

WRITTEN STATEMENT

of

KATHLEEN Q. ABERNATHY

**Commissioner,
Federal Communications Commission**

on

“The Broadcast Decency Enforcement Act of 2004”

**Before the
United States House of Representatives
Committee on Energy and Commerce
Subcommittee on Telecommunications and the Internet**

Wednesday, February 11, 2004

SUMMARY OF STATEMENT OF KATHLEEN Q. ABERNATHY

The law holds that broadcasters, because they make licensed use of publicly owned airwaves to provide programming to the general public, have a statutory obligation to make sure that their programming serves the needs and interests of the local audience. The courts have upheld the existence of a compelling government interest in the well-being of children, as well as the prerogative of parents to supervise their children in furtherance of that well-being. These simple and straightforward legal principles are the foundation of laws and regulations that limit the broadcast of indecent programming, and make available to parents means to help them control the programming available to their children.

Notwithstanding these well-established legal principles and the steps taken in furtherance of them, this hearing is a most timely response to an increasingly urgent set of problems. We have seen a progressive coarsening of our culture as reflected in broadcasting, cable and video games. It is particularly surprising that some more recent incidents have occurred *despite* this Commission's vigorous enforcement of the indecency laws, *despite* our announcement that these efforts would be further intensified by the prospect of levying higher fines and subjecting each separate utterance to a separate fine, *despite* our putting broadcasters on notice that we would not hesitate to designate licenses for revocation if the circumstances warranted, *despite* pending Congressional legislation to increase our forfeiture authority, and *despite* the Administration's support for that legislation.

I strongly support the "Broadcast Decency Enforcement Act of 2004" and your efforts to increase our forfeiture authority for violations of our indecency rules. Monetary penalties alone, however, may not fully prevent future misconduct, especially when it comes to the live broadcast of radio or TV programming. Therefore, in addition to current and even enhanced enforcement measures, it may also be appropriate to consider improving and amplifying our complement of forward-looking safeguards as well.

This means going beyond the V-chip and program ratings legislation that Congress passed to help parents understand the content of broadcast programs. To supplement that effort, I have personally undertaken outreach efforts to further parental awareness of the V-chip and ratings system. But any system based on giving advance notice to parents will work only when accurate information is, in fact, made available. Because many unwelcome surprises seem most apt to happen during live-broadcast entertainment or awards shows, we could also evaluate the effectiveness of a five- or ten-second audio and video delay on the broadcast of live entertainment events. Furthermore, I believe we will need to enlist the help of broadcasters if we are to ultimately address consumer concerns. Broadcasters must accept responsibility for the profound effect their programming has on our children and our culture.

STATEMENT OF KATHLEEN Q. ABERNATHY

Good morning Mr. Chairman and distinguished Members of the Committee. I appreciate the opportunity to appear before you this morning to discuss “The Broadcast Decency Enforcement Act of 2004” and the FCC’s efforts to protect children from indecent broadcast programming.

A recent study found that even the youngest of children – those under the age of six – are immersed in today’s media world, and a vast majority of parents have seen their children imitate behavior they have seen on television.¹ This comes as no surprise: children are a part of the broadcast audience for a substantial part of the broadcast day. Moreover, media has a profound impact on our perception of the world and gives us an impression of what is “normal” or acceptable in our society.

The law holds that broadcasters, because they make licensed use of publicly owned airwaves to provide programming to the general public, have a statutory obligation to make sure that their programming serves the needs and interests of the local audience. These local audiences inevitably include parents and children. The courts have upheld the existence of a compelling government interest in the well-being of children, as well as the prerogative of parents to supervise their children in furtherance of that well-being. Those simple and straightforward legal principles are the foundation of the laws and regulations that limit the broadcast of indecent programming, and make available to parents means to help them control the programming available to their children.

¹ *Zero to Six, Electronic Media in the Lives of Infants, Toddlers and Preschoolers*, Fall 2003, The Henry J. Kaiser Family Foundation.

Notwithstanding these well-established legal principles and the steps taken in furtherance of them, this hearing is a most timely response to an increasingly urgent set of problems. The recent Super Bowl halftime show was perhaps the most notorious, but only the most recent, example of a progressive coarsening of our culture as reflected in broadcasting, cable, and video games. And it is not simply an issue with regard to excessive sexual content in many mainstream programs; it is also reflected in the excessively violent content of material distributed to children via broadcasting and the internet.

It finally appears that the level of public tolerance is waning for artists who regard any live appearance on broadcast television as an opportunity for indecent utterances or actions. And it is also waning for broadcasters who, despite all the surprise and contriteness they display *after* an indecent incident has occurred, seem bereft of the common sense and control needed to prevent such action *before* it happens.

It is particularly surprising that some more recent incidents have occurred *despite* this Commission's vigorous enforcement of the indecency laws as described by Chairman Powell, *despite* our announcement that these efforts would be further intensified by the prospect of levying higher fines and subjecting each separate utterance to a separate fine, *despite* our putting broadcasters on notice that we would not hesitate to designate licenses for revocation if the circumstances warranted, *despite* pending congressional legislation to increase our forfeiture authority, and *despite* the Administration's support for that legislation.

Historically the FCC's indecency rules and enforcement efforts have generally been effective at balancing broadcasters' First Amendment rights with society's right to

protect its children from material that is unsuitable for them. Our rules and precedents have allowed us to calibrate our evaluations to the specific circumstances of particular broadcasts and to reach results that, hopefully, reflect the judgment an average broadcast viewer or listener would make. But with the advent of new technologies that deliver hundreds of channels into consumers' homes and an increased desire to target marketing to those elusive viewers aged 18 to 24, it appears that some radio and TV broadcasters have lost their footing and must be reminded not only of their public interest obligations but also of the critical role they play in forming and shaping society.

In light of this environment, the FCC must be given the ability to impose meaningful fines that will deter the future airing of indecent programming. Therefore, I strongly support the "The Broadcast Decency Enforcement Act of 2004" and your efforts to increase our forfeiture authority. Our current statutory maximum of \$27,500 could be perceived as a mere slap on the wrist. In contrast, for any violation of Title II of the Act, we are authorized to fine up to \$120,000 for a single violation, and \$1.2 million for continuing violations. The well-being of our children is just as important as Title II violations and our authority should be expanded to demonstrate this commitment.

The FCC also must do more to clarify the legal parameters regarding the broadcast of indecent material and encourage best practices by the industry. For example, relying on its understanding of past Commission rulings, the Enforcement Bureau staff recently issued a decision determining that Bono's use of the "f word" during a live telecast of the Golden Globes was not indecent. The full Commission is reviewing this staff decision. And while I would not want to comment on what action the full Commission may ultimately take, I will say that it is difficult to imagine very many

contexts where the knowing broadcast of this obscenity would not be patently offensive under contemporary community standards.

Moreover, I am aware that concerns have been raised about the processes currently used to handle indecency complaints, including how these are enumerated and reported, the standard of documentation that must be met even to file a complaint, and the length of time it has taken us to resolve them. I support an expeditious reexamination of these matters. If these or any other procedural rules are unintentionally discouraging the public from filing otherwise credible complaints, they can and must be changed.

Nevertheless, these enforcement-based measures, at their best, are necessarily after the fact. And although I strongly support the pending legislation to increase the amount the FCC may fine broadcasters for violating the indecency rules, monetary penalties alone may not fully prevent future misconduct, especially when it comes to the live broadcast of radio or TV programming. Therefore, in addition to current and even enhanced enforcement measures, it may also be appropriate to consider improving and amplifying our complement of forward-looking safeguards as well.

Currently, these forward-looking safeguards consist of laws and regulations whose intent is to enable parents to limit their children's television viewing to those programs consistent with whatever value system the parents are striving to teach. Gone forever are the days when a parent could simply sit a child down in front of the TV and leave that child in the hands of the broadcast babysitter. Television viewing today requires that responsible parents be proactive in selecting and in monitoring the material their children are permitted to watch.

Our laws try to help parents understand and control the programs their children watch in several different ways, especially when it comes to pre-recorded material. The rule restricting indecent broadcasts to the hours of 10 p.m. to 6 a.m. puts parents on notice that they must exercise particular care in supervising the material that children watch or listen during those hours. But it is perhaps even more important to understand what options are available to protect children from adult programs that broadcast during the main part of the broadcast day – programs that may not be indecent but include excessive violence or sexual content or are simply inappropriate for young children. The V-chip and program ratings legislation that Congress has passed is intended to help parents understand the content of broadcast programs, thereby assuring that the values they are attempting to instill in their children won't be compromised by exposure to programming at odds with those values.

Is this system working as well as one would wish? No, it is not. Most parents do not understand how to use the V-chip and are unaware that a TV ratings system exists.² At the same time, broadcasters are trying to retain audiences that have been deserting them in droves in favor of cable programming that is not subject to any indecency restrictions. As a consequence broadcast licensees are constantly pushing the programming envelope in an attempt to be more like cable.

The Commission is reaching out to the public to help make parents aware of the V-chip and the program ratings system, and how to use them. I have tried to address this problem by working with the FCC's Consumer and Governmental Affairs Bureau to create an FCC web site called *Parents Place*. *Parents Place* explains the rating systems, including what the ratings mean and when and where the ratings are displayed and directs

parents to web sites that identify age-appropriate programming. It also explains the V-chip is and how it works. In addition, I dedicated an issue of my consumer newsletter, Focus on Consumer Concerns, to how parents can protect children from objectionable programming on television. This newsletter also includes details on the V-chip technology and ratings system, as well as other blocking tools, including lockboxes.

Nevertheless, any system based on giving advance notice to parents, however it is constituted, will work only when advance notice and information are, in fact, made available. As last week's Super Bowl debacle showed, these early warning systems simply won't work in the face of surprise. Whatever we may be able to do about either improving the existing system or informing more parents how to use it, both efforts are meaningless unless we also consider ways to eliminate the kind of surprise indecency that thwarts the best efforts of even the most vigilant parent.

Because such unwelcome surprises seem most apt to happen during live-broadcast entertainment or awards shows, we could begin by evaluating the effectiveness of a five- or ten-second audio and video delay on the broadcast of live entertainment events. This type of safeguard has already been implemented by a number of broadcasters, and it would seem to offer the best assurance against the recurrence of the kind of unfortunate spur-of-the-moment displays that we are increasingly being subjected to.

I also believe we will need to enlist the help of broadcasters if we are to ultimately address consumer concerns because the issues encompass more than simply what is or is not indecent programming. I am somewhat heartened that broadcasters are finally getting the message. Just last week I spoke at a conference organized by Fox Entertainment Group for their creative executives. All of senior management were there, from Rupert

² See, e.g., *Parents and the V-Chip 2001*, July 2001, The Henry J. Kaiser Family Foundation.

Murdoch on down, and the focus of the conference was how their producers and programmers can balance creativity and responsibility. I discussed not only what the law requires with respect to indecency on the airwaves, but how they, as broadcasters, cable programmers, and filmmakers, can and should go beyond the letter of the law to ensure that their programming reflects the values of the communities they serve. My remarks were followed up by a series of panels that included parents and their children, producers, government officials, and members of such groups as Kaiser Family Foundation and the Parents Television Council. The goal was to have an open and frank discussion about media content, the FCC's indecency rules and the networks responsibility to its viewers.

Mr. Chairman, if there is anything at all positive to be said about what has happened, it may be that all of us now appreciate the significant challenges we face in ensuring that our children are protected from indecent or inappropriate programming while continuing to tap into the best of what broadcasting has to offer. In response to these challenges, I fully support your efforts to increase our forfeiture authority and the expanded enforcement efforts by the Commission, as well as the possibility of improving the existing safeguards, and I welcome the opportunity to discuss any additional matters the Members of this Committee may wish.