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

In the Matter of	)	
	)	
Complaints Against Various Broadcast Licensees Regarding their Airing of the "Golden Globe Awards" Program	)))	File No. EB-03-1H-0110

TO: The Commission

COMMENTS OF PUBLIC BROADCASTERS ON PETITIONS FOR RECONSIDERATION

The Association of Public Television Stations, Community Television of Southern California (KCET), Educational Broadcasting Corporation d/b/a Thirteen/WNET New York, Greater Washington Educational Telecommunications Association (WETA), KCTS Television, KQED, Inc., Oregon Public Broadcasting, the Public Broadcasting Service, Twin Cities Public Television, Inc. (TPT) and WGBH Educational Foundation (collectively, "Public Broadcasters") recognize the complexity of the task before the Commission in this proceeding.[1] There is no more sensitive area for government than reconciling the limited content regulation authorized by Congress[2] with the First Amendment and the Communications Act's prohibition against censorship.[3] We do not take a position on the merits of the *Order*, and we do not file these comments to add to the constitutional and legal arguments set out in the petitions. Rather, we file these comments to illustrate the extremely problematic and unintended effects that a lack of

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[1] In re *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Memorandum Opinion and Order, 19 FCC Rcd. 4975 (2004) (the "*Order*").

[2] *See* 18 U.S.C. § 1464 (2002).

[3] *See* 47 U.S.C. § 326 (2002).

measure in a Commission decision in this sensitive area can have on the production and presentation of serious news, documentary, dramatic, science and cultural programming.

The public television system consists of 357 noncommercial television stations serving the public in all 50 states and receiving national programming through PBS and other program distributors. Some of the most highly regarded programming in the United States is broadcast free over the air by public television stations. Last year, for example, PBS led the television industry for the sixth consecutive year with 10 daytime Emmy awards; its producers won seven news and documentary Emmys, leading in this category for the third consecutive year; and it won eight prime-time Emmys for its dramatic programming. It won eight George Foster Peabody awards, more than twice the number won by any commercial network, and three Alfred I. duPont-Columbia University awards for its news programming. Last year, President Bush presented public television Station KLRU(TV), Austin, Texas, with the National Medal for the Arts for the PBS series *Austin City Limits*, the first television program to be so honored in the 20 years since that award's creation. Public television programming is of great importance to the American public. In a recent representative month, for example, 70.9 percent of television-owning families in the United States -- 75.7 million households representing almost 144 million people -- watched public television for an average of more than seven and one-half hours per month. And in the Roper survey released in February 2004, PBS was given the public's top ranking for trustworthiness among public institutions.

Public Broadcasters take our responsibility to the American public seriously. This responsibility, to be sure, requires public television programming to take into account the tastes and sensibilities of our audiences. Yet, our responsibility to the

public requires a parallel faithfulness to the sometimes painful reality of the subjects on which we report in news, science and documentary programming. It also requires a parallel dedication to ensure that our cultural and dramatic programming reflects the true nature of artistic and dramatic endeavor and of life itself. It requires, in short, that our commitment to ensuring that our programming is tasteful and not offensive must not prevent our programming from achieving its core mission of educating and enlightening our audiences. We have struck this balance carefully and, so far, successfully. To date, no public television station has had an adjudicated finding of indecency entered against it. Indeed, historically our audiences have expected us to speak to serious and mature issues and to address artistic matters in uncensored terms when appropriate, and they are sophisticated enough to understand and appreciate our doing so.

The overbreadth of the Commission's decision in this docket has had the unintended consequence of undermining the balance we have struck over years of unwavering attention to careful programming practices. For the first time, producers and broadcasters of public television programming have engaged in significant self-censorship out of fear of government penalty. We have spent inordinate amounts of time scouring news, documentary and dramatic programming for words and visual elements that might be found to be "indecent" in isolation, despite clear support in the context of the work, and for words that might be found to be "profane." We have been forced, at increased expense, to provide multiple nationwide feeds of programs that would have been unthinkable to edit only weeks ago. In some cases, we have had to re-review upcoming programs that have aired in tne past -- even as long as a decade ago -- to no complaint or controversy. As a result of these efforts to comply with the Commission's

new policies on indecency and profanity, some of our stations have been criticized by their audiences, not for airing programming that is "edgy" or too mature, but for engaging in "censorship" by editing programs.[4]

These efforts have been required in programming that is of exceptionally high quality and that present issues of overwhelming public importance. For example:

- It was necessary to determine whether to edit for language a *Frontline* documentary produced by WGBH about the workings of the Al Qaeda terrorist network because it included videotape of the second plane crashing into the World Trade Center and an expletive uttered by a horrified onlooker.

- An episode of *NOVA*, an award-winning science series produced by WGBH, contained dramatic footage from the Iraq war showing a bomb exploding near a convoy. An enraged and shocked U.S. soldier yelled to his commanding officer that a nearby Iraqi was "lying" and used the "f-word." Despite the raw battlefield context and the extraordinary news value of the footage, editing the program in light of the current environment was considered.

- Even a program as innocuous as *Antiques Roadshow* has presented issues that have had to be considered. A segment involving a famous

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[4] As an example, consider this comment received from a viewer of Station WGBH(TV):

> "*Prime Suspect* was another HUGE reason NOT to contribute to WGBH. Helen Mirren's salty character, Jane Tennison, had every word deemed 'off color' deleted by WGBH censors. Now I know why I watch BBC America and NOT WGBH. I have given up on PBS and WGBH."

Consider also this comment received by Station WNET(TV):

> "While we very much appreciate you showing *Prime Suspect*, we do not appreciate the censorship of language in the show. My wife and I have been past members of WNET (and WHYY and NJN), but will not renew our membership as long as your censorship policy remains in place."

Yet another viewer comment on the same topic from KCET(TV):

> "I just now finished viewing KCET's airing of *Prime Suspect* on *Masterpiece Theatre* and was very disappointed to have noted multiple audio deletions occurring in the dialogue of *Prime Suspect*. I presume that since KCET and PBS present *Prime Suspect* on a program that they call *Masterpiece Theatre*, KCET and PBS must consider *Prime Suspect* to be a masterpiece. Are KCET and PBS in the habit of censoring masterpieces? If not, why did they delete portions of the dialogue occurring in *Prime Suspect*?"

50-year-old lithograph depicting a nude celebrity had to be considered for editing, despite the fact that it had run months ago to no complaint.

- KCET recently produced *The Gin Game* by D.L. Coburn for national broadcast as part of the series *PBS Hollywood Presents*. When the play was originally produced in 1978, it garnered four Tony nominations and was awarded the Pulitzer Prize for drama. This version, starring Dick Van Dyke and Mary Tyler Moore, was broadcast before the Commission's new policy was announced without editing in many communities but now must be reconsidered.

- Other issues that have required extensive attention have included whether the written correspondence of an infamous child killer, in a *Frontline* segment exploring his motivations, had to be obscured because the "f-word" was slightly visible on the screen, and whether the "f-word" being silently mouthed and said in a foreign language, in a serious dramatic program, violated the Commission's policies.

In each of these cases, the word or image in controversy was an integral part of a program of exceptional quality and public importance. Yet, serious and intensive consideration had to be given to editing these programs because of the Commission's new policies.

This self-censorship by public television producers and broadcasters, who have a longstanding, demonstrated and consistent track record of offering quality, stimulating and educational programming, has resulted in a loss to the public television system and to the public we serve. We point this out because it is critical to recognize that the Commission's new policies do not affect only commercial entertainment programs and live radio personalities battling for ratings. Serious news and documentary programming has been subjected to significant pressures and amendment as well.[5] It is true, of course, that instances of words such as the "f-word" in news and documentaries

[5] This appears to have been a result that the *Order* sought to avoid. *See Order* ¶ 11 & n. 30 ("We do not envision that today's action will lead to licensees abandoning program material solely over uncertainty surrounding whether the isolated use of a particular word is indecent").

are rare.[6] But they occur, as they do inevitably in everyday life. The Commission's new questioning of the importance of the context in which language occurs can require the editing of legitimate news and documentary programming and, by extension, the redaction of the historical record.

It also must be recognized that the Commission's questioning of the essential role of context as a significant limiting factor in these determinations affects not only footage that might include the particular word dealt with in the *Order*, but also footage that includes other mature language. This is particularly true given the unbounded nature of the Commission's newly announced "profanity" standard. Public stations simply cannot afford to take the risk of broadcasting any material that could violate this broad new standard, regardless of the program's artistic merit, historical accuracy or newsworthiness, when the decision to broadcast could result in defense costs and fines. This is particularly the case when those fines are issued on a per-utterance basis and could be escalated significantly by Congress.

In dramatic programming, too, public broadcasting has a unique mission. Longstanding dramatic programs such as *Masterpiece Theatre*, as just one example, are

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[6] The impact of the *Order* on news programming is less than clear. In the *Order*, the Commission did not include the *Peter Branton* decision, Letter from Donna R. Searcy, Secretary, FCC, to Peter Branton, 6 FCC Rcd 610 (1991), on the list of decisions from which it was departing, *see Order* ¶ 12 nn. 31 & 32, and implied in another decision released the same day as the *Order* that *Peter Branton* was still good law. *See* In re *Infinity Radio License, Inc., Licensee of Station WLLD(FM), Holmes Beach, Florida*, File No. 99090433, FCC 04-48, ¶ 9 (Mar. 18, 2004) (holding that Infinity's live broadcast of material describing a sexual activity was indecent but finding that "[b]y comparison, the utterances cited in *Branton* were not presented in a vacuum, but during a news story concerning organized crime. Listeners were warned about the rough language and informed, *inter alia*, that Mr. Gotti's words came from a wiretap recording of material that the government had used as evidence at Mr. Gotti's trial."). The *Order*'s discussion of *Branton* was, however, ambiguous. *See Order*, ¶ 9 & n. 25 ("This is not to suggest that the fact that a broadcast had a social or political value would necessarily render use of the 'F-Word' permissible").

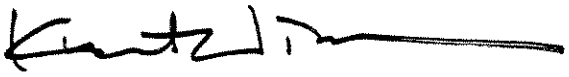
among the premiere noncommercial and non-subscription venues for high-quality U.S. and international dramatic programming. Public broadcasting stations around the country regularly broadcast exceptional dramatic programming across their schedules. Again, the Commission's new policies have forced new processes for reviewing highly prized dramatic programming that are both time consuming and invasive into areas of artistic integrity that traditionally rely on the sensitivity and discretion of program producers rather than the judgments of lawyers. Dramatic programs that have been suitable for audiences around the world, and which would have been entirely appropriate for U.S. audiences up through the immediate past, now have been called into question. Award-winning producers have begun expressing serious doubts about whether free, over-the-air television still provides an appropriate venue for the best of the world's dramatic programming.

The "safe harbor" does not provide a ready answer to the struggle of editing serious television programming for our audiences. It is simply impossible for all public television programming that deals with serious themes and issues, or that might contain, in context, mature language, to air after 10:00 p.m. This is particularly true in time zones where "prime time" *ends* at 10:00 p.m.

We do not question the Commission's authority to regulate broadcast indecency. But the extraordinary burden that overly broad findings of indecency place on serious producers of news, science, documentary, culture and dramatic programming suggests that the Commission should reconsider its policies so as to tailor narrowly its decisions to the facts at hand. The breadth of the *Order* will lead to a process by which free broadcast television requires scores of lawyers to screen program material with little

assurance that the public will ultimately receive the high-quality programming it expects and to which it is entitled from our nation's public television system. We urge the Commission to bear in mind the unintended consequences that result from overly broad content decisions as it undertakes its sensitive duty in this docket and others like it.

Respectfully submitted,



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I hereby certify that a copy of the foregoing Comments of the Public Broadcasters on Petitions for Reconsideration was sent via first-class, U.S. mail on this 4th day of May, 2004, to the following:

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KCRA-TV
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KETK-TV
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KFOR-TV
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KHAS-TV
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KING-TV
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