

FCC Indecency Enforcement

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Indecency has certainly been a major topic of attention this year – at the FCC, in Congress and more generally in the press and among the American people. The FCC has been receiving record numbers of complaints, with more than half a million on the Super Bowl halftime incident alone.

What I plan to do today is give you an overview of recent developments regarding FCC indecency enforcement and a sense of what is likely to be happening in this area in the coming months.

While I realize many of you already may be familiar with it, I want to start by providing a very brief overview of the law in this area to put things in context.

For more than 75 years, dating back to the Radio Act of 1927, Congress has entrusted the FCC with protecting children from broadcast indecency. Through statutory changes and litigation during the early 1990s, broadcast indecency is now prohibited between the hours of 6 a.m. and 10 p.m., when children are most likely to be in the audience. Between 10 p.m. and 6 a.m., broadcast indecency is permissible, although obscenity is not. The statute does not cover indecency on cable and the FCC does not regulate satellite indecency given the subscription nature of the service.

The FCC defines indecency as “language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.” This definition has been in place for about 30 years and has been affirmed by the courts, including the Supreme Court, as consistent with the First Amendment. The Commission balances three factors in applying this definition: (1) whether the material is sufficiently graphic or explicit; (2) whether the material dwells on or repeats sexual or excretory references or whether the references are fleeting; and (3) whether the material is presented in a pandering or titillating manner of for shock value. No one factor decides the case; it’s a balancing test.

In enforcing the indecency statute, it is obviously critical that the agency be mindful of the important First Amendment values at stake here. I can tell you that First Amendment considerations are always at the forefront of Chairman Powell’s analysis of indecency issues and of mine as well. In this regard, let me quote the Chairman’s

statement on the recent consent decree with Clear Channel – a consent decree to which two Commissioners dissented as not being aggressive enough:

[T]he government's involvement in content regulation can be a dangerous game. Even where well intended, in our desire, for instance, to protect children from indecent broadcasts, encroachments on content can have adverse affects on the public interest. By its very nature, government action, or even mere threats, to quell protected speech can have the unintended consequence of depriving the public of a speaker's artistic, literary, scientific or political viewpoint.

As the Chairman further said there is, of course, a “delicate balance” between protecting the First Amendment values at stake here and protecting our children from broadcasts that Congress has prohibited. I know that many of you disagree with how the Commission is setting that balance and believe we are not being sufficiently sensitive to the First Amendment. At the same time, many others think we are not being aggressive enough. We do our best in a difficult and sensitive area.

So let me turn to summarizing what the Commission has been doing in the last year or so and what may be coming down the pike. The bottom line – as you probably know – is that the Commission has strengthened its indecency enforcement in several respects.

First, the Commission is proposing more forfeitures at higher aggregate amounts. So far during 2004, the Commission has issued six indecency Notices of Apparent Liability for a total of more than \$1.5 million dollars in proposed indecency forfeitures. It also entered into a record \$1.75 million consent decree with Clear Channel to settle about \$800,000 in outstanding NALs as well as various pending complaints. Last year the Commission proposed nearly a half million dollars more in indecency forfeitures. By way of comparison, in 2000, the Commission proposed only seven indecency forfeitures during the whole year, for a total of \$48,000. Indeed, indecency enforcement in the last three and a half years has been more than double that of the previous seven years combined.

Second, the Commission has increased the amount of individual indecency forfeitures. Instead of routinely proposing forfeitures at the \$7,000 “base” amount provided in the Commission's *Forfeiture Policy Statement*, the Commission has been proposing forfeitures for the statutory maximum of \$27,500 per violation. Applying this stepped-up approach to enforcement, the Commission has recently proposed indecency forfeitures of \$247,500, \$355,000, \$495,000 and \$715,000. The \$715,000 proposed forfeiture (which the licensee paid) was the highest single broadcast forfeiture in the history of the Commission.

Third, the Commission provided explicit notice last year to broadcasters that it may treat multiple utterances within a single program as constituting multiple indecency violations, rather than following its traditional per program or per segment approach. A

few months ago, the Commission took its first action under this new approach, finding two indecency violations within a single program segment based on the utterances of each of the two speakers. The Commission also put broadcasters on explicit notice that it may begin license revocation proceedings for serious or repeated indecency violations.

Fourth, the Commission broadened its indecency investigations to cover not just the station that is the subject of a complaint but also co-owned stations that broadcast the same potentially indecent material. Similarly, in television investigations, we now ask networks for a list of affiliates that aired complained-of programs distributed by these networks. In addition, in an NAL earlier this year, the Commission instructed the Bureau to broaden its investigations even further to inquire in certain instances into potential violations by the originating licensee that syndicated the program to the licensee that was the subject of a complaint.

Fifth, we have also begun collecting additional information from broadcasters about the context of broadcasts that are under investigation, that is, a longer excerpt of the tape or transcript of the program.

Sixth, in the Commission's recent *Golden Globe* decision involving the use of the "F Word" by Bono on an awards broadcast, the Commission toughened its substantive standards regarding the use of expletives. In reversing a decision of the Enforcement Bureau – my decision, that is -- the Commission explicitly declared that several of its prior precedents in this area were no longer good law and ruled that the fleeting and gratuitous use of the "F Word" on a live awards show was indecent.

I should note that, despite how the decision is often portrayed, the Commission did not rule that broadcast of the "F Word" is *per se* indecent. Indeed, it continued to focus on its traditional contextual approach, finding broadcast of the word *in this context* to be indecent. In addition, while the Commission effectively overruled several of its prior precedents, it intentionally mentioned and did not overrule the *Peter Branton* case, in which the Commission had found multiple uses of the "F Word" in the context of a recorded news program to be lawful.

In *Golden Globe*, the Commission also infused new meaning and life into the profanity section of the statute by finding the use of the "F Word" in the context at issue also to be profane. The Commission's traditional approach to profanity had focused only on blasphemy, which is essentially a dead concept in light of Establishment Clause principles. Contrary to what some have suggested, I don't believe the Commission intended to reinvigorate the blasphemy standard. Rather, the Commission re-defined profanity as, depending on context, including the "F Word" and similar expletives. The Commission indicated that, as with indecency, profanity would be prohibited during the hours of 6 a.m. to 10 p.m.

Seventh, the Commission is strengthening its television indecency enforcement efforts. While historically most complaints have focused on radio, in recent years the Commission has been getting more complaints about television and the Commission has

now started to enforce more in that area. In addition to the *Golden Globe* case, the Commission recently issued a proposed forfeiture against a TV station when – with the apparent active encouragement of station personnel -- a performer exposed himself on a news program. And, as you know, the Commission is investigating the Super Bowl incident. Other television investigations are also pending.

The Commission is not, of course, the only one getting tougher on indecency enforcement. Both the House and the Senate have now passed legislation to increase substantially the maximum forfeitures for indecency violations – by 10 times in the case of the Senate and nearly 20 times in the case of the House. And, I should add, the votes were not close – 99 to 1 in the Senate and 391-22 in the House.

As I mentioned at the outset, it is important to emphasize that, at the same time the Commission is strengthening its indecency enforcement, it remains strongly committed to protecting broadcasters' First Amendment rights.

First in this regard, every case is analyzed with great care. We don't move forward lightly to take enforcement action. And, when we do start enforcement proceedings, we review the responses carefully. In two cases in recent years we decided not to impose forfeitures after reviewing the licensee's response to our proposed forfeitures. We also continue to deny or dismiss meritless complaints.

Second, sensitivity to constitutional rights and general fairness principles has led the Commission to make certain changes in its indecency enforcement regime apply prospectively only. Thus, most prominently, when the Commission concluded that use of the "F Word" by Bono on the Golden Globe show was indecent and profane, it did not propose to take enforcement action against any of the relevant stations. Similarly, when the Commission announced that it would begin considering revocation for indecency violations and begin considering forfeitures for separate utterances rather than just programs or segments, it said it would apply its new policies only to programs that aired after it put broadcasters on clear notice. In addition, while I cannot speak for the Commission, certainly an important issue if and when it finds the fleeting use of additional expletives to be indecent and/or profane will be whether to apply such decisions prospectively only.

Third, the Commission has also continued to enforce the indecency laws in response to specific complaints rather than, as some have suggested, go out and monitor programs and stations that it suspects might be indecent. We do not target any specific programs, performers or licensees. Rather, we review a particular program only if a member of the public files a complaint about it.

Fourth, as the Commission has made clear in the recent Clear Channel consent decree, its goal is not punishment for the sake of punishment. Thus, when presented with a situation where a company was willing to admit that it had crossed the line and was committed to concrete steps to clean up its act, the Commission, led by Chairman Powell

and over two dissents, entered into a consent decree settling numerous cases rather than proceeding to litigate them.

As we remain sensitive to First Amendment concerns, it is also incumbent on broadcasters to do more than just recite a mantra that the First Amendment protects everything they may air. Both the Supreme Court and, more recently, the DC Circuit, have made clear that FCC regulation of broadcast indecency is constitutional and that the specific standard we use is also constitutional. While there may be some questions at the margin, in the vast majority of cases there's a clear line that broadcasters are crossing and that they know or should know that they shouldn't be crossing. While increased competition may be producing a so-called "race to the bottom," enforcement by the FCC alone is not enough to stem the tide. Recent voluntary efforts by broadcasters to ensure compliance with the law and, more generally, to exercise more oversight over their programming standards, including the recent NAB summit and the Clear Channel consent decree, are very positive steps.

So what can we expect in the coming months in the indecency area?

As I just said, it's a good sign that broadcasters are stepping up to the plate to take voluntary action. At the same time, where there are clear violations, you can expect more enforcement actions by the FCC with high forfeitures. You may also see the FCC adopt a requirement that broadcast stations keep recordings of their programs for a period of time in order to make our enforcement process more effective. Indeed, just this morning, the Commission released an NPRM proposing such a requirement.

I want to stress, though, that we don't view our role in this area as just being in the business of issuing indecency forfeitures. We are in the business of deciding cases. We review the complaints we get and apply the law to the facts. We continue to deny at the Bureau level meritless complaints when we get them. And, along with the forfeiture actions you can expect to see from the Commission in coming months, you can also expect to see various complaint denials from the Commission that will make clear that the Commission is approaching this in a balanced manner consistent with the law and the First Amendment. I am hopeful that these cases – both Commission-level enforcement actions and Commission-level denials – will provide broadcasters with even further guidance regarding the law.

I also think it is fair to say that we can expect a new round of court litigation on indecency. Petitions for reconsideration have been filed against the Commission's *Golden Globe* decision and, even to the extent the Commission provides some clarification to its decision, I expect that the case may end up in court. Indeed, recently a stay petition has been filed with the Commission, which suggests there may be a court challenge even before the Commission rules on the reconsideration petitions.

In addition, under a D.C. Circuit decision last year in *AT&T v. FCC*, a company that receives a forfeiture order can now pay the forfeiture and appeal it to the D.C. Circuit rather than simply waiting to defend itself in a district court enforcement action brought

by the Department of Justice. In the past, broadcasters have expressed concerns about not being able to get to court quickly enough to challenge indecency decisions and they now have a quick avenue to court. It's not clear yet whether broadcasters will take advantage of this new right to appeal; to the extent they suspect they will lose, they may prefer to delay court review for as long as possible. In any event, from my perspective, I welcome court review of our decisions. Whatever a court decides, the additional judicial guidance certainty will be helpful to all concerned.

Thank you. I'd be happy to take questions.