

**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

OPPOSITION TO APPLICATION FOR REVIEW

For decades, the Commission has refused to deem broadcast material indecent on the basis of one word, no matter how offensive. Now, an Application for Review in the above-captioned proceeding (the “Application”) asks the Commission to overturn this policy in order to reverse the correct decision of the Enforcement Bureau and censure 86 television stations, including stations owned and operated by National Broadcasting Company, Inc. (“NBC”),¹ for airing an awards show in which one of dozens of excited honorees used a single crude word that, in context, does not even meet the Commission’s test for indecency. Because the Bureau correctly applied the Commission’s established indecency policy, the Application should be denied.

¹ NBC owns the NBC television network, which transmitted the Golden Globes presentation to all of its affiliates. NBC did not receive formal notice or a copy of any of these complaints until they were dismissed. In order to facilitate Commission resolution of this matter, NBC files this opposition on behalf of its owned NBC affiliates that have been targeted by one or more of these complaints, but notes that this pleading also demonstrates why the Bureau was right to dismiss all of the various complaints against all NBC affiliated stations. Also, a number of stations named in complaints – including NBC-owned stations KNBC and KNSD – are located in the Mountain or Pacific time zones, which received NBC’s time-delayed feed that deleted the objected-to term.

BACKGROUND

Since 1979, the Commission has not deemed any broadcast to be indecent based on one word.² Even in 1987, when the Commission undertook its only real broadening of its indecency policy since the Supreme Court approved limited regulation of broadcast indecency in 1978, the Commission did not amend its policy to allow the indecency of broadcast material to turn on a single offensive term.³ In the Commission's most recent indecency policy statement, issued in March 2001 after years of deliberation, the Commission confirmed that, to be indecent, broadcast material must "depict or describe" sexual or excretory organs or functions and be "patently offensive."⁴

In January 2003, the 60th Golden Globes Awards ceremony was held. NBC transmitted the ceremony live to stations in the Eastern and Central time zones and via tape delay to stations in the Mountain and Pacific time zones. Prior to broadcast, the ceremony's producer expressly warned all participants that proper decorum was expected. The show then aired with a TV-PG rating.

² Following a Supreme Court decision upholding the Commission's role in indecency enforcement, the Commission acted only against material involving "the repeated use" of indecent words. *See Action for Children's Television v. FCC*, 11 F.3d 170 (D.C. Cir. 1993); *L.M. Communications of South Carolina, Inc. (WYBB(FM))*, 7 FCC Rcd 1595 (MMB 1992) (rejecting indecency finding for "fleeting and isolated utterance" during live programming). Because the First Amendment protects indecent speech, the Commission is limited in its authority to regulate indecent broadcasts. *See, e.g.*, Policy Statement, *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999 (2001) (the "Indecency Policy" or "Policy").

³ *See, e.g.*, *Peter Branson*, 6 FCC Rcd 610 (1991) (subsequent history omitted) (no language is *per se* indecent). *Cf. Action for Children's Television v. FCC*, 852 F.2d 1332, 1339 (D.C.Cir. 1988) (explaining the limited changes adopted by the Commission to its indecency policy).

⁴ *Indecency Policy*, 16 FCC Rcd at 8002 (¶¶ 7-8). *Cf. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) ("*Pacifica*") (establishing tenets of broadcast indecency standard).

Roughly halfway through the presentation, one honoree uttered the single word that is the basis for this entire proceeding. The Irish band U-2 was awarded Best Original Song for a Motion Picture, and Bono, U-2's lead singer, opened his unscripted response by exclaiming: "This is really, really, fucking brilliant. Really, really great."⁵ Bono then discussed the inspiration for the award-winning music and thanked a number of persons. In response, many persons associated with the Parents' Television Council (the "PTC") filed complaints.⁶

In October 2003, the Enforcement Bureau found the material not indecent and denied all complaints. The Bureau concluded that Bono's choice of phrase did not "depict or describe sexual or excretory activities and organs."⁷ The Bureau also noted that the "fleeting" or "isolated" use of a crude word does not constitute indecency under settled Commission policy.⁸ Given these facts, there was no need for the Bureau to inquire further as to other facts relevant to this matter, including the live nature of the initial broadcast and the outside source of the material. Nonetheless, the PTC decided to file the Application.

⁵ To the extent relevant, the word brilliant in the United Kingdom is commonly used to mean excellent or cool. *See, e.g.,* <http://cgi.peak.org/~jeremy/retort.cgi?British=brilliant>.

⁶ In light of NBC's own standards, which are more restrictive than the legal standard for indecency, NBC promptly deleted the lone vulgar term from its feeds of this event to stations in the Pacific and Mountain time zones.

⁷ *See Complaints Against Various Broadcast Licensees Regarding Their Airing of the Golden Globes Awards Program*, Memorandum Opinion & Order, File No. EB-03-IH-0110 at ¶ 5 (EB released October 3, 2003) ("*Golden Globes*").

⁸ *Id.* at ¶ 6.

ARGUMENT

The courts have long determined that indecent broadcast programming merits protection from government intrusion under the First Amendment.⁹ However, 25 years ago, the Supreme Court approved a limited role for the Commission in regulating broadcast indecency in light of the “relative dominance of that medium in the communications marketplace in the past.”¹⁰ In *Pacifica*, the Supreme Court approved a relatively specific two-prong test for indecency, which remains substantially unchanged today.¹¹ Under the Commission’s established Indecency Policy, programming is not indecent unless “the material alleged to be indecent”: 1) “describe[s] or depict[s] sexual or excretory organs or activities;” and 2) is “patently offensive as measured by contemporary community standards for the broadcast medium.”¹²

The Bureau was unarguably correct that Bono’s choice of phrase did not implicate the first prong of the test. The inclusion of a single crude adverbial intensifier to mean “very” or “really” does not “describe sexual or excretory activities.”¹³ The Bureau also was undoubtedly

⁹ See, e.g., *Action for Children’s Television v. FCC*, 852 F.2d 1332, 1334 (D.C.Cir. 1988) (“Broadcast material that is indecent but not obscene is protected by the first amendment; the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what people say and hear.”).

¹⁰ Concurring Statement of Commissioner Furchtgott-Roth, *Indecency Policy*, 16 FCC Rcd 7999 (2001) (referring to *Pacifica*).

¹¹ See *Indecency Policy*, 16 FCC Rcd at 8002 (¶ 4) (citing *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) and *ACT I*, 852 F.2d 1339; *Action for Children’s Television v. FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1282 (1992) (“ACT II”); *Action for Children’s Television v. FCC*, 58 F.3d 654, 657 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 701 (1996) (“ACT III”)).

¹² *Indecency Policy*, 16 FCC Rcd at 8002 (¶¶ 7-8).

¹³ *Indecency Policy*, 16 FCC Rcd at 8001 (¶ 5).

correct that a lone crude term does “not warrant Commission action.”¹⁴ Because the challenged language did not trigger the first prong of the Commission’s standard, the Bureau had no reason to address the test’s second prong.

Faced with the Bureau’s correct reasoning, the Application makes six arguments, all without meaningful legal support:¹⁵ 1) use of the challenged term must constitute a description or depiction of sexual activities, regardless of context; 2) the challenged term, regardless of its meaning, is *per se* offensive and hence always indecent; 3) the term was not fleeting because Bono “had time to gather his thoughts” and could have apologized for the remark; 4) the Bureau’s decision, which PTC alleges is a matter of first impression, legitimizes all forms of the challenged term at any time; 5) the Commission’s policy in this area is wrong; and 6) NBC “betrayed” the public trust by not airing the program with a time delay.

PTC’s first assertion contradicts settled Commission policy and common sense. The Commission has established a two-pronged test for indecency, the first of which depends on what the challenged content depicts or describes. In this case, the only thing the challenged word describes is the adjective “brilliant,” not sexual or excretory activity. Even PTC does not suggest how Bono’s use of the term as an intensifier in this context could convey anything sexual, except to assert that all forms of the challenged word must convey something sexual.

¹⁴ *Id.* at ¶ 6.

¹⁵ *See* Application at 2-5. The Application does not challenge the Bureau’s finding that the challenged content was not obscene.

PTC's position is grammatically incorrect,¹⁶ logically bankrupt, and contrary to the Commission's own precedent.¹⁷

PTC's second allegation ignores the fact that the Indecency Policy, as approved by the Supreme Court as far back as 1978, involves two prongs.¹⁸ Under that policy, it is not enough to find a term is patently offensive if the term also does not describe or depict sexual or excretory organs or activities. Accordingly, that PTC finds the content in question to be offensive is simply not sufficient, as a matter of law, for the content to be found indecent. Similarly, the Bureau did not need to determine whether Bono's choice of phrase was patently offensive, as it did not constitute indecency under the first prong of the Commission's test.¹⁹

PTC's third claim is irrelevant. Whether material is too fleeting to be indecent does not depend on whether the speaker "had time to gather his thoughts" or could have apologized. Settled Commission precedent confirms that a single use of any crude word is too fleeting to constitute indecency under federal regulation.²⁰

¹⁶ For example, the American Heritage Dictionary defines "fucking" separately from similar terms to mean "really" or "very," which is exactly how it was used here. *See* American Heritage Dictionary (2d College Ed.) at 537 (1991).

¹⁷ *Entrecom Buffalo License, LLC (WGR(AM))*, 17 FCC Rcd 11997, 11999-12000 (EB 2002) ("*WGR*") (finding use of term "pissed on" to mean something other than excretory activity in context of relevant material). On this point, this case is even clearer than *WGR*, especially given the dictionary's separate definition of the challenged term as an intensifier meaning "very."

¹⁸ *See supra* note 4.

¹⁹ That PTC offered no sustainable basis to conclude that the fleeting use of a crude term was patently offensive under the Commission's requirements is an independent reason to reject the Application.

²⁰ *See, e.g., Lincoln Dellar, Renewal of License for Stations KPRL(AM) and KDDB(FM)*, 8 FCC Rcd 2582, 2585 (ASD, MMB 1993) (declining to find single utterance of "fucked up" by news announcer to be indecent); *L.M. Communications of South Carolina, Inc. (WYBB(FM))*,

PTC's fourth contention is both factually and legally wrong. First, this is not a matter of first impression – in decisions at least as far back as 1992, the Commission has recognized that broadcast mention of forms of the word “fuck” is not *per se* indecent.²¹ Those prior decisions, the first of which was issued more than a decade ago, have not resulted in profligate use of such terms over the nation's airwaves. Second, PTC ignores the critical principle that any indecency case depends on the context of the challenged material.²² The Golden Globes case involves significant unique circumstances – an outside party, clearly excited, uses a single crude term as a synonym for “really.” These circumstances minimize this case as any sort of support for PTC's sweeping speculative concerns.

PTC's fifth point – a facial (and time-barred) challenge to the Commission's indecency policy – is procedurally deficient and substantively dubious. To the extent PTC is asking for reconsideration of the 2001 restatement of the Indecency Policy, that matter has long since closed. To the extent PTC is asking the Commission to change the Policy after the fact in order to censure this past broadcast, the request raises serious constitutional and administrative law issues, and is contrary to the Commission's past practice in this area.²³ Moreover, PTC offers no precedent or rationale for eliminating the first prong of a two prong standard that has been approved by numerous courts, including the Supreme Court, and on which all broadcasters have relied to guide their own review of program material. Any change to that standard calls into

7 FCC Rcd 1595 (MMB 1992) (rejecting indecency finding for “fleeting” utterance of the term “mother-fucker” during live programming).

²¹ See *id.*

²² See, e.g., *Indecency Policy Statement*, 16 FCC Rcd at 8002 (¶ 9).

²³ See, e.g., *Infinity Broadcasting Corp.*, 3 FCC Rcd 930, *aff'd in part, vacated in part, remanded sub nom ACT I*, 852 F.2d 1332 (D.C. Cir. 1988) (subsequent history omitted) (refusing to sanction broadcasters because indecency finding resulted from changed Commission policy).

question the Commission's authority over indecent broadcasts, especially in light of the changes of the media marketplace since *Pacifica*, including the general availability of cable programming not subject to Section 73.3999 of the Commission's Rules.

The sixth argument is baseless. NBC takes seriously its efforts to limit or prevent inappropriate conduct in its broadcasts. A single crude utterance does not seriously cast doubt as to that commitment. NBC has aired the same awards ceremony for the past several years without incident, and had no reason to think this past year's ceremony would pose any new issues. NBC also voluntarily rated the Golden Globes as TV-PG in an effort to ensure that parents do not forget that the program involves live and unscripted material. Indeed, contrary to PTC's unsupported allegations, NBC here took immediate steps to limit any possible offense by deleting the challenged word out of its transmission of the ceremony to stations in the Mountain and Pacific time zones.²⁴ To NBC's knowledge, no NBC affiliated station in these regions aired the challenged material as part of network programming.

²⁴ Accordingly, it is not clear on what basis complaints were filed against a number of television stations – including KNBC(TV), Los Angeles, California – that did not air Bono's single crude term. That such misleading complaints were filed is troubling, and suggests that not all complainants may have actually seen the objected-to material. Also, PTC's attribution of deletion of the challenged term to individual stations in the Pacific time zone, *see* Application at n. 1, is incorrect. NBC itself deleted the material because the material did not meet NBC's own internal standards. Of course, such questions of fact are irrelevant to these complaints, which could have been and were denied as a matter of law and Commission policy.

CONCLUSION

Accordingly, for the foregoing reasons, the Application should be denied.

Respectfully submitted,

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November 17, 2003

Certificate of Service

I hereby certify that a copy of the foregoing letter was sent via first-class, U.S. mail on this 17th day of November, 2003, to the following:

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

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

FDM-TV
Freedom Broadcasting of Texas, Inc.
P.O. Box 7128
Georgetown, TX 77706

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

KJGW
King Broadcasting Company
1000 South Record Street
Dallas, TX 75202

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

KJING-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
11th Floor
Washington, DC 20004

KOAA-TV
Sangre de Cristo Communications, Inc.
2200 Seventh Avenue
Pueblo, CO 81003

KOB-TV
KOB-TV, LLC
3415 University Avenue
ATTN: L. Wefring
St. Paul, MN 55114

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

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

KRBC-TV
Mission Broadcasting, Inc.
544 Red Rock Drive
Wadsworth, OH 44281

KRIS-TV
KVOA Communications, Inc.
109 South Staples Street
Corpus Christi, TX 78401

KTGF
MMM License LLC
900 Laskin Road
Virginia Beach, VA 23451

KSDK
Multimedia KSDK, Inc.
c/o Gannett Co., Inc.
950 Jones Branch Drive
McLean, VA 22107

KSHB-TV
Scripps Howard Broadcasting Company
312 Walnut Street
Cincinnati, OH 45202

KSNF
Nexstar Broadcasting of Joplin, LLC
109 Lake Carolyn Parkway
1450
Joplin, MO 64501

KTEN
Channel 49 Acquisition Corporation
P.O. Box 549
Hampton, VA 23669

KTIV
KTIV Television, Inc.
135 Floyd Boulevard
Sioux City, IA 51105

KUSA-TV
Multimedia Holdings Corporation
c/o Gannett Co.
7950 Jones Branch Drive
McLean, VA 22107

WES-TV
Midessa Television Company
P.O. Box 60150
Midland, TX 79711

KWWL
Raycom America, Inc.
RSA Tower, 20th Floor
201 Monroe Street
Montgomery, AL 36104

WYTV
WY3, Inc.
99 West Sunshine Street
Springfield, MO 65807

WANE-TV
Indiana Broadcasting, LLC
4 Richmond Square
Providence, RI 02906

WAVE
Libco, Inc.
39 Isbell Road
390
Reno, NV 89509

WBBH-TV
Waterman Broadcasting Corp. of Florida
3719 Central Avenue
Fort Myers, FL 33901

WBOY-TV
West Virginia Media Holdings, LLC
P.O. Box 11848
Charleston, WV 25339

WBRE-TV
Nexstar Broadcasting of NE PA, LLC
909 Lake Carolyn Parkway
#1450
Irving, TX 75039

WCNC-TV
WCNC-TV, Inc.
400 South Record Street
Dallas, TX 75202

WCSH
Pacific & Southern Co., Inc.
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7950 Jones Branch Drive
McLean, VA 22107

VCYB-TV
Appalachian Broadcasting Corp.
101 Lee Street
Bristol, VA 24201

WDIV-TV
Post-Newsweek Stations, Michigan, Inc.
550 West Lafayette Blvd.
Detroit, MI 48226

VDSU
New Orleans Hearst-Argyle Television, Inc.
88 Seventh Avenue
New York, NY 10106

WESH
Orlando Hearst-Argyle Television, Inc.
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VFIE
Libco, Inc.
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Reno, NV 89509

WFLA-TV
Media General Communications, Inc.
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WFMJ-TV
WFMJ Television, Inc.
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300 N Street, NW
Washington, DC 20037

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

WHDH-TV
WHDH-TV Government Center
Bulfinch Place
Boston, MA 02114

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

HO-TV
New York Times Management Svcs.
Corporate Center 1
102 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
Greenland, WI 54501

WKYC-TV
WKYC-TV, Inc.
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WVLWT
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P.O. Box 1800
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WMC-TV
Raycom America, Inc.
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Montgomery, AL 36104

WMMFE-TV
Community Communications, Inc.
1510 E. Colonial Drive
Orlando, FL 32817

WMGT
Endurance Broadcasting, LLC
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104 North Main Street
Stillwater, MN 55082

WMTV
Gray 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

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

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

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

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

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

VSAZ-TV
Immis Television License Corporation
500 West Olive Avenue
300
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WSFA
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SMV-TV
Credith Corp., Television Stations
16 Locust Street
Des Moines, IA 50309

WTHR
VideoIndiana, Inc.
1000 North Meridian Street
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TMJ-TV
Journal Broadcast Corporation
155 S. Valley View Boulevard
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WTVY
Gray MidAmerica TV License Corp.
P.O. Box 1089
Dothan, AL 36302

TVLA
Night Broadcasting of Baton Rouge Lic. Corp.
100 St. John Street
301
Baton Rouge, LA 70501

WWBT
Jefferson-Pilot Communications Co. of VA
P.O. Box 12
Richmond, VA 23218

WVLP
WVLP Broadcasting, LLC
100 Richmond Square
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