. 15 (citing statistics on boom in communications outlets).

For these reasons, I believe that the lenient constitutional standard for reviewing broadcast speech, formally announced in *Red Lion*, rests on a shaky empirical foundation.[11] Technology, especially digital communications, has advanced to the point where broadcast deregulation is not only warranted, but long overdue. In my view, the bases for challenging broadcast indecency has been well laid, and the issue is ripe for court review.[12]

I must note my amazement that it has taken over seven years for the Commission to fulfill its obligation to issue this item. While broadcast indecency is a delicate issue to discuss, it has not benefited the industry or the Commission to ignore the matter. I commend the Chairman for taking the initiative to move this item. Norm Goldstein and others staff members deserve special credit for crafting a document that makes the best of a difficult situation for the Commission.

With these observations in mind, I vote to adopt this policy statement.

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[11]It is ironic that streaming video or audio content from a television or radio station would likely receive more constitutional protection, *see Reno*, than would the same exact content broadcast over-the-air. A more interesting First Amendment question will soon arise when digital television stations begin offering subscription services over-the-air. Will intermediate scrutiny apply because the pay service is akin to cable television or will a lesser standard apply because it is available over-the-air? The same inquiries attach to radio signals delivered to listeners on a subscription basis via satellite.

[12]Dissenting Statement of Commissioner Harold W. Furchtgott-Roth, *In the Matter of 1998 Biennial Regulatory Review: Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Communications Act* (rel. June 20, 2000).