

Before the
Federal Communications Commission
Washington, DC 20554

)	
In the Matter of)	
)	
FCC Seeks Comment on Adopting)	GN Docket No. 13-86.
Egregious Cases Policy)	
)	
)	

Comments of Future of Music Coalition

I. Introduction

Future of Music Coalition (FMC) is pleased to submit these comments to the Federal Communications Commission (FCC) in response to its Notice of Inquiry¹ concerning changes to the FCC’s indecency policy.

FMC is a national nonprofit organization that works to nurture a diverse musical culture where artists flourish, are compensated fairly for their work, and where fans can find the music they want. FMC also seeks to educate the media, policymakers and the public about issues at the intersection of music, technology, policy and law, while bringing together diverse voices in an effort to identify creative solutions to challenges in this space. Founded in June 2000 by musicians, artist advocates, technologists, and legal experts, FMC works to ensure that musicians have a voice in the issues that affect their livelihood. As FMC is a music organization, our comments will focus on the impact of the FCC’s indecency policy on performing artists, songwriters and radio stations as well as noncommercial broadcasters, who have limited resources to anticipate and respond to the FCC’s vague policy. FMC is pleased to be an ongoing participant in this important conversation. FMC previously weighed in on the subject, filing a brief² in the Supreme Court case, *FCC v. Fox*.

¹ *FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (More than One Million Complaints); Seeks Comment on Adopting Egregious Cases Policy*, Public Notice in GN Docket No. 13-86, DA 13-581, released April 1, 2013 (Notice).

² See Brief of Respondents Center for Creative Voices in Media and The Future of Music Coalition, *FCC v. Fox Television Studios, Inc.*, 556 U.S. 502 (2009).

FMC strongly urges the Commission not to expand its current indecency policy to include a ban on “fleeting expletives” from the airwaves. Such a policy creates an inhibiting environment that has a chilling effect on artists’ creative expression — among the speech the First Amendment was designed to protect. The chilling effect is most pronounced upon noncommercial and other small stations, including the low-power FM stations that FMC has long championed³, and which the FCC is about to more broadly license. FMC also recommends a well-defined penalty system for indecency violations so that broadcasters affected by the FCC’s policy are clearly aware of their potential liability. FMC believes that the FCC should have freedom to exercise discretion regarding punitive action, however, we would prefer that this discretion also include FCC higher standards of scrutiny regarding stations’ localism obligations. Vague and arbitrary indecency policy isn’t the only hindrance to creative expression on the public airwaves; rampant consolidation in station ownership as a result of the 1996 Telecommunications Act has also limited opportunities for communities to benefit from a broader range of expression in broadcasting.

II. Penalizing broadcasts that contain fleeting expletives contradicts First Amendment principles, has a chilling effect on creative expression and contradicts precedent in *Pacifica*.

A. Banning fleeting expletives has a chilling effect on artists’ creative expression, which the First Amendment was designed to protect.

The First Amendment was enacted specifically to protect creative expression. As Justice Thurgood Marshall explained in 1972:

Above all else, the First Amendment means that government has no power to restrict expression because of its ideas, its subject matter, or its content. [citations.] To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship.⁴

Broadcast material that is indecent but not obscene is protected by the First Amendment, therefore “the FCC may regulate such material *only with* due respect for the high value our Constitution places on freedom and choice in what the people say and hear.”⁵ (emphasis added). However, broad government regulation of indecent speech is unlawful “if a substantial amount of protected speech is prohibited or chilled in the process.”⁶

³ See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 S.Ct 1800, 1835–38 (2009) (Breyer, J., dissenting) (addressing the “likelihood that smaller independent broadcasters, including many public service broadcasters . . . would reduce local coverage, indeed cancel coverage, of many public events . . .”).

⁴ *Police Dept. of Chicago v. Mosely*, 408 U.S. 92, 95 (1972).

⁵ *Action for Children’s Television v. F.C.C.*, 852 F.2d 1332, 1344 (D.C. Cir. 1991).

⁶ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 237 (2002).

An overly prohibitive indecency policy would severely chill artists' creative expression. Creators, including musicians and songwriters, consume television and radio with a heightened interest in observing and building upon the work of other artists. Access to diverse expression enables and fosters further creative expression, and is therefore a critical aspect of the creative process. Restrictions on protected speech would curtail this process and impact individual "freedom and choice in what the people say and hear."⁷ Creators and their public, as individual viewers and listeners, are entitled to expect a diversity of creative expression.

The use of expletives in an artistic work can serve a legitimate informational or communicative purpose due to their emotive power.⁸ If the FCC enacts a ban on fleeting expletives, creators will feel compelled to censor their expression, which could have the effect of reducing their intended effect or meaning. An all-inclusive ban on fleeting expletives would hinge on "esthetic and moral judgments about art and literature," that "are for the individual, to make, not for the government to decree."⁹

B. An FCC ban on fleeting expletives is contradictory to precedent set in *Pacifica* and a departure from the FCC's own practice.

In 1978, the Supreme Court approved FCC censorship of indecent speech on the airwaves.¹⁰ *Pacifica* permitted the FCC to penalize broadcasts containing expletives that were deliberate, repetitive, and used in a patently offensive manner.¹¹ However, the Court emphasized the narrowness of its holding¹², stating an understanding that no chilling effect would be had upon broadcasters from its decision because the FCC would "proceed cautiously, as it ha[d] in the past."¹³

An expansion of the FCC's indecency policy that includes a ban on fleeting expletives is contradictory to the holding and dicta in *Pacifica*. In the opinion, Justice Powell explains that "[w]e have not decided that an occasional expletive . . . would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution."¹⁴ Furthermore, dissenting in *FCC v. Fox*, Justice Breyer clarified "two Members of the [*Pacifica*] majority suggested

⁷ See *supra* note 5.

⁸ See *Denver Area Edu. Telecom. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 805 (1996) (Kennedy, J., concurring) ("[i]n artistic or political settings, indecency may have strong communicative content, protesting conventional norms or giving an edge to a work by conveying 'otherwise inexpressible emotions.'") (quoting *Cohen v. California*, 403 U.S. 15, 26 (1971) in part).

⁹ *United States v. Playboy Entm't group, Inc.*, 529 U.S. 803, 818 (2000).

¹⁰ *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

¹¹ See Memorandum Opinion and Order, 2 FCC Rcd 2698, 2699 (1987) ("If a complaint focuses solely on the use of expletives, we believe that . . . deliberate and repetitive use in a patently offensive manner is a requisite for finding indecency.").

¹² *Pacifica*, 438 U.S. at 756–57.

¹³ *Id.* at 761 n.4.

¹⁴ *Id.* at 750.

that they could reach a different result, finding an FCC prohibition unconstitutional, were that prohibition aimed at the fleeting or single use of an expletive.”¹⁵ Finally, in its own 2001 *Indecency Policy Statement*, the FCC explained, “where sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has tended to *weigh against* a finding of indecency”¹⁶ (emphasis added). Enacting a policy prohibiting the use of fleeting expletives would therefore be contradictory to the precedent set in *Pacifica* and a departure from the FCC’s own historical practices. A fleeting expletive ban would produce the chilling effect on creators that the *Pacifica* court intended to prevent.¹⁷

III. The FCC’s indecency policy should pronounce a clear standard for assessment of liability, because its current vague regime has a chilling effect on noncommercial radio stations.

The First Amendment, said Judge Learned Hand, “presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.”¹⁸ The FCC’s presumptive ban on fleeting expletives, with exceptions to be invoked at the agency level, has created a severe chill on creative expression, especially in noncommercial broadcasting.

Community-based, noncommercial radio stations provide a platform for niche and regional music formats throughout the US, where culturally significant and novel expression is most likely to find a home. In 2006 Congress increased the fines for indecency tenfold, subjecting broadcasters to pay up to \$325,000 for each violation.¹⁹ Many community-based, noncommercial radio stations operate entirely with volunteers²⁰, leaving them with a tiny staff, no lawyers and limited resources. These programmers have limited budgets and cannot afford to risk an indecency fine, or pay the legal costs incurred in responding to FCC investigations. As PBS President Paula Kerger said, “[w]hen you have stations whose

¹⁵ FCC v. Fox Television Stations, 556 U.S. 502, 553 (2009) (Breyer, J., dissenting).

¹⁶ *Indecency Policy Statement*, 16 FCC Rcd at 8008–09 ¶ 17.

¹⁷ See *supra* note 13.

¹⁸ U.S. v. Associated Press, 52 F. Supp. 362, 372 (D.C.S.D.N.Y. 1943).

¹⁹ Pub. L. No. 109–235, 120 Stat. 491 (2006) (“[P]enalty under this subsection shall not exceed \$325,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$3,000,000 for any single act or failure to act.”).

²⁰ See Comments of Prometheus Radio Project, Future of Music Coalition, United Church of Christ, Office of Communication, Inc., *In the Matter of Creation of a Low Power Radio Service*, Docket No. 99–25, Sept. 6, 2011 at 4–5 (noting difficulties of grassroots groups in even navigating the LPFM application process, using volunteers and, on occasion, volunteering attorneys). Available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021707649>.

operating budgets are only a couple of million dollars, even the old fines, once you factor in all the legal work, were daunting. The fines now would put stations out of business.”²¹

Since noncommercial stations with limited budgets generally offer more program variety, yet are least equipped to deal with hefty fines, FMC suggests the FCC adopt an indecency policy that will penalize only egregious violations. When it comes to broadcast indecency, FMC agrees with The National Association of Broadcasters “that responsible industry self-regulation is preferable to government regulation in areas of programming content.”²² A high degree of federal regulation makes it impossible for local communities to draw their own standard of acceptability. Therefore the FCC should employ a practice of using the “lightest touch possible” when making changes to their indecency policy.

Additionally, FMC urges the Commission to promulgate a well-defined penalty system for indecency violations so that radio stations affected by the FCC’s policy are well aware of their potential liability. Without such guidance, community-based, noncommercial stations will shy away from broadcasting controversial content for fear of incurring indeterminate fines that could result in shutting down their station. Self-censorship of fiction, drama, history and journalism will deplete the program diversity available to consumers. Without clarification, the FCC’s currently vague indecency policy will lead to “countless other stations where broadcasters will exercise their editorial judgment and decline to pursue contentious people or subjects, or will eschew live programming altogether, in order to avoid the FCC fines. This chill reaches speech at the heart of the First Amendment.”²³

IV. The FCC should adopt an indecency policy that best promotes a range of expression through competition and diversity at the local level.

Further consolidation of the commercial radio industry will only exasperate the loss of localism, competition, and diversity in radio programming. As Congress declared in the 1992 Cable Act, “A primary objective and benefit of our Nation’s system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation.”²⁴ It is important to place limits on broadcast ownership because concentration of media ownership has restricted program format diversity²⁵, *i.e.* the “multitude of tongues”²⁶ the First Amendment was designed to

²¹ See Mark Dawidziak, *PBS: Language in Burns’ ‘War’ Worth Fighting For*, SUN JOURNAL, July 31, 2006. Available at <http://www.sunjournal.com/node/175642>.

²² NAB Statement on Supreme Court Ruling on FCC Indecency Regulations, NATIONAL ASSOCIATION OF BROADCASTERS, June 21, 2012. Available at <http://www.nab.org/documents/newsroom/pressRelease.asp?id=2763>.

²³ *Fox Television Stations, Inc. v. F.C.C.*, 613 F.3d 317, 335 (2d Cir. 2010).

²⁴ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. no. 102–385, 106 Stat 1461 (2006).

²⁵ FMC has submitted several detailed analyses to the FCC showing a relationship between group ownership and the loss of diversity in radio music formats. See, *e.g.*, Future of Music Coalition, “*Do Radio Companies Offer More Variety When They Exceed the Local Ownership Cap?*” at <http://futureofmusic.org/filing/fmc-comments-filed-fcc-broadcast-ownership->

protect. FMC has been an active participant in FCC proceedings concerning limits on broadcast ownership and participated in the FCC's "localism" document.²⁷

The FCC should adopt an indecency policy that encourages localism, given that First Amendment-protected expression has more opportunity to flourish with the availability of diverse perspectives. Indecency decisions should be made at the local level, as accountable bodies comprised of community members are better capable of addressing specific programmatic concerns.

As the Supreme Court explained in *Denver Area Edu. Telecom. Consortium, Inc. v. F.C.C.*²⁸, public access channels "are normally subject to a complex supervisory systems of various sorts, often with both public and private elements."²⁹ Since localized channels are often financed through public funds, they are commonly subject to supervision by a local supervisory board.³⁰ The existence of the public/nonprofit programming control systems provide "locally accountable bodies [to] prescreen programming, promulgate rules for the use of public access channels, [and] are merely available to respond when problems arise."³¹ This system makes it unlikely that local standards of patently offensive programming will be broadcast to children³², the concern the Court faced in *Pacifica*.

The FCC has the power to revoke a station's license for the broadcast of indecent material.³³ One way for the FCC to deal with indecency concerns would be to conduct a meaningful examination of licensing requirements to ensure that stations are fulfilling their localism obligations. A higher standard in licensing is preferable to a policy that chills expression or encourages further consolidation of commercial radio.

V. Conclusion

As evidenced by our previous court filings on indecency issues, FMC is committed to a broadcasting environment that supports a diverse range of expression. We believe that creators benefit from exposure to such diversity, as does the broader public. As a number of judicial rulings have borne out, the FCC is within its mandate to promulgate rules

proceeding. *See also*, *Prometheus Radio Project v. FCC*, 373 F.3d 372, 432 (3d Cir. 2004) (citing FMC comments).

²⁶ *See supra* note 18.

²⁷ These comments may be viewed at <http://futureofmusic.org/files/FMClocalismreplycomments08.pdf> (FMC comments); and http://www.creativevoices.us/cgi-upload/news/news_article/LocalismCommentsApril2008.pdf (CCV comments).

²⁸ 518 U.S. 727 (1998).

²⁹ *Id.* at 761.

³⁰ *Id.* at 762. (citing, *e.g.*, D.C. Code Ann. § 43-1829 (1990 and Supp. 1996); Lynchburg City Code § 12.1-44(d)(2)(1998)).

³¹ *Id.* at 763.

³² *Id.*

³³ 47 U.S.C. § 312(a)(6).

regarding broadcast indecency. However, these rules must be specific and appropriately tailored. Going further, we suggest that local communities are the best arbiters of indecency, in accordance with their mores. While it is true that some communities would have more stringent standards, we believe that, taken as a whole, localism in broadcasting would result in a greater diversity expression, particularly with regard to music. Our observations are rooted in more than a decade of quantitative analysis on the impact of consolidation among commercial radio owners. It is incumbent on the FCC to consider these impacts closely as it devises an indecency policy that is transparent, actionable and not expressly punitive towards the very broadcasters who are exemplars of America's proud traditions of free speech and creativity.

Future of Music Coalition
1615 L ST NW Suite 520
Washington, DC
20036