

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Complaints Against Various) File No. EB-03-IH-0110
Broadcast Licensees)
Regarding Their Airing of the)
“Golden Globe Awards” Program)

To the Commission

COMMENTS IN SUPPORT OF THE
APPLICATION FOR REVIEW

Introduction

Parents Television Council has submitted an Application for Review requesting the Commission to reverse the Enforcement Bureau’s Order in the “Golden Globe Awards” proceeding (Memorandum & Order, File Number, EB-03-IH-0110, decided October 3, 2003, hereinafter, *Memorandum*). In that proceeding, the Commission’s Enforcement Bureau concluded that various broadcast TV stations did not violate the broadcast indecency law by airing the word “f--k--g” during a live telecast of the “Golden Globe Awards” program.

In part, the Bureau justified its conclusion by noting, “we have previously found that fleeting and isolated remarks of this nature do not warrant Commission action” (*Memorandum* at p.3), particularly “within the context of live and spontaneous programming” (at p.3 at n.16).

The *Memorandum* also stated (at p.3):

“As a threshold matter, the material aired during the Golden Globe Awards program does not describe or depict sexual or excretory activities and organs. The word ‘fucking’ may be crude and offensive, but, in the context presented here, did not describe sexual or excretory organs or activities. Rather, the performer used the word ‘fucking’ as an adjective or expletive to emphasize an exclamation. Indeed, in similar circumstances, we have found that offensive language used as an insult rather than as a description of sexual or excretory activity or organs is *not within the scope* of the Commission’s prohibition of indecent program content.” [Emphasis ours]

It is one thing for the Commission to determine that the *frequency* with which a vulgarism for sexual or excretory activities or organs is used, the *nature* of the program (live or recorded) in which it is used, and *how* it is used (as an adjective, expletive, insult or description) are variables in determining whether programming is indecent. It is quite another for the Commission to

when children are in the audience was patently offensive, and held that the broadcast was indecent.” [Emphasis ours]

In other words, it was the “dirty words” themselves that were the problem, not any particular use or uses that Carlin made of those words in his monologue.

In rejecting the contention that “prurient appeal is an essential component of indecent language” (at 741), the *Pacifica* Court said (at 741, n.16):

“”Similarly, regardless of whether the ‘4-letter words’ and sexual description set forth in ‘Lady Chatterly’s Lover’ ...made the book obscene for mailing purposes, *the utterance of such words or the depiction of sexual activity* on radio or TV would raise similar public interest and Section 1464 questions.”” [Emphasis ours]

In rejecting the contention that the Commission’s indecency definition was overbroad, the *Pacifica* Court stated (at 743):

“the Commission’s definition of indecency will deter only the broadcasting of patently offensive *references to excretory and sexual organs and activities.*” [Emphasis ours]

The *Pacifica* Court continued (at 743, n.18):

“A requirement that indecent language be avoided will have its primary effect *on the form rather than the content*, of serious communication. There are few, if any, thoughts that cannot be expressed by less offensive language.” [Emphasis ours]

In other words, a restriction on “4-letter words” used as “adjectives” or as “expletives” or as “insults” will have its primary effect on the form rather than the content of communication.

In concluding that indecency can be regulated in the broadcast medium, the *Pacifica* Court distinguished its holding in *Cohen v. California*, 403 U.S. 15 (1971), in which the Court held that criminal sanctions could not be imposed on a man who walked into a courthouse wearing a jacket “emblazoned with the words ‘F—k the Draft’”. The *Pacifica* Court said in part:

“Second, broadcasting is uniquely accessible to children, even those too young to read. Although Cohen’s written message might have been incomprehensible to a first grader, *Pacifica’s* broadcast could have enlarged a child’s vocabulary in an instant.”

Even today, few first graders would understand what the f-word means—even if used to “describe sexual or excretory organs or activities” (*Memorandum*, at p.3). The problem, as the *Pacifica* Court saw it, was not *how* the word was used, but rather *where and when* it was used.

In emphasizing the narrowness of its holding, the *Pacifica* Court had this to say:

“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...” [Emphasis ours]

One would think that the FCC would be mindful of the growing body of evidence that children are adversely affected by the vulgarity and sex they hear and view on broadcast TV.

But if the Enforcement Bureau were doing what "one would think," how do we explain why, since Pacifica, the FCC has never fined a broadcast TV network affiliate for airing indecent programming that was provided by one of the networks (ABC, CBS, FOX, NBC, UPN & WB)?

Part of the explanation is that since *Pacifica*, the Bureau has generally refused to act on indecency complaints that do not include a tape or transcript of the program; and most TV viewers aren't taping programs when unexpectedly assaulted by indecent programming.

The Bureau also refuses to lift a finger to obtain a tape of a program—even though virtually all broadcast TV network programming is taped by the networks or by program producers.

The Bureau also refuses to monitor programming on its own initiative, even when it has grounds to do so—for example, when it receives complaints about a program or when a program generates media coverage describing (often in detail) the content of programming.

The Bureau's *provide-a-tape-or-transcript-or-we-won't-act-policy*, however, is clearly not the whole problem. Over the decades, many viewers and organizations have sent tapes or transcripts of TV network programs to the FCC—but to no avail.

The other part of the explanation (as we see it) is that the Enforcement Bureau in significant measure ignores the *Pacifica* case and applies a definition of indecency that is all too similar to the "patently offensive" sexual conduct prong of the *adult* obscenity test. When the Bureau talks about "indecency," what it really means is "hardcore indecency" or "public lewdness."

We hasten to add that since *Pacifica*, the FCC's definition of broadcast indecency, *on its face*, is similar to the second prong of the adult obscenity test set forth in *Miller v. California*, 413 U.S. 15 (1973). Beneath the surface, however, there are two important differences.

First, obscenity laws can be violated even when the material is distributed only to *consenting* adults [*Paris Adult Theatre I v. Slaton*, 413 U.S. 49, at 57-58 (1973)]; and children are *not* to be included in determining community standards unless there is "evidence that children were the intended recipients of the materials at issue...or that petitioner had reason to know children were likely to receive the materials" [*Pinkus v. U.S.*, 98 S.Ct. 1808, at 1812 (1978)].

In contrast, broadcast TV programming reaches into virtually every American home (where most citizens do not welcome gutter language and sex talk that not too long ago would have been heard only in a locker room) and is uniquely accessible to children, even those too young to read.

officials to determine as a hard and fast rule that it is permissible for a person to make a loud noise in a residential neighborhood, regardless of decibels and time of day, as long as the noise isn't of long duration or frequent or, no matter how long or frequent, isn't the result of revelry.

For the foregoing reasons, the Application for Review should be granted, and the Commission should make clear that the *frequency* with which vulgarisms for sexual or excretory activities are used, the *nature* of the program (live or recorded) in which used, and *how* used (e.g., as an adjective, expletive, insult or description) are "variables" to be considered in determining whether programming is indecent. Such words can be actionable even if used only once or infrequently in a live program and when used as adjectives, expletives or insults.

Respectfully submitted,

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By:



Robert W. Peters, Esq.

President of Morality in Media

Signing on behalf of the following organizations:

Morality in Media, Inc.
475 Riverside Drive
New York, NY 10115
(212) 870-3222

Family Research Council
801 G Street, NW
Washington, DC 20001
(202) 393-2100

Alliance Defense Fund
15333 N. Pima Road, Ste. 165
Scottsdale, AZ 85260
(480) 444-0020

Focus on the Family
2605 Explorer Drive
Colorado Springs, CO 80920
(719) 531-3400

American Family Association
P.O. Drawer 2440
Tupelo, MS 38803
(601) 844-5036

Kids First Coalition
919 Prince Street
Alexandria, VA 22314
(703) 548-6799

American Mothers, Inc.
15 Dupont Circle, NW
Washington, DC 20036
(202) 234-7375

Concerned Women for America
1015 Fifteenth St., NW, Ste. 1100
Washington, DC 20005
(202) 488-7000