

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

**STAMP & RETURN
RECEIVED**

APR 19 2004

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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
File No. EB-03-IH-0110

To: The Commission

PETITION FOR PARTIAL RECONSIDERATION

I. INTRODUCTION

National Broadcasting Company, Inc. ("NBC"), by its attorneys and pursuant to Section 1.106(b) of the Commission's rules, hereby petitions on behalf of itself and its owned and operated affiliated stations for reconsideration of certain aspects of the Commission's 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 "*Order*").

The Commission was correct in ruling that there was no legal basis for imposing a forfeiture or any other penalty, either now or in the future, against NBC or NBC affiliates because of the airing of the 2003 Golden Globe Awards program in which U2 lead singer Bono exclaimed the f-word. The Commission refused to fine NBC for multiple reasons, including fundamental issues of notice and retroactivity. This decision was solidly grounded in common sense and a long line of constitutional and administrative precedent.

The remainder of the *Order*, however, raises serious constitutional, policy, and regulatory concerns. In previous decisions upholding the FCC's past efforts to regulate indecency as

developed in *FCC v. Pacifica*¹ and subsequent rulings,² the courts have imposed a high hurdle for what constitutes permissible content regulation. In particular, the courts have stressed that even in the context of the broadcast medium, the FCC must identify a compelling governmental interest that warrants regulation and must explain how the regulations were narrowly tailored to serve those interests effectively.³ Remarkably, the *Order* significantly expands content regulation without even attempting to meet this judicial standard or acknowledging all the relevant changes in the broadcasting environment since *Pacifica*, including v-chip blocking technology and the broad availability of television programming not subject to Section 1464.⁴ In particular,

1. The *Order* contradicted years of precedent by creating strict liability for certain offensive words regardless of their fleeting nature or context. This policy reversal is ambiguous as to whether it preserves the Commission's long-standing news programming safe harbor and appears not to protect other forms of time-critical or informative programming.
2. The *Order* suggested a sweeping new definition of profane utterance that has never been cited in any prior Commission case involving allegedly offensive language, even those in which no action was taken under the Commission's indecency policy.

¹ 438 U.S. 726 (1978).

² See, e.g., *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*").

³ *ACT I*, 852 F.2d at 1343 n.18; *ACT II*, 932 F.2d at 1508-09; see also *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989) ("The 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") (holding unconstitutional blanket ban on indecent commercial telephone message services).

⁴ Cf. *United States v. Playboy Entertainment Group Inc.*, 529 U.S. 803 (2000). As the Commission is aware, the v-chip has been required on all television sets 13 inches or larger manufactured since January 1, 2000. Recent studies suggest that between 6-10% of parents use the v-chip in combination with program ratings to block particular programming. See, e.g., The Annenberg Public Policy Center, University of Pennsylvania Washington, *Parents' Use of the V-Chip to Supervise Children's Television Use* (Apr. 2003); Ad Council News Release, *The Advertising Council and the Four Major Broadcast Television Networks Announce Unprecedented Partnership to Educate Parents About the V-Chip* (Mar. 30, 2004).

The First Amendment demands clear and narrowly tailored limitations on all protected speech, even those broadcast or otherwise communicated electronically. The *Order* does not satisfy constitutional, statutory, and administrative requirements. NBC urges the Commission to modify the *Order* to resolve these issues so as to preclude its current chilling effect on broadcast speech, including news and other live coverage.

II. THE ORDER'S APPARENT REVERSAL OF YEARS OF PRECEDENT BY CREATING STRICT LIABILITY FOR CERTAIN OFFENSIVE WORDS REGARDLESS OF THEIR CONTEXT OR FLEETING NATURE HAS NO CLEAR BASIS IN LAW OR FACT.

A. The Commission's Precedents Do Not Prohibit Isolated and Fleeting Utterances of Offensive Words.

The Commission acknowledged in the *Order* that the broadcast in question was permitted by existing precedent interpreting the statute and the rules. That precedent – including a *Policy Statement* developed over a seven-year period and issued just three years ago – consistently held that isolated and fleeting uses of the f-word in broadcasts were not actionable as indecent.⁵ Nor was there any suggestion that they would be separately actionable as “profane.” Those rulings applied in the contexts of entertainment programs as well as in newscasts, sports programming, and other types of programs.⁶ The *Order* appears for the first time to have adopted a *per se* rule

⁵ See *Industry Guidance On the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999, 8002, 8009 (2001), and cases cited therein.

⁶ See, e.g., *Peter Branton*, 6 FCC Rcd 610 (1991) (refusing to find indecent repeated use of the f-word in a broadcast of an interview with organized crime figure John Gotti); cf. *WUHY-FM*, 24 F.C.C.2d 408 (1970) (distinguishing coverage of bona fide news events from expletive-laced interview with Grateful Dead lead guitarist Jerry Garcia), *on recon.*, 59 F.C.C.2d 892, 893 (1976) (“... RTNDA's Petition calls to our attention the fact that ‘in some cases, public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing.’ Under these circumstances we believe that it would be inequitable for us to hold a licensee responsible for indecent language”).

Although the *Peter Branton* decision is not included in the list of published decisions identified in the *Order* from which the Commission now “departs,” *Order* at n.43, the *Order* nevertheless appears to create a *per se* rule that today would subject a broadcaster who aired the John Gotti interview to liability under Section 1464 and Section 73.3999. The chilling effect of such a decision is immediate and significant, as broadcasters everywhere are forced to reconsider how they may present their many hours of local and national news in light of the *Order*.

– overruling years of Commission-level precedent without adequate explanation – that disregards context and sweeps newscasts, sporting events and other live programming within its purview.⁷

Live and uncensored programming is the hallmark of a free society. Former President Jimmy Carter made headlines in 2002 when he traveled to Cuba to meet with Fidel Castro and made a plea for free speech and democratic elections in Cuba.⁸ A 70-minute exchange between President Bill Clinton and China’s President Jiang Zenin in 1998 provoked a similar reaction around the world as President Clinton probed the Chinese leader about free speech and human rights in China.⁹ What attracted worldwide attention was less the substance of the exchange than the fact that in each case the event was televised in a live uncensored broadcast on national television in a country known for its suppression of free speech and control of the press.¹⁰ In each case, the medium truly was the message.

⁷ See *Office of Communication of United Church of Christ v. FCC*, 590 F.2d 1062 (D.C. Cir. 1978) (holding that in expanding its interpretation of Section 315(a) of the Communications Act, FCC has discretion to decide whether to proceed by adjudication or rulemaking as long as Commission provides reasoned explanation of its action and interested groups who were not parties to the proceeding had an opportunity to comment), citing *Chisholm v. FCC*, 538 F.2d 349 (D.C. Cir. 1976).

⁸ See, e.g., Gregory Bull, *Bush Squeezes Cuba to Keep Miami’s “Little Havana” Sweet*, THE INDEPENDENT, May 19, 2002, at 18 (“the . . . dictator made unprecedented concessions of his own – . . . broadcasting live the former president’s call at Havana University for human rights and the restoration of democracy”); accord Mark Fineman, *Carter Hopes His Cuba Visit Fosters Ties*, LOS ANGELES TIMES, May 18, 2002, at 3; James Bone, *Castro Will Not Loosen Grip, Says Carter*, THE TIMES (LONDON), May 18, 2002; Kevin Sullivan, THE WASHINGTON POST, May 19, 2002, at A3; Tracey Eaton and Alfredo Corchado, *Cubans Weigh Carter’s Words with Cautious Optimism*, THE DALLAS MORNING NEWS, May 16, 2002.

⁹ See, e.g., Conor O’Clery, *TV Discussion of Forbidden Topics Amazes Viewers*, THE IRISH TIMES, June 29, 1998, at 9 (“Long after President Clinton has returned to the United States, millions of people in China will remember and talk about his trip here for one reason alone, the astonishing decision of the Communist Chinese government to televise live the press conference held by Mr. Clinton and the Chinese President”); accord David Lague, *China, US in Historic Debate*, THE AGE (MELBOURNE), June 29, 1998, at 1; Mary Kwang, *Chinese Press Hails “Broad Consensus,”* THE STRAITS TIMES (SINGAPORE), June 29, 1998, at 13; Simon Beck, *Early Honours Even in Beijing*, SOUTH CHINA MORNING POST (HONG KONG), June 29, 1998, at 17; Stephen Fidler and James Kynge, *Clinton in China, President Can Claim Success in Broadening “Strategic Dialogue,”* FINANCIAL TIMES, June 29, 1998, at 4; Terrence Hunt, *Debate Has Them All Talking*, THE DAILY TELEGRAPH (SYDNEY, AUSTRALIA), June 29, 1998, at 23 (“Never before had China’s 1.2 billion people seen one of their leaders arguing with a Western visitor live on state television about subjects ranging from Tiananmen Square to Tibet, human rights and trade”).

¹⁰ See *supra* notes 8 & 9.

The Commission suggests, almost in passing, that broadcasters no longer should aspire to present uncensored news or other live programming and should instead routinely employ delay mechanisms or other self-censorship. Yet the mere availability of delay technology cannot justify overruling long-standing statutory interpretation. The *per se* rule apparently established by the Commission in the *Order* inevitably will encourage a “play-it-safe” attitude by broadcasters in the exercise of their editorial judgment – a chilling effect that cannot be squared with the public interest or the Constitution. Worse, the *Order* implies, without any further guidance, that the list of “curse” words will grow over time, thus leaving broadcasters to guess at the future evolution of FCC judgments.

B. Any Per Se Rule Improperly Disregards the Critical Element of Context.

By ignoring context, the *Order's per se* rule cannot be squared with the Supreme Court's ruling in *FCC v. Pacifica*.¹¹ In *Pacifica*, the U.S. Supreme Court stressed the importance of context when it upheld the authority of the FCC to regulate the broadcast of “patently offensive words dealing with sex and excretion.”¹² In the agency ruling on appeal, the FCC had concluded that the broadcast of George Carlin's “Filthy Words” monologue included several words that referred to excretory or sexual activities or organs; that the repetitive, deliberate use of those words in an afternoon broadcast when children were in the audience was patently offensive; and that the broadcast was therefore indecent within the meaning of 18 U.S.C. § 1464. The Court agreed that the broadcast was indecent. The Court also recognized, however, that “[a]lthough these words ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment. Some uses of even the most offensive words are

¹¹ 438 U.S. 726 (1978).

¹² *Id.* at 745.

unquestionably protected. . . . Indeed, we may assume arguendo that this monologue would be protected in other contexts.”¹³

Pacifica stands for the proposition that, even in the case of offensive words that are by their nature not entitled to absolute constitutional protection, the *context* of such speech must be considered in order to determine whether FCC censorship is constitutionally permissible: “This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. *We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution.* The Commission’s decision rested entirely on a nuisance rationale under which context is all-important.”¹⁴ The *per se* rule established by the *Order*, however, impermissibly disregards the context of offensive utterances.

III. THE ORDER SUGGESTED A SWEEPING NEW DEFINITION OF PROFANE UTTERANCE THAT HAS NOT BEEN CITED IN ANY PRIOR COMMISSION CASE, INCLUDING THOSE INVOLVING ALLEGEDLY OFFENSIVE LANGUAGE.

Even though the Commission acknowledged that its “limited case law on profane speech has focused on . . . blasphemy,” the agency nevertheless found as an “independent ground” for its ruling in the *Order* that Bono’s expletive on the broadcast constituted “profane” language under 14 U.S.C. § 1464. Prior to the Commission ruling, no party, including the Media Bureau, even suggested, that the language in question was profane. Nor has the Commission ever suggested, in the many cases in which the Commission found language similar to that used by Bono was not indecent, that such incidents were separately actionable as profane.

¹³ *Id.* at 746.

¹⁴ *Id.* at 750 (emphasis added). *Cf.* “*Petition for Clarification or Reconsideration*” of a Citizen’s Complaint Against *Pacifica Foundation*, 59 F.C.C.2d 892, 893 (1976) (relying on context to exempt certain offensive words in live broadcasts).

Citing the Seventh Circuit’s “most recent” decision, which was rendered over three decades ago and purportedly defined “profane” under Section 1464,¹⁵ the Commission ruled that, in the future and in addition to blasphemy or divine imprecation, “profane” will now encompass the f-word “and those words (or variants thereof) that are as highly offensive as the ‘F-Word’”¹⁶ Rather than provide examples of what such words might be, however, the FCC stated that it would “analyze other potentially profane words or phrases on a case-by-case basis.”¹⁷ This ruling is impermissibly vague.

As for the Seventh Circuit’s “most recent” decision, that involved a case dealing with a criminal conviction for obscenity, not indecency. Accordingly, the decades-old Seventh Circuit’s proffer of a definition in its opinion was nothing more than dicta and should not be the basis for any Commission action.

The Commission also impermissibly collapsed the distinct meanings of “obscene, indecent, or profane” in Section 1464, thereby exacerbating the vagueness of the new standard for profane material. The Supreme Court in *Pacifica* stated that “the words ‘obscene, indecent, or profane’ are written in the disjunctive, implying that each has a separate meaning.”¹⁸ The variety of definitions proposed for “profane utterance” by the FCC apparently overlooked this teaching.¹⁹

¹⁵ *Tallman v. United States*, 465 F.2d 282 (7th Cir. 1972).

¹⁶ *Order*, ¶ 14. According to the Seventh Circuit, profanity is “construable as denoting certain of those personally reviling epithets naturally tending to provoke violent resentment or denoting language . . . so grossly offensive to members of the public who actually hear it as to amount to a nuisance.” *Tallman*, 465 F.2d at 286.

¹⁷ *Order*, ¶ 14.

¹⁸ 483 U.S. at 739-40.

¹⁹ The *Order* also creates substantial confusion about the breadth of the new standard for profane material by apparently overruling – without discussion – the Commission’s very recent decision in *Raycom America, Inc.*, 18 FCC Rcd 4186 (2003), holding that an episode of “The West Wing” did not violate Section 1464’s proscription on profanity when the program’s lead character, President Bartlet, made an impassioned lament to God. That lament

IV. THE ORDER MUST BE MODIFIED BECAUSE IT INCORRECTLY FOUND AN INDECENCY VIOLATION BY MEASURING THE PROGRAM AGAINST A STANDARD THAT DID NOT EXIST AT THE TIME OF THE BROADCAST.

Although the Commission stated repeatedly in the *Order* that the broadcast was permitted by existing precedent, it nevertheless concluded – without any effort to explain what seems to be a clear internal contradiction – that NBC and the affiliates who broadcast the f-word “violated” 18 U.S.C. § 1464. It is a fundamental principle of due process that a party cannot be held liable for conduct that complied with the law at the time it was undertaken, even if such conduct is later declared to be unlawful.²⁰ The Commission acknowledged that NBC and its affiliates did not have the requisite notice to justify any penalty in this action.²¹ Accordingly, the Commission must modify the *Order* by removing all references to NBC and its affiliates having “violated” the law. Allowing this to stand also implies that in the future the FCC may similarly find violations of standards that are only announced years after the fact.

It is no answer to respond that the Commission has not “penalized” NBC and its affiliates because it has disclaimed any intent to consider the broadcast adversely as part of the license renewal process. The harm caused to NBC and its affiliates flows from the finding of a violation memorialized in the official and permanent record of the Commission, the “inherently coercive”

contained *none* of the language at issue in *Pacifica* or the Golden Globe Awards program. By “departing” from that decision without explanation, the *Order* appears to make unlawful the broadcast of categories of speech that have already been determined by the *courts* to be fully protected under the First and Fourteenth Amendments. *See Order* at n.43. The *Order* treats in similar fashion an earlier case holding that use of the word “damn” was not profane under Section 1464. *Id.* (citing *Warren B. Appleton*, 28 F.C.C.2d 36 (1971)).

²⁰ *See, e.g., Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3 (1987) (“Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule”).

²¹ The Commission also acknowledged that it had an insufficient factual basis to take any action against individual stations. In fact, many of the complained-about stations did not even broadcast the challenged word. *See Order* at n.46.

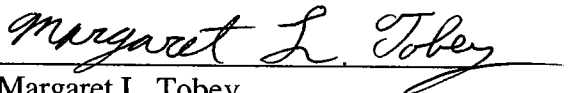
nature of the finding, and the risk that the Commission will disregard its disclaimer at some point in the future.²²

V. CONCLUSION

For the foregoing reasons, the Commission must reconsider the *Order* to resolve the multiple constitutional, statutory and policy issues raised by its sweeping decision in the *Golden Globe Awards* matter.

Respectfully submitted,

NATIONAL BROADCASTING
COMPANY, INC.

By: 
Margaret L. Tobey
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W.
Suite 5500
Washington, D.C. 20006
(202) 887-1500

F. William LeBeau
National Broadcasting Company, Inc.
1299 Pennsylvania Avenue, N.W.
11th Floor West
Washington, D.C. 20004
(202) 637-4535

Its Attorneys

April 19, 2004

²² See *Meredith Corp. v. FCC*, 809 F.2d 863 (1987), where the Commission found that Meredith Corp. had violated the Fairness Doctrine, but also concluded that the licensee had subsequently acted in good faith. The Commission therefore imposed no fine or other sanction and did not include in its ruling any express warning about future conduct. The reviewing court found that the FCC's finding of a violation was "inherently coercive" because it was binding on Meredith, it was an implicit admonition as to future conduct, and it could be used against Meredith in a renewal hearing. At oral argument, counsel for the FCC advised the court that the Commission would be estopped, based on its position before the court, from ever using the finding of a fairness doctrine violation against Meredith in a future proceeding. The court was unpersuaded by this argument: "We doubt that the Commission would be estopped as a matter of law, and we put little faith in the Commission's assurance, since the FCC's position on enforcement is admittedly so heavily influenced by non-legislatively-expressed congressional concerns." *Id.* at 869 n.4.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Partial Reconsideration of National Broadcasting Company, Inc. was sent via first-class, U.S. mail on this 19th day of April, 2004 to the following:

Chairman Michael Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Kathleen Abernathy
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Michael Copps
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Kevin Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Jonathan Adelstein
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jon Cody, Esq.
Media Advisor to Chairman Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Stacy Fuller, Esq.
Media Advisor to Commissioner Abernathy
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jordan Goldstein, Esq.
Media Advisor to Commissioner Copps
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Catherine Bohigian, Esq.
Media Advisor to Commissioner Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Johanna Shelton, Esq.
Media Advisor to Commissioner Adelstein
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

John Rogovin, Esq.
Office of the General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

David Solomon, Esq.
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

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

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

