

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
COMPLAINTS AGAINST VARIOUS)	File No. EB-03-IH-0110
BROADCAST LICENSEES REGARDING)	
THEIR AIRING OF THE "GOLDEN)	
GLOBE AWARDS" PROGRAM)	

**COMMENTS OF THE MEDIA INSTITUTE
AND MEMBERS OF ITS FIRST AMENDMENT ADVISORY COUNCIL
IN SUPPORT OF THE
PETITION FOR RECONSIDERATION
FILED BY THE AMERICAN CIVIL LIBERTIES UNION, ET AL.**

May 4, 2004

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The Media Institute, a nonprofit foundation specializing in communications policy and First Amendment issues, hereby submits comments in support of the Petition for Reconsideration filed by the American Civil Liberties Union, et al., in the above-captioned matter (the FCC’s “*Golden Globe Awards*” decision).¹ The Media Institute is joined in these comments by members of its First Amendment Advisory Council, a group comprising many of the country’s leading First Amendment scholars, attorneys, and experts.

First Amendment Concerns. We are especially troubled by the First Amendment implications of *Golden Globe Awards*. While we concur with all of the points raised by the Petitioners, we believe that the First Amendment concerns they raise are particularly telling and reason enough for the Commission to reconsider its action. The FCC has a statutory obligation to tread lightly in the realm of broadcast content regulation. In *Golden Globe Awards*, however, the FCC ignored this obligation and transgressed the First Amendment by: (1) using an opinion and order to create a rule of general applicability that greatly, and unconstitutionally, expands the Commission’s authority to regulate program content; and (2) extending the definitions of “inde-

¹ *In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, Memorandum Opinion and Order*, FCC 04-43 (March 18, 2004) (“*Golden Globe Awards*”). This reversed an earlier order by the Enforcement Bureau finding that Bono’s utterance of the expletive “f-----” during a live telecast of the Golden Globe Awards ceremony was not indecent. 18 FCC Rcd. 19859 (2003) (Enforcement Bureau, 2003).

gency” and “profanity” in ways so vague and overbroad as to force broadcasters to exercise self-censorship that implicates a wide range of heretofore acceptable speech in serious news, public affairs, and dramatic programming.²

Loss of Constitutional Restraint. It is worth noting, and repeating, that the courts have long accorded First Amendment protection to “indecent” speech in other media, most recently on the Internet.³ The lower standard of First Amendment protection for indecent speech in the broadcast media is a very narrow exception, based in part on the “uniquely pervasive” character of broadcasting presumed to have existed before the explosion of cable, satellite, and other distribution platforms.⁴ Thus, the FCC’s indecency policy -- anomalous, ambiguous, and amorphous as it was -- showed a certain restraint in deference to the bigger First Amendment picture. (For example, the policy was limited to certain hours of the day, it tolerated isolated or fleeting expletives, it gave deference to certain types of content in newscasts, and it was enforced with varying degrees of alacrity.) But now the FCC has superseded this mechanism (constitutionally suspect as it was) with a far more ominous scheme of speech regulation that will punish even isolated or fleeting expletives without regard to their context, take a “new approach to profanity,”⁵ and give the Commission broad latitude to arbitrarily define “offensive” speech.

Vague and Overbroad. The vagueness and overbreadth of *Golden Globe Awards* contribute significantly to its First Amendment infirmities. For example, the Commission warns that it will prohibit “words (or other variants thereof) that are as highly offensive as the ‘F-Word,’” yet gives no indication of what such words might be.⁶ The FCC plans to measure “offensive language” by “contemporary community standards” – a vague yardstick made even vaguer by the Commission’s historical lack of interest in clearly defining such standards.⁷ In terms of

² See generally Bruce W. Sanford and Mark I. Bailen, “How the Government’s Crackdown on Broadcasting Threatens Emma Thompson and All of Us,” *Perspectives* issue paper No. 1 (The Media Institute, April 2004).

³ *Reno v. ACLU*, 521 U.S. 844, 871-881 (1997).

⁴ *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978).

⁵ *Golden Globe Awards* at para. 15.

⁶ *Id.* at paras. 13-14.

⁷ As the Petitioners note: “Which words may be deemed ‘highly offensive’ is a function of contemporary community standards – a concept the Commission has never previously defined other than to say it is a national standard based on the ‘average broadcast viewer or listener.’ *Industry Guidance*, 16 FCC Rcd. [7999, 8002 (2001)].... Indeed, the Commission has never been involved in a case that resulted in a judicial application of ‘community standards’ as currently defined by the FCC.” *ACLU, et al., Petition for Reconsideration* (April 19, 2004) at pp. 11, 12.

overbreadth, the Commission now extends the definition of “profane” speech to cover virtually all language that could conceivably offend someone, including “personally reviling epithets,” “blasphemy,” “divine imprecation,” and words thought to be “vulgar,” “irreverent,” “coarse,” or just “grossly offensive.”⁸

Chilling Effect. These serious shortcomings of vagueness and overbreadth, together with the Commission’s announced intention to aggressively punish transgressions with increased fines and license revocation hearings, are already resulting in a serious chilling effect on broadcasters’ speech. Many examples have already been recited by the Petitioners and others, including edits in respected series such as NBC’s “ER” and PBS’s “American Experience” and “Independent Lens.”⁹ Moreover, the very future of live programming is threatened as broadcasters eliminate live shows or employ taped delays to edit out unscripted language that may run afoul of the new indecency restrictions. It was reported that even a television news operation went so far as to electronically distort vulgar graffiti on a vandalized car that appeared as part of a news story.¹⁰ It is alarming indeed that the FCC’s new indecency standard may stifle the First Amendment press freedoms of broadcast journalists.

Conclusion. The FCC has clearly overstepped the constitutional boundary with its new regimen of speech regulation announced in *Golden Globe Awards*. This scheme to regulate “indecent” speech encompasses a far broader range of language – essentially any speech of the Commission’s choosing. The new policy is already having a chilling effect on entertainment, documentary, and news programming that is as real and pernicious as overt government censorship. We fail to see how the Commission has conducted an adequate First Amendment analysis, or considered the constitutional implications, of the policy it articulates in *Golden Globe Awards*. The First Amendment deserves better.

For this reason, we support the Petition for Reconsideration filed by the ACLU and a broad range of media, entertainment, and free speech groups. We endorse the specific measures the Petitioners urge the Commission to adopt.¹¹ In particular, we strongly recommend that the

⁸ *Golden Globe Awards* at paras. 13-14.

⁹ See, e.g., *Petition for Reconsideration* at pp. 17-20.

¹⁰ Steve McClellan, “LIN Will Delay News, Sports,” *Broadcasting & Cable Online*, April 26, 2004.

¹¹ “[T]he Commission should: (1) reverse its finding that the isolated or fleeting broadcast of an expletive may constitute actionable indecency; (2) rescind its decision to add ‘profanity’ as a separate offense under the law; (3) require complaints to be supported by credible evidence, such as a tape or transcript; (4) cease imposing disproportionate fines on a ‘per utterance’ basis; and (5) the Commission should grant reconsid-

FCC undertake a thorough First Amendment analysis of its indecency policy. This analysis should go to the fundamental question of whether and how the Commission can structure and enforce a policy based on its own term of art (“indecency”), in the context of the current media landscape and social climate, that does not run afoul of the First Amendment.

Respectfully submitted,

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eration to seriously examine whether the system of government regulation of content announced in this Order, including its threats of potential license revocations, is fundamentally incompatible with the First Amendment of the Constitution.” *Petition for Reconsideration* at p. 22.

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