Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globes Awards" Program	**File No. EB-03-IH-0110**

JOINT PETITION FOR A STAY

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JOINT PETITION FOR A STAY

Pursuant to 47 C.F.R. §§ 1.41 & 1.43, 1.106(n), Fox Entertainment Group, Inc., NBC Universal, Inc., and Viacom Inc. ("petitioners") jointly request the Commission to stay the effect of its order in this proceeding pending resolution of petitions for reconsideration and any judicial review of Commission orders in this proceeding.[1] For the reasons explained below, the *Order* misconstrues the relevant statute, is arbitrary and capricious, and violates the First and Fifth Amendments. Without a stay, petitioners' and others' speech will continue to be inhibited, which is a classic form of irreparable harm, and petitioners will be forced to suffer additional burdens and costs that cannot be redressed if they eventually prevail. No person will suffer significant harm if a stay is granted. The Commission's prior indecency policy would remain in effect, and the serious constitutional interests implicated here confirm that the public interest warrants a stay.

[1] Memorandum Opinion and Order, *Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, FCC 04-03, File No. EB-03-1H-0110 (released Mar. 18, 2004) ("*Order*").

INTRODUCTION AND SUMMARY

Petitioners request a stay of an order that announced a dramatic new standard for when licensees' broadcasts may lead to the imposition of forfeiture penalties and other sanctions for violations of 18 U.S.C. § 1464's prohibition against the broadcast of "obscene, indecent, or profane language."[2] The *Order* addressed complaints against petitioner NBC Universal's live broadcast of the annual "Golden Globe Awards" program, during which the performer Bono, who received an award, stated: "This is really, really fucking brilliant. Really, really great." The *Order* expressly abandoned aspects of the Commission's established policy governing enforcement of Section 1464 and established a new enforcement policy. Under the new policy, an isolated, fleeting use of the word "f***" or "any of its variants" "in any context" -- even when used as an intensifier, without any intention on the part of the licensee, and potentially without regard to the social value of the speech at issue -- is both "indecent" and "profane" for purposes of Section 1464 and the subsequent imposition of forfeiture liability under 47 U.S.C. § 503(b). Petitioners own and operate licensed broadcast stations and own and manage broadcast networks. This new policy limits and inhibits their speech, imposes substantial costs upon them, and exposes them to serious potential liability as described below.[3]

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[2] On the same day, the Commission released three additional orders addressing aspects of the enforcement of its indecency policy. *See Infinity Radio License, Inc.*, Mem. Op. and Order, FCC 04-48 (rel. Mar. 18, 2004); *Infinity Broad. Operations, Inc.*, Notice of Apparent Liability for Forfeitures, FCC 04-49 (rel. Mar. 18, 2004); *Capstar TX Ltd. Partnership*, Notice of Apparent Liability for Forfeiture, FCC 04-36 (rel. Mar. 18, 2004). One (*Capstar TX Ltd. Partnership*) has been resolved by consent. To the extent the issues raised in this petition implicate those remaining orders, a ruling staying the *Order* may affect those additional orders as well.

[3] Further information and background material are set forth in Petition for Reconsideration of ACLU et al., *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globes Awards" Program,* File No. EB-03-1H-0110 (filed Apr. 19, 2004) ("*Multiparty Recon. Petition*"), and Petition for Partial Reconsideration of NBC, Inc., *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globes Awards" Program,* File No. EB-03-1H-0110 (filed Apr. 19, 2004) ("*NBC Partial Recon. Petition*").

The Commission should grant a stay of the *Order* because petitioners are likely to succeed on the merits while showing irreparable injury or, alternatively, present a serious question regarding the merits coupled with a showing that the balance of equities tips in their favor. As to the merits, the broadcast at issue was neither "indecent" nor "profane" under the plain meaning of Section 1464's terms or under the tests that the Commission itself established to govern the interpretation of Section 1464. The Commission's reasoning is internally contradictory, lacks record support, and impermissibly departs from the Commission's own controlling rules. The scope of the speech encompassed by the new standard, and especially the open-ended, multiple definitions of "profane" language, is insufficiently sensitive to the First Amendment interests that compel a narrower construction of the statute.

For related reasons, the *Order* is unconstitutional. The *Order*'s standard is vague and thus fails to provide notice to broadcasters of what speech is proscribed or to cabin the Commission's discretion as required by the First and Fifth Amendments. The standard is also overbroad, and regulates far too much protected speech in light of the asserted interest even under the less protective standard historically applied to broadcast speech. And the *Order* even more clearly fails the traditional First Amendment standards that should be applied to broadcast and non-broadcast speech alike.

Petitioners will suffer irreparable harm in the absence of a stay. The uncertainty created by the *Order* is "chilling" and has "chilled" petitioners' speech, which is the archetype of irreparable harm. Although the Commission did not "envision that [the *Order*] will lead to licensees abandoning program material," *Order* ¶ 11 n.30, there is ample evidence that the *Order* is having precisely that effect. In addition, petitioners are burdened by changes to production

practices, legal expenditures, and other costs imposed by the new policy announced in the *Order*. Those costs are irrecoverable.

The balance of equities also clearly favors a stay. In contrast to the harm petitioners will suffer in the absence of a stay, no third party will suffer appreciable harm if a stay is granted. This is especially so because the Commission's prior policy, which the Commission has deemed sufficient to protect the public interest for a quarter century, would remain in place. The public interest, and especially the interests of third parties, also favors the grant of a stay. The *Order* operates to burden and to chill the speech of a broad range of broadcasters, with commensurate harm to listeners and viewers whose own First Amendment interests are harmed by the *Order*'s inhibition of broadcasters' speech.

ARGUMENT

The *Order* should be stayed if petitioners show (i) a likelihood of success on the merits together with a showing of irreparable injury or (ii) the existence of a "'serious'" legal question and a more "'substantial'" showing that the balance of equities favors petitioners. *See Washington Metro. Area Transit Comm'n*, 559 F.2d 841, 844 (D.C. Cir. 1977); *see also* Order, *Hickory Tech Corp. & Heartland Telecomms. Co.*, 13 FCC Rcd. 22,085, ¶ 3 & n.9 (1998) (no need to demonstrate likelihood of success on merits "if little harm will befall others if the stay is granted and denial of the stay would inflict serious harm"). Petitioners readily meet each alternative standard because they are likely to succeed on the merits and the equities clearly favor a stay.

I. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS.

There is unquestionably a "serious" legal question underlying petitioners' challenge to the *Order*, and the statutory, administrative and constitutional grounds for that challenge establish that petitioners are very likely to prevail in their challenge.

A. The *Order* Misconstrues Section 1464 and Is Arbitrary and Capricious.

Each principal component of the *Order* misconstrues Section 1464 or constitutes arbitrary agency action.

First, the Commission itself construed the term "indecent" in Section 1464 as requiring a statement that "does depict or describe sexual activities," yet the *Order* clearly misapplied even that definition. The Commission "recognize[d] NBC's argument that the 'F-Word' here was used 'as an intensifier'" and that the dictionary definition of the word includes an independent meaning of "'really'" or "'very,'" but the Commission nonetheless concluded that "given the core meaning of the 'F-Word,' *any use* of that word or a variation, in any context, inherently has a sexual connotation." *Order* ¶ 8 & n.23 (emphasis added). This construction is plainly wrong. Once the Commission recognized, as it must, that certain meanings of the word are intensifiers and *distinct* from meanings that describe sexual activities, it has removed any basis for its conclusion that "any" use of the word or its variants inevitably depicts or describes sexual activity. It simply defies credulity to conclude that Bono's reference to "fucking brilliant" denoted or connoted any sexual meaning.

Second, no record support or other rational basis exists for the Commission's conclusion that "the phrase at issue here is patently offensive under contemporary community standards for the broadcast medium." *Id.* ¶ 9. The Commission reasoned that use of the "'F-Word'" "invariably invokes a coarse sexual image" and was "shocking and gratuitous." *Id.* The conclusion that the term "invariably" invokes a sexual image is wrong and unsupportable for the

reasons just noted. More important, the Commission and its staff have consistently concluded for many years that isolated or fleeting uses of vulgar words, including "f***," are not indecent. There is no basis in the record to conclude that the "community standards" during the last decade have become less, rather than more, accepting of such use of language, and the *Order* points to none.

Third, the Commission's own reasoning and conclusion do not comport with the factors that the Commission itself determined ought to control the proper interpretation of Section 1464. The *Order* reaffirmed that "the context in which the material appeared is critically important" and that an indecency determination under Section 1464 required consideration of three factors:

> "(1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value."

Order ¶ 7 (emphasis removed). But the phrase "really, really fucking brilliant. This is really, really great" cannot rationally be characterized as meeting any of the three factors, and the Commission did not explain how it might do so. Nor could "every" or "any" use of the word "f***" and its variants satisfy these factors.

Fourth, the Commission improperly construed the statutory term "profane." The Commission used multiple standards to attempt to define the term, resulting in an open-ended and hopelessly meaningless construction. For example, the Commission erred in reasoning that "'profanity' is commonly defined as 'vulgar, irreverent, or coarse language'" and that the word "f***ing" is clearly the "vulgar and coarse" language that falls within Section 1464's term

"profane." *Order* ¶ 13.[4] "Profanity" is not, of course, the statutory term at issue, and the meaning of "profane" is tied closely to actions directed to the sacred or holy.

The Commission's introduction of "profane" as a separate ground for regulating speech also improperly departed in an adjudicatory proceeding from its rules addressing enforcement of Section 1464. Those rules and their underlying orders equate the "[e]nforcement of 18 U.S.C. § 1464" with enforcement of "restrictions on the transmission of obscene and indecent material," and the rules do not prohibit broadcasts of language that is profane but not indecent or obscene.[5] These rule-based constraints on the Commission's enforcement powers are consistent with the Commission's policy statement addressing enforcement of Section 1464, which does not address profanity independently of indecency, and with the Mass Media Bureau's conclusion that "'[p]rofanity that does not fall under one of the above two categories [indecency or obscenity] is fully protected by the First Amendment and cannot be regulated.'"[6] It is black-letter law that an agency's rules bind its determinations in subsequent adjudications and that an agency can change its rules only through a notice-and-comment rulemaking process.[7] The Commission's departure from its rules in this adjudicatory proceeding independently renders the *Order* unlawful.

Finally, the Commission's statutory construction ignored two factors that should have led it to a much narrower interpretation of Section 1464. Initially, the Commission acknowledged that it must "take into account the fact that such speech is protected under the First Amendment,"

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[4] The *Order*'s reliance on dicta in *Tallman* v. *United States*, 465 F.2d 282, 286 (7th Cir. 1972), is misplaced. *Tallman* itself limited its discussion to words without First Amendment protection, which clearly does not encompass the word "f***" after *Cohen* v. *California*, 403 U.S. 15 (1971) (protection for display of words "Fuck the Draft").

[5] 47 C.F.R. § 73.3999.

[6] *See Order* at Statement of Commissioner Abernathy (alteration in original) (describing Mass Media Bureau publications and policy); Policy Statement, *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency*, 16 FCC Rcd. 7999 (2001) ("*Section 1464 Enforcement Policy Statement*").

requiring "that, in such determinations, we [must] proceed cautiously and with appropriate restraint." *Order* ¶ 5; *see Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1344 (D.C. Cir. 1988) ("*ACT I*"). Sensitivity to the constitutional concerns outlined below, however, would compel a narrow construction of Section 1464 that did not extend to isolated, unintentional uses of the word "f***" or its variants, to their use as an intensifier, or to language that might be deemed "profane." In addition, section 1464 is a criminal statute, which requires *scienter* for violation and implicates the rule of lenity.[8]

B. The Order Violates the First and Fifth Amendments.

The networks are also likely to prevail on their constitutional challenges to the *Order*.

The *Order* cannot survive scrutiny even if First Amendment standards that provide lesser protections for broadcast speech are applied. In *Pacifica*, the majority opinion expressly limited its holding and disavowed any approval of a regulation that might extend to "an occasional expletive." *FCC* v. *Pacifica Found.*, 438 U.S. 726, 750 (1978) (plurality opinion); Memorandum Opinion and Order, *Application of WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1254 (¶ 10) (1978) ("the Commission's opinion, as approved by the Court, relied in part on the repetitive occurrence of the 'indecent' words in question"). Rather, that opinion indicated that "context is all-important." 438 U.S. at 750. Justices Powell and Blackmun concurred on the express understanding that "[t]he Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word in the course of a

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[7] *See, e.g., United States* v. *Nixon*, 418 U.S. 683, 694-96 (1974); 1 K. Davis & R. Pierce, Jr., *Administrative Law Treatise* § 6.3 (3d ed. 1994).

[8] While the Court in *Pacifica* declined to evaluate the Commission's construction of Section 1464 in light of the statute's criminal nature, the Court has elsewhere held to the contrary, in addressing a parallel criminal statute, 18 U.S.C. § 1304, enforced by the Commission in forfeiture proceedings. *See FCC* v. *American Broad. Co.*, 347 U.S. 284, 296 (1954) ("There cannot be one construction for the Federal Communications Commission and another for the

radio broadcast, as distinguished from the verbal shock treatment administered by respondent here." *Id.* at 760-61. And, of course, four other Justices would have barred the Commission from regulating even the extensive monologue, with repeated vulgarities, at issue in *Pacifica*.

Furthermore, the *Order's* vagueness and overbreadth create additional constitutional infirmities that were not before the Court in *Pacifica* and that cannot be defended by reference to that decision. The policy announced in the *Order* exacerbates the uncertainty of the statute's application. *See Reno v. ACLU*, 521 U.S. 844, 870-71 (1997); *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926) (constitutional infirmity if persons "of common intelligence must necessarily guess at its meaning and differ as to its application"). Specifically, the Commission's decision expands the scope of Section 1464 in two fatal respects: liability may now attach to isolated broadcasts of words (or variations thereon) that the Commission finds offensive, and to language that falls within the Commission's open-ended and yet-to-be developed definition of "profane." What isolated instances of broadcast material may offend in this manner and what constitutes vulgarity or nuisance for purposes of the Commission's interpretation of "profane" are entirely unclear, and have as a result resulted in substantial chilling of protected speech.[9] The *Order* thus neither provides notice to broadcasters nor constrains the Commission's discretion as the First Amendment requires.

The Commission's newly broadened Section 1464 enforcement policy is also not "'the least restrictive means to further the articulated interest'" achieved through "'narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First

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Department of Justice. If we should give [the statute] the broad construction urged by the Commission, the same construction would likewise apply in criminal cases.").

[9] *See Multiparty Recon. Petition* at 7-13, 17-21; Comments of Public Broadcasters on Petition for Reconsideration, *Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, File No. EB-03-1H-0110, at 3-7 (filed May 4, 2004) ("*Public Broadcasters' Comments*"); *infra* Part II.A.

Amendment freedoms.'" *Action for Children's Television* v. *FCC*, 58 F.3d 654, 663-64 (D.C. Cir. 1995) (en banc) ("*ACT III*") (quoting *Sable Communications* v. *FCC*, 492 U.S. 115, 126 (1989)). Even if the Commission has a legitimate interest in regulating indecent language to prevent "the coarsening of impressionable minds that can result from a persistent exposure to sexually explicit material just this side of legal obscenity," *id.* at 662; *see id.* at 660-62, this interest diminishes considerably as applied to isolated or fleeting uses of offensive language. The newly expansive definition reaches so broad a category of speech that it is not plausibly narrowly tailored to the Commission's asserted interests, and for this reason does not serve the government's interests "without unduly infringing on the adult population's right to see and hear indecent material." *Id.* at 665.

The Commission has also failed to create any record that establishes the degree to which, or whether, isolated uses of offensive or profane language may harm children, or the benefits that justify the *Order*'s restrictions on speech. "When the Government defends a regulation on speech as a means to ... prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 632, 664 (1994) (citation omitted). Here, the Commission has not shown that children must be protected from isolated broadcast vulgarities, that the magnitude of any harm outweighs the harm to adult viewers' or listeners' First Amendment interests in receiving broadcasts that will be inhibited by the *Order*, or, in light of the multitude of non-broadcast information sources, that expansion of its indecency regulation will materially reduce children's exposure to even fleeting uses of offensive language.

In addition, the Commission's order is unconstitutional because its regulation of indecent speech violates traditional First Amendment standards.[10] While the Commission's *Order* is predicated on the applicability of a lesser First Amendment standard to broadcast speech, the basis for that assumption has disappeared as new media and information sources have expanded dramatically in the years since *Pacifica*. The growth of alternative sources of information has eliminated the basis for *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), and its progeny, which rested a lower level of First Amendment protection for broadcast speech on the uniquely important role of broadcast media in providing information to citizens. Now, as the Commission has recognized repeatedly, Americans secure their information and entertainment from a multitude of sources and distribution systems.[11] *See Reno v. ACLU*, 521 U.S. at 849-54 (surveying Internet-enabled communications).

The growth of new media also exposes an additional flaw in the Commission's order. The *Order* fails to explain why its policy is directed solely to broadcast licensees. The equal protection component of the Fifth Amendment bars the Commission from "singling out" a particular medium, *Turner Broad. Sys., Inc.*, 512 U.S. at 640-41, and places the burden on the Commission to explain why its policies have focused on imposing liability on broadcast licensees rather than considering less intrusive measures to reduce the prevalence of offensive speech on all television media.

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[10] Under any applicable First Amendment standard, the Commission separately would be precluded from regulating "profane" speech that is not otherwise properly subject to regulation as indecent or obscene language. Such speech addressing religious issues is often linked to valuable political and social commentary, and regulation of such speech is inconsistent with the Establishment Clause.

[11] *See, e.g.*, Report and Order and Notice of Proposed Rulemaking, *2002 Biennial Regulatory Review- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996*, 18 FCC Rcd. 13620 (2003) ("*Cross-Ownership Order*"). Cable television, the Internet, satellite broadcasting, DVDs, and other

II. THE BALANCE OF EQUITIES FAVORS THE GRANT OF A STAY

Even absent a finding that petitioners are likely to succeed on the merits, a stay of a new policy that presents serious legal issues is appropriate when denial of a stay would inflict serious, irreparable harm and little harm would befall others if the stay is granted.[12] A stay in these circumstances is warranted "even though [the Commissioner's] own approach may be contrary to movant's view of the merits." *Washington Metro. Area Transit Comm'n*, 559 F.2d at 843. These equitable factors must be balanced in light of the particular circumstances at hand, and a stay may be warranted if the Commission finds that there is a particularly strong showing for at least one of the factors, even if it finds no support in relation to others. Memorandum Opinion and Order, *AT&T* v. *Ameritech Corp.*, 13 FCC Rcd. 14508, 14515-16 (¶ 14) (1998).[13] In this case, a stay is warranted because petitioners are suffering significant irreparable harm, no party would appreciably be harmed by the grant of a stay, and the stay would advance the public interest, particularly the First Amendment interests of viewers and listeners of broadcast material and of speakers other than petitioners.

A. The Commission's New Policy is Causing Petitioners Irreparable Harm.

A stay of the *Order* is warranted because petitioners are suffering severe irreparable injuries and will continue to suffer them. *See Wisconsin Gas Co.* v. *FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (requiring a showing that serious irreparable harm "has occurred in the past and

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information sources have expanded rapidly since *Red Lion* and *Pacifica*, and most Americans receive even their network television broadcasts via cable television systems.

[12] *See, e.g.*, *Hickory Tech Corp.*, 13 FCC Rcd. at ¶ 3 n.9; *Cuomo* v. *United States NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985) (per curiam); *Wisconsin Gas Co.* v. *FERC*, 758 F.2d 669, 673-34 (D.C. Cir. 1985) (per curiam); *Washington Metro. Area Transit Comm'n*, 559 F.2d at 843-44.

[13] *See also* Order, *Revisions to Broad. Auxiliary Serv. Rules in Part 74 & Conforming Technical Rules for Broad. Auxiliary Serv., Cable Television Relay Serv. & Fixed Servs. in Parts 74, 78 & 101 of the Commission's Rules*, 18 FCC Rcd. 7032, 7033-34 (¶ 15)(2003); *Telephone Number*

is likely to occur again" or "that the harm is certain to occur in the near future"). Petitioners' speech is being inhibited, which is a quintessential form of irreparable injury. It has long been settled that "'the loss of First Amendment freedoms, for even minimal periods of time,' may constitute irreparable injury." *National Treasury Employees Union* v. *United States*, 927 F.2d 1253, 1254 (D.C. Cir. 1991) (alteration omitted) (quoting *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976)).[14] Petitioners and other speakers have been deprived of the reasonable latitude afforded by the Commission's prior indecency policy, related to isolated uses of offensive language. In these circumstances, "[f]acing the uncertainty generated by a less than precise definition of indecency *plus* the lack of a safe harbor for the broadcast of (possibly) indecent material, broadcasters surely would be more likely to avoid such programming altogether than would be the case were one area of uncertainty eliminated." *ACT I,* 852 F.3d at 1342.

As prior filings in this proceeding have demonstrated at considerable length, the *Order* has inhibited protected speech in just this way.[15] Broadcasters have repeatedly chosen to edit televised content and curtail live broadcasts rather than risk potential FCC enforcement actions.[16] Radio stations have likewise scoured their playlists for songs – some of which have been played for years – and have dropped or edited potentially offensive songs.[17] Nor are only mainstream commercial broadcasts affected. A segment of "Antiques Roadshow," for example, was subject

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Portability, FCC 03-298 (2003); Memorandum Opinion and Order, *Biennial Regulatory Review*, 14 FCC Rcd. 9305, 9307 & n.10 (¶ 4) (1999).

[14] *See Wolff* v. *Selective Serv. Local Bd. No. 16*, 372 F.2d 817, 824 (2d Cir. 1967) ("It has been held repeatedly that the mere threat of the imposition of unconstitutional sanctions will cause immediate and irreparable injury to the free exercise of rights as fragile and sensitive to suppression as the freedoms of speech and assembly and the right to vote.") (citing *Baggett* v. *Bullitt*, 377 U.S. 360 (1964); *NAACP* v. *Button*, 371 U.S. 415 (1963); *Smith* v. *California,* 361 U.S. 147 (1959)).

[15] *See, e.g., Multiparty Recon. Petition* at 7-13, 17-21; *Public Broadcasters' Comments* at 3-7.

[16] S. Brown, *Nipple Effect: The FCC Steps Into the Censorship Booby Trap,* Entertainment Weekly, Feb. 27, 2004, at 10; *see Multiparty Recon. Petition* at 19-20.

to review to address the display of a nude image of Marilyn Monroe, and PBS affiliates have dropped strong language from a Masterpiece Theatre series.[18]

Contrary to the Commission's prediction that "today's action will [not] lead to licensees abandoning program material solely over uncertainty surrounding whether the isolated use of a particular word is indecent," *Order* ¶ 11 n.30, there is ample evidence to the contrary. Broadcast licensees recently limited coverage of the eulogies delivered at the memorial service for former pro football player and war hero Pat Tillman.[19] Broadcasts of programs by prominent conservatives, including Rush Limbaugh and Sean Hannity, have been regularly "beeped" due to uncertainties regarding the scope of liability under the Commission's new policy.[20] And now that broadcasters have had ample time to assess the *Order*'s effect, they are broadly concluding that it has considerably limited protected speech. The chief executive of Emmis Communications has concluded that "'there has been overcaution on the part of broadcasters today'" because "'[e]veryone is going to err on the side of caution. There is too much at stake. People are just not sure what the standards really are.'"[21] As public broadcasters recently concluded, "[f]or the first time, producers and broadcasters of public television programming have engaged in significant self-censorship out of fear of government penalty."[22]

In addition to limiting petitioners' and others' speech, the *Order* has caused irreparable harm by imposing other costs and burdens that cannot be recovered even if petitioners prevail in

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[17] M. Brown, *No Evil; Broadcast Words, Actions Stir Efforts to Clean Up 'Dirty' Airwaves*, Rocky Mountain News, March 27, 2004, at 1D; *see also Multiparty Recon. Petition* at 18-19.
[18] *Talk of the Nation; FCC: Chill Factor?* (NPR radio broadcast May 19, 2004); *see Public Broadcasters Comments* at 3-7. One educational station, KCRW(FM) even fired a reporter after the inadvertent broadcast of an expletive which the radio station had intended to "bleep." G. Brown, *KCRW Fires Loh Over Obscenity*, L.A. Times, Mar. 4, 2004, at B1.
[19] C. Baker, *CBS Stations Protest to FCC; Decency Rules Can Stifle News*, *Wash. Times* (May 6, 2004).
[20] J. Steinberg, *Eye on F.C.C., TV and Radio Watch Words*, N.Y. Times, May 10, 2004, at A1.
[21] *Id.*

this or subsequent proceedings.[23] Certain of petitioners have purchased or will purchase time-delay equipment, have hired additional broadcast standards personnel, and have incurred and will continue to incur costs related to training and implementing time-delay and additional editing processes in circumstances required only as a result of the *Order*.[24] Also as a result of the Commission's new enforcement policy, petitioners have incurred significant legal and operational costs, especially in providing formal responses to Letters of Inquiry from Commission staff that sometimes result in no enforcement action. Such inquiries and related proceedings have become much more common, requiring petitioners to incur hundreds of thousands of dollars of legal and other expenses.[25] In addition, under the Commission's heightened enforcement of its indecency rules, these Letters of Inquiry now contain detailed interrogatories and document requests that may include inquiries into the creation of content. Such intrusive inquiries into the creative process itself inherently chill speech, because content creators will have to be concerned about how the government will subsequently evaluate the drafting of a script or the direction of a series episode. More broadly, these inquiries illustrate the breadth of the Commission's new policy as well as the potentially open-ended burden that it

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[22] *Public Broadcasters' Comments* at 3.

[23] *Washington Metro. Area Transit Comm'n*, 559 F.2d at 843 n 2 (financial losses may be irreparable if unrecoverable); see also Order, *Dumont Tel. Co. & Universal Communications, Inc.*, 13 FCC Rcd. 17,363 (1998); Order Granting Motion for Partial Stay, *Florida Pub. Serv. Comm'n, Request for Interpretation of the Applicability of the Limit on Change in Interstate Allocation, Section 36.154(f) of the Commission's Rules.*, 11 FCC Rcd. 14324 (1996).

[24] *Compare Public Broadcasters' Comments* at 3 ("We have spent inordinate amounts of time scouring news, documentary and dramatic programming for words and visual elements that might be found to be 'indecent' in isolation, despite clear support in the context of the work, and for words that might be found to be 'profane.' We have been forced, at increased expense, to provide multiple nationwide feeds of programs that would have been unthinkable to edit only weeks ago.").

[25] Because Letters of Inquiry are not publicly released, the Commission itself is the best source of information concerning how many Letters of Inquiry have been sent to broadcasters since the beginning of 2004, and how this compares to the numbers sent during the first six months of 2003.

has placed on petitioners. While these burdens are not as significant as the inhibition of speech caused by the *Order*, they nonetheless constitute irreparable harm. And for smaller broadcasters, the costs and burdens of participating in Commission proceedings may be devastating, and the resulting burden on speech particularly severe.[26]

B. Third Parties Would Suffer No Appreciable Harm from a Stay.

Third parties would not be appreciably harmed if a stay is granted. Even if the Commission's new policy were stayed and eventually upheld in its entirety, the Commission's prior policy would remain in place in the interim. The Commission had deemed that policy adequate to protect the public against indecent broadcasts for more than a quarter century, and the grant of a stay would not limit the Commission's ability to employ that policy to enforce the pre-existing standard.

During the period of the stay, whatever harm to the public that arises from broadcasts of material that falls within the Commission's new policies addressing Section 1464 -- but not its old indecency policy -- is almost certain to be *de minimus*. No record evidence suggests that "profane" broadcasts, not already encompassed in the Commission's prior indecency policy, are common. Indeed, prior to the *Order*, the Commission has during the past decades apparently rested *no* enforcement actions solely on the "profane" nature of a broadcast. Nor is there any record support or other basis to believe that isolated and fleeting uses of offensive words are common or that, however common, they would cause harm.

Furthermore, the substantial uncertainty regarding the *Order*'s lawfulness further reduces the prospect that a stay would harm third parties. No legal cognizable harm can flow from the

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[26] *See, e.g.*, Comments of CBS Television Network Affiliates Association on Petition for Reconsideration, at 2-3, File EB-03-IH-0110 (May 4, 2004); Comments of NBC Television Affiliates in Support of the Petition for Partial Reconsideration of the National Broadcasting Company, Inc., at 1-3, File No. EB-03-IH-0110 (May 5, 2004).

stay of invalid policy. Moreover, even if there is only a *substantial likelihood* that the new policy is statutorily unsupported or lacking in constitutional support, "no substantial harm to others can be said to inhere" in the stay of such a policy. *See Déjà Vu of Nashville, Inc.* v. *Metropolitan Gov't of Nashville & Davidson County, Tenn.*, 274 F.3d 377, 400 (6th Cir. 2002), *cert. denied*, 535 U.S. 1073 (2002).

C. A Stay Would Further the Public Interest.

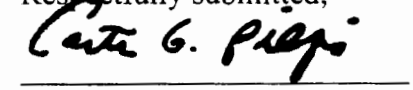
Additional public interest considerations also favor the grant of a stay. A stay would clearly advance the First Amendment interests of speakers other than petitioners and of listeners and viewers of broadcast material. *Compare CBS, Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 122 (1973) (plurality opinion) ("the 'public interest' standard necessarily invites reference to First Amendment principles"). As explained at length in prior filings in this proceeding, the *Order* is having a chilling effect on the speech of a wide array of broadcasters, writers, performers, musicians, and other producers of materials protected by the First Amendment. For the reasons and in the respects outlined above in relation to petitioners' activities, the *Order* is also imposing irrecoverable administrative, programming, and legal burdens and costs on petitioners and other broadcast licensees.

The public interest necessarily encompasses the interests of viewers and listeners of broadcast materials, and they, too, are harmed by the reduction of broadcast speech that results from the *Order*'s vagueness and overbreadth. Even a properly crafted restriction would infringe adult viewers' First Amendment interest in viewing indecent material, *see ACT III*, 58 F.3d at 665, and a stay advances those constitutional interests even if the *Order* is eventually upheld. If the *Order* is invalidated, of course, the stay will have protected and advanced the First Amendment interests of the entire viewing public by ensuring that broadcasters and other speakers are not inhibited from producing materials entitled to First Amendment protection.

CONCLUSION

For the foregoing reasons, the Commission should promptly grant a stay of the *Order* and thereby limit the implementation of its new enforcement policy announced therein until the conclusion of these proceedings and any subsequent proceedings seeking judicial review of the *Order* or other orders in this proceeding.

Respectfully submitted,



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June 18, 2004

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Joint Petition for a Stay was sent via first-class mail on this 18th day of June, 2004 to the following:

KALB-TV
Media General Communications, Inc.
333 East Franklin Street
Richmond, VA 23219

KARE
Multimedia Holdings Corporation
7950 Jones Branch Drive
McLean, VA 22107

KARK-TV
909 Lake Carolyn Parkway
#1450
Irving, TX 75039

KATV
KATV, LLC
P.O. Box 77
Little Rock, AR 72203

KBTV-TV
Nexstar Broadcasting of Beautmont/Port Arthur
909 Lake Carolyn Parkway, #1450
Irving, TX 75039

KCBD
Libco, Inc.
639 Isbell Road
#390
Reno, NV 89509

KCEN-TV
Channel 6, Inc.
P.O. Box 6103
17 South Third Street
Temple, TX 76503

KCNC-TV
CBS Television Stations, Inc.
2000 K Street, NW
#725
Washington, DC 20006

KCRA-TV
KCRA Hearst-Argyle Television, Inc.
888 Seventh Avenue
New York, NY 10106

KETK-TV
KETK Licensee L.P.
Shaw Pittman (K.R. Schmeltzer)
2300 N Street, NW
Washington, DC 20037

KFDM-TV
Freedom Broadcasting of Texas, Inc.
P.O. Box 7128
Beaumont, TX 77706

KFOR-TV
New York Times Management Services
Corporation Center 1
2202 NW Shore Blvd., #370
Tampa, FL 33607

KGW
King Broadcasting Company
400 South Record Street
Dallas, TX 75202

KHAS-TV
Greater Nebraska Television, Inc.
6475 Osborne Drive West
Hastings, NE 69801

KING-TV
King Broadcasting Company
400 South Record Street
Dallas, TX 75202

KOB-TV
KOB-TV, LLC
3415 University Avenue
ATTN: L. Wefring
St. Paul, MN 55114

KPRC-TV
Post-Newsweek Stations, Houston, LP
8181 Southwest Freeway
Houston, TX 77074

KRIS-TV
KVOA Communications, Inc.
409 South Staples Street
Corpus Christi, TX 78401

KSDK
Multimedia KSDK, Inc.
c/o Gannett Co., Inc.
7950 Jones Branch Drive
McLean, VA 22107

KSNF
Nexstar Broadcasting of Joplin, LLC
909 Lake Carolyn Parkway
#1450
Irving, TX 75039

KTIV
KTIV Television, Inc.
3135 Floyd Boulevard
Sioux City, IA 51105

KWES-TV
Midessa Television Company
P.O. Box 60150
Midland, TX 79711

KKCO
Eagle III Broadcasting, LLC
2325 Interstate Avenue
Grand Junction, CO 81505

KOAA-TV
Sangre de Cristo Communications, Inc.
2200 Seventh Avenue
Pueblo, CO 81003

KPNX
Multimedia Holdings Corporation
7950 Jones Branch Drive
McLean, VA 22107

KRBC-TV
Mission Broadcasting, Inc.
544 Red Rock Drive
Wadsworth, OH 44281

KTGF
MMM License LLC
900 Laskin Road
Virginia Beach, VA 23451

KSHB-TV
Scripps Howard Broadcasting Company
312 Walnut Street
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KTEN
Channel 49 Acquisition Corporation
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KUSA-TV
Multimedia Holdings Corporation
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KYTV
KY3, Inc.
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WAVE
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WBOY-TV
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Charleston, WV 25339

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Dallas, TX 75202

WCYB-TV
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WDSU
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New York, NY 10106

WFIE
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Reno, NV 89509

WFMJ-TV
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KWWL
Raycom America, Inc.
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WANE-TV
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Providence, RI 02906

WBBH-TV
Waterman Broadcasting Corp. of Florida
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WBRE-TV
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Irving, TX 75039

WCSH
Pacific & Southern Co., Inc.
c/o Gannett Co.
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McLean, VA 22107

WDIV-TV
Post-Newsweek Stations, Michigan, Inc.
550 West Lafayette Blvd.
Detroit, MI 48226

WESH
Orlando Hearst-Argyle Televisin, Inc.
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New York, NY 10106

WFLA-TV
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WHDH-TV
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WHO-TV
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WLWT
Ohio/Oklahoma Hearst-Argyle TV, Inc.
P.O. Box 1800
Raleigh, NC 27602

WMFE-TV
Community Communications, Inc.
11510 E. Colonial Drive
Orlando, FL 32817

WMTV
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Madison, WI 53711

WNYT
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St. Paul, MN 55114

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WGAL
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WHEC-TV
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Montgomery, AL 36104

WMGT
Endurance Broadcasting, LLC
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Stillwater, MN 55082

WNDU-TV
Michiana Telecasting Corp.
P.O. Box 1616
South Bend, IN 46634

WOOD-TV
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Grand Rapids, MI 49503

WPXI
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WRIC-TV
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301 Arboretum Place
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WSAZ-TV
Emmis Television License Corporation
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WSMV-TV
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WTMJ-TV
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WVLA
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WWLP
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Bloomington, IN 47402

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333 East Franklin Street
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639 Isbel Road
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Reno, NV 89509

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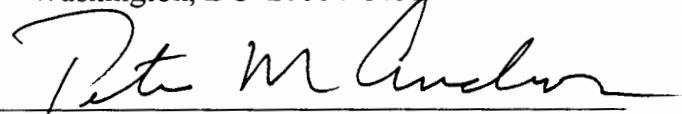

Peter M. Andros