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January 30, 2004

Via Hand Delivery

Federal Communications Commission
Enforcement Bureau
Investigations and Hearings Division
445 12th Street, S.W.
Washington, D.C. 20554

RECEIVED

JAN 30 2004

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

ATTENTION: Melanie Godschall

RE: EB-03-IH-0617

Dear Ms. Godschall:

On behalf of Fox Television Stations, Inc. ("FTS"), enclosed herewith please find FTS' response to the letter, dated January 7, 2004, from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, with respect to the above-referenced matter. This submission is timely filed pursuant to the January 20, 2004 letter from Mr. Freedman to the undersigned granting FTS an extension to January 30, 2004 to file a response.

Should you have any questions concerning this submission, please contact the undersigned.

Respectfully submitted,



John C. Quale
Counsel to FTS

Enclosures

RESPONSE OF FOX TELEVISION STATIONS, INC.
TO FCC LETTER OF INQUIRY*

1. State whether the Licensee broadcast the material described in Attachment A over any station licensed to it on December 10, 2003, between 8:00 and 10:00 p.m., and/or on that and/or any other date between 6:00 a.m. and 10:00 p.m. If answered in the affirmative, for each such broadcast and station, provide the following:

ANSWER: Fox Television Stations, Inc. (the "Licensee") objects to the scope of the LOI insofar as it requests information regarding multiple television stations without identifying any specific complaint against any particular station. The FCC's request conflicts with its mandate to proceed cautiously and with appropriate restraint. The LOI conflicts directly with Commission precedent limiting indecency inquiries to entities about which the FCC has received a documented complaint.

The Commission has historically emphasized that "it does not independently monitor broadcasts for indecent material."¹ Rather, "its enforcement actions are based on documented complaints of indecent broadcasting received from the public."² Similarly, the section of the Commission's Internet site dedicated to indecency information instructs interested parties that "[e]nforcement actions in this area are based on documented complaints of indecent or obscene broadcasting received from the public."³

The Commission's reluctance to enforce the indecency rules absent a documented public complaint is inextricably linked to the FCC's longstanding recognition that indecent speech is protected by the First Amendment – "a critical Constitutional limitation that demands we proceed cautiously and with appropriate restraint."⁴

* See Letter, Dated January 7, 2003, to Fox Television Stations Inc., from William Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau ("LOI").

¹ In Re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd 7999, 8015 (2001) ("Indecency Policy Statement").

² Id. See also In Re Infinity Broadcasting Operations, Inc., Licensee of Station WKRK-FM, Detroit, Michigan, FCC 03-71 (rel. April 3, 2003) at para. 6 ("Infinity") ("The Commission's indecency enforcement is based on complaints from the public").

³ See <http://www.fcc.gov/eb/broadcast/obscind.html> (last visited January 28, 2004).

⁴ Infinity, at para. 4 (citing Action for Children's Television v. FCC, 852 F.2d 1332, 1344 (D.C. Cir. 1988) ("ACT I") ("the FCC may regulate [indecent] material only

Indeed, in upholding the Commission's indecency rules, both Justice Powell in the Supreme Court's Pacifica decision and the D.C. Circuit in ACT I specifically relied upon the Commission's assurances that it would act cautiously in pursuing indecency issues.⁵

By relying on a complaint driven process, the FCC appropriately limits governmental interference with licensees' program decision-making. The more active the role that government plays in monitoring programming content, the more likely the danger that licensees will engage in self-censorship, sacrificing their First Amendment rights.

Nonetheless, in the interest of bringing this matter to a prompt conclusion (yet subject to the objections identified in this Response and to the response of the Licensee to Inquiry 2 below) attached as Exhibits 1 and 2 hereto are two lists of the stations licensed to Fox Television Stations, Inc. and other wholly-owned subsidiaries of Fox Television Holdings, Inc. that broadcast the material described in Attachment A to the LOI on December 10, 2003. Exhibit 1 contains a list of stations located in cities in the Eastern and Central time zones; Exhibit 2 contains a list of stations located in cities in the Mountain and Western time zones.

a. The call sign, community of license and licensee;

ANSWER: Subject to the foregoing and to the response of the Licensee to Inquiry 2 below, the stations listed in Exhibits 1 and 2 hereto broadcast the material described in Attachment A to the LOI on December 10, 2003 at the times listed in Exhibits 1 and 2.

b. The date(s) and time(s) of the broadcast(s);

ANSWER: See Exhibits 1 and 2.

with due respect for the high value our Constitution places on freedom and choice in what people say and hear"))).

⁵ See FCC v. Pacifica Foundation, 438 U.S. 726, 761, n.4 (1978) ("[S]ince the Commission may be expected to proceed cautiously, as it has in the past, I do not foresee an undue 'chilling' effect on broadcasters' exercise of their rights.") (Powell, J., concurring); ACT I, 852 F.2d at 1340, n.14 ("[T]he FCC has assured this court, at oral argument, that it will continue to give weight to reasonable licensee judgments when deciding whether to impose sanctions in a particular case. Thus, the potential chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy.")

- c. **If only a portion of the material was broadcast, describe the material so broadcast.**

ANSWER: Subject to the foregoing and to the response of the Licensee to Inquiry 2 below, the stations listed in Exhibits 1 and 2 aired the corrected versions of the material described in Attachment A to the LOI; see the response of the Licensee to Inquiry 2 below.

- d. **Any and all DVDs, tapes, transcripts, or other Documents reproducing, discussing or otherwise relating to the material in the broadcast. Provide, for each broadcast, a recording that includes the material described in Inquiry 1, above, and 15 minutes of the broadcast aired before and after that material. Also provide a written transcript of the material contained in each such recording.**

ANSWER: See the attached Declaration of Molly Pauker, Vice President of Fox Television Holdings, Inc., the parent of Fox Television Stations, Inc. and the other licensees of the stations listed in Exhibits 1 and 2. The Licensee has produced Documents responsive to Inquiry 1(d) to the extent that the Documents are not protected by the First Amendment and/or the attorney-client privilege. See Licensee's objections, contained in its responses to Inquiries 3-7.

2. **If the programming described in Inquiry 1, above, and in Attachment A does not accurately reflect the material actually broadcast by Licensee, describe any inaccuracies.**

ANSWER: The description of the programming contained in Attachment A to the LOI does not accurately reflect the material aired by the stations listed in Exhibits 1 and 2. Provided below are two corrected copies of Attachment A to the LOI (the first is applicable to the stations located in cities in the Eastern and Central time zones and the second is applicable to stations located in cities in the Mountain and Western time zones). Inaccuracies are bracketed and noted in italicized text.

Corrected Version of Attachment A to the LOI for Stations Listed in Exhibit 1

Paris Hilton: Now, Nicole, [*remember*] this is a live show. Watch the bad language.

Nicole Richie [*There is no "t" in Richie*]: Okay. God.

Paris Hilton: It feels so good to be standing here tonight.

Nicole: Yeah, instead of standing in mud and [*dropped audio*].

..... [*There is no reason for an ellipses; there was no intervening dialog between the line that appears above the ellipses and the one that appears below it.*]

Nicole: Why do they [*even*] call it 'The Simple Life?' Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple.

Corrected Version of Attachment A to the LOI for Stations Listed in Exhibit 2

Paris Hilton: Now, Nicole, [*remember*] this is a live show. Watch the bad language.

Nicole Richie [*There is no "t" in Richie*]: Okay. God.

Paris Hilton: It feels so good to be standing here tonight.

Nicole: Yeah, instead of standing in mud and [*dropped audio*].

. . . . [*There is no reason for an ellipses; there was no intervening dialog between the line that appears above the ellipses and the one that appears below it.*]

Nicole: Why do they [*even*] call it 'The Simple Life?' Have you ever tried to get [*dropped audio*] out of a Prada purse? It's not so [*dropped audio*] simple.

3. **Describe, with specificity, the process by which the remarks of each individual who spoke during the broadcast of the material described in Attachment A were prepared. If such remarks were prepared in advance of the broadcast, identify each person involved in the preparation, revision, review and/or approval of the remarks and, for each such person so identified, describe his or her role in that process.**

ANSWER: The Licensee objects to Inquiry 3 to the extent that it seeks to inquire into the process by which the Licensee creates and acquires content. The creative process and the creation of content lie at the heart of the First Amendment's protections.⁶ The FCC's requests in Inquiries 3-7 seriously impinge upon the Licensee's First Amendment rights and conflict with the FCC's obligation to proceed cautiously when enforcing indecency regulations.⁷

The FCC has long recognized that indecent speech is protected by the First Amendment – "a critical Constitutional limitation that demands we proceed cautiously and with appropriate restraint."⁸ The investigation represented by Inquiries 3-7 is wholly inconsistent with the notions of caution and restraint. The government's effort to compel a licensee to divulge information about the creation of content threatens to chill the speech of both broadcasters and members of the creative community.

⁶ See Zachini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 578 (1977) ("There is no doubt that entertainment, as well as news, enjoys First Amendment protection. It is also true that entertainment itself can be important news").

⁷ See Infinity, at para. 4 (citing ACT I, 852 F.2d at 1344 ("the FCC may regulate [indecent] material only with due respect for the high value our Constitution places on freedom and choice in what people say and hear")).

⁸ Id.

If broadcasters are faced with governmental interference in the creative process, they will undoubtedly engage in self-censorship. The intrusive questions posed by Inquiries 3-7 thrust the government into the inner workings of the creative process, threatening to stifle creativity while breeding an atmosphere of mistrust. Rather than expose themselves to governmental interference, broadcasters may sacrifice their First Amendment rights and avoid taking the risks necessary to produce innovative and interesting programming. In addition, members of the creative community will shun broadcasting for unregulated media – particularly cable. The threat is especially great where, as here, the government attempts to insert itself into the creative realm *even though there has been no finding of indecency*. Indeed, as the Licensee's response to Inquiry 9 makes clear, there can be no finding of indecency with regard to the programming described in Attachment A to the LOI. The FCC's invasive approach stands in direct conflict with the Supreme Court's admonition that the government's "exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas"⁹

Moreover, Inquiries 3-7 are entirely unnecessary. The FCC can fulfill its duty to respond to indecency allegations simply by asking licensees for a properly supported explanation of the facts surrounding a particular broadcast. Broadcasters can respond to a less intrusive inquiry without fear that the government is invading the realm of content creation, just as the Licensee has done in this case (see the attached Declarations and the Licensee's response to Inquiry 7). In contrast, when the government launches a fishing expedition into the creative process, it poses a far more severe threat to free speech.

In sum, if the government is permitted to scrutinize the creative process, the negative effect on programming will be profound. The ultimate harm will be felt by viewers of free, over-the-air television, who will have fewer options and less diversity in broadcast programming.

Nonetheless, in the interest of bringing this matter to a prompt conclusion (yet subject to the foregoing objections), the Licensee has attached hereto the Declarations of Bob Bain, executive producer of the 2003 Billboard Music Awards, and Kevin Spicer, Executive Director of Broadcast Standards at Fox

⁹ See Sweezy v. New Hampshire, 354 U.S. 234, 245 (1957); see also Federal Election Commission v. Machinists Non-Partisan Political League, 655 F.2d 380, 389 (D.C. Cir. 1981) (cert. denied, 454 U.S. 897 (1981)) ("[B]efore a state or federal body can compel disclosure of information which would trespass upon first amendment freedoms, a 'subordinating interest of the State' must be proffered, and it must be 'compelling.'" (citing NAACP v. Alabama, 357 U.S. 449, 463 (1958))).

Broadcasting Company ("FBC"). The Declarations confirm that the dialog contained in Attachment A to the LOI did not appear either in the script or on the TelePrompTer for the 2003 Billboard Music Awards.¹⁰ The Declarations further confirm that the dialog contained in Attachment A to the LOI was "spontaneously delivered" by Nicole Richie, and that no producer or writer working on the 2003 Billboard Music Awards "suggested, encouraged or influenced Nicole Richie to deviate from the script in her spoken remarks at the 2003 Billboard Music Awards."¹¹

4. **Identify each person employed by or otherwise associated with the Licensee who prepared, revised, reviewed, approved and/or otherwise had knowledge of the remarks described in Inquiry 1, above, prior to the broadcast. For each such person, describe, with particularity, his or her role in that process.**

ANSWER: See Licensee's response to Inquiry 3.

5. **Did any or all of the broadcast remarks described in Inquiry 1, above, deviate from the remarks that were prepared, reviewed and/or approved prior to the broadcast pursuant to the processes described in the Licensee's responses to Inquiries 3 and 4, above? If so, describe any such deviation.**

ANSWER: For the reasons set out in its response to Inquiry 3, the Licensee objects to Inquiry 5 to the extent that it inquires into the process by which the Licensee creates and acquires content. As to that portion of Inquiry 5 that asks whether the remarks contained in Attachment A to the LOI differed from the script for the 2003 Billboard Music Awards, the Bain and Spicer Declarations demonstrate that the dialog contained in the attachment deviated from the script.¹²

In particular, the script did not call for Paris Hilton to make any reference to "bad language." Her first scripted words were "It feels so good to be standing here tonight." Furthermore, Nicole Richie's first scripted line read "Yeah – instead of standing in mud and pig crap." Finally, the script called for Nicole Richie to say: "Have you ever tried to get cow manure out of a Prada purse? It's not so freaking simple."

¹⁰ See Declaration of Bob Bain, President of Bob Bain Productions, Inc. and executive producer of the 2003 Billboard Music Awards (the "Bain Declaration"); see also Declaration of Kevin Spicer, Executive Director of Broadcast Standards for Fox Broadcasting Company (the "Spicer Declaration").

¹¹ Id.

¹² See id.

6. **If the Licensee's response to Inquiry 5, above, is that some deviation occurred, Identify each person who made, or influenced the decision to so deviate and, if so, how, when and for what reason. For each such person, describe his or her role in that process.**

ANSWER: For the reasons set out in its response to Inquiry 3, the Licensee objects to Inquiry 6 to the extent that it inquires into the process by which the Licensee creates and acquires content. As to that portion of Inquiry 6 that asks who made the decision to deviate from the script for the 2003 Billboard Music Awards, the Bain and Spicer Declarations confirm that, to the Licensee's knowledge, the decision was made solely by Nicole Richie and Paris Hilton.¹³

7. **Describe all procedures employed by the Licensee on December 10, 2003, to ensure that the broadcast of the Billboard Music Awards program did not contain any indecent or otherwise offensive language. Identify each person employed by or otherwise associated with Licensee involved in establishing those procedures and/or their implementation and, for each such person, describe with particularity his or her role with respect to establishing and/or implementing such procedures. Explain, despite the existence of any such procedures, how and why the material contained in Attachment A was, in fact, broadcast.**

ANSWER: For all of the reasons set out in its response to Inquiry 3, the Licensee objects to Inquiry 7 to the extent that it inquires into the process by which the Licensee creates content. The Licensee's procedures for ensuring that its content complies with its own standards and with the Commission's indecency and obscenity rules necessarily implicate the creative process. Indeed, these procedures – including hiring production and writing teams to oversee the composition of scripts; reviewing, commenting upon and ultimately approving scripts and their drafts; and putting scripts into a TelePrompTer so as to provide performers with a real-time transcript of their lines – are all inseparable components of the creative process. In addition, Licensee objects to Inquiry 7 insofar as it implies that the material contained in Attachment A was indecent. As the Licensee's response to Inquiry 9 makes clear, the material contained in Attachment A to the LOI was not indecent.

To the extent that Inquiry 7 asks the Licensee to describe its time delay procedures for editing objectionable content from live broadcasts, the Licensee is providing the attached Declaration of Roland McFarland, the Vice President of Broadcast Standards for FBC.¹⁴ The McFarland Declaration describes the technical procedures employed by FBC to ensure that indecent material did not

¹³ See id.

¹⁴ See Declaration of Roland McFarland, Vice President of Broadcast Standards for Fox Broadcasting Company (the "McFarland Declaration").

appear in the broadcast of the 2003 Billboard Music Awards. As the McFarland Declaration makes clear, FBC takes very seriously its commitment to ensure that offensive, indecent and obscene material does not appear in any FBC-produced programming.¹⁵

With the immediacy of live television comes the possibility that performers will spontaneously deviate from the script and do or say something that is offensive to some viewers. Accordingly, FBC has utilized a five-second delay during the production of live entertainment programming. In addition, FBC ensures that a member of its Broadcast Standards division monitors all live broadcasts for offensive, indecent or obscene material. The Broadcast Standards employee has access to a "delay button" that enables the employee to edit out objectionable content before it appears on viewers' televisions. FBC also ensures that an additional Broadcast Standards representative is assigned to all live entertainment events. This representative remains involved in an event throughout its production. He or she reviews in advance the script, attends dress rehearsals and is physically present at the site of the live event.¹⁶

Although the above-described procedures have been effective for a number of years in preventing objectionable material from appearing during live entertainment broadcasts, the system relies on human beings and it therefore remains imperfect. During the broadcast of the material described in Attachment A to the LOI, the above-described procedures proved insufficient to permit the editing of two objectionable words that occurred immediately following an objectionable word that had been deleted. Although the Broadcast Standards employee working during the 2003 Billboard Music Awards succeeded in editing out the first expletive spoken by Nicole Richie, he failed to act quickly enough to catch the remaining expletives during Ms. Richie's spontaneous dialog.¹⁷

FBC acted swiftly to correct this error. First and foremost, it immediately edited the tape of the 2003 Billboard Music Awards to remove the expletives before the material aired on tape delay in the Mountain and Western time zones. In addition,

¹⁵ The Licensee emphasizes, however, that its response to Inquiry 7 does not in any way constitute an admission that the material described in Attachment A to the LOI was indecent or violative of any other Commission rule or policy. The procedures discussed in the response to Inquiry 7 are designed to deal not only with indecent programming, but also with programming that FBC feels may be offensive to some viewers. FBC's effort to eliminate or edit certain aspects of the material described in Attachment A to the LOI are a reflection of its belief that some of the dialog described in the attachment was offensive – even though none of it was indecent.

¹⁶ See McFarland Declaration.

¹⁷ See id.

FBC has suspended the Broadcast Standards employee who made the error during the live broadcast shown to viewers in the Eastern and Central time zones.

FBC has implemented several significant changes to its time delay procedures in an effort to reduce the risks associated with human error during future live entertainment broadcasts. First, whenever possible, FBC intends to air live entertainment programming using a five minute delay in which the event would actually start five minutes before the broadcast begins. This will allow far more effective editing of potentially objectionable content. Second, FBC will increase its time delay from five to 10 seconds to provide its Broadcast Standards employees with additional time to catch and remove objectionable content before it airs. Moreover, FBC is adding a second delay button to all live broadcasts of entertainment programming. Equally significant, this second button will be physically located at the site of the live event and will be under the control of the Broadcast Standards representative assigned to the event. Because he or she will work on the program throughout its production (including attending dress rehearsals) and will monitor the live broadcast while physically present at the site, he or she will be familiar with the content and likely will have a more instinctive feel for the flow of the program. Ultimately, having two employees with access to the delay button will enable each to serve as a back-up set of eyes and ears in case the other person fails to react quickly enough to edit objectionable content.¹⁸

Finally, FBC recognizes that certain performers may present more risk of spontaneous objectionable content during live performances than others. Where feasible, FBC intends to tape in advance certain performances to air during otherwise "live" broadcasts. In fact, given its experience during the 2003 Billboard Music Awards, FBC taped in advance an appearance by Paris Hilton and Nicole Richie and aired the tape during a New Year's Eve celebration that otherwise was broadcast live on December 31, 2003.¹⁹

In sum, FBC has been responsible and conscientious when broadcasting live entertainment programming. It has utilized a time delay system that has generally been quite effective at keeping objectionable material off the air. Nonetheless, FBC is now working diligently to improve its system to further reduce the risks associated with broadcasting events live.

8. **Provide copies of all Documents that support the Licensee's responses to Inquiries 1-7, above.**

ANSWER: The Licensee has produced Documents that support its responses to Inquiries 1-7 to the extent that the Documents are not protected by the First Amendment and/or the attorney-client privilege. See the attached Declaration of

¹⁸ See id.

¹⁹ See id.

Molly Pauker, Vice President of Fox Television Holdings, Inc., the parent of Fox Television Stations, Inc. and the other licensees of the stations listed in Exhibits 1 and 2.

9. **If the Licensee believes that a defense to the subject allegations exists, state concisely the nature of the defense.**

ANSWER: The material described in Attachment A to the LOI is not actionably indecent. The Licensee submits that the LOI is improper and violative of its First Amendment rights. In the interest of bringing this matter to a prompt conclusion, but without waiving its objection to the inquiry, the Licensee hereby demonstrates why the material described in Attachment A to the LOI is not indecent.

The Indecency Rules

The Commission's indecency rule states: "No licensee of a radio or television station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent."²⁰ The FCC has indicated that its evaluation of indecency involves two fundamental determinations:

First the material alleged to be indecent must fall within the subject matter scope of our indecency definition, that is, the material must describe or depict sexual or excretory organs or activities. . . .

Second, the broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast medium.²¹

The Commission has a long and uninterrupted history of emphasizing that "[t]he use of specific potentially offensive words is not per se indecent."²² Rather, a fundamental prerequisite of an indecency finding is that the language must depict or describe sexual or excretory organs or activities. Thus, "speech that is indecent must involve more than an isolated use of an offensive word."²³ The Supreme Court, in affirming the FCC's limited authority to regulate indecency, relied upon the fact that the Commission's definition of indecency requires a sufficient nexus between content and a

²⁰ 47 C.F.R. § 73.3999.

²¹ See Indecency Policy Statement, at 8002 (emphasis in original) (citation omitted).

²² Id.; see also Peter Branton, 6 FCC Rcd 610 (1991) (subsequent history omitted) ("[n]o terms are per se indecent").

²³ In Re The Regents of the University of California, 2 FCC Rcd 2703 (1987) (citing In Re Pacifica Foundation, Inc., 2 FCC Rcd 2698, 2699 (1987)).

sexual or excretory description or depiction.²⁴ Indeed, the Supreme Court specifically emphasized the narrowness of its holding: "We have not decided that an occasional expletive . . . would justify any sanction"²⁵

The Commission has repeatedly embraced this limited approach. When confronted with words that can serve both as an expletive and as a sexual reference, the FCC has analyzed the context to determine whether it can make the threshold finding required by the indecency definition.²⁶ For example, the Commission found that a radio station had not broadcast indecent material where the word "prick" was "not used to 'describe or depict' a sexual activity or organ, but was instead used as a vulgar insult."²⁷ In short, offensive words, if wholly detached from any sexual or excretory meaning, cannot possibly be characterized as indecent.

Even when the FCC is satisfied that content meets the threshold definition of indecency, the Commission has made clear that "the determination as to whether certain programming is patently offensive is not a local one and does not encompass any particular geographic area."²⁸ The Commission reviews the content from the perspective of the average broadcast viewer – not the sensibilities of any individual complainant.²⁹ In determining whether material is patently offensive, the FCC has laid out three principal factors for evaluation: (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2)

²⁴ See FCC v. Pacifica Foundation, 438 U.S. at 745 (the "question in this case is whether a broadcast of patently offensive words *dealing with sex and excretion* may be regulated because of its content") (emphasis added). In its decision below, the Commission had made clear that the "concept of 'indecent' is intimately connected . . . to language that describes . . . sexual or excretory organs or activities . . ." Citizen's Complaint Against Pacifica Foundation Station WBAI(FM), 56 F.C.C.2d 94, 98 (1975).

²⁵ FCC v. Pacifica Foundation, 438 U.S. at 750.

²⁶ See, e.g., In Re Entercom Buffalo License, LLC, 17 FCC Rcd 11997, 11999 (2002).

²⁷ Id.

²⁸ Indecency Policy Statement, at 8002 (citation omitted).

²⁹ See id. at n.15. Indeed, the "purpose of 'contemporary community standards' was to ensure that material is judged neither on the basis of a decisionmaker's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group." Id. (citing Hamling v. United States, 418 U.S. 87, 107 (1974), reh'g denied 419 U.S. 885 (1974)).

whether the material dwells on or repeats at length the descriptions or depictions; and (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.³⁰ The Commission has emphasized that, as part of any determination of whether material is patently offensive, the "full context in which the material appeared is critically important."³¹ None of the three principal factors alone is controlling. Rather, these criteria, and other case-specific factors, are reviewed in the aggregate.

Furthermore, the Commission has held that even when speech meets the threshold definition of indecency (i.e., it depicts or describes sexual or excretory organs or activities), it is not actionably indecent if the speech is only a "fleeting and isolated utterance" – especially if the speech occurs within the context of live and spontaneous programming.³² In fact, in its reconsideration decision in the Pacifica case that established the current indecency definition, the Commission pointed out that, under circumstances in which "public events likely to produce offensive speech are covered live," it would be "inequitable for us to hold a licensee responsible for indecent language."³³

Analysis

First and foremost, the Licensee emphasizes that the objectionable dialog contained in Attachment A to the LOI aired only on stations in the Eastern and Central time zones (identified in Exhibit 1 hereto). As demonstrated in the Licensee's response to Inquiry 2, stations in the Mountain and Western time zones (identified in Exhibit 2 hereto) aired an edited version of the material contained in Attachment A to the LOI. With regard to stations in the Mountain and Western time zones, no material was broadcast that meets the threshold definition of indecency.

Stations in the Eastern and Central time zones did air the expletive "fucking." However, in the context of its use as described in Attachment A

³⁰ See Indecency Policy Statement, at 8003.

³¹ Id. at 8002 (emphasis in original).

³² See, e.g., L.M. Communications of South Carolina, Inc., 7 FCC Rcd 1595 (1992); see also Steve Bridges, 9 FCC Rcd 1681 (1994) ("given the brief, live and unscripted nature of the material as well as its outside source, we will take no further action with respect to this broadcast").

³³ In Re "Petition for Clarification or Reconsideration" of a Citizen's Complaint Against Pacifica Foundation, 59 F.C.C.2d 892, 893, n.1 (1976). The Supreme Court in Pacifica took specific note of the Commission's decision in this regard. See FCC v. Pacifica, 438 U.S. at 732-33 & n.7.

to the LOI, the word "fucking" does not depict or describe sexual or excretory organs or activities and therefore does not fall within the subject matter scope of the Commission's indecency definition. At most, the word constitutes a vulgar expletive used to express emphasis. The word was not used to convey any type of sexual meaning whatsoever.

Because the word "fucking" was not used to depict or describe sexual or excretory organs or activities, the factors for considering whether the broadcast was patently offensive are inapposite. Even assuming that the Commission were to conclude, and it should not, that the word did constitute a description or depiction of sexual or excretory activity, none of the three factors weighs in favor of a finding of patent offensiveness. Similarly, the phrase "cow shit" (which also aired only on stations in the Eastern and Central time zones) was not used in a patently offensive manner under any of the three factors.

As to the first factor (explicitness or graphic nature), the dialog contained at most a passing reference to an excretory by-product (i.e., "cow shit") and an expletive used for emphasis. As to the second factor (whether the material dwells on or repeats at length depictions or descriptions), the dialog lasted only 22 seconds out of a two-hour program. Finally, the Licensee did not use the dialog to pander to or titillate the audience, nor did it present the dialog for "shock value." To the contrary, the Licensee diligently attempted to edit out all of the offensive language during the live broadcast of the 2003 Billboard Music Awards shown to viewers in the Eastern and Central time zones. Moreover, the Licensee immediately edited the offensive language out of the tape delayed broadcast of the 2003 Billboard Music Awards shown to viewers in the Mountain and Western time zones.

As the Commission has noted, the *full context* in which the material appeared is critically important.³⁴ The language contained in Attachment A to the LOI constitutes fleeting and isolated utterances delivered during live programming. Moreover, the expletives were not scripted but rather were spontaneous outbursts by Nicole Richie.³⁵ Thus, the material contained in Attachment A to the LOI is not actionably indecent.

³⁴ See Indecency Policy Statement, at 8002.

³⁵ See Steve Bridges, 9 FCC Rcd at 1681 ("given the brief, live and unscripted nature of the material as well as its outside source, we will take no further action with respect to this broadcast").

Conclusion

The First Amendment is a critical constitutional limitation that demands that the Commission "proceed cautiously and with appropriate restraint."³⁶ Indecency determinations are difficult as evinced by the Commission's struggles in recent cases to define what is in fact indecent.³⁷ Ultimately, however, the outcome of this case is clear: Commission precedent and the Constitution require that the Commission deny the complaints filed against the Licensee and take no further action.

Dated: January 30, 2004

³⁶ In Re KBOO Foundation; Licensee of Noncommercial Educational Station KBOO-FM, Portland, OR, 18 FCC Rcd 2472, para. 5 (2003) ("KBOO") (citing United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 813-15 (2000); Action for Children's Television, 852 F.2d 1332, 1344 (D.C. Cir. 1988)).

³⁷ See, e.g., KBOO, 18 FCC Rcd at 2472 (rescinding a Notice of Apparent Liability for willfully broadcasting indecent language); In Re Citadel Broadcasting Co.; Licensee of Station KKMG(FM), Pueblo, Colorado, 17 FCC Rcd 483 (2002) (rescinding a Notice of Apparent Liability for willfully broadcasting indecent language).

EXHIBIT 1

In the Eastern and Central time zones, the following television stations, all of which are licensed to Fox Television Stations, Inc. ("FTS"), a wholly-owned subsidiary of FTS, or a wholly-owned subsidiary of Fox Television Holdings, Inc., aired the material described in Attachment A to the LOI (subject to the Licensee's response to Inquiry 2) on December 10, 2003.

<u>Station</u>	<u>Community of License</u>	<u>Licensee</u>	<u>Time Aired¹</u>
WNYW	New York, NY	FTS	9:08 p.m.
WFLD	Chicago, IL	FTS	8: 08 p.m.
WTFX	Philadelphia, PA	Fox Television Stations of Philadelphia, Inc.	9: 08 p.m.
WFXT	Boston, MA	FTS	9: 08 p.m.
KDFW	Dallas, TX	KDFW License, Inc.	8: 08 p.m.
WTTG	Washington, DC	FTS	9: 08 p.m.
WAGA	Atlanta, GA	FTS	9: 08 p.m.
WJBK	Detroit, MI	FTS	9: 08 p.m.
KRIV	Houston, TX	FTS	8: 08 p.m.
WTVT	Tampa, FL	TVT License, Inc.	9: 08 p.m.
KMSP	Minneapolis, MN	FTS	8: 08 p.m.
WJW	Cleveland, OH	WJW License, Inc.	9: 08 p.m.
WOFL	Orlando, FL	FTS	9: 08 p.m.
KTVI	St. Louis, MO	KTVI License, Inc.	8: 08 p.m.
WITI	Milwaukee, WI	WITI License, Inc.	8: 08 p.m.

¹ All times are approximate local times for the station listed.

WDAF	Kansas City, MO	WDAF License, Inc.	8:08 p.m.
WBRC	Birmingham, AL	WBRC License, Inc.	8:08 p.m.
WHBQ	Memphis, TN	FTS	8:08 p.m.
WGHP	High Point, NC	WGHP License, Inc.	9:08 p.m.
KTBC	Austin, TX	KTBC License, Inc.	8:08 p.m.
WOGX	Ocala, FL	FTS	9:08 p.m.

EXHIBIT 2

In the Mountain and Western time zones, the following television stations, all of which are licensed to Fox Television Stations, Inc. ("FTS"), a wholly-owned subsidiary of FTS, or a wholly-owned subsidiary of Fox Television Holdings, Inc., aired the material described in Attachment A to the LOI (subject to the Licensee's response to Inquiry 2) on December 10, 2003.

<u>Station</u>	<u>Community of License</u>	<u>Licensee</u>	<u>Time Aired²</u>
KTTV	Los Angeles, CA	FTS	9:04 p.m.
KSAZ	Phoenix, AZ	KSAZ License, Inc.	8: 08 p.m.
KDVR	Denver, CO	FTS	8: 08 p.m.
KSTU	Salt Lake City, UT	FTS	8: 08 p.m.

² All times are approximate local times for the station listed.

EXHIBIT 3

FCC-X01-001	1(d)	KMSP	Mary Morrisette	fox9@kmosp.com	December 10, 2003	viewer e-mail
FCC-X01-002	1(d)	KMSP	Mary Morrisette	fox9@kmosp.com	December 10, 2003	viewer e-mail
FCC-X01-003	1(d)	KMSP	Julie Mueller	fox9@kmosp.com	December 11, 2003	viewer e-mail
FCC-X01-004	1(d)	KMSP	Gail Engblom	fox9@kmosp.com	December 10, 2003	viewer e-mail
FCC-X01-005	1(d)	KMSP	Bonnie Hagen	fox9@kmosp.com	December 11, 2003	viewer e-mail
FCC-X01-006	1(d)	KMSP	Tracy Lallak	fox9@kmosp.com	December 13, 2003	viewer e-mail
FCC-X01-007	1(d)	KDVR	Robert Wiswell	Bschm603@foxtv.com	January 12, 2004	viewer e-mail
FCC-X01-008						
FCC-X01-009	1(d)	KRIV	George Hall	Bebel D'Artagnan	December 12, 2003	viewer letter
FCC-X01-010	1(d)	KTBC	Kim Bucklew	KTBC Programming Dept.	December 11, 2003	viewer e-mail
FCC-X01-011	1(d)	KTBC	KTBC Programming Dept.	Kim Bucklew	December 11, 2003	response to viewer e-mail
FCC-X01-012	1(d)	KTBC	Kim Bucklew	KTBC Programming Dept.	December 11, 2003	viewer e-mail
FCC-X01-013	1(d)	KTBC	KTBC Programming Dept.	Kim Bucklew	December 12, 2003	response to viewer e-mail
FCC-X01-014						
FCC-X01-015	1(d)	KTBC	Holly Breaux	Mark Lipps	December 11, 2003	e-mail correspondence re: viewer e-mail
FCC-X01-016	1(d)	KTBC	Mark Lipps	General Managers et al.	December 11, 2003	Fox intranet cyber-mailer
FCC-X01-017	1(d)	KTBC	Janie Robles	Danny Baker	January 13, 2004	viewer e-mail
FCC-X01-018						
FCC-X01-019	1(d)	WFLD			December 11, 2003	WFLD Archives -- 7am news report
FCC-X01-020	1(d)	WFLD			January 13, 2004	WFLD Archives -- 9pm news report
FCC-X01-024						
FCC-X01-025	1(d)	WFLD	Stangmom86@aol.com	comments@foxchicago.com	December 11, 2003	viewer e-mail
FCC-X01-026	1(d)	WFLD	nyhojohn@aol.com	comments@foxchicago.com	December 10, 2003	viewer e-mail
FCC-X01-027	1(d)	WFLD	Thomas LaJeone	comments@foxchicago.com	December 10, 2003	viewer e-mail
FCC-X01-028	1(d)	WGHP	EasyLink	General Managers et al.	December 11, 2003	Fox intranet cyber-mailer
FCC-X01-029	1(d)	WGHP	Connie Green	programming@wgghp.com	December 11, 2003	viewer e-mail
FCC-X01-030	1(d)	WGHP	Karen Adams	Connie Green	December 31, 2003	response to viewer e-mail
FCC-X01-031	1(d)	WGHP	Wendy Butler	programming@wgghp.com	December 10, 2003	viewer e-mail
FCC-X01-032	1(d)	WGHP	Allen Holloman	Karen Adams	December 31, 2003	response to viewer e-mail
FCC-X01-033	1(d)	WGHP	Sue Fisher	Karen Adams	December 31, 2003	response to viewer e-mail
FCC-X01-034						
FCC-X01-035	1(d)	WHBQ	tables@mail.lced.net	whbg-RandyAdams@foxtv.com	December 11, 2003	viewer e-mail

FCC-X01-124	1(d)	Fox Broad-casting Co.			Videotape of material for Eastern and Central time zones
FCC-X01-125	1(d)	Fox Broad-casting Co.			Videotape of material for Mountain and Western time zones