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

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
COMPLAINTS AGAINST VARIOUS )  
BROADCAST LICENSEES REGARDING )  
THEIR AIRING OF THE "GOLDEN GLOBE )  
AWARDS" PROGRAM )

File No. EB-03-IH-0110

To: The Commission

**COMMENTS OF THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION IN  
SUPPORT OF PETITIONS FOR RECONSIDERATION**

The Radio-Television News Directors Association ("RTNDA"), by its attorneys, and pursuant to Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, hereby submits its comments in support of the Petition for Reconsideration and Petition for Partial Reconsideration (collectively, the "Petitions") filed by the American Civil Liberties Union *et al.* and the National Broadcasting Company (collectively, "Petitioners"), respectively, in the above-captioned proceeding. RTNDA is the world's largest professional organization devoted exclusively to electronic journalism. RTNDA represents local and network news executives in broadcasting, cable and other electronic media in more than 30 countries. RTNDA submits these comments to emphasize to the Commission the deleterious and chilling effect its Memorandum Opinion and Order in *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, FCC 04-43 (March 18, 2004) (the "Golden Globes Order") has had and will have on broadcast journalism.

Indeed, it has been RTNDA's practice over the past three decades, as courts have considered this sensitive aspect of broadcast content regulation and as the Commission's indecency rules and policies have evolved accordingly, to stress, both before the courts and

before the Commission, that efforts to regulate indecent programming must be tailored so as not to limit accurate and insightful reporting.<sup>1</sup> RTNDA submits that in its *Golden Globes Order*, the Commission has violated the precept that the government must tread lightly where it ventures into the area of broadcast censorship.

While the United States Supreme Court held in *FCC v. Pacifica Foundation*<sup>2</sup> that the FCC may constitutionally regulate indecent broadcasts, the relevant judicial foundation also specifically and emphatically recognizes how limited is the scope of the accommodation to the demands of decency. The Court afforded the FCC some latitude in regulating indecent broadcasts because it expected the agency to “proceed cautiously” and to consider carefully the chilling effect any standards it adopted would have on broadcast speech.<sup>3</sup> Since *Pacifica*, the Court has made clear that content-based regulations of protected speech require the strictest forms of review, and noted that “encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.”<sup>4</sup>

Thus, FCC indecency enforcement traditionally has walked the fine line between restricting the broadcast of “indecent” material into homes at times when children may be watching and upholding the First Amendment protections to which such speech is entitled. While the FCC never has chosen specifically to exempt news and public affairs programming

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<sup>1</sup> See, e.g., *FCC v. Pacifica Foundation*, 428 U.S. 726 (1978); *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988); *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991) (RTNDA participating as *amicus curiae*). See also *Peter Branton v. FCC*, 72 RR 2d 1259 (D.C. Cir 1993) (RTNDA participating as Intervenor); *RTNDA Petition for Clarification or Reconsideration of a Citizen's Complaint against Pacifica Foundation, Station WBAI(FM), New York, NY*, 59 F.C.C. 2d 892 (1976).

<sup>2</sup> 438 U.S. 726 (1978).

<sup>3</sup> *Id.* at 761 (Powell, J., concurring).

<sup>4</sup> *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 826 (2000); *Reno v. ACLU*, 521 U.S. 844, 855 (1997).

from indecency enforcement, it has accorded considerable deference to the reasonable good faith judgments of broadcasters. Consistent with *Pacifica's* teaching, the Commission repeatedly has emphasized that the “context” in which complained-of material appears is critically important.<sup>5</sup> Consequently, the agency has rejected the idea that discrete words and phrases, in and of themselves, are indecent *per se*, in the absence of a contextual framework.<sup>6</sup> Under this approach, FCC staff actions held that isolated or fleeting utterances of curse words during a newscast or a live interview, or where such language might be integral to a *bona fide* news story, were not indecent.<sup>7</sup>

The *Golden Globes Order*, however, eschews the measured and restrained approach to indecency enforcement mandated by *Pacifica* and subsequent cases.<sup>8</sup> While paying lip service to the notion that “[t]he First Amendment is a critical constitutional limitation that demands that . . . [the FCC] proceed cautiously and with appropriate restraint,”<sup>9</sup> the Commission proceeds to overturn years of well-reasoned precedent by creating strict liability for certain words regardless of their fleeting nature or context. In addition, the *Golden Globes Order* announces an “independent ground” for regulating broadcast content and creates a vague and disturbing new definition of “profanity,” which now includes, among other things, “vulgar and coarse language,” or language that is “so grossly offensive to members of the public who actually hear

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<sup>5</sup> *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency* (“*Indecency Policy Statement*”), 16 FCC Rcd 7999, 8002 (2001).

<sup>6</sup> *Id.*

<sup>7</sup> See, e.g., *Peter Branton*, 6 FCC Rcd 610 (1991) (subsequent history omitted); *Lincoln Dellar, Renewal of License for Stations KPRL(AM) and KDDB(FM)*, 8 FCC Rcd 2852 (1993).

<sup>8</sup> See *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (“*ACT I*”); *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 913 (1992) (“*ACT II*”).

<sup>9</sup> *Golden Globes Order* ¶ 5.

it as to amount to a nuisance.”<sup>10</sup> Most importantly, in determining that Bono’s fleeting and isolated use of the “F-word” during the Golden Globes telecast was “indecent” and “profane” regardless of context, the FCC appears to have abandoned, as Petitioners note, those interpretive restraints that have served to ensure that its policies do not cross the constitutional line.<sup>11</sup> The Commission’s actions have further muddied the already vague definition of indecency, left broadcasters to guess which words and phrases will subject them to strict liability, and offers no guidance as to when, if ever, the context of a given program will outweigh its presumed offensiveness.

The background of the *Golden Globes Order*, its constitutional infirmities, and its already chilling effect on broadcast entertainment programming have been addressed at length by Petitioners and will not be repeated herein. Lest the Commission assume that the censorial effects of its decision will not reach broadcast newsrooms, however, RTNDA wishes to supplement the record with a discussion of how the *Golden Globes Order* has and will exert a substantial chilling effect on this particular area of constitutionally-protected speech.

As stated above, it is now apparently the Commission’s position that certain words are *per se* so offensive that any consideration of the context in which they were spoken is irrelevant. As a result, the *Golden Globes Order* directly conflicts with the FCC’s longstanding abhorrence for interfering with the editorial discretion of broadcasters. In 1991, for example, the Commission dismissed a complaint filed against National Public Radio (“NPR”) alleging that a segment about reputed organized crime figure John Gotti was indecent.<sup>12</sup> The program

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<sup>10</sup> *Golden Globes Order* ¶ 13.

<sup>11</sup> *ACLU Petition* at 8.

<sup>12</sup> *Peter Branton*, 6 FCC Rcd 610 (1991) (subsequent history omitted) (“*Gotti*”).

contained a wiretap of a telephone conversation in which Gotti reportedly used variations of the word "fuck" ten times in seven sentences. The FCC "recognize[d] that the repetitious use of coarse words is objectionable to many persons," and acknowledged that the complainant may have been offended. Still, the Commission found that the use of such words in a legitimate news report was not "patently offensive." The Commission explicitly noted that it had been "reluctant to intervene in the editorial judgments of broadcast licensees on how best to present serious public affairs programming."<sup>13</sup>

Indeed, implicit in the *Gotti* decision was the FCC's deference to NPR's editorial judgment that airing this piece of tape without deletion was necessary to inform the audience and to establish the character of the alleged leader of a New York organized crime syndicate. Similarly, the Commission held that a licensee's decision, after careful consideration, to air "Murder at Kent State" (which contained offensive language) was appropriate, since the language was not broadcast for shock or sensationalism, but rather for the purpose of presenting a vivid and accurate account of a disastrous incident in our nation's history.<sup>14</sup>

Broadcast journalists make editorial decisions like these every day, and they are determinations that, consistent with the fundamental principles embodied in the First Amendment, should be left to journalists. The First Amendment exists to protect the people from the government, not to protect the public from the media. Where journalists are not responding appropriately to the needs and sensitivities of the listening and viewing public, there exist any number of means through which the public may voice its discontent without invoking

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<sup>13</sup> *Id.* at 611 (quoting *Syracuse Peace Council*, 2 FCC Rcd 5043, 5051 (1987), *recon. denied*, 3 FCC Rcd 2035 (1988), *aff'd sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 107 L.Ed. 2d 737 (1990)).

<sup>14</sup> *Jack Straw Memorial Foundation*, 29 FCC 2d 334 (1971).

government censorship, the simplest being hitting the “off” button, turning the dial, or changing the channel.

Broadcast journalists historically have exercised reasonable judgment, responsibility and sensitivity to the public's needs and tastes in their newscasts. Recently, a Los Angeles television station aired a story on a protest where a car was vandalized and marked with a slew of expletives. The car was shown during the story but with the expletives digitally tiled so they could not be read. That decision was made prior to the *Golden Globes Order*. It was the judgment of the journalists involved that the story could be told effectively without showing the expletives.

In other instances, however, it may be the broadcaster's judgment that depicting epithets or including vulgar or coarse language is integral to a story. Last month, President Hugo Chavez of Venezuela characterized President Bush as a “pendejo.” While reported translations of the word “pendejo” have varied from “idiot,” to “asshole,” to “dick,” the word is, by all accounts, “vulgar.” Unlike their newspaper, online and print brethren, however, under the regulatory regime announced in the *Golden Globes Order*, broadcast journalists are forced to wrestle with additional and unconstitutional constraints in relating the newsworthy incident to the public. Given the ambiguous nature of the Commission's decision and the severe nature of potential penalties, it is not absurd to suggest that broadcasters—uncertain as to whether the use of “pendejo” or its English translations would incur FCC sanctions—might avoid the story altogether, or reduce it to the banal (“President Chavez called President Bush a bad word.”). Similarly, broadcasters might refrain from presenting stories involving sex education, or medical pieces concerning, for example, mammograms, sexually transmitted diseases, or safe sex. In the current regulatory environment, it is probable that, given the language contained in scenes from

inside the World Trade Center, licensees would be hesitant if not unwilling to broadcast CBS's compelling documentary "9/11." To include such language was, in the judgment of the filmmakers and journalists involved, critical to portraying accurately the events of that day.

Certainly, the "play it safe" attitude engendered by the *Golden Globes Order* strikes at the heart of broadcast news which, by its very nature, is live and uncensored. RTNDA members are being forced to rethink entirely how they present local and national news. In the past, the FCC wisely recognized that "in some cases, public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing."<sup>15</sup> In those instances, the Commission stated that it would be "inequitable to hold a licensee responsible for indecent language."<sup>16</sup> Now, the Commission appears to have retreated entirely from that position. The *Golden Globes Order*, combined with the specter of enterprise-threatening fines and license revocation, will make broadcasters hesitant to use audio and video actualities of angry political demonstrations, and even structured political debate, interviews and conversations. Given the risk that certain "offensive" language might be heard on the battlefield, had the Commission issued the *Golden Globe Order* a year ago, it is questionable whether we would have seen the compelling live reports of journalists embedded with U.S. troops in Iraq. Broadcast journalists will be hesitant to cover those persons who, for whatever reason, may publicly use language that the Commission may consider to be indecent or now, "profane." And we may no longer hear live audio or see live footage from coverage of an arraignment or trial, an emotionally charged demonstration, a locker room interview, or the scene of breaking news such as a disaster or terrorist attack.

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<sup>15</sup> *RTNDA Petition for Clarification or Reconsideration of a Citizen's Complaint against Pacifica Foundation, Station WBAI(FM), New York, NY*, 59 F.C.C. 2d 892 (1976).

<sup>16</sup> *Id.*

The FCC offers as a solution to the “live problem” the suggestion that networks and broadcasters undertake to delay broadcasts “for a period of time sufficient for them to effectively bleep the offending word.”<sup>17</sup> As a preliminary matter, implementing such a delay will be costly and inefficient for most local broadcasters. Others, however, may feel they have no choice under the FCC’s new enforcement standards. LIN Television, for example, this week announced that it had purchased equipment to impose a delay on all of its news and sports programming.<sup>18</sup> LIN’s President is quoted as saying, “[n]ews organizations can’t control what is being said on the air all the time.” Indeed, they cannot and should not. To suggest that coverage of news events be sanitized, as the Commission has now done, is in and of itself a form of censorship. The *Golden Globes Order* has the practical effect of altering the very nature of broadcast news, which relies heavily on live reporting. The Commission’s action threatens to dilute the first-hand, eyewitness images, sounds and accounts unique to broadcast journalism, and inevitably will result in the public receiving less information. RTNDA submits that the government’s interest in protecting children from those relatively rare instances where language that may potentially be offensive to some makes its way into a story simply cannot justify eviscerating the live broadcast, long heralded as a hallmark of our free society.

Finally, the FCC states that it does not “envision that today’s action will lead to licensees abandoning program material solely over uncertainly surrounding whether the isolated use of a particular word is indecent.”<sup>19</sup> The Commission could not be more wrong. As stated above, while the FCC prefaces its *Golden Globes Order* with the statement that its role in regulating

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<sup>17</sup> *Golden Globes Order* ¶ 11.

<sup>18</sup> Steve McClellan, *LIN Will Delay News, Sports*, BROADCASTING & CABLE, April 26, 2004.

<sup>19</sup> *Golden Globes Order* n. 30.



broadcast content is necessarily limited, it proceeds to rule that the utterance of the F-Word on television without regard its fleeting nature or context violates its indecency rules, overturns years of precedent, and leaves broadcasters guessing as to what other words or depictions might subject them to similar strict liability. While possible in some future scenario that the Commission will conclude that a particular program was not actionably indecent "in context," it is clear that no broadcaster wants to be the test case. "When in doubt, leave it out" will inevitably govern in many instances. Certainly a broadcast licensee will now be more inclined to avoid certain topics or types of coverage rather than risk prolonged administrative and judicial proceedings to vindicate the First Amendment freedoms of itself and its audience. And station owners and managers will be less likely to support the editorial discretion exercised by their newsrooms in the name of good journalism where a "wrong guess" could result in a \$500,000 (or multiple thereof) fine or the loss of a station's license.

Such a chilling result, particularly given the tenuous nature of the constitutional basis on which the FCC regulates broadcast content, is unacceptable. In its haste to curb the gratuitous use of "vulgar and coarse" language on radio and television, the *Golden Globes Order* has had and will continue to have the practical effect of making broadcast journalism less accurate, less insightful, and less thought provoking. "Reduc[ing] the adult population to seeing and hearing only what is fit for children,"<sup>20</sup> as the Commission has now done, is constitutionally impermissible.

In sum, RTNDA submits that the FCC indecency enforcement policy as announced in the *Golden Globes Order* deserves the public and violates the First Amendment rights of broadcast journalists. As the Supreme Court has duly recognized, "it is a characteristic of speech such as

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<sup>20</sup> *ACT I*, 852 F.2d at 1335.

this that both its capacity offend and its social value vary with circumstances.”<sup>21</sup> The *Golden Globes Order* is ambiguous as to whether any contextual factors, such as newsworthiness, are to be taken into consideration, and offers no protection for other forms of live or informative programming. Our system of government demands more when rights protected by the First Amendment are curtailed.

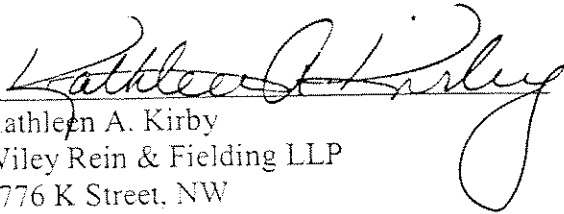
When dedicated journalists who use radio and television to bring news and information to their audiences broadcast language the FCC might now consider “indecent” or “profane” because, in their considered judgment, it is important in the context of the programming, or inadvertently permit its use under circumstances, it is not in the public interest to penalize them. Indeed, to do so violates the Communications Act and the Constitution. The *Golden Globes Order* is misguided and inconsistent with those fundamental principles of free speech on which our society is based. RTNDA urges the Commission to reconsider its decision so as to bring its use of indecency regulatory within constitutional bounds, and to remove the current chilling effect on broadcast speech, including news programming.

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<sup>21</sup> *Pacifica*, 478 U.S. at 738.

Respectfully submitted,

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April 29, 2004

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments in Support of Petitions for Reconsideration of the Radio-Television News Directors Association was sent via first-class, U.S. mail on this 29<sup>th</sup> day of April 2004 to the following:

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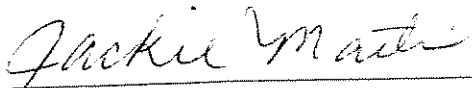
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KARE  
Multimedia Holdings Corporation  
7950 Jones Branch Drive  
McLean, VA 22107

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

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

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

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

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

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

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

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

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

KFOR-TV  
New York Times Management Svcs.  
Corp. Center 1  
2202 NW Shore BLVD., #370  
Tampa, FL 33607

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

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

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

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

WNBC, et al.  
National Broadcasting Company, Inc.  
1299 Pennsylvania Avenue, NW  
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Washington, DC 20004

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

KOB-TV  
KOB-TV, LLC  
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St. Paul, MN 55114

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

KRBC-TV  
Mission Broadcasasting, Inc.  
544 Red Rock Drive  
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KRIS-TV  
KVOA Communications, Inc.  
409 South Staples Street  
Corpus Christi, TX 78401

KTGF  
MMM License LLC  
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KSDK  
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Hampton, VA 23669

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Sioux City, IA 51105

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KWES-TV  
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KWWL  
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KYTV  
KY3, Inc.  
999 West Sunshine Street  
Springfield, MO 65807

WANE-TV  
Indiana Broadcasting, LLC  
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Providence, RI 02906

WAVE  
Libco, Inc.  
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WBBH-TV  
Waterman Broadcasting Corp. of Florida  
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Fort Myers, FL 33901

WBOY-TV  
West Virginia Media Holdings, LLC  
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Charleston, WV 25339

WBRE-TV  
Nexstar Broadcasting of NE PA, LLC  
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Irving, TX 75039

WCNC-TV  
WCNC-TV, Inc.  
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Dallas, TX 75202



WCSH  
Pacific & Southern Co., Inc.  
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WCYB-TV  
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WDIV-TV  
Post-Newsweek Stations, Michigan, Inc.  
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WDSU  
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New York, NY 10106

WESH  
Orlando Hearst-Argyle Television, Inc.  
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WFIE  
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WFLA-TV  
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WFMJ-TV  
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WGAL  
WGAL Hearst-Argyle Television, Inc.  
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WHDH-TV  
WHDH-TV Government Center  
7 Bulfinch Place  
Boston, MA 02114

WHEC-TV  
WHEC-TV, LLC  
c/o Hubbard Broadcasting, Inc.  
3415 University Avenue  
St. Paul, MN 55114

WHO-TV  
New York Times Management Svcs.  
Corporate Center 1  
2202 NW Shore Blvd., #370  
Tampa, FL 33607

WILX-TV  
Gray MidAmerica TV Licensee Corp.  
500 American Road  
Lansing, MI 48911

WJFW-TV  
Northland Television, Inc.  
P.O. Box 858  
Rhineland, WI 54501

WKYC-TV  
WKYC-TV, Inc.  
c/o Gannett Co.  
7950 Jones Branch Drive  
McLean, VA 22107

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

WMC-TV  
Raycom America, Inc.  
RSA Tower, 20<sup>th</sup> Floor  
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Montgomery, AL 36104

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

WMGT  
Endurance Broadcasting, LLC  
c/o Dan Smith  
104 North Main Street  
Stillwater, MN 55082

WMTV  
Grady MidAmerica TV Licensee Corp.  
615 Forward Drive  
Madison, WI 53711

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

WNYT  
WNYT-TV, LLC  
c/o Hubbard Broadcasting, Inc.  
3415 University Avenue  
St. Paul, MN 55114

WOOD-TV  
Wood License Company, LLC  
120 College Avenue, S.E.  
Grand Rapids, MI 49503

WOWT-TV  
Gray MidAmerica TV Licensee Corp.  
3501 Farnam Street  
Omaha, NE 68131

WPXI  
Clear Channel Broadcasting Licenses, Inc.  
2625 South Memorial Drive #A  
Tulsa, OK 74129

WPXI  
WPXI-TV Holdings, Inc.  
3993 Howard Hughes Park #250  
Las Vegas, NV 89109

WRCB-TV  
Sarkes Tarzian, Inc.  
205 North College Avenue  
Bloomington, IN 47402

WRIC-TV  
Young Broadcasting of Richmond, Inc.  
301 Arboretum Place  
Richmond, VA 23236

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

WSAZ-TV  
Emmis Television License Corporation  
3500 West Olive Avenue #300  
Burbank, CA 91505

WSFA  
Libco, Inc.  
639 Isabel Road #390  
Reno, NV 89509

WSMV-TV  
Meredith Corp., Television Stations  
1716 Locust Street  
Des Moines, IA 50309

WTHR  
VideoIndiana, Inc.  
1000 North Meridian Street  
Indianapolis, IN 46204

WTMJ-TV  
Journal Broadcast Corporation  
3355 S. Valley View Boulevard  
Las Vegas, NV 89102

WTVY  
Gray MidAmerica TV License Corp.  
P.O. Box 1089  
Dothan, AL 36302

WVLA  
Knight Broadcasting of Baton Rouge Lic. Corp.  
700 St. John Street #301  
Lafayette, LA 70501


WWBT  
Jefferson-Pilot Communications Co. of VA  
P.O. Box 12  
Richmond, VA 23212

WWLP  
WWLP Broadcasting, LLC  
4 Richmond Square  
Providence, RI 02906

WXIA-TV  
Gannett Georgia, LP  
c/o Gannett Co., Inc.  
7950 Jones Branch Drive  
McLean, VA 22107

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

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