

Before the  
Federal Communications Commission  
Washington, D.C. 20554

MM Docket No. 89-494

In the Matter of

Enforcement of Prohibitions  
Against Broadcast Indecency in  
18 U.S.C. § 1464

**REPORT OF THE COMMISSION**  
(Proceeding Terminated)

Adopted: July 12, 1990;

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By the Commission: Commissioner Quello concurring  
and issuing a statement.

**TABLE OF CONTENTS**

Subject	Paragraph
I. Introduction	1
II. Background	4
III. Discussion	10
A. Constitutional Standard	11
B. Governmental Interest	14
C. Operative Definitions	24
1. Definition of Indecency	24
2. Definition of Children	28
D. Narrowly Tailored Means	34
1. Accessibility to Children	34
2. Children's Listening and Viewing Habits	38
a. Radio	39
b. Television	50
c. Supervision	57
d. Conclusions	65
E. Alternatives to 24-Hour Prohibition	69
1. Time Channeling	70
2. Ratings and Warning Devices	76
3. Broadcast Technologies	80
F. Non-Broadcast Alternative Programming Sources	84
G. Enforcement	89
IV. Conclusion	91
V. Ordering Clauses	94

Appendix A: Parties Filing Formal Comments and Reply Comments

Appendix B: Examples of Commission Action

**I. INTRODUCTION**

1. In this report we respond to a remand of the record granted by the U.S. Court of Appeals for the District of Columbia Circuit in *Action for Children's Television v. FCC (ACT II)*.<sup>1</sup> In its remand order, the court directed the Commission to conduct a "full and fair hearing" on the constitutionality of a statutory provision<sup>2</sup> which requires the Commission to prohibit the broadcast of indecent material 24 hours a day.<sup>3</sup> The court granted the remand in light of the Supreme Court's recent decision in *Sable Communications of California, Inc. v. FCC (Sable)*,<sup>4</sup> which held that government may regulate indecent speech if the regulation promotes a "compelling" government interest and is "narrowly tailored" to serve that interest. The Commission accordingly issued a *Notice of Inquiry (NOI)*<sup>5</sup> to solicit public comment on issues relevant to analyzing the validity of the 24-hour indecent broadcasting prohibition in view of the *Sable* decision.<sup>6</sup>

2. After careful consideration of the responses to our inquiry, we conclude that a 24-hour prohibition on indecent broadcasts comports with the constitutional standard the Supreme Court enunciated in *Sable* for the regulation of constitutionally protected speech. First, the Supreme Court has expressly recognized the government's compelling interest in protecting children from broadcast indecency, both to facilitate parental supervision and to promote the well-being of children who may be exposed to indecent material. Moreover, the narrowness with which courts have interpreted "obscenity" has commensurably broadened the range of patently offensive material that could be deemed "indecent" if broadcast, rendering the government interest in protecting children even more compelling. Second, the record in this proceeding reveals that no alternative to a 24-hour prohibition on indecent broadcasts would effectively serve this government interest. The best available evidence indicates that there is a reasonable risk that significant numbers of children ages 17 and under listen to radio and view television at all times of day and night. Neither time channeling nor ratings and warning devices permit effective parental control over these activities, and technologies that may permit control are not currently available. On the other hand, indecent material similar to that broadcast is readily available on other media over which parents can exercise control. Accordingly, we conclude that the compelling government interest in protecting children from indecent broadcasts would not be promoted effectively by any means more narrowly tailored than a 24-hour prohibition.

3. We recognize, however, that there may be instances in which children are not in the broadcast audience at a given time of day in a given market. We therefore have decided to modify our enforcement procedures to permit stations accused of airing indecent material to demonstrate that children in fact are not present in the broadcast audience in their market at the time the alleged indecent program was aired. We believe that, as thus enforced, the 24-hour prohibition against broadcast indecency clearly meets the narrowly tailored criteria applied by the Supreme Court in *Sable*.

## II. BACKGROUND

4. This proceeding addresses Section 1464 of the Criminal Code, 18 U.S.C. § 1464 (1988), first enacted by the Radio Act of 1927, reenacted by the Communications Act of 1934, and later codified in the Criminal Code. Throughout this period of more than 60 years, Section 1464 and its identical predecessor provisions have prohibited the broadcast of indecent language. Since 1934, the Commission has been authorized by the Communications Act to enforce Section 1464's provisions by, among other things, assessing forfeitures for its violation.<sup>7</sup>

5. In 1978, the Supreme Court affirmed the Commission's enforcement of Section 1464's prohibition on indecent broadcasting, including the Commission's definition of indecent language.<sup>8</sup> *F.C.C. v. Pacifica Foundation (Pacifica)*, 438 U.S. 726 (1978); See also *Action for Children's Television v. F.C.C.*, 852 F.2d 1332, 1339 (D.C. Cir. 1988) (*ACT I*). In *Pacifica*, the Court also reaffirmed its holding in *Ginsberg v. New York*<sup>9</sup> "that the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household' justified regulation of otherwise protected expression." The Court found that these concerns, along with the broadcast media's uniquely pervasive presence and unique access to children, justified special treatment of the broadcast of indecent material. *Id.* at 748-749.

6. In *ACT I*, the D.C. Circuit Court affirmed the Commission's action in one case involving the daytime broadcast of indecent material, but remanded for further explanation two other cases involving broadcasts aired after 10 p.m. In the two cases remanded, the court found that the Commission had not adequately justified its narrowing the "safe harbor" during which indecent material could be broadcast from the hours of 10 p.m. - 6 a.m. to midnight - 6 a.m. The court also rejected the Commission's suggestion that channeling decisions could be made on a case-by-case basis, finding that such an approach could have a chilling effect on broadcasters' exercise of their First Amendment rights. Thus, the court directed the Commission to afford broadcasters clear notice of reasonably determined times at which indecent material safely may be aired.

7. Shortly after the *ACT I* decision, Congress directed the Commission to enforce the broadcast indecency provisions of Section 1464 on a 24-hour basis.<sup>10</sup> In response, the Commission promulgated the rule which now is at issue in this case.<sup>11</sup> A number of petitioners challenged the rule, and on January 23, 1989, the D.C. Circuit in *ACT II* stayed its implementation pending judicial review.

8. Before briefing and oral argument had occurred on the merits of the 24-hour prohibition, the Supreme Court, in its *Sable* decision, addressed the extent to which the government may regulate indecent telephone messages. After noting that indecent speech is protected by the First Amendment, the Supreme Court nevertheless affirmed that "[t]he government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Sable*, 109 S. Ct. at 2836. Restating the point later in its opinion, the Court described the relevant constitutional standard as requiring that the means chosen by the government be "carefully tailored" or "narrowly tailored" to achieve the regulatory ends. *Id.* at 2839.

9. The Supreme Court in *Sable* distinguished the telephone medium from the broadcast medium, noting that "unlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it." 109 S. Ct. at 2837. Also, in a concurring opinion, Justice Scalia suggested that indecent broadcasts could be prohibited if data demonstrate "the infeasibility of alternate means to provide . . . adequate protection of minors." *Id.* at 2840 (Scalia, J., concurring).

## III. DISCUSSION

10. As noted above, based on the record in this proceeding and the Court's decision in *Sable*, we believe that the Commission's enforcement of a 24-hour prohibition on indecent broadcast programming comports with the First Amendment. Using the "compelling interest/narrowly tailored" standard set forth in *Sable*, we conclude that a 24-hour prohibition is the most narrowly tailored means of effectively promoting the government's compelling interest in protecting children from broadcast indecency because there is a reasonable risk that a significant number of children are in the broadcast audience at all times of day and night. In addition, we find that: (1) "children" are appropriately defined as minors 17 and under; (2) the government has a compelling interest in regulating children's access to indecent broadcast material, as the courts and Congress consistently have found; (3) our definition of indecency is not vague or overbroad and, in fact, repeatedly has been upheld by the courts; (4) other alternatives for protecting children, such as ratings, warning devices, or lock-out mechanisms would be ineffective; (5) because the risk of exposure to children exists even in the late evening and early morning hours, a time channeling approach would not protect children from indecent broadcast materials; and (6) adults have alternative sources of indecent materials. In order to tailor our enforcement of the 24-hour prohibition on indecent broadcasting as narrowly as possible, however, in actual cases of alleged indecent broadcasting stations will be permitted to demonstrate that children were not in fact present in the broadcast audience for the market at the time the programming at issue aired.

### A. Constitutional Standard

11. Several parties argue that the constitutionality of the indecency prohibition should be judged under the time, place and manner standard, rather than the more rigorous compelling interest/narrowly tailored standard applied by the Supreme Court in *Sable*.<sup>12</sup> However, based upon the Supreme Court's having applied the more demanding test in *Sable*, and similar views expressed by the D.C. Circuit in *ACT I* that content-based restrictions are sustainable only if "the regulation is a precisely drawn means of serving a compelling state interest,"<sup>13</sup> we believe it appropriate to apply the more rigorous standard.

12. It is well established that the First Amendment does not protect obscene speech, and that therefore the government has broad authority to regulate commerce in obscenity without reference to First Amendment principles. *Sable*, 109 S. Ct. at 2835; *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973); *Roth v. United States*, 354 U.S. 476, 481 (1957). In contrast, as the Supreme Court observed in *Sable*, "[s]exual expression which is indecent but not ob-

scene is protected by the First Amendment. . . ." 109 S. Ct. at 2836. *See also Pacifica*, 438 U.S. at 743 (Stevens, J.), 756 (Powell, J.). Nonetheless, the Supreme Court has indicated that it will uphold governmental regulation of indecent speech if the regulation meets the constitutional standards that the Court has articulated.

13. In *Sable*, the Court set forth the constitutional standard that governs restrictions on protected speech: the government may "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." 109 S. Ct. at 2836. The Court also stated that the means chosen by the government must be "carefully tailored" or "narrowly tailored" to achieve the regulatory ends. *Id.* at 2836, 2839. While the standard has been expressed with somewhat different wording,<sup>14</sup> we understand it to require, essentially, a showing that the regulation or statute serves a compelling governmental interest and is narrowly tailored to serve that interest. This standard is substantially more rigorous than the time, place and manner test applied to content-neutral regulation of speech,<sup>15</sup> which requires only that the regulation be a reasonable means of serving "a significant governmental interest" and that it leave "ample alternative channels for communication." *Consolidated Edison Co. of New York v. Public Service Commission of New York*, 447 U.S. at 535. *See also Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 293 (1984); *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984).

#### B. Governmental Interest

14. In effectuating our statutory mandate, our primary concern has been and remains the protection of children from exposure to indecent materials. *See* 134 Cong. Rec. S9912 (daily ed. July 26, 1988) (statement of Senator Helms); *Reconsideration Order*, 3 FCC Rcd 930, 931 (1987), *aff'd in relevant part sub nom. ACT I*, 852 F.2d at 1340; *Pacifica Foundation*, 56 FCC 2d at 97, *recon. denied*, 59 FCC 2d 892 (1976), *rev'd, Pacifica Foundation v. F.C.C.*, 556 F.2d 9 (D.C. Cir. 1977); *rev'd, Pacifica*, 438 U.S. 726. In both *Pacifica* and *Sable* the Supreme Court recognized the government's interest in assisting parental supervision of their children and, generally, in protecting the well-being of youth, citing *Ginsberg v. New York*, 390 U.S. 629, 639 (1968). *Sable*, 109 S. Ct. at 2836; *Pacifica*, 438 U.S. at 749-750. In the *NOI*, we solicited comment on whether a 24-hour prohibition of broadcast indecency advances this interest. We also noted that courts have recognized an alternative governmental interest in protecting the public's right to be free from indecent material in the privacy of their homes, and sought comment on this point.

15. Although parties generally agree that the government has an interest in protecting minors from indecent broadcasts, they differ on the scope of that interest. Some parties maintain that the government's sole legitimate interest is to facilitate parental supervision, and not to substitute governmental for parental supervision.<sup>16</sup> In contrast, *Morality in Media (MIM)* argues that a 24-hour prohibition on broadcast indecency advances an independent governmental interest in the well-being of minors,<sup>17</sup> and that the *Pacifica* decision can be read to establish an "indecent for all" (including adults) standard, and not merely an "indecent for children" standard.<sup>18</sup> On the other hand, Broadcasters argue that there is no legitimate interest in protecting adults from indecency, as adults

have a right to receive constitutionally protected indecent material.<sup>19</sup> Several commenters argue that a 24-hour prohibition also advances a governmental interest in protecting the public's right to be free from indecent material in the privacy of their homes.<sup>20</sup> Cohn and Marks (C&M) disagrees, arguing that adults, unlike children, are capable of receiving the "first blow" from constitutionally protected indecent speech without undue damage.<sup>21</sup>

16. It is well established that protecting children from exposure to indecent material is a compelling governmental interest. *See e.g., Sable*, 109 S. Ct. at 2836; *New York v. Ferber*, 458 U.S. 747, 756-57 (1982); *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968); *Carlin Communications, Inc. v. FCC*, 749 F.2d 113, 121 (2d Cir. 1984). Two related rationales underlie this interest. First, as the Court explained in *Ginsberg* and reiterated in *Pacifica*, *see* 438 U.S. at 749-750, "parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society," and parents are "entitled to the support of laws designed to aid discharge of that responsibility." 390 U.S. at 639. Thus, the regulation of broadcast indecency is intended "to facilitate parental supervision of children's listening." *ACT I*, 852 F.2d at 1343. In addition, the Supreme Court has expressly stated that "a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" *New York v. Ferber*, 458 U.S. at 756-57, quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). As stated by the Court in *Ginsberg*, "[t]he State also has an independent interest in the well-being of its youth." 390 U.S. at 640. The Court quoted with approval from *People v. Kahan*, 15 N.Y.2d 311, 312, 206 N.E.2d 333, 334 (C.A.N.Y. 1965) (Fuld, J., concurring), which dealt with the sale of sexually explicit material to children:

While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults.

390 U.S. at 640. *See also Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) (state interest in protecting "the welfare of children" and preventing abuses that might prevent their "growth into free and independent well-developed men and citizens").<sup>22</sup> These two related purposes, supporting parental supervision and promoting the well-being of youth, support the enforcement of narrowly drawn measures to restrict children's access to indecent materials.

17. Despite the fact that protecting children from exposure to indecent material is recognized as a compelling governmental interest, some parties, including P.E.N. American Center *et al.* (PEN) and Broadcasters, argue that there is no proof that exposure to indecent broadcasts harms children. Broadcasters submit a study that concludes that few studies have been performed regarding harm resulting from indecency and that there is little evidence of harm to children.<sup>23</sup> On the other hand, Salem Communications Corporation (Salem) and American Family Association *et al.* (AFA) submit studies to support

their argument that exposure to indecent broadcasting has the potential to harm children. For example, AFA submitted findings from a clinical psychologist who concludes that children are harmed by pornography.<sup>24</sup>

18. The debate over harm to children is not at issue here. Irrespective of the continuing social science debate, the courts have recognized Congress' authority, derived from the governmental interest in protecting its youth, to regulate access by children to indecent material. As a legal matter, it is well established that exposure of children to such material may be harmful, even if that effect has not been completely proven scientifically. See *Pacifica*, 438 U.S. at 757-58 (Powell, J., concurring); *Ginsberg*, 390 U.S. at 641-43. In proscribing the dissemination of indecent material to minors, Congress has considered testimony that cites its harmful effects and has responded not only with the statute and mandate before us in this particular case, but also with the passage of other statutes that limit the availability of indecent material to minors.<sup>25</sup> For example, Congress has acted to protect minors from indecent telephone messages,<sup>26</sup> and the Supreme Court in *Sable* fully recognized Congress' authority to do so (although it held that Congress in that case had not sufficiently tailored its effort to serve this interest). See 109 S. Ct. at 2839. Similarly, in 1984, Congress required cable operators to make available to their customers a device to enable them to control reception of indecent programming to protect minors from inadvertent access. See 47 U.S.C. § 544(d)(2)(A). More broadly, the Supreme Court has upheld, in the face of a First Amendment challenge, a congressional statute which protects the public, and particularly children, from unwanted mail which the recipient considers offensively lewd. See 39 U.S.C. §§ 3008 and 3010 (1988); *Rowan v. Post Office Department*, 397 U.S. 728 (1970). These statutes evidence findings by Congress that children deserve protection from harm that indecent material may inflict. It is significant that the 24-hour prohibition specifically has been mandated by the Congress, and although Congress is not the ultimate interpreter of the Constitution, its findings and purposes are due deference as those of a co-equal branch of government charged with providing for the general welfare of the United States. See *Metro Broadcasting v. F.C.C.*, No. 89-453, 58 U.S.L.W. 5053, 5061 (U.S. June 27, 1990).

19. Our concern with the harm to children caused by exposure to indecent broadcast material is particularly strong given the range of materials that could be included in the "indecent" programming category (and thus conceivably could be broadcast between 8 p.m. and 6 a.m., given the current restrictions on our enforcement authority). As Justice Scalia noted in his *Sable* concurrence, "the more narrow the understanding of what is 'obscene,' and hence the more pornographic what is embraced within the residual category of 'indecent,' the more reasonable it becomes to insist upon greater assurance of insulation from minors." *Sable*, 109 S. Ct. at 2839 (Scalia, J., concurring).

20. It thus is significant that the courts have applied a very narrow definition of obscenity in ruling on pornographic films, holding that movies containing graphic depictions of sex acts, such as "Deep Throat" and "Debbie Does Dallas," are not legally obscene.<sup>27</sup> We recognize that these cases have not involved the broadcast media and that most broadcasters are likely to exercise self-restraint and not air such movies unedited. Our own enforcement actions demonstrate, however, that some broadcasters have

been willing to air patently offensive, sexually explicit material that would seem to tread close to the obscenity line.<sup>28</sup>

21. The broad range of sexually-oriented material that has been or could be considered indecent or "protected speech" -- but not obscene speech -- accordingly heightens our concerns for preventing harm to children. Specifically, we find that Justice Scalia's statement in *Sable* is extremely relevant in the broadcast indecency context. It has become "more reasonable . . . to insist upon greater assurance of insulation from minors" in light of the extremely pornographic nature of what may be encompassed within the category of broadcast indecency.

22. Although the Commission has focused on the government's interest in protecting children as a basis for regulating broadcast indecency, preserving the privacy of the home provides an alternative basis for upholding the constitutionality of the 24-hour prohibition. In *Pacifica*, the Supreme Court's first stated rationale for sustaining the Commission's decision was the right of all members of the public to be free of indecent material in the privacy of their homes. The Court found that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." 438 U.S. 726, 748, citing *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970); *Id.* at 759-60 (Powell, J., concurring in part).<sup>29</sup> In *Sable*, the Supreme Court again referred to this residential privacy interest, noting the "unique" attributes of broadcasting, i.e., that it "can intrude on the privacy of the home without prior warning as to program content." 109 S. Ct. at 2837.<sup>30</sup>

23. The government's interest in preserving the privacy of the home reinforces its interest in protecting children. As D.C. Circuit Judge Leventhal noted in his dissenting opinion in *Pacifica*, "[w]ith the pervasiveness of TV-radio and its reach into the home the choice made by broadcasters precludes an effective choice by the family. Because of the unique interest in home life, especially strong in homes where children are being raised, it is bootless to quote from cases that reflect a more permissive attitude to speech in public streets and places, without attention to the difference. . . . The reality of broadcasting's special access to the home conjoins with the passivity of TV-radio reception -- a mere click, without current purchase." 556 F.2d at 33 (Leventhal, J., dissenting). While the record demonstrates that a 24-hour prohibition on broadcast indecency is needed to advance our primary interest in controlling children's access to indecent materials, it also supports this alternative residential privacy interest, particularly the evidence concerning the pervasiveness of the broadcast media, the prevalence of random tuning and remote control devices, and the ineffectiveness of prior warnings. See *infra* at pp. 17-18 and 34-35.

## C. Operative Definitions

### 1. Definition of Indecency

24. In carrying out its statutory responsibility to enforce Section 1464, the Commission consistently has defined indecency as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory ac-

tivities or organs." *Pacifica Foundation*, 56 FCC 2d at 98, 100 (1975), *aff'd*, *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978); *Reconsideration Order*, 3 FCC Rcd at 930 ¶ 2 (1987), *rev'd on other grounds*, *ACT I*, 852 F.2d at 1338-39.<sup>31</sup> We continue to believe that this definition is sufficiently narrow to continue to pass muster under the First Amendment. Indeed, we note that the U.S. Court of Appeals for the D.C. Circuit, relying upon the Supreme Court's opinion in *Pacifica*, explicitly affirmed this definition recently in *ACT I*, 852 F.2d at 1340.

25. Many commenters agree that the Commission's generic definition of indecency retains its validity because it is sufficiently narrow and has survived Supreme Court scrutiny.<sup>32</sup> Others, however, claim that the definition is unconstitutionally vague,<sup>33</sup> and that the vagueness could suppress broadcast material with serious literary, artistic, social, and cultural value, as well as discussions on a range of subjects.<sup>34</sup> Several parties argue that the Commission should adopt a rule that defers to the reasonable, good faith judgments of licensees.<sup>35</sup> Finally, Broadcasters argue that a licensee should have a right to a trial *de novo* whenever the Commission applies the definition to specific circumstances.<sup>36</sup>

26. We do not believe that application of our definition of indecency will lead to unconstitutional censorship. We have emphasized that "subject matter alone does not render material indecent. Only when that matter is presented in a manner that is patently offensive will it be considered indecent." *Reconsideration Order*, 3 FCC Rcd at 932 (emphasis in original).<sup>37</sup>

27. Furthermore, we will continue to give weight to reasonable licensee judgments when deciding to impose sanctions in specific cases. We cannot, however, abrogate our statutory duty to enforce Section 1464 by deferring absolutely to broadcasters' judgments. See *ACT I* at 1340 n.14. Finally, in response to the suggestion by Broadcasters that a trial *de novo* be available, we note that under the procedure we have utilized for indecency enforcement actions, issuance of notices of apparent liability, a trial *de novo* is in fact available to any station that challenges the Commission's determination by not paying its forfeiture. See 47 U.S.C. § 504.

## 2. Definition of Children

28. We find that for the purpose of enforcing Section 1464,<sup>38</sup> children ages 17 and under constitute the category of persons that should be defined as "children." This conclusion is supported by the legislative history of the statutory 24-hour prohibition against indecent broadcasts. Supreme Court decisions addressing the regulation of other sexually explicit indecent materials, and other statutes governing the availability of indecent materials to children.

29. In the *NOI*, we noted that our 1987 enforcement rulings indicated that children 17 and under should be protected from indecent broadcasts, and sought comment on whether we should continue to so define children. Arguing generally that including all minors would be consistent with state laws protecting minors from other sexually explicit speech, some parties agree that "children" should include persons 17 years old and under.<sup>39</sup> However, opposing parties argue that even though states may protect children from obscenity, they do not protect children from indecency,<sup>40</sup> and that in any event there is no evidence that exposure to indecent speech harms children.<sup>41</sup>

30. Defining children to be protected from indecent broadcasts as those 17 years old and under is consistent with the legislative history of the statutory provision requiring the Commission to enforce Section 1464 twenty four hours a day. That history reveals that the statute's author intended to encompass children 12 to 17, as well as those under 12, within the class of persons to be protected by the 24-hour prohibition.<sup>42</sup> Since the statutory provision originated as an amendment introduced on the Senate floor, no committee reports exist for reference. The author's explanation, delivered immediately before the measure was adopted, therefore must be accorded substantial weight in interpreting the provision.<sup>43</sup>

31. In addition, defining children as those 17 and under is consistent with other laws regulating the availability of sexually explicit indecent materials to children. One such statute is the "dial-a-porn" prohibition, 47 U.S.C.A. § 223(b)(3) (Supp. 1990), enacted in 1989, which prohibits indecent telephone communications to persons under the age of 18. This provision is strong evidence that Congress has found that persons 17 and under should be protected from indecent materials. In addition, contrary to the comments cited above, the *NOI* at Appendix A lists statutes from 48 states that penalize persons for disseminating to minors materials that are sexually explicit, and not necessarily obscene by adult standards. Most of these state laws protect children ages 17 and under.

32. The government's interest in protecting children 17 and under from exposure to indecent materials also has been recognized by the courts. For example, when discussing an earlier version of the "dial-a-porn" statute, the Supreme Court in *Sable* explicitly recognized the government's "compelling interest in preventing minors from being exposed to indecent telephone messages," and tacitly approved Congress' decision to apply the statute to children ages 17 and under. 109 S. Ct. at 2839. Similarly, in *Ginsberg*, 390 U.S. at 631, and *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, the Supreme Court found a compelling governmental interest in controlling the availability of indecent matter to persons in the 12-17 age group. These precedents make clear that the government has a legitimate interest in protecting persons 17 and under from exposure to indecent broadcast materials.

33. We recognize that the court in *ACT I* criticized the Commission for not clearly defining "children" for purposes of applying Section 1464 and for failing to justify its application to the 12-17 age group.<sup>44</sup> In this report we clarify that all children 17 and under will be included in the protected age group. We find sufficient justification for adopting this definition in analogous federal and state statutes. Supreme Court precedent, and in the legislative history of the 24-hour statutory prohibition against indecent broadcasts. Accordingly, for purposes of protecting children from exposure to indecent broadcast materials, we will consider "children" to be persons age 17 and under.

## D. Narrowly Tailored Means

### 1. Accessibility to Children

34. As did the Supreme Court in *Pacifica*, we find that the broadcast medium is uniquely pervasive and accessible to minors, and that these characteristics further justify prudent regulation of indecent broadcast programs. The Supreme Court has recognized that "each medium of expression presents special First Amendment problems."

*Pacifica*, 438 U.S. at 748. Broadcasting has specific characteristics that support regulation of indecency that would not necessarily be permissible if applied to other media. In particular, for purposes of regulating indecent broadcasting, the Court has noted "that broadcasting is 'uniquely pervasive,' can intrude on the privacy of the home without prior warning as to program content, and is 'uniquely accessible to children, even those too young to read.'" *Sable*, 109 S. Ct. at 2837, quoting *Pacifica*, 438 U.S. at 748-49.<sup>45</sup>

35. Notably, the Supreme Court in *Sable* distinguished indecent telephone services from broadcasting, observing that the caller to a "dial-a-porn" service must "take affirmative steps to receive the communication," 109 S. Ct. at 2837. In contrast, "[b]ecause the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content." *Pacifica*, 438 U.S. at 748. Thus, "[p]lacing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message." 109 S. Ct. at 2837.

36. The *Sable* decision strongly suggests that a 24-hour broadcast indecency prohibition is constitutional if it is the most narrowly tailored means of protecting children from exposure to indecent materials. The reversal of the dial-a-porn prohibition in *Sable* rested not on the failure to channel such communication, but on the government's failure to show that a complete prohibition on indecent dial-a-porn was necessary to meet the government's interest in protecting children from the indecent material. The emphasis the Court placed on the inadequacy of the record in *Sable* thus supports a conclusion that a total prohibition on indecency would be upheld if the record demonstrates that no alternative would effectively serve the compelling interest at stake.

37. The record in this proceeding confirms the general pervasiveness and accessibility of broadcasts to children. TV, available in virtually every household, is viewed an average of 26 hours per week by children ages 2 to 17 years old.<sup>46</sup> Between 25% and almost 50% of children have a TV set for their personal use.<sup>47</sup> Radio is even more pervasive, with each household having an average of over five radios. Over 99% of children age 12 to 17 listen to radio at least once a week.<sup>48</sup> Moreover, as described in detail *infra*, children do not just have general access to the broadcast media, but they in fact tune in to their radio and television sets without meaningful supervision at all times of the day and night.

## 2. Children's Listening and Viewing Habits

38. The record indicates that there are children in the radio and television audience at all hours of the day and night. The data further shows that a significant number of these children are not subject to active parental supervision, even during the late evening and early morning hours.

### a. Radio

39. The data submitted in response to the *NOI* indicate that there are children in the radio listening audience at all times of day, with an average of nearly three-quarters of a million children listening to radio between midnight and 6 a.m. From this data we conclude that there is no

time during which indecent material could be broadcast on radio without a reasonable risk that significant numbers of children will be listening to it.

40. The Commission's initial review of radio ratings and surveys revealed little quantitative information about the radio listening habits of children under 12 years of age, although listening data for children ages 12-17 were available. These data indicated that, in all time frames measured, including midnight to 6 a.m., a higher percentage of all children ages 12-17 listened to radio than the percentage of all adults 18 and over listening to radio. Furthermore, post-midnight listening for children ages 12-17 averaged 2 3/4 hours per week.<sup>49</sup>

41. The *NOI* indicated that the national listening audience for children ages 12-17 between midnight and 6 a.m. peaked at 1,471,000 between 12:00 and 12:15 a.m., decreased gradually to a low of 309,000 between 3:45 and 4:00 a.m., and then increased to 1,429,000 between 5:45 and 6:00 a.m. The average quarter-hour audience for the entire six hour block of midnight to 6 a.m. was 716,000 children ages 12-17. The average one day cume (the estimated number of *different* persons who listen to radio for a minimum of five minutes within a specified time frame) for between midnight and 6 a.m. was 3,533,000 children ages 12-17. That is, during any given midnight to 6:00 a.m. time frame on any given day, 3,533,000 different children ages 12-17 in the United States listened to the radio for at least five minutes. The weekly cume for listening between midnight and 6 a.m. was 10,896,000 children ages 12-17. These listeners constituted 10 to 12 percent of the post-midnight total listening audience and this proportion was generally consistent for daytime listening as well.<sup>50</sup> We requested comment on these data and asked commenters to submit any other data or studies regarding listening habits of children and adults.

42. Commenters supporting the 24-hour prohibition submit that children ages 12-17 make up a substantial portion of the radio audience. MIM submits radio listening data for children ages 12-17 for New York, Chicago and Los Angeles collected by Arbitron for the summer of 1989.<sup>51</sup> MIM combines the data for the three markets and makes a national projection of post-midnight listening by children ages 12-17 that is remarkably close to the national data presented in the *NOI*.<sup>52</sup> MIM estimates that from 12 to 1:00 a.m. the average quarter hour audience for this age group nationally is 1,334,557, which is very close to the Commission's estimate of 1,429,000 for 12 to 12:15 a.m. MIM's estimated low in listening among children ages 12-17 occurs at 4-5 a.m. with 220,067 in the audience, whereas the Commission estimated 309,000 in the audience from 3:45 to 4:00 a.m.

43. Bonneville International Corporation (Bonneville) reviewed data on audiences for several of its radio stations that it classifies as having "some teen appeal," and found that children ages 12-17 are in the audience post-midnight. Bonneville also reviewed data for non-Bonneville stations in markets in which Bonneville has stations and, similarly, found stations with greater post-midnight listening by children ages 12-17 than any other demographic group.<sup>53</sup> Salem submits a Bakersfield, California, radio study showing that 28% of children ages 12-17 in that market listen to radio between midnight and 6 a.m.<sup>54</sup> National Religious Broadcasters (NRB) also submits radio data for Detroit and Tampa showing large numbers of 12 to 17 year olds listening to radio at all times of the day and night.<sup>55</sup>



44. Broadcasters claim that the audience for certain programming that the Commission is reviewing as (or has deemed to be) indecent contains few children, referring to a Gallup survey of New York area households with children ages 6-11 commissioned by Infinity Broadcasting indicating that in 99.6% of households surveyed, no children in that age group listen to the Howard Stern morning radio show.<sup>56</sup> In the sole household that reported a child listening to that show, it was reported that the child was supervised by an adult.<sup>57</sup> MIM responds that although Broadcasters assert that few children ages 6 to 11 listen to the Howard Stern show, there are older children in the audience. As reported in Arbitron's *Summer 1989 "Radio Market Report"* for New York, only 5 of the 48 stations listed for the New York market have a greater audience of children ages 12-17 than WXRK-FM Monday through Friday, 7-8 a.m., when a portion of the Howard Stern show is broadcast. MIM further states that Arbitron reports an estimated 10,600 children ages 12-17 listened to the Stern show for at least 5 minutes during any quarter hour from 7-8 a.m. Monday through Friday in the summer of 1989.<sup>58</sup>

45. Other commenters opposing the 24-hour prohibition dispute the Commission's initial findings and submit radio listening data in support of their position. KDVS-FM (KDVS) urges that channeling be used to enhance parental responsibility, and states that Arbitron and other radio surveys suggest that the number of young children in the audience during school hours is only between 3 and 5% of the potential audience of children ages 12-17. This group comprises only 1-4% of the total audience during these broadcast hours. Both of these figures are far lower than even those seen in the 11 p.m.-midnight sampling, and approximate the post-midnight sampling. KDVS claims that these statistics suggest two appropriate times for channeling -- during the school day and the late evening hours. KDVS also states that the same survey (Arbitron *Fall 1983*) reported that, during Monday through Friday, 7 p.m. to midnight, only 10% of the total audience of children ages 12-17 listened to radio outside the home at those hours. Therefore, argues KDVS, most of the children in the radio audience would be subject to adult supervision.<sup>59</sup>

46. KDVS also states that children ages 12-17 make up only 10% of a very small midnight to 6 a.m. listening audience. KDVS maintains that nationally, only about 3.5% of children ages 12-17 are present in any quarter hour post-midnight time frame for all stations. KDVS estimates that if this age group comprises 10% of the population, then the 3.5% of all children ages 12-17 listening to radio post-midnight represents only 0.35% of the entire population.<sup>60</sup> Finally, KDVS states that the Commission, in the *NOI*, did not identify estimates of the sampling error or relative standard error involved in the ratings.<sup>61</sup>

47. Pacific *et al.* (Pacifica) also claims that listening statistics regarding children ages 12-17 are flawed in their application. Pacifica states that the Commission gives the impression that a significant number of children in this age group listen to radio generally. Pacifica, like KDVS, claims that the percentage of children ages 12-17 of the total listening population (the largest possible representation of these data) does not reflect the percentage of these children in the actual total population. Pacifica states that

the 12-17 year old listening population should be divided by the total population to obtain a more realistic representation of this group's listening.

48. Pacifica further observes that such data do not reflect children's listening to public radio stations. Pacifica relies on data from Arbitron, Spring 1989, to conclude that children ages 12-17 listening to public radio stations account for a mere 0.2% share of this group's listening to radio and no [0] share of total radio listening. Only 1.5% of the population of children ages 12-17 tuned into public radio for 5 minutes during an average week from this survey.<sup>62</sup> Broadcasters also refer to the minimal audience of children ages 12-17 that National Public Radio (NPR) attracts. Broadcasters submit that, according to the Arbitron National Report (Spring 1989), member stations carrying NPR programming have no measurable audience in this age group from 6 to 10 a.m. and 6 p.m. to 6 a.m.<sup>63</sup>

49. The submitted data confirm our initial determination that there are a significant number of children in the listening audience at all times of day and night. MIM, Salem and NRB have submitted data illustrating that the listening patterns of children ages 12-17 are similar to those described in the *NOI*,<sup>64</sup> which indicated that the percentage of children in this age group listening to radio during all time frames was higher than the percentage of adults age 18 and over listening to radio.<sup>65</sup> These 12 to 17 year olds represent over 10% of the 6.9 million total average quarter-hour listening audience from midnight to 6 a.m.<sup>66</sup> Although KDVS maintains that there are few children ages 12-17 in the listening audience during the day, even low numbers of children (KDVS' submission indicates that 1-4% of the total audience is children ages 12-17) confirm that there are significant numbers of children listening to radio during school hours. Similarly, although KDVS maintains that 12 to 17 year olds listening between midnight and 6 a.m. during any quarter hour make up only 0.35% of the total population, this figure represents 3.5% of all children in this age group in the U.S., or 716,000 children ages 12-17.<sup>67</sup>

#### b. Television

50. Our initial data, and data supplied by several commenters, validate the Commission's concerns regarding children's viewing, especially late night viewing, of television. These data demonstrate that there is a reasonable risk that a significant number of children are present in the nationwide television viewing audience at all times.

51. The *NOI* stated that, based on ratings data, children are in the television audience throughout the day. Unlike radio, there are no reported data reflecting television viewing by age between 2:00 and 6:00 a.m. That which is available, however, demonstrates that children, particularly those ages 12-17, remain in the viewing audience throughout the last reported time period ending at 2:00 a.m. The data also indicate that between 3% (for ages 2 to 5) and 8% (for ages 12-17) of children's weekly viewing occurs between 11:00 p.m. and 1:00 a.m. The *NOI* also analyzed Arbitron data depicting the percentage of persons by age group that watch TV from 6:00 p.m. to 1:45 a.m. in four selected markets. These data show that percentage-wise, as many children ages 12-17 as adults watch television during the late evening hours, and that a higher percentage of 12 to 17 year olds than adults may watch television during these hours in some markets during the

summer months.<sup>68</sup> We requested comment on these data and solicited additional studies or data regarding children's viewing.

52. The United States Catholic Conference (USCC) submits results of a radio listening and television viewing survey of almost 8100 children attending Catholic diocesan schools (5,726 age 12 and under and 2,346 age 13-18). The USCC survey indicated that children 12 and under watch an average of 3.5 hours of television per day, mostly from 3-9 p.m. Monday through Friday, and an average of 6 hours per day on the weekend, mostly from 8-11 a.m. and 7-11 p.m. USCC also reported that children age 13-18 watch an average of 3.5 hours per day, mostly from 4-11 p.m. Monday through Friday, and an average of 6 hours per day on the weekend, mostly from 7-9 a.m. and 2-11 p.m.<sup>69</sup> USCC concludes that *if* a reasonably clear distinction between times when children are and are not in the audience can be discerned, then time of day restrictions for the broadcast of indecent material could be established.

53. KDVS takes issue with the Commission's graphic representation of Arbitron television viewing data for the four markets that appear in Appendix C of the *NOI*. It asserts that the post-10:30 p.m. periods are measured in fifteen-minute intervals, whereas pre-10:30 p.m. time periods are measured in thirty-minute intervals, thus depicting the rate of audience decline after 10:30 p.m. as slower than it is in reality. KDVS further states that the Commission has implied incorrectly that the proportion of age groups represented on the charts is indicative that each group is similar in size.<sup>70</sup>

54. Several commenters have filed evidence indicating that children comprise a significant portion of the late night audience. Salem and NRB submit data showing that, in five metropolitan areas, the number of children in the viewing audience late at night is substantial.<sup>71</sup> For example, in the Washington, D.C. market, for July 1989, seven percent of children ages 12-17 and four percent of children ages 2-11 are in the viewing audience from 1:45 to 2:00 a.m., Monday through Friday. Salem averages the data for the five markets and projects the national television audience for various post-11:00 p.m. time frames. For the 1:45-2:00 a.m. period, Salem projects that, nationally, 4.8% of children ages 12-17 watch television. This translates to over 970,000 12 to 17 year olds in the television audience at that hour.<sup>72</sup>

55. These data and our initial data confirm our belief that there is a reasonable risk that significant numbers of children are watching television at all times, including late at night. USCC's suggestion that distinctions can be made as to when children are or are not in the viewing audience is unpersuasive. Its survey indicates only that children watch TV *mostly* in certain time frames, but these time frames are not all-inclusive of children's viewing. In addition, we note that 66.9% of U.S. television households have videotape recorders (VCRs).<sup>73</sup> Through VCRs, children can record late night programming for viewing during daytime, thus obtaining access to programs even if they are not in the audience when the programs are initially aired.

56. KDVS' arguments regarding the data presented in the *NOI* also are unpersuasive. Depicting audience in 15 minute intervals as opposed to 30 minute intervals from 10:30 p.m. to 1:45 a.m. achieves a greater level of accuracy in the measurement of late night TV audiences. Using 30 minute increments does not alter the percentage

of each age group that is watching TV at those times. We agree with KDVS that the rate of decline for *all* audience segments is relatively steep late at night. This does not change the evidence indicating that children remain in the viewing audience late at night. With regard to KDVS' contention that the Commission implied that each age group in the four markets charted in Appendix C of the *NOI* is similar in size, such an implication was not made. The *NOI* states that the percentage of each demographic group is represented on the chart. While the percentages of each group are, in some cases, equal, the actual numbers of each group are not. Nevertheless, there appears to be a reasonable risk that significant numbers of children are in the television viewing audience at all times.

### c. Supervision

57. As previously noted, the government has a clearly established compelling interest in protecting children from exposure to indecent broadcast materials, both to facilitate parental supervision of their children and to generally promote the well-being of youth. In order to compile a record with respect to supporting parental supervision, the *NOI* requested comment on parents' ability to supervise children's listening and viewing, whether parents in fact supervise listening and viewing, and whether parents are concerned about their children's exposure to indecent broadcasts. Our preliminary finding was that there is significant unsupervised television viewing by children on a daily basis. In addition, while there are fewer data available to measure unsupervised radio listening among children, we preliminarily concluded that, because of the number of radios per household, a significant number of children have the opportunity for, and actually engage in, unsupervised listening.<sup>74</sup> Our review of the record in this proceeding confirms the validity of these preliminary findings, and demonstrates that unsupervised children are watching and listening to television and radio at all times of day and night.

58. Broadcasters dispute the *NOI*'s assumption that in order to supervise their children, parents must co-view or co-listen with them or have specific knowledge of their viewing or listening. Broadcasters argue that as long as parents or other adults are present, they have the opportunity to supervise their children's viewing and listening. Broadcasters maintain that examining the presence of adults as the key to whether children are subject to adult supervision is analogous to the methods used by courts to examine the regulation of indecent material by cable and telephone. Rather than examining the actual use of technical devices to block reception of indecent material transmitted by cable or telephone, or examining parental supervision, Broadcasters state that courts instead analyze the opportunity to use these methods to block reception.

59. Broadcasters commissioned a survey of 1,000 homes with children 17 and under to determine opportunities for parental and adult supervision. According to the survey, over 88% of children were under parental supervision and 98% were under adult supervision between the hours of 8:00 p.m. and 6:00 a.m. During the 10:00 p.m. to 6:00 a.m. period, over 93% of children were under parental supervision and 99% were under adult supervision. Between midnight and 6:00 a.m., over 98% of children were under parental supervision and 99% were under adult supervision.<sup>75</sup> Broadcasters claim these data dem-



onstrate that parents or other adults have the opportunity to supervise their children's viewing and listening during these hours.

60. MIM disputes Broadcasters' study, arguing that under the "opportunity for supervision" theory advanced by Broadcasters, the study equates presence with supervision, assumes that a child will not watch television or listen to the radio after his or her bedtime, and assumes that supervision by anyone over the age of 18 is the equivalent of parental supervision.<sup>76</sup> AFA argues that even if a child is in the presence of an adult, that adult may not supervise a child as a parent would.<sup>77</sup> Even when parents are home, AFA argues, there is limited parent-child co-viewing of television. AFA submits the results of a 1989 study of co-viewing habits of parents and children that concludes that parents generally do not view family series with their children. The study found that, on average, parents and second graders co-viewed 5.6 prime time and 1.96 syndicated series in the last year. Parents and sixth graders co-viewed 7.21 prime time and 2.05 syndicated series, while parents and tenth graders co-viewed 7.63 prime time and 2.8 syndicated series. The study determined that for all series and for prime time series only, the mean co-viewing frequency was between something less than "just a few times this year" and "have watched [together], but not in the last year."<sup>78</sup> The authors of this study claim that "parents co-view with children, particularly when their viewing preferences coincide, and that co-viewing is associated with generally positive parental attitudes toward television and specific beliefs in encouragement for children learning from television. [The data] do not, however, suggest that co-viewing is very much motivated by an active determination to mediate children's television experiences."<sup>79</sup> On the other hand, USCC submits a survey of over 8,000 parochial school students showing that 81% of the respondents ages 12 and under, and 70% between the ages of 13 and 18, watch television with an adult at night. The study also shows that 72% of the respondents ages 12 and under, and 90% between the ages of 13 and 18, sometimes or almost never listen to radio with an adult.<sup>80</sup>

61. The record before us demonstrates that the pervasiveness and accessibility of television and radio, coupled with the lack of effective parental control mechanisms, discussed *infra*, make effective parental supervision exceedingly difficult if not impossible for the average parent. We noted in the *NOI* that 63% of television households have more than one television set, and of the ninety-nine percent of households with radios, each household has, on average, over five.<sup>81</sup> The number of televisions and radios in households can easily prevent a parent from actively supervising a child's viewing and listening habits. In a household with more than one television, a child may watch a program without parental knowledge. VCRs permit a child to tape a television program for later viewing without parental knowledge. The ability to listen to radio without parental knowledge is even greater, given the number of radios in the average household, their portability, and the widespread use of headphones.

62. We note, moreover, that parents' control of children's television viewing and radio listening differs from parental control of cable viewing and telephone calls. Technical means are readily available to block children's access to indecent cable programs and indecent telephone calls. Upon request, cable operators must provide a device such as a "lock-box" or "parental key" that permits a

subscriber to restrict access to selected programming,<sup>82</sup> and access codes and scrambling are among the methods which can restrict children's access to dial-a-porn services.<sup>83</sup> In both instances, these methods can restrict access by children whether or not parents are physically present and actively supervise. In the case of television and radio, however, there is no comparable means that is readily available upon which parents may rely to prevent children from watching indecent off-the-air broadcast television programs or listening to indecent radio programs. Most television receivers do not permit blocking of specific channels,<sup>84</sup> and channel blocking devices are not available for radios. There is no evidence in the record that a lock-box type of device is available for attachment to televisions and radios to prevent access to specific channels. Therefore, because parents cannot rely on technical devices to prevent children from viewing indecent programs, parents can effectively supervise their children only by co-viewing or co-listening, or, at a minimum, by remaining actively aware of what their children are watching at all times. As many concerned parents filing comments in this proceeding emphasized, however, it is not practical for parents to exercise this type of control. The letter of Elizabeth Urquhart of Houston, Texas, addressed to Commissioner Duggan, succinctly sums up the point made in a large number of other letters submitted in this proceeding in stating that "[I]t is not a matter of my responsibility to monitor. A person (parent) would have to be super human to monitor every program a child might watch - in and out of our home [ sic ]."<sup>85</sup>

63. We do not believe that Broadcasters' study demonstrates that parental presence alone can adequately protect children from indecent broadcast programming. Broadcasters' data show that at no time during the day are all children under parental supervision. Even during the period of time from 1:00 a.m. to 6:00 a.m., the survey found that 1.2% of the children were neither with a parent nor asleep.<sup>86</sup> Since children are in the broadcast audience during this period, it is not unlikely that some of these children could watch indecent programming broadcast late at night. In addition, although the survey asked parents if the child in question was "in the presence of at least one parent, stepparent, or legal guardian," the term "presence" was apparently undefined. A respondent may have answered that the child was in the "presence" of a parent even if the child was awake in another part of the home and the parent asleep. Nor did the survey ask what parents were doing during the hours that they were in the presence of children. Because there is no technical means to prevent children from viewing or listening to particular programs, supervision requires parents either to co-view or co-listen, or to remain actively aware of a child's viewing or listening at all times. As a practical matter, mere "presence" in the same house as a child does not necessarily translate into supervision.

64. Commenters have not disputed our estimates of the amount of unsupervised television viewing by children. Our analysis, based on a 1980 study of 817 American households with children between the ages of 6 and 17, estimated that the maximum amount of unsupervised children's daily viewing ranges from 212 to 222 minutes and the minimum ranges from 40 to 54 minutes.<sup>87</sup> We also estimated that among children in certain age groups the maximum amount of unsupervised children's daily viewing could range from 357 to 375 minutes, if we assume that all of a child's viewing in two-television

households occurs on a separate set from the parents'.<sup>88</sup> The *NOI* also suggested that the number of radios in households made a substantial amount of unsupervised radio listening by children likely. The data submitted by the parties to this proceeding do not refute these estimates. In any event, the record demonstrates that parents cannot always provide meaningful supervision, even when they are present at home. Accordingly, we conclude that there is a substantial amount of unsupervised viewing and listening by children, and that as a practical matter, the pervasiveness and technology of broadcasting serve to deny parents the means necessary to exercise effective control over these activities.

#### d. Conclusions

65. The above evidence indicates that there is a reasonable risk that significant numbers of children are in the audience for radio and television broadcasts at all times of the day and night. The number of children present, moreover, clearly is more than "a few of the most enterprising and disobedient young people." *Sable*, 109 S. Ct. at 2838. For example, evidence submitted by the commenters indicates that, in all time frames measured, a higher percentage of all children between the ages of 12 and 17 listen to radio than the percentage of all adults age 18 and over, even between midnight and 6 a.m.<sup>89</sup> Although some commenters claim that 12 to 17 year olds listening between midnight and 6 a.m. during any quarter hour make up only 0.35% of the total population,<sup>90</sup> this figure represents a full 716,000 children between the ages of 12 and 17.<sup>91</sup>

66. Similarly, the record demonstrates that there is a reasonable risk that a significant number of children are in the television audience throughout the broadcast day and night. As previously noted, available data show that children, particularly those between the ages of 12 and 17, are in the viewing audience until the last time period reported for television ratings. The data further show that as high a percentage of children ages 12 to 17 as adults watch television during the late evening hours. Indeed, for the 1:45 to 2:00 a.m. time period, one commenter has estimated that there are over 970,000 12 to 17 year olds in the television audience.<sup>92</sup> These figures, of course, do not take into consideration the number of children who may be using VCRs between midnight to 6 a.m. to record television programs for viewing at a later time.

67. The data further show that a significant number of children in the broadcast audience are not subject to active parental supervision, even during the late evening and early morning hours. Although Broadcasters have submitted a study alleging that many children are under "parental supervision" at all times of the broadcast day, the study does not establish that parents in fact actively supervise their children's viewing and listening of radio and television; rather, it shows only that most children are usually in the "presence" of an adult, an undefined term that leaves open the possibility that children may be watching or listening to a television or radio while their parents (or other adults) are in other parts of the house or are asleep. The record, moreover, indicates that children engage in unsupervised viewing and listening throughout the day and night not because of a lack of concern by parents, but because of the impracticality of total supervision that derives from a combination of the technology involved and the lack of available and effective parental control devices.

68. In sum, the evidence establishes that, given the pervasiveness and accessibility of radio and television, unsupervised children in pursuit of entertainment need be neither "enterprising" nor "disobedient" to turn on a television or radio, or to record a program on a VCR, at any time of day or night. Accordingly, we conclude that there exists a reasonable risk that a sufficient number of children are in the broadcast audience at all times to warrant narrowly-tailored government regulation of indecent broadcasting aimed both at facilitating parental supervision and promoting the well-being of youth. Such regulation is particularly necessary since, as previously discussed, a wide range of sexually explicit and patently offensive material may be encompassed within the definition of "indecentcy."<sup>93</sup>

#### E. Alternatives to 24-Hour Prohibition

69. The *NOI* solicited comment on alternatives to a 24-hour prohibition, including (1) channeling indecent broadcasts to a time of day when children most likely will not be exposed to them; (2) using program rating codes or pre-broadcast warnings to protect children; and (3) relying upon broadcast technologies to limit children's access. After careful consideration of the record, we conclude that none of these options can effectively advance our interest in protecting children from indecency and, accordingly, that a 24-hour prohibition is the most narrowly tailored means of serving this compelling government interest.

##### 1. Time Channeling

70. Time channeling would establish a specific time period during which non-obscene, but indecent adult-oriented programming could be aired. The feasibility of this alternative depends on whether indecent broadcasts could be channeled to hours when it is unlikely that children would be in the audience. We conclude that, based on the data indicating that there is a reasonable risk that children are present in the viewing and listening audience at all times, there is no time when the reasonable risk of children in the audience is sufficiently low to make their exposure to indecent programs unlikely. Accordingly, we conclude that it would not be possible for broadcast stations, as a general matter, to channel indecent material to certain times of the broadcast day without risk that a significant number of children will be watching or listening without meaningful parental supervision.

71. Broadcasters argue that channeling broadcasts to times of day when parents have an opportunity to supervise their children gives parents a meaningful opportunity to prevent children's access to indecent programs.<sup>94</sup> A 24-hour prohibition, argue Broadcasters, places government in the position of deciding what children should see and hear.<sup>95</sup> KDVS suggests that the Commission implement time channeling during school days, when there is a reduced risk that children would be in the broadcast audience.<sup>96</sup> Other parties, however, note that a number of children are alone during various times of the day.<sup>97</sup> In this regard, we note that *ACT I* affirmed the Commission's regulation of a daytime indecent broadcast.<sup>98</sup>

72. Finally, AFA argues that the effectiveness of a time channeling approach is diminished by the proliferation of VCRs, claiming that an estimated seventy-five to eighty percent of households with children have VCRs.<sup>99</sup> KDVS counters AFA's claim, arguing that most VCRs are purchased by parents, frequently for the personal use of their

children, and that parents therefore must be aware of the possibility that their children may use VCRs to tape broadcast programming.<sup>100</sup>

73. After further consideration of time channeling, we conclude that we cannot identify a time when the reasonable risk of children in the audience is sufficiently low to make their unsupervised viewing of indecent programs unlikely.<sup>101</sup> We have determined that at all times there is a reasonable risk that significant numbers of children are in the broadcast audience for television and radio. The proliferation of VCRs further undermines a channeling approach for television, for, as AFA noted, a majority of households with children have VCRs that children may operate to tape a program. Clearly, many teens and even younger children know how to use the recording and playback functions of a VCR. As a result, delayed viewing on a VCR provides children with access to programs broadcast at a time when their live viewing is least likely.

74. Broadcasters' argument that stations should be permitted to channel indecent programming to times of day when parents have an opportunity to supervise their children, moreover, fails to address the impracticality of parents supervising their children's listening and viewing 24 hours a day.<sup>102</sup> The record in this case includes thousands of letters from parents addressing this issue and convinces us that parents who wish to exercise such supervision do not have the tools or time available to do so because of the pervasiveness of the broadcast media and the lack of effective parental control devices.<sup>103</sup> Although Broadcasters' study attempts to show that opportunities for parental supervision are extensive, it fails to demonstrate that meaningful parental supervision is possible as a practical matter.<sup>104</sup> Indeed, in view of the substantial amount of unsupervised viewing and listening by children, the number of children who are without parental supervision and the factors interfering with parental ability to supervise children's viewing and listening effectively, we must conclude that time channeling would be an ineffective means of protecting children from broadcast indecency.

75. Several commenters also argue that, because the Commission's definition of indecency and its indecency enforcement policies are allegedly vague, unless a time channeling approach is adopted in lieu of a 24-hour prohibition, the threat of sanctions could deter some broadcasters from presenting programs that are not actually indecent.<sup>105</sup> C&M maintains that time channeling recognizes the rights of broadcasters to transmit constitutionally protected indecent speech and the rights of listeners to receive indecent programming.<sup>106</sup> This request for a "safe harbor" to present indecent programming reflects a belief that a broadcaster cannot determine with any degree of certainty whether a specific program violates the guidelines adopted in this proceeding. This is incorrect. Our definition of indecency, read in conjunction with our decisions in enforcement actions, provides licensees sufficient guidance to decide whether a program would be indecent.

## 2. Ratings and Warning Devices

76. Another alternative to a 24-hour prohibition of broadcast indecency is the use of a voluntary industry ratings code for television and radio broadcasts. The ratings, which would be published in television and radio guides and announced prior to each program, would alert the viewer or listener to the content of the program. We

conclude that ratings and warnings would not effectively limit children's exposure to indecent programming, since this method would require parents to actively supervise their children's listening and viewing at all hours and in all locations. The effectiveness of ratings and warnings is further reduced by random tuning behavior known as "grazing," in which viewers use television remote control or radio scanning devices to rapidly tune through the entire channel menu until they find something interesting enough to hold their attention.

77. The *NOI* requested comment regarding the use of a voluntary industry ratings code for television and radio broadcasts. However, the *NOI* expressed doubt that ratings and warnings would prevent minors from viewing or listening to indecent programming because the broadcast audience is constantly tuning in and out of programs, and suggested that random tuning behavior may be even more prevalent today than when *Pacifica* was decided in 1978.<sup>107</sup> The *NOI* suggested that children could be exposed to different programming in rapid succession without warning as to content either because they graze or because they are co-viewing with others who are grazing.

78. Several commenters address the possible use of ratings and warning devices. USCC and KDVS suggest that a combined time channeling and ratings system could be effective.<sup>108</sup> However, AFA and Salem suggest that ratings require parental supervision in order to be effective.<sup>109</sup> Other commenters fear that an indecency warning could attract children to a particular broadcast<sup>110</sup> or that a warning could serve to "license" an indecent broadcast by warning the viewer of content.<sup>111</sup> Several commenters also specifically responded to the Commission's discussion of grazing. Broadcasters submits a study conducted by Arbitron and NAB of 13,000 radio listeners aged 12 and over showing that this group listened to an average of 2.99 radio stations per week.<sup>112</sup> Broadcasters concludes that this study indicates that neither adults nor children engage in significant random tuning for radio. *Pacifica* claims that radio listeners, especially those who listen to noncommercial radio stations, do not engage in grazing.<sup>113</sup> On the other hand, others contend that grazing is prevalent.<sup>114</sup>

79. We conclude that ratings and warnings would not effectively limit children's exposure to indecent programming. Currently there is no device which would permit a parent to "lock out" programming. Unless it were practical for parents to supervise viewing at all times, a child may ignore a warning and view or listen to indecent programming. Indeed, a warning may attract a child's attention and lead the child to view or listen to the program. This is of particular concern because of the significant amounts of unsupervised viewing and listening by children. We also believe that grazing is sufficiently common to reduce the effectiveness of ratings, even if a child is supervised. Grazing and channel changing by either a parent or a child may cause the viewer or listener to miss a content warning.<sup>115</sup> We believe the study cited by Broadcasters indicating the average number of radio stations listened to per week is not relevant in determining whether grazing occurs. Grazing involves turning to a number of channels in a short period of time, and such rapid switching may not be reflected in ratings. Broadcasters do not state whether the study asked listeners if they engaged in grazing to find those channels, or if they ever engaged in grazing. Therefore, we conclude that lack

of parental supervision, coupled with the proclivity of viewers and listeners to graze, would undermine the efficacy of a system of ratings and warnings.

### 3. Broadcast Technologies

80. The *NOI* requested comment on whether there are feasible broadcast technologies that could restrict children's access to indecent broadcasts. We conclude that although such technology may be feasible, no such technologies are currently available to the public for this purpose.

81. The *NOI* suggested that the FM or television aural subcarrier could be used for the broadcast of audio indecency. The subcarrier signal would be receivable only by special decoders. Salem supports the *NOI*'s assessment that subcarriers could be used to provide audio indecency. Salem maintains that an FM station could install a subcarrier signal generator at minimal expense, and that decoders for home use currently cost approximately \$60, but could be expected to fall in price if produced in large quantities.<sup>116</sup> John W. Olivo, Jr., suggests use of a signal that would permit electronic blocking of programs by home receivers. KDVS, however, suggests that alternative broadcast technologies may not be financially feasible for many broadcasters, particularly noncommercial stations.<sup>117</sup>

82. As another alternative, NRB suggests that the Commission permit the broadcast of scrambled indecent material at any hour.<sup>118</sup> Kennedy Broadcasting ("Kennedy") similarly suggests that low power television (LPTV) stations be permitted to offer adult-oriented programming if scrambled. NRB and Kennedy argue that the decoder necessary to view scrambled programming would protect children from indecent material in much the same way as a cable lock-box or parental key. Kennedy also asks the Commission to state whether indecency standards will be applied to subscription television.

83. With respect to scrambling, we note our previous statements that we do not impose regulations regarding indecency on encrypted services, such as subscription television, that lack "the indiscriminate access to children that characterizes broadcasting." *Video 44*, 3 FCC Rcd 757, 760 n.2 (1988), *rev. on other grounds sub nom. Monroe Communications Corp. v. F. C. C.*, 900 F.2d 351 (D.C. Cir. 1990). While signal blocking and subcarrier use appear to be technologically feasible to prevent reception by individuals not wishing to receive certain signals, neither is available today, so we cannot rely on these technologies either to protect children from exposure to indecent broadcasts or to assist parents in supervising their children's viewing and listening. Use of a signal as suggested by Olivo also is not available today nor expected to be available in the foreseeable future, and may or may not prove practical. However, we encourage interested parties to continue to bring to our attention technologies or other means capable of restricting access by children to indecent broadcast programs.

### F. Non - Broadcast Alternative Programming Sources

84. We recognize that we must be sensitive to the concern of the Supreme Court that the adult population not be reduced to seeing or hearing only what is fit for children.<sup>119</sup> In *Pacifica*, the Supreme Court recognized that non-broadcast alternatives to broadcast indecency are available to adults, including tapes, records, theaters and

nightclubs. The *NOI* requested comment on whether these non-broadcast alternatives and additional non-broadcast alternatives, including cable with a lock-box capacity, videocassettes, audiocassettes, and motion pictures, provide adults with access to visual and audio programs functionally equivalent to those that would be proscribed from broadcast. We noted that cable television, a non-broadcast alternative not mentioned by the *Pacifica* Court, provides adults with access to programming designed for mature audiences yet incorporates equipment that facilitates parental control over the viewing of their children. Several commenters agree with the Commission's assessment that adults have many alternative sources of indecent material.<sup>120</sup> AFA submits an analysis of the MPAA ratings for 1,309 movies shown on premium cable services from December 26, 1987, through January 12, 1990, and claims that 663, or 51%, were R-rated.<sup>121</sup>

85. In response, Broadcasters argues that total suppression of indecent material in the broadcast medium would deprive adults of their ability to receive protected material, and thereby would violate their First Amendment rights,<sup>122</sup> because much material that might be indecent either is not available elsewhere or could be found only with time or effort. Broadcasters also claims that live radio and television talk shows, special news reports, public affairs programs, and many made-for-television entertainment programs are not available elsewhere. Broadcasters maintains that at least seven of the broadcast programs that triggered Commission action in 1989 contained material that was unavailable in any other medium.<sup>123</sup> Even if some material is available, Broadcasters asserts, many adults will be deterred from obtaining the material because they will have to determine if the material is available and then purchase it. Furthermore, the timeliness of the material will be lost and, with it, a large measure of at least some of the programs' value.<sup>124</sup> Broadcasters also argues that adults' ability to purchase indecent material is irrelevant constitutionally because the Supreme Court has "made clear that free speech may not be 'abridged on the plea that it may be exercised in some other place.'" <sup>125</sup> Broadcasters also claims that "every decision cited in the long history of this proceeding, whether in broadcasting, cable, telephone, or print, unhesitatingly concluded that blanket bans on indecency violate the First Amendment."<sup>126</sup>

86. We conclude that a 24-hour prohibition on broadcast indecency will not, in the words of the *Pacifica* Court, "reduce adults to hearing [or seeing] only what is fit for children."<sup>127</sup> The Court specifically referenced *Butler* in affirming the Commission's action in *Pacifica*, noting that "[a]dults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear these words." 438 U.S. at 750 n.28. *See also* 438 U.S. at 760 (Powell, J., concurring). Thus, the Court has recognized that the opportunity to obtain access to indecent material through other outlets is sufficient even if those outlets are not absolutely fungible with broadcasting.

87. In addition, indecent material is available on media that are largely indistinguishable from the viewer's perspective, from broadcast television, although their characteristics facilitate restricting access to adults. Parties do not question that adults can obtain indecent material through cable television, wireless cable,<sup>128</sup> home satellite dishes,<sup>129</sup> or satellite master antenna television systems (SMATV)<sup>130</sup> and, soon in the future, DBS.<sup>131</sup> We note, for example, that as of July, 1990, 53.9 million house-

holds, or 58.6% of the total television households, subscribed to cable, and 71.3 million television households were passed by cable.<sup>132</sup> The individual who seeks indecent material via cable television need not leave his or her home to obtain the material. Furthermore, through the use of a lock-box or parental key, parents can control children's viewing, even permitting children to view indecent material if parents believe that doing so is in a child's best interest. AFA in its comments demonstrates that a significant number of R-rated movies are shown on cable. Accordingly, imposition of a 24-hour prohibition on broadcast indecency will not significantly interfere with the ability of adults to view or listen to indecent programming.

88. Moreover, *Butler* does not address the situation presented here, in which there is no feasible way to offer adults access to the medium without offering access to children. *Butler* concerned the sale to adults of books "tending to incite minors to violent or depraved or immoral acts manifestly tending to the corruption of the morals of youth." 352 U.S. at 381. Distributors of books or other media such as magazines, movies, and video and audio cassettes, with a salesperson behind the counter, have the means to control access by children at their point of sale or access. Thus, in the words of Justice Powell, "dissemination of this kind of speech to children may be limited without also limiting willing adults' access to it." *Pacifica*, 438 U.S. at 758 (Powell, J., concurring). Broadcasting, however, has no salesperson behind the counter or lockbox which parents may use to control access. Unlike other media, broadcasting is delivered directly into the privacy of the home and does not distinguish among recipients. Accordingly, "such a physical separation of the audience cannot be accomplished in the broadcast media. . . . [T]he broadcaster cannot reach willing adults without also reaching children." *Id.* at 758-759. *Butler* simply does not address the conflict between adults' right to obtain indecent material and the need to protect children from exposure to such material in the broadcast medium. We believe, however, that the established compelling interest in protecting children, coupled with the impossibility of separating children from adults in the broadcast audience, must outweigh the right of adults to view or to hear broadcast indecency, especially when adults can readily see or hear such material on widely available and readily accessible media which can separate children and adults. As Justice Powell said, *Butler's* attentiveness to adults' rights "is not sufficiently strong to leave the Commission powerless to act" to control broadcast indecency. *Pacifica*, 438 U.S. at 760 (Powell, J., concurring).

#### G. Enforcement

89. The foregoing demonstrates that only a 24-hour prohibition would effectively serve to protect children from broadcast indecency. Nonetheless, although audience surveys and data demonstrate the likelihood that significant numbers of children may be found in broadcast audiences at all times of the day and night, in the future we will consider, on a case-by-case basis, evidence from a station charged with indecent broadcasting that the data concerning children's viewing or listening are not applicable in its specific market. In other words, we will permit the broadcaster to submit evidence illustrating that only "a few of the most enterprising and disobedient young people" are in the broadcast audience in the sta-

tion's market at the time of the broadcast in question. In this regard, stations will not be required to show that children were not in the market audience on the specific date and at the specific time that the allegedly indecent program was aired (e.g., Thursday, July 12, 1990 at 11:30 p.m.). Rather, stations will be permitted to demonstrate through ratings data or other probative evidence that children typically are not in the audience on the day and at the time in question (e.g., Thursday nights at 11:30 p.m.). This policy will ensure that enforcement of the broadcast indecency statute will be narrowly tailored to situations in which there is in fact a risk that children are in the audience. We do not believe this requirement is unduly burdensome for a licensee.<sup>133</sup>

90. We note that in several prior instances, parties have responded to Letters of Inquiry or Notices of Apparent Violations with data which, they argue, demonstrate that few or no children were likely to have been listening to their particular station when the alleged indecent language was aired. Listeners and viewers, however, often switch indiscriminately from station to station and, particularly in the case of radio, "tune into a station generally without the benefit of a schedule of programs or warning as to potentially offensive content." *In re Pacifica*, 2 FCC Rcd at 2701, citing *Pacifica*, 438 U.S. at 760 n.2 (Powell, J., concurring). As a result, if children in a given market are in the broadcast audience, they may well tune into a particular station when "grazing" through different channels on their radio or TV set. Accordingly, to ensure that children are not exposed to indecent programming, we will require a station defending against a broadcast indecency complaint to demonstrate that children in fact are not in the broadcast audience for the entire market, not just the particular station, at the time it aired the allegedly indecent material.

#### IV. CONCLUSION

91. Based upon the information contained in the record and discussed in this *Report*, and our analysis of the applicable constitutional law as recently set forth by the Supreme Court in *Sable*, we conclude that the 24-hour prohibition on broadcast indecency is the most narrowly tailored means of protecting children from indecent material. In 1988 Congress, concerned with children's access to indecent material through broadcast stations, statutorily required this Commission to enforce the prohibition against indecent material on a 24-hour-a-day basis. In response to the Court's remand of the record in *ACT II*, in which the validity of the statute and the Commission's implementation of it was put at issue, we have conducted a full and fair proceeding to assess the validity of the 24-hour prohibition. In the *NOI*, we invited comment on a broad range of relevant issues and received comment on these and additional issues that responding parties wished to address. Over 92,500 comments have been received in response to this *NOI*, the vast majority of which favor the 24-hour prohibition.

92. Congress and the courts have determined that indecent material is potentially harmful to children. The Commission's definition of indecency has been affirmed by the Supreme Court, and permits broadcasters to identify material that is indecent. Because data gathered in this proceeding establish that children are in the broadcast audience at all times of the day and night, we do not believe that a channeling mechanism will accomplish the

compelling governmental purpose of protecting children. Adults, on the other hand, have other means to access such material should they so desire.

93. To comply with *Sable's* requirement that the means to accomplish the governmental interest be tailored as narrowly as possible, we have decided, when enforcing the 24-hour prohibition, to consider on a case-by-case basis any information that children are not in the broadcast audience in the market of the station accused of airing indecent material. This policy, we believe, will ensure that enforcement actions are taken only against those stations that broadcast indecent material when children are in the audience.

#### V. ORDERING CLAUSES

94. Accordingly, IT IS ORDERED, That the late filed reply comments of AFA ARE ACCEPTED.

95. IT IS FURTHER ORDERED, That upon release, the General Counsel IS INSTRUCTED to submit this Report to the U.S. Court of Appeals for the District of Columbia Circuit in response to the remand of the record in *Action for Children's Television v. F.C.C.*, No. 88-1916.

96. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

#### FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy  
Secretary

#### FOOTNOTES

<sup>1</sup> No. 88-1916 (D.C. Cir. Sept. 13, 1989).

<sup>2</sup> The Commission's 1989 appropriations law states: "By January 31, 1989, the Federal Communications Commission shall promulgate regulations in accordance with section 1464, title 18, United States Code, to enforce the provisions of such section on a 24 hour per day basis." *Making Appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies for the Fiscal Year Ending September 30, 1989, and for Other Purposes*, Pub. L. No. 100-459, § 608, 102 Stat. 2186, 2228 (1988).

<sup>3</sup> Enforcement of the FCC regulation promulgating the 24-hour prohibition, codified at 47 C.F.R. § 73.3999 (1989), was stayed pending judicial review by the court in *ACT II*.

<sup>4</sup> 109 S. Ct. 2829 (1989).

<sup>5</sup> 4 FCC Rcd 8358 (1989).

<sup>6</sup> We received over 92,500 formal and informal responses to our NOI. Almost 88,000 informal letters supported a 24-hour prohibition, while approximately 4,500 letters opposed it. Formal commenters are listed in Appendix A, and the informal comments have been placed in the docket file. American Family Association *et al.* (AFA) filed its reply comments one day late. In the interest of assembling a full and complete record, and the lack of prejudice resulting to any party, we will accept those comments.

<sup>7</sup> See 47 U.S.C. §§ 312(a)(6) and (b), 503 (b)(1)(D) (1988).

<sup>8</sup> The Commission's definition of indecent language remains "language that describes in terms patently offensive as measured by contemporary community standards for the broadcast me-

dium, sexual or excretory activities or organs." *Pacifica Foundation*, 56 FCC 2d 94, at 98, 100 (1975). In our *Reconsideration Order* we explained that we separately consider the nature of the material involved and the time of broadcast because the time of broadcast is pertinent to whether the broadcast is actionable, rather than to whether it is indecent. See 3 FCC Rcd 930, 936 n.6 (1987); *ACT I* at 1338 n.8.

<sup>9</sup> 390 U.S. 629 (1968). In *Ginsberg*, the Court upheld a state statute that prohibited the sale to minors (17 and under) of sexual material deemed by the legislature to be obscene as to children.

<sup>10</sup> See n.2, *supra*.

<sup>11</sup> 47 CFR § 73.3999 (1989). See *Order in Enforcement of Prohibitions Against Broadcasting Obscenity and Indecency in 18 U. S. C. § 1464*, 4 FCC Rcd 457 (1988).

<sup>12</sup> Morality in Media (MIM) Comments at 23-32; Salem Communications Corporation and Focus on the Family (Salem) Reply Comments at 24-27.

<sup>13</sup> *ACT I* at 1343 n.18, quoting *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 540 (1980).

<sup>14</sup> *Cf. United States v. Grace*, 461 U.S. 171, 177 (1983) (regulation must be "narrowly drawn to accomplish a compelling governmental interest"); *Consolidated Edison Co. of New York v. Public Service Commission of New York*, 447 U.S. 530, 540 (1980) (regulation must be "a precisely drawn means of serving a compelling state interest"); *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980) (law invalid because state's interest could be "served by measures less intrusive"); *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 800 (1985) (state can exclude speakers if "compelling state interest" and "narrowly drawn exclusion"); *Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37, 45 (1983) (government must show that "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end"); and *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) ("closely drawn to avoid unnecessary abridgment," quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam)).

<sup>15</sup> See *ACT I* at 1343 n.18.

<sup>16</sup> Capital Cities/ABC (ABC) Comments at 28; Pacifica Foundation *et al.* (Pacifica) Comments at 32; P.E.N. American Center *et al.* (PEN) Comments at 9; Cohn and Marks (C&M) Comments at 20; and Comments submitted jointly by a number of broadcasters and organizations, including the National Association of Broadcasters, CBS Inc., Action for Children's Television, and the American Civil Liberties Union *et al.* (hereinafter collectively referred to as "Broadcasters") at 19, 23.

<sup>17</sup> MIM Reply Comments at 15-16.

<sup>18</sup> MIM Comments at 4-5.

<sup>19</sup> Broadcasters Comments at 5-6.

<sup>20</sup> MIM Comments at 12-14; AFA Comments at 2-7; Salem Reply Comments at 49-53.

<sup>21</sup> C&M Comments at 19 n.28. C&M's reference to absorbing the "first blow" derives from *Pacifica*, 438 U.S. at 749: "To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow." See also n.29, *infra*.

<sup>22</sup> There seems to have been some understandable confusion in the past as to the extent to which we relied on both of these two purposes -- supporting parental supervision and promoting the well-being of youth -- in serving the compelling interest of protecting children. Compare, e.g., *Reconsideration Order*, 3 FCC Rcd at 930 ¶ 3, with 3 FCC Rcd 931 ¶ 11. The court in



*ACT I* understood the Commission's position as based solely on its interest in supporting parental authority. *ACT I*, 852 F.2d at 1343. However, the Supreme Court in various cases, including *Ginsberg*, *Pacifica*, and *Sable*, has recognized a broader governmental interest in protecting children which goes beyond merely supporting parental supervision, and Congress specifically referenced this broader interest in directing the adoption of the 24-hour prohibition on broadcast indecency. See 134 Cong. Rec. S9912 (daily ed. July 26, 1988) (statement of Sen. Helms). We take this occasion to state that, consistent with Congress' direction, the broader view more accurately reflects what we seek to accomplish -- specifically, to support parental supervision and to promote generally the well-being of youth.

<sup>23</sup> Broadcasters Comments at Appendix A.

<sup>24</sup> AFA Reply Comments at Appendix 2. In defining pornography, Victor B. Cline, author of the study, noted that "something could be regarded as 'pornographic' but still not be legally obscene." *Id.* at 1.

<sup>25</sup> See *Telephone Decency Act of 1987*, Hearing Before the Subcommittee on Telecommunications and Finance of the U.S. House of Representatives Committee on Energy and Commerce, 100th Cong., 1st Sess. (Serial No. 100-99, Sept. 30, 1987) at pp. 22-26, 27, 63-64, 96-97; *Cable - Porn and Dial - A - Porn Control Act*, Hearing Before the Subcommittee on Criminal Law of the United States Senate Committee on the Judiciary, 99th Cong., 1st Sess. (July 31, 1985, Serial No. J-99-46) at pp. 103, 135-138.

<sup>26</sup> See Pub. L. 98-214, 97 Stat. 1469 (1983); amended by Pub. L. 100-297, 102 Stat. 424 (1988); further amended by Pub. L. 101-166, 103 Stat. 1159, 1192-1194 (1989).

<sup>27</sup> See *United States v. Various Articles of Obscene Merchandise*, Schedule No. 2102, 709 F.2d 132 (2d Cir. 1983). Other movies found not to be obscene included "Insatiable," "Star Virgin," "The Opening of Misty Beethoven," and "Inside Desiree Cousteau." The court described these movies as "examples of hard-core pornography, describing and depicting a wide range of scenes of explicit sex on the part of adults, singly and in groups, including detailed portrayals of genitalia, sexual intercourse, fellatio, and masturbation." 709 F.2d at 134. See also *Hermann v. United States*, 259 A.2d 347 (D.C. 1969), holding the movie "Threes, Menage a Trois" not to be obscene. The movie was described by the court as depicting "a succession of more or less disconnected scenes portraying or suggesting sexual activities including repetitive self-fondling of female nipples, lesbian-like stroking, some displays of female genital areas and pubic hair, and poses suggestive of cunnilingus between a fully dressed man and a partly dressed woman." 259 A.2d at 348.

<sup>28</sup> Examples of the patently offensive indecent material broadcast by some stations are included in Appendix B.

<sup>29</sup> In his concurrence, Justice Powell noted that "broadcasting -- unlike most other forms of communication -- comes directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds. . . . Although the First Amendment may require unwilling adults to absorb the first blow of offensive but protected speech when they are in public before they turn away, . . . a different order of values obtains in the home." 438 U.S. at 759 (Powell, J., concurring in part) (citation omitted).

<sup>30</sup> The Court has recognized the government's substantial interest in protecting the privacy of the home in non-broadcast contexts as well. See, e.g., *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (upholding a narrowly-tailored ban on picketing a specific residence and stating that "we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom"); *Carey v. Brown*, 447 U.S. 455, 471 (1980) ("The

State's interest in protecting the well-being, tranquility and privacy of the home is certainly of the highest order in a free and civilized society"); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 77-78 (1983) (Rehnquist, J., concurring) ("We have often recognized that individuals have a legitimate 'right to be left alone' in the privacy of the home . . . the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds").

<sup>31</sup> Our initial definition of indecency included the language "when there is a reasonable risk that children may be in the audience." *Pacifica*, 56 FCC 2d at 98. Starting with our 1987 decisions, however, we have treated the nature of the material involved and the presence of children in the audience as separate issues because the question whether there is a reasonable risk of children in the audience is "more pertinent to . . . whether a broadcast is 'actionable' under 18 U.S.C. § 1464 than to whether it is indecent." *Reconsideration Order*, 3 FCC Rcd at 936 n.6. See *supra*, n.8.

<sup>32</sup> See, e.g., MIM Reply Comments at 22-25; Salem Reply Comments at 10-21; and AFA Reply Comments at 3-7.

<sup>33</sup> See, e.g., Broadcasters Comments at 35-40; PEN Comments at 11-16; Post-Newsweek Stations (Post) Comments at 1-2; ABC Comments at 19-21; C&M Comments at 7-16; and Cox Comments at 9-15.

<sup>34</sup> PEN Comments at 16-20; Pacifica Comments at 13-20; Post Comments at 2-5; and KDVS Comments at 11-14.

<sup>35</sup> Broadcasters Comments at 40; ABC Comments at 36-41; and Arizona Board of Regents *et al.* (Joint Parties) Comments at 22-23.

<sup>36</sup> Broadcasters Comments at 44.

<sup>37</sup> We also note that the courts already have determined that our definition of indecency is not unconstitutionally vague. See *ACT I* at 1338-1339.

<sup>38</sup> Section 1464 states that "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000 or imprisoned not more than two years, or both." 18 U.S.C. § 1464.

<sup>39</sup> See, e.g., AFA Comments at 13; Bonneville International Corporation (Bonneville) Comments at 5; and Salem Reply Comments at 21-24.

<sup>40</sup> See Broadcasters Comments at 26-29. See also Cox Enterprises (Cox) Comments at 26-28 and PEN Comments at 20-23.

<sup>41</sup> Broadcasters Comments at 13-17 and Appendix A; Broadcasters Reply Comments at 10-12; Pacifica Comments at 30-31; and ABC Comments at 23-28.

<sup>42</sup> In enacting the 24-hour prohibition, Senator Helms, the author of the legislation, relied upon data regarding children 12 to 17 in arguing for enactment of the prohibition and, therefore, intended for it to apply to this age category. 134 Cong. Rec. S9912 (daily ed. July 26, 1988) (statement of Sen. Helms).

<sup>43</sup> See *North Haven Board of Education v. Bell*, 456 U.S. 512, 526-527 (1982); *Steiner v. Mitchell*, 350 U.S. 247, 254 (1956) (remarks of legislation's sponsor is an authoritative guide to statute's construction and deserves to be accorded substantial weight). See also *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612, 640 (1967) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt.").

<sup>44</sup> The Court in *ACT I* noted that the Commission in a 1976 legislative proposal had recommended that the regulation of broadcast indecency be directed to protecting children under 12. See 852 F.2d at 1342, citing 122 Cong. Rec. at 33,367 n.119. At the time, we made this recommendation for two reasons. First, we proposed that broadcasters could defend against an indecency complaint by showing that they had made efforts to minimize

the risk of exposure to children. Including 18-year olds in the definition of children, we feared, would deprive broadcasters of this defense because of the difficulties inherent in effectively shielding 18-year olds from indecent programming. Second, we observed that age 12 "is the accepted upper limit for children's programming in the industry and at the Commission." 122 Cong. Rec. at 33,367 n.119; see 122 Cong. Rec. at 33,364 (Sept. 29, 1976).

However, now outside the confines of that debate and on further examination, we conclude that the appropriate "upper limit for children's programming" differs from the appropriate upper limit for protecting children from exposure to indecent material. To the extent the public interest requires broadcasters to offer age-specific or other special programming for children, that interest subsides when the child reaches an age, such as 12 years old, when general interest programming serves his or her needs. In contrast, the wide usage of the age of 17 and under in other federal and state laws intended to protect children from access to sexually explicit material demonstrates the general acceptance of the need to protect children older than 12 from exposure to such material. Moreover, our recommendation to Congress in 1976 simply struck a different balance between the need to protect children and the rights of adults to see or hear indecent matter from that struck by Congress in 1988 when it directed the Commission to enforce the prohibition on indecent broadcasting 24 hours a day.

<sup>45</sup> Similarly, in enacting the 24-hour prohibition on broadcast indecency, the statute's author expressed concern regarding the pervasiveness and accessibility of the broadcast medium. 134 Cong. Rec. S9912 (daily ed. July 26, 1988) (statement of Sen. Helms).

<sup>46</sup> *NOI* at 8361.

<sup>47</sup> *Id.* Additional data submitted by AFA illustrates the pervasive nature of television, using the Chicago television market as an example. Chicago has 5 VHF and 3 UHF TV stations, of which most broadcast at least 20 hours a day, 7 days a week. As a result, for over 80% of all hours in a week, day or night, there are at least 8 different programs being broadcast simultaneously. In a typical 168 hour broadcast week, there are over 1,120 hours of programs broadcast. AFA Comments at 41-42.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 8361.

<sup>50</sup> *Id.*

<sup>51</sup> MIM Comments at 42-62.

<sup>52</sup> *NOI* at 8361.

<sup>53</sup> Bonneville Comments at 6-7. Bonneville's statistics are from Spring 1989 Arbitron Radio Ratings (Metro AQH M-F midnight - 1:00 a.m.).

<sup>54</sup> Salem Reply Comments at Exhibit 1.

<sup>55</sup> NRB Reply Comments at Exhibit 2.

<sup>56</sup> Mr. Stern's morning radio show was the subject of one of the Commission's 1987 indecency decisions. See *Infinity Broadcasting Corp. of Pennsylvania*, 2 FCC Rcd 2705 (1987).

<sup>57</sup> Broadcasters Comments at 26 n.65, citing a poll by the Gallup Organization, WXRK Radio, Special Listenership Study (Dec. 1989).

<sup>58</sup> MIM Reply Comments at 20.

<sup>59</sup> KDVS Comments at 7-9.

<sup>60</sup> KDVS Reply Comments at 3-4.

<sup>61</sup> *Id.* at 5-6.

<sup>62</sup> Pacifica Comments at 23-25 and Attachment 4.

<sup>63</sup> Broadcasters Comments at 26.

<sup>64</sup> *NOI* at 8361 and Appendix B, Tables 3 and 4.

<sup>65</sup> *NOI* Appendix B, Table 3.

<sup>66</sup> With regard to KDVS' concern that the Commission omitted estimates of the sampling error or relative standard error in the data presented in the *NOI*, the Commission does not attach the rating companies' descriptions of methodology with error and reliability estimates for their data. However, these descriptions are readily available in ratings reports, and do not suggest that this information is systematically skewed.

<sup>67</sup> *NOI* at Appendix B, Table 4.

<sup>68</sup> *NOI* at 8362 and Appendix C.

<sup>69</sup> USCC Comments at 5. We note that USCC admits that the results of its survey are not conclusive, and that it was unable to receive a full response to its survey. *Id.* at 5-6.

<sup>70</sup> KVDS Reply Comments at 4.

<sup>71</sup> Salem Reply Comments at Exhibit 2 and NRB Reply Comments at Exhibit 1, citing data from Arbitron *Television Market Reports* for the five markets for July 1989.

<sup>72</sup> Salem multiplies the 20,254,000 total population of 12 to 17 year olds cited in the *NOI* by 4.8% to arrive at 972,192 children in this age range. Salem Reply Comments at 65.

<sup>73</sup> 1990 Nielsen Report on Television at 1.

<sup>74</sup> *NOI* at 8363.

<sup>75</sup> *Id.* at 32-34, Appendix C.

<sup>76</sup> MIM Reply Comments at 18-19.

<sup>77</sup> AFA Reply Comments at 8.

<sup>78</sup> AFA Comments at 38-39.

<sup>79</sup> *Id.* at n.55.

<sup>80</sup> USCC Comments at 5-6.

<sup>81</sup> *NOI* at 8361.

<sup>82</sup> Cable Communications Policy Act of 1984 § 624(d)(2), 47 U.S.C. § 544(d)(2).

<sup>83</sup> See 47 U.S.C.A. § 223 as amended by Pub. L. 101-66, 103 Stat. 1159, 1192-1194 (1989); *Regulations Concerning Indecent Communications by Telephone (Report and Order)*, FCC No. 90-230, adopted June 14, 1990.

<sup>84</sup> In reply comments, Broadcasters submit a list compiled by the Consumers Union of selected television models currently sold in the United States. Broadcasters claim that over 120 models are equipped with a channel blocking feature that prevents unauthorized access to channels. Broadcasters Reply Comments n.14, Appendix 5. Virtually all of the televisions on this list have at least a twenty-inch screen and, judging by the list price, appear to be color televisions. Broadcasters provide no data showing the market share held by these models. No commenters submitted evidence as to whether channel blocking devices for attachment to existing television sets are available. Furthermore, Broadcasters offer no information as to how channel blocking works, particularly whether a channel blocking feature completely prevents access to a particular channel or whether it may easily be circumvented. Moreover, most television sets used in homes today do not have any blocking mechanism. Finally, no party has submitted evidence regarding the feasibility of using televisions with channel blocking in this context, or of the market penetration of these televisions.

<sup>85</sup> Many letters submitted in this proceeding emphasized the impossibility of close supervision. Representative of these are the following five. Mrs. Barbara Gigous of Warsaw, Indiana, wrote: "I have two teenage boys who have their own walkmans and tape recorders. There is no way that I can know what they are listening to all the time." Donald and Sandra Lee of Irving, Texas stated: "As working parents, our children have access to television at times when neither my husband nor myself are available to screen their viewing. The radio is available every-

where they go and it is equally offensive. . . ." Yvonne Thomas of Boonsboro, Maryland, a public school teacher, wrote "Many children live alone with a television as both parents are working." Another teacher, Ann Davis of Shrewsbury, Pennsylvania, wrote: "I tuned in the radio about 6 A.M. to see if any of the schools had been delayed [due to inclement weather]. This was the station suggested at school to listen to. I heard the most foul language and sexual innuendos I'd ever heard in public. . . . I had to ask [my son] to leave the room saying that I would let him know when the announcement was made." Cheryl Mayer of Bronson, Michigan, reported: "As I was driving my four children to school one morning, around 7:30, I was appalled at what I heard on a radio station. . . . two D.J.'s were being very crude."

<sup>86</sup> Broadcasters Comments, Appendix C, Table 2.

<sup>87</sup> NOI at 8363 and Appendix B, Table 5 at 8376.

<sup>88</sup> *Id.*

<sup>89</sup> MIM Comments at 42-62; Salem Reply Comments at Exhibit 1; NRB Reply Comments at Exhibit 2; *see also* NOI at 8361 and Appendix B, Tables 3 and 4.

<sup>90</sup> KDVS Reply Comments at 3-4.

<sup>91</sup> NOI at Appendix B, Table 4.

<sup>92</sup> Salem Reply Comments at 65.

<sup>93</sup> *See* ¶¶ 19-21, *supra*.

<sup>94</sup> Broadcasters Comments at 21.

<sup>95</sup> *Id.* at 23.

<sup>96</sup> KDVS Comments at 7-8. KDVS submits data from a 1983 Arbitron survey of the San Francisco metropolitan area showing that teens comprise one to four percent of the total television broadcast audience during the day.

<sup>97</sup> AFA Comments at 36-37; Lynda Beams (Beams) Reply Comments at 8-9 and Exhibit G; Bonneville Comments at 8.

<sup>98</sup> *ACT I*, 852 F.2d at 1341.

<sup>99</sup> AFA Comments at 29. *See also* Salem Reply Comments at 63, note 92, in which Salem cites a 1990 Nielsen study showing that over 14% of VCR taping is done from 11:00 p.m. to 6:00 a.m., and over 50% of VCR recordings are made when the television is turned off.

<sup>100</sup> KDVS Reply Comments at 6.

<sup>101</sup> For this reason, we overrule the conclusion reached in the *Reconsideration Order*, 3 FCC Rcd 930 (1987), that time channeling is an effective means of controlling children's access to indecent broadcasting.

<sup>102</sup> Indeed, it appears that the most effective means for parents to actively supervise their children's listening and viewing activities is to remove all televisions and radios. This result not only is highly impractical, but also would deprive families of the many benefits of the broadcast media.

<sup>103</sup> *See* n.85, *supra*.

<sup>104</sup> *See* ¶¶ 57-64, *supra*.

<sup>105</sup> *See* Post Comments at 1-2; Cox Comments at 24-25.

<sup>106</sup> C&M Comments at 28-30.

<sup>107</sup> NOI at 8363 and n.44. The *Pacific* a Court noted, "Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content." 438 U.S. at 738.

<sup>108</sup> USCC Comments at 6; KDVS Comments at 1.

<sup>109</sup> AFA Comments at 46; Salem Reply Comments at 72.

<sup>110</sup> Beams Reply Comments at 10; Salem Reply Comments at 72; AFA Comments at 46.

<sup>111</sup> MIM Reply Comments at 30.

<sup>112</sup> Broadcasters Reply Comments at 9, n.17.

<sup>113</sup> *Pacifica* Comments at 21-23.

<sup>114</sup> AFA Comments at 44-46, n.65; Salem Reply Comments at 72, n.105; MIM Reply Comments at 35-36.

<sup>115</sup> We note that the broadcast in question in *Pacifica* was heard by a man while driving with his young son, and that the parent apparently missed the warning aired before the broadcast. *Pacifica*, 438 U.S. at 730.

<sup>116</sup> Salem Reply Comments at Appendix 18.

<sup>117</sup> KDVS Reply Comments at 7.

<sup>118</sup> NRB Reply comments at 13.

<sup>119</sup> *Butler v. Michigan*, 352 U.S. 380, 383 (1957). In striking down a state statute that prohibited the sale to adults as well as to children of books "tending to the corruption of the morals of youth," the Court held that the statute was not reasonably tailored to its expressed purpose. In this case, a book arguably within the prohibited category was sold to an adult, and the Court stated that the effect of the statute was to reduce adults to reading only what is fit for children.

<sup>120</sup> *See* Bonneville Comments at 8-9; AFA Comments at 49-52; AFA Reply Comments at 34-36.

<sup>121</sup> AFA Comments at Appendices 4 and 5. In addition, Appendix 3 lists over 200 titles of videotapes available through sexually-oriented magazines.

<sup>122</sup> Broadcasters Comments at 6. *See also* PEN Comments at 8-9.

<sup>123</sup> Broadcasters Reply Comments at 3. Six of the broadcasts mentioned by Broadcasters consisted of radio talk shows, and the seventh included a live telephone conversation.

<sup>124</sup> Broadcasters Comments at 8-9.

<sup>125</sup> Broadcasters Comments at 9, citing *Schneider v. State*, 308 U.S. 147 (1939).

<sup>126</sup> Broadcasters Comments at 9-10.

<sup>127</sup> *Pacifica*, 438 U.S. at 750 n.28.

<sup>128</sup> "Wireless cable" is a relatively new service that provides multiple channels of video entertainment and informational programming using microwave frequencies and special reception equipment. Currently there are 50 or more systems operating in the United States, and numerous additional systems are planned. *See* Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, Report, MM Docket 89-600 at 53 (released July 31, 1990, FCC 90-276).

<sup>129</sup> An estimated 2.8 million home satellite dishes are in use. *Id.* at 55.

<sup>130</sup> Approximately 500,000 viewers subscribe to SMATV service. *Id.* at 57.

<sup>131</sup> *See Id.* at 56.

<sup>132</sup> *See Broadcasting*, July 16, 1990, at 94.

<sup>133</sup> We note that broadcast licensees are obligated to know and to serve the special needs of children, *see Children's Television Programming*, 55 F.R.2d 199, 214 (1984), and as a result, they appear to be uniquely able to demonstrate that children are not present in the listening or viewing audience.

<sup>134</sup> MIM also filed further reply comments.

## APPENDIX A

## The following parties filed formal comments:

1. Action for Children's Television, American Civil Liberties Union, Association of Independent Television Stations, Inc., Capital Cities/ABC, Inc., CBC, Inc., Infinity Broadcasting Corporation, Motion Picture Association of America, Inc., National Association of Broadcasters, National Broadcasting Company, Inc., National Public Radio, People for the American Way, Post-Newsweek Stations, Inc., Public Broadcasting Service, Radio-Television News Directors Association, Recording Industry Association of America, The Reporters Committee for Freedom of the Press, and Society of Professional Journalists (Broadcasters).

2. American Family Association, Inc. and Children's Legal Foundation, Inc., submitted on behalf of American Family Association, Advent Christian General Conference, Baptist General Conference, Catholic Center, Christian Standard, Conservative Congregational Christian Conference, Children's Legal Foundation, Assembly of God, Associate Reformed Presbyterian, Central Presbyterian Church, Conservative Baptist Association, Diocese of Eau Claire, Evangelical Free Church of America, General Association of General Baptists, International Pentecostal Church of Christ, North American Christian Convention, Wesleyan Church, General Association of General Baptists, General Conference Mennonite Church, Missionary Church, and Open Bible Standard Churches (AFA).

3. Arizona Board of Regents for Benefit of the University of Arizona, Arkansas Educational Television Commission, Board of Regents of the University of Houston System, Board of Trustees of the University of Illinois, Council for Public Television, Channel 6, Inc., Greater Dayton Public Television, Inc., Maryland Public Television, Milwaukee Area District Board of Vocational, Technical and Adult Education, Nebraska Educational Telecommunications Commission, The Ohio State University, Public Television 19, Inc., The Regents of the University of New Mexico and the Board of Education of the City of Albuquerque, New Mexico, St. Louis Regional Educational and Public Television Commission, The University of Nebraska, WITF, Inc., and WSKG Public Telecommunications Council, in a pleading entitled "Joint Comments of Noncommercial Parties" (Joint Parties).

4. Bonneville International Corporation (Bonneville).
5. Capital Cities/ABC, Inc. (ABC).
6. Cohn and Marks Law Firm (C&M).
7. Cox Enterprises, Inc. (Cox).
8. Marc Dyer (Dyer).
9. Evangelical Free Church of America (Evangelical).
10. Gospel Opportunities Inc. (Gospel).
11. Kennedy Broadcasting, Inc. (Kennedy).
12. Morality in Media, Inc. (MIM).
13. John W. Olivo, Jr. (Olivo).
14. Pacifica Foundation, the National Federation of Community Broadcasters, P.E.N. American Center, and Allen Ginsberg (Pacifica).
15. P.E.N. American Center, William S. Burroughs, Allen Ginsberg and Michael McClure (PEN).

16. Post-Newsweek Stations, Inc. (Post).
17. United States Catholic Conference (USCC).
18. University of California Radio Network and Station KDVS-FM (KDVS).

## The following parties filed formal reply comments:

1. Broadcasters.
2. AFA.
3. American Academy and Institute of Arts and Letters statement.
4. Lynda Beams (Beams).
5. Central Communications and Electronics, Inc. (Central).
6. City Lights Booksellers & Publishers, Sandra Lee Golvin, David H. Halperin, Eileen Myles, Ron Padgett and Patrick Zale (City Lights).
7. Allen Ginsberg.
8. Barbara M. Hattemer (Hattemer).
9. Kenneth C. Hill.
10. KDVS.
11. MIM.<sup>134</sup>
12. National Religious Broadcasters (NRB).
13. PEN.
14. Salem Communications Corporation and Focus on the Family (Salem).