

Separate Statement of Commissioner Susan Ness***In Re: Industry Guidance on the Commission's Case Law Interpreting
18 U.S.C. 1464 and Enforcement Policies Regarding Broadcast Indecency***

Our enforcement of the broadcast indecency statute compels the FCC to reconcile two competing fundamental obligations: (1) to ensure that the airwaves are free of indecent programming material during prescribed hours when children are most likely to be in the audience; and (2) to respect the First Amendment rights of broadcasters regarding program content.

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.

Despite an onslaught of on-air smut, the Commission necessarily walks a delicate line when addressing content issues, and must be careful not to tread on the First Amendment -- the constitutional bulwark of our free society. Even words that might be construed as indecent are subject to some constitutional protection against government regulation.¹

That said, the Supreme Court has seen fit, despite declining broadcast audience shares, to reaffirm the FCC's broadcast indecency enforcement role, given the "pervasive" and "invasive" characteristics of the free over the air broadcast medium.² Our Policy Statement on indecency reconciles our statutory mandate and constitutional obligation by providing helpful guidance to broadcasters and the public alike. The guidance we offer – a restatement of existing statutory, regulatory, and judicial law – establishes a measure of clarity in an inherently subjective area.

Recommended Procedural Improvements

We should strive to make our complaint procedures as user-friendly as possible.³ I believe that our complaint process could be improved if, prior to acting on an indecency complaint, the Commission routinely forwarded the complaint to the licensee in question. The Policy Statement concedes that in "many [indecency] cases, the station may not be aware that a complaint has been filed."⁴ Moreover, many consumers feel that the Commission mechanically dismisses their

¹ *FCC v. Pacifica Foundation*, 438 U.S. 726, 746 (1978) (while offensive words might "ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment), *cf. id.* at 745 ("obscenity may be wholly prohibited").

² See, *Reno v. ACLU*, 521 U.S. 844, 868 (1997).

³ The Policy Statement is careful to point out that complaints need not be letter perfect, *see, e.g.*, n. 20 (citing Bureau decision that an inexact transcript may be sufficient to meet procedural requirements).

⁴ Policy Statement at para. 24.

complaints. I do not believe that broadcasters' First Amendment rights would be threatened if we were to send broadcasters a courtesy copy of complaints filed with the FCC. Indeed, most broadcasters *want* to be made aware of audience complaints. And consumers would be reassured that their views were being treated seriously.

Broadcasters Are Part of a National Community

Release of this Policy Statement alone will not solve the festering problem of indecency on the airwaves. However, it is entirely within the power of broadcasters to address it -- and to do so *without government intrusion*. It is not a violation of the First Amendment for broadcasters on their own to take responsibility for the programming they air, and to exercise that power in a manner that celebrates rather than debases humankind.

It is time for broadcasters to consider reinstating a voluntary code of conduct. I encourage broadcasters, the Bush Administration, and Congress swiftly to resolve any antitrust impediments to such action and move ahead.

We all are part of a National Community. As stewards of the airwaves, broadcasters play a vital leadership role in setting the cultural tone of our society. They can choose to raise the standard or to lower it. I hope that broadcasters will rise to the occasion by reaffirming the unique role of broadcasting as a family friendly medium. The public deserves no less.