



LEVENTHAL SENTER & LERMAN PLLC

August 24, 2005

VIA HAND DELIVERY

David J. Brown, Esq.
Investigations and Hearings Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, SW, Room 4-A462
Washington, DC 20554

**Re: Station WQXA-FM, York, Pennsylvania
File No. EB-05-IH-0106**

Dear Mr. Brown:

Citadel Broadcasting Company ("*Citadel*"), licensee of radio station WQXA-FM, ("*WQXA-FM*" or the "*Station*"), York, Pennsylvania, by its counsel, hereby responds to the August 10, 2005 request for information and documents (the "*Inquiry Letter*") issued by the Enforcement Bureau (the "*Bureau*"). In the Inquiry Letter, the Bureau states that it is investigating an allegation that WQXA-FM may have broadcast indecent or profane material on February 2, 2005 at approximately 8:40 a.m. in violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999. The Inquiry Letter follows a listener complaint, apparently received by the Commission on February 2, 2005, from a complainant whose identity has been redacted by the Bureau (the "*Complaint*").

The Bureau should dismiss the Complaint because it is unsupported by sufficient evidence – in the form of a tape, transcript, or significant excerpt of the alleged broadcast – to sustain its claims.¹ The Complaint consists of nothing more than the bare allegation that the "s-word" (the "*Expletive*") was broadcast at 8:40 a.m. on February 2, 2005.²

As a threshold matter, the Bureau's launch of a full investigation into the matter, based solely on this unelaborated and unsupported Complaint, is contrary to the Commission's recognized obligation to "proceed cautiously and with appropriate restraint" when regulating speech. *Citadel Broadcasting Company*, 17 FCC Rcd 483, 486 (EB 2002) (Bureau rescinds

¹ Bureau staff has verbally confirmed that the complainant did not submit a tape or transcript of the programming to the Commission.

² Insofar as Citadel is aware, the Complainant did not specifically allege that the word "shit" was broadcast but rather complained of the broadcast of the "s-word." The Inquiry Letter concludes, without elaboration, that the "s-word" is the word "shit."



sanction imposed on a licensee that broadcast a version of the Eminem song “The Real Slim Shady”). Under the First Amendment, when considering any complaint alleging the broadcast of indecent or profane language, the Bureau has an affirmative duty to protect a broadcaster’s free speech rights – and the rights of their listeners to hear that speech. *See Action for Children’s Television v. FCC*, 852 F.2d 1332, 1344 (D.C. Cir. 1988) (“ . . . the FCC may regulate [indecent] material only with due respect for the high value our Constitution places on freedom and choice in what people may say and hear.”). The Commission’s own instructions to the public as to how to file a complaint establish the critical importance of context to any language that is the subject of a complaint. Here, despite those published instructions, the Bureau has proceeded without any documentary evidence, or even significant description of the material involved. As discussed further below, the extremely limited Complaint cannot support a finding of indecency in this instance.

For these reasons, Citadel urges the Bureau to dismiss the Complaint and close the instant investigation without further action.

Responses to Inquiries

Subject to its objections regarding both the merits and scope of the instant investigation, Citadel responds below to the six inquiries presented in the Inquiry Letter. Citadel makes clear that by providing these responses, it is not waiving any potential objection to the inquiry.³

Inquiry 1. State whether the Licensee broadcast the matter described in the Complaint, including the Expletive, over Station WQXA(FM) on the date and time indicated in the Complaint and/or on that or any other date between 6:00 a.m. and 10:00 p.m. If so, state the date and time (sic) each

³ Indeed, the Bureau should dismiss the Complaint because the Commission’s indecency and profanity definitions are unconstitutionally vague and overbroad. In *Reno v. ACLU*, 521 U.S. 844 (1997), the Supreme Court invalidated a nearly identical indecency definition applicable to the Internet on vagueness and overbreadth grounds. In addition, the Commission has failed to establish the proximate link between indecency and harm to children required to demonstrate the necessary compelling governmental interest. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *Interactive Digital Software Assoc. v. St. Louis County*, 329 F.3d 954, 958-59 (8th Cir. 2003). The Commission’s current profanity definition encompasses “language that denot[es] 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,” which is itself impermissibly vague and overbroad. *See Complaints Against Various Broadcast Licensees Regarding Their Airing Of The “Golden Globe Awards” Program*, 19 FCC Rcd 4975, 4981 (2004) (defining “profanity” for purposes of Section 1464 enforcement) (“*Golden Globe Awards*”), quoting *Tallman v. United States*, 465 F.2d 282, 286 (7th Cir. 1972).



such broadcast. Also provide 3 recordings of each such broadcast on compact disc (CD-R), and a written transcript of one such recording.

Based upon its good faith investigation, Citadel believes it did not broadcast the matter described in the Complaint, including the Expletive, over WQXA-FM either (i) on the date and time indicated in the Complaint, or (ii) on that or any other date between 6:00 a.m. and 10:00 p.m. See Declaration of Mark Harper, attached hereto, at ¶2, and Declaration of Earl David Reed, attached hereto, at ¶2.

Citadel does not have an audio recording of the material broadcast by the Station at approximately 8:40 a.m. on February 2, 2005, a broadcast which occurred more than six months before the FCC's Inquiry Letter was issued.

Inquiry 2. With regard to each broadcast referred to in the response to Inquiry 1 above, if the programming described in the Complaint does not accurately reflect the material broadcast over Station WQXA (FM), describe any inaccuracies.

As stated in response to Inquiry 1, Citadel does not believe that the February 2, 2005 broadcast included the Expletive. Because Citadel lacks a recording of the broadcast in question, however, it is unable to provide conclusive documentation.⁴

Citadel can report that normal station practices would have precluded the broadcast of the Expletive, as the Expletive is a word that is generally recognized by WQXA-FM as unacceptable for broadcast. As set forth in the attached Declarations of Mark Harper and Earl David Reed, the co-hosts of the WQXA-FM Morning Show, each morning show personality states his best recollection that the referenced material was not aired on WQXA-FM.

Inquiry 3. With regard to each broadcast referred to in the response to Inquiry 1 above, provide any and all Documents relating to the matter reflected in the broadcast.

Based upon review of its internal files and records, Citadel has no Documents that relate to the broadcast matter referred to in the Complaint.

Inquiry 4. Indicate whether the Licensee broadcast all or any portion of the material described in the Complaint over any station licensed to it other than Station WQXA (FM)?

No. The program at issue does not air on any other station licensed to Citadel.

⁴ The complainant, of course, has not provided such documentation either, contrary to the requirements of the Commission's *Industry Guidance*, which are discussed further below.



Inquiry 5. If the answer to Inquiry 4, above is “yes,” provide, for each such broadcast:

- a. the call sign, community of license and licensee;
- b. the date and time of the broadcast;
- c. any and all Documents discussing, or otherwise relating to the material so broadcast over the station. Also provide a recording on compact disc (CD-R) along with a written transcript of the matter contained in each recording.

Not applicable. See response to Inquiry 4 above.

Inquiry 6. Provide copies of all Documents that provide the basis for or otherwise support the responses to Inquiries 1-5, above.

No Documents were used by Citadel to form the basis for or otherwise support its responses, apart from the attached declarations, which have been created for this response to the Bureau’s inquiry.

* * * * *

Citadel notes that even if the Expletive had been uttered on-air as the Complainant has alleged, the Bureau has no basis under its existing precedent for determining whether a violation of the indecency or profanity standards has occurred based on the evidence before it. For this reason, even if the word had been broadcast, there would be no basis for the Bureau to conclude that the broadcast was indecent.

As indicated above, the Commission’s specific guidance to the broadcast industry regarding indecency enforcement issued just four years ago stated unambiguously, “enforcement actions are based on documented complaints of indecent broadcasting received from the public.” *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) (“*Industry Guidance*”). It further explained that where a complainant fails to provide a minimum level of supporting information – including a tape, transcript or significant excerpt of the subject program, in addition to the date and time of the broadcast and the call sign of the station involved – the complaint is typically dismissed as deficient. *Id.* It made clear that it is the responsibility of the *complaining party* to provide the sufficient information in the first instance, including all relevant context, to allow the Commission to evaluate whether the broadcast indecency policy has been violated. *Id.* While *Industry Guidance* only addresses broadcast indecency, the requirement that a complainant provide sufficient supporting information and all relevant context also applies to cases involving allegations of broadcast profanity. See Enforcement Bureau – Obscene, Profane & Indecent Broadcasts (available at <http://www.fcc.gov/eb/broadcast/opi.html>)



(“In making indecency and profanity determinations, context is key! The Commission staff must analyze what was actually said during the alleged broadcast, the meaning of what was said and the context in which it was stated. ... In whatever form the complainant decides to provide the information, *it must be sufficiently detailed such that the Commission can determine the words and language actually used during the broadcast and the context of those words or language.* ... Moreover, the FCC must know the context when analyzing whether specific, isolated words are indecent or profane.”) (emphasis added).⁵

Here, the complainant’s allegations provide no detail, let alone the level of detail necessary to determine any aspect of the context of the segment that is the subject of the Bureau’s inquiry. The complainant has provided no audio recording, and has not submitted even a partial transcript of the broadcast. Instead, the Complaint consists solely of the allegation that a single objectionable word, the “s-word”, was uttered during the broadcast, the remaining content of which is left wholly unelaborated. In *Industry Guidance*, the Commission observed that “[g]iven the sensitive nature of [indecency] cases and the critical role of context in an indecency determination, it is important that the Commission be afforded as full a record as possible to evaluate allegations of indecent programming.” 16 FCC Rcd at 8015. Because the Complaint offers a record that is plainly insufficient to meet this standard, the complaint must be dismissed. *See EZ Communications, Inc.*, 8 FCC Rcd 2448, 2449 (MMB 1993).

Specifically, dismissal is required here because the Commission has made clear that no word or subject matter is indecent *per se* in all contexts. *See, e.g., Infinity Broadcasting Corp. of Pennsylvania*, 2 FCC Rcd 2705, 2706 (1987).⁶ Even in the Commission’s constitutionally suspect *Golden Globe Awards* decision, which abandoned well-established Commission precedent in several areas, the Commission stressed in its finding that a single use of a variant of the “f-word” was both indecent and profane that its decision was reached only after ascertaining the specific context in which that word was uttered. *See Golden Globe Awards*, 19 FCC Rcd at 4977 & 4981 (¶¶ 5 & 13) (finding use of a variant of the “f-word,” in the context of a nationally televised awards program, to be indecent because it was “shocking and gratuitous” and to be profane because it “amount[ed] to a nuisance”).⁷

⁵ *See also* FCC Consumer Facts – Obscene, Profane & Indecent Broadcasts (available at <http://www.fcc.gov/cgb/consumerfacts/obscene.html>); Complaints About Broadcast of Obscene, Indecent or Profane Material (available at <http://www.fcc.gov/eb/bccomplaints/opic.html>); EB – Obscene, Profane & Indecent Broadcasts (available at <http://www.fcc.gov/eb/broadcast/obscind.html>).

⁶ In that decision, the Commission stated “masturbation, ejaculation, breast size, penis size, sexual intercourse, nudity, urination, oral-genital contact, erections, sodomy, bestiality, menstruation and testicles[,] [n]one of these subjects is *per se* [sic] beyond the realm of the acceptable broadcast discussion.” *Infinity Broadcasting Corp. of Pennsylvania*, 2 FCC Rcd at 2706.

⁷ In that same decision, the Commission also put broadcasters on notice that, “depending on the context,” it will consider other words as highly offensive as the “f-word” under its



More recently, the Commission reached the opposite conclusion with respect to the use of the very same word in the context of a dramatic presentation. *See Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* FCC 05-23, slip op. (released February 28, 2005) ("*Saving Private Ryan*"). In *Saving Private Ryan*, the Commission found that the use of expletives in the film at issue was realistically reflective of "strong human reactions," and that "[d]eleting all such language or inserting milder language or bleeping sounds into the film would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers."⁸ It specifically found that "contextual differences between the expletives contained in the broadcast of the film here and that contained in the 2003 broadcast of the Golden Globe Awards ceremony are critical to our analysis under Section 1464." *Id.* at 8 (¶18).

With respect to the use of any specific word, such as the Expletive, the Commission has therefore made plain that it must have not only evidence that a particular word was uttered in a broadcast, but must also be able to evaluate the surrounding context, information which it has identified as "critical" to its analysis. Accordingly, even if utterance of the Expletive were proven in this instance, this fact alone, in the absence of details of the context in which it was used on the program in question, would not be sufficient evidence to support an indecency or profanity finding because the Commission lacks the contextual detail required to perform the type of careful analysis it has deemed essential in its prior cases.⁹

profanity definition. *Golden Globe Awards*, 19 FCC Rcd at 4981 (¶ 14). As discussed above, the Bureau cannot determine the relevant context in this case.

⁸ *Saving Private Ryan*, FCC 05-23 at 6 & 7 (¶ 14). In *Saving Private Ryan*, with specific reference to protecting children, the Commission distinguished its finding from its conclusion in *Golden Globe Awards*, where it found the phrase "really, really fucking brilliant," uttered during a live telecast, was actionably indecent. *Id.* at 8 (¶18). "*Saving Private Ryan*," a movie that had its initial theatrical release six years before the Fall 2004 airing at issue in the FCC's order, includes such dialogue as: "Fuck Private James Ryan, fuck him, just fuck the goddamned son-of-a-bitch."

⁹ *See, e.g., Letter to Mr. Peter Branton*, 6 FCC Rcd 610 (1991) *appeal dismissed*, *Branton v. FCC*, 933 F.2d 906 (D.C. Cir. 1993) (finding repeated use of variants of the "f-word" not indecent in the context of a National Public Radio news broadcast concerning mobster John Gotti).

David J. Brown, Esq.
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Conclusion

For the foregoing reasons, Citadel respectfully requests that the Complaint be dismissed and the instant inquiry be closed without further action.

Respectfully submitted,

CITADEL BROADCASTING COMPANY

By: Nancy A. Ory
Dennis P. Corbett
Nancy A. Ory

Leventhal Senter & Lerman PLLC
2000 K Street, NW
Suite 600
Washington, DC 20006-1809

Attachments

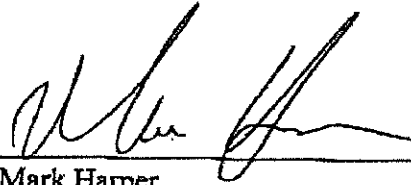
Its Counsel

DECLARATION OF MARK HARPER

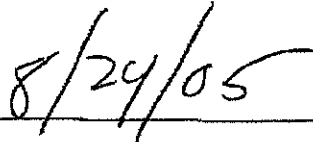
I, Mark Harper, under penalty of perjury, hereby declare that the following is true and correct. I understand that this Declaration will be submitted to the Federal Communications Commission ("FCC").

1. I am co-host of the WQXA-FM Morning Show, which airs on Station WQXA-FM, York, Pennsylvania ("WQXA-FM").

2. I was performing my regular on-air duties on the WQXA-FM Morning Show on February 2, 2005, and to the best of my recollection, the word "shit" was not broadcast during the Morning Show on that date. I recognize the word "shit" as unacceptable for broadcast on WQXA-FM



Mark Harper
WQXA-FM Morning Show Co-Host



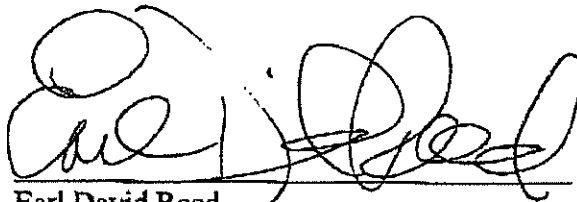
Date

DECLARATION OF EARL DAVID REED

I, Earl David Reed, under penalty of perjury, hereby declare that the following is true and correct. I understand that this Declaration will be submitted to the Federal Communications Commission ("FCC").

1. I am co-host of the WQXA-FM Morning Show, which airs on Station WQXA-FM, York, Pennsylvania ("WQXA-FM").

3. I was performing my regular on-air duties on the WQXA-FM Morning Show on February 2, 2005, and to the best of my recollection, the word "shit" was not broadcast during the Morning Show on that date. I recognize the word "shit" as unacceptable for broadcast on WQXA-FM



Earl David Reed
WQXA-FM Morning Show Co-Host

August 24, 2005
Date

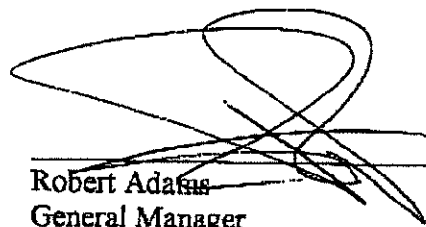
DECLARATION OF ROBERT ADAMS

I, Robert Adams, under penalty of perjury, hereby declare that the following is true and correct. I understand that this Declaration will be submitted to the Federal Communications Commission.

1. I am General Manager of Station WQXA-FM, York, Pennsylvania, which is licensed to Citadel Broadcasting Company ("Citadel"). In that capacity, I have oversight over all programming broadcast over the facilities of WQXA-FM. I have reviewed the letter sent by the FCC's Enforcement Bureau to Citadel on August 10, 2005 (the "Inquiry Letter").

2. I have reviewed the foregoing response to the Inquiry Letter, which is dated August 24, 2005, and certify that the facts set forth therein are true and correct, except for those of which official notice may be taken or that are attested to by others.

3. There are no Documents, as defined in the Inquiry Letter, that relate to the broadcast matter referred to in the Inquiry Letter.



Robert Adams
General Manager
Station WQXA-FM
Citadel Broadcasting Company

8/23/05

Date

DECLARATION OF JUDY ELLIS

I, Judy Ellis, under penalty of perjury, hereby declare that the following is true and correct. I understand that this Declaration will be submitted to the Federal Communications Commission ("FCC").

1. I am Chief Operating Officer of Citadel Broadcasting Corporation, the parent company of Citadel Broadcasting Company ("Citadel"), licensee of Station WQXA-FM, York, Pennsylvania. I have reviewed the letter sent by the FCC's Enforcement Bureau to Citadel on August 10, 2005 (the "Inquiry Letter"), and I have reviewed the foregoing response to the Inquiry Letter, which is dated August 24, 2005.

2. I do not have personal knowledge of the relevant facts concerning the matters addressed in the Enforcement Bureau's Inquiry Letter. None of the company's employees at Station WQXA-FM with personal knowledge of such facts, however, is an officer of the licensee. In an effort to comply to the extent possible with the Enforcement Bureau's request that Citadel's response be accompanied by a "declaration under penalty of perjury, signed and dated by an authorized officer of the Licensee with personal knowledge of the representations provided in the Licensee's response," I certify, to the best of my knowledge, information and belief, that the facts set forth in the response to which this declaration is attached, except those of

which official notice may be taken or that are attested to or certified by others, are true and correct.



Judy Ellis
Chief Operating Officer
Citadel Broadcasting Corporation

8/24/05

Date