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October 3, 2007

Via Hand Delivery

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
236 Massachusetts Avenue, S.E., Suite 110
Washington, D.C. 20002

Attention: Ms. Sandra Watson
Investigations and Hearings Division
Enforcement Bureau, Room 4-A330

Re: Ohio/Oklahoma Hearst-Argyle Television, Inc.
File No. EB-07-IH-3904
Response to Letter of September 4, 2007

Dear Ms. Watson:

Please find enclosed, on behalf of Ohio/Oklahoma Hearst-Argyle Television, Inc., licensee of Station WLWT(TV), Cincinnati, Ohio, a Response to a letter of inquiry dated September 4, 2007, in the above-referenced matter, together with two DVD recordings of the broadcast material in question.

Ms. Marlene Dortch
Attention: Ms. Sandra Watson
October 3, 2007
Page 2

If any questions should arise during the course of your consideration of this matter, please communicate with this office.

Sincerely,

A handwritten signature in black ink, appearing to read "David Kushner", with a long horizontal flourish extending to the right.

David Kushner
*Counsel to Ohio/Oklahoma Hearst-Argyle
Television, Inc.*

Enclosures

cc: Jennifer Lewis, Investigations and Hearings Division, EB Room 4-A330

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Ohio/Oklahoma Hearst-Argyle Television, Inc.)	File No. EB-07-IH-3904
)	
Licensee of Station WLWT(TV),)	
Cincinnati, Ohio)	

**RESPONSE OF OHIO/OKLAHOMA HEARST-ARGYLE TELEVISION, INC.
TO LETTER OF INQUIRY**

Ohio/Oklahoma Hearst-Argyle Television, Inc. ("Hearst-Argyle"), licensee of Station WLWT(TV), Cincinnati, Ohio, by its attorneys, submits this response to the Commission's letter of inquiry dated September 4, 2007, (the "Letter") in connection with the above-captioned matter. Station WLWT is an affiliate of the NBC Television Network ("NBC").

I. Response to Commission Inquiries

On December 14, 2006, from 8:57:44 p.m. to 8:57:59 p.m., WLWT broadcast a 15-second NBC Network commercial announcement contained in an NBC Network program promoting the DVD release of the movie *American Pie Presents: The Naked Mile* (the "Promo"). The Promo appeared within a network commercial block at the end of an episode of NBC's situation comedy *The Office*. The alleged indecent content (the "Material") appeared during the Promo.

The Promo lasted 15 seconds. It began with a fixed graphic shot lasting 2.6 seconds of the name of the movie and ended with another fixed graphic shot lasting 4.5 seconds of the cover of the DVD and its public availability beginning Tuesday (December 19, 2006). The Promo contains approximately 8 seconds of 11 quickly-edited scenes from the movie, with each scene lasting on

average less than 3/4 second. The Promo was provided to the Station by NBC as a national spot ad.

See Dyer Decl. at ¶ 5.

Among other things, the Material contained an image of two women. The Complainant alleges that, when watching a recorded playback of the Promo and when pausing the playback, he discerned that one of the frames depicted the women topless. The Complainant adds, however, that when viewed "at regular speeds" it could not be discerned that the women were topless.

Hearst-Argyle assures the Commission that the Station had no intention of broadcasting an image—however fleeting—of topless women. To do so would be contrary to the Station's standards and practices. As the attached affidavits disclose, the Station's executives had no knowledge that the NBC Network Promo contained any such image, and, as the Complainant expressly acknowledges, the fact that the women were apparently topless was not discernable when the Promo was played in real time at "regular speeds." Thus, there was no way—even if the NBC Promo had been recorded and screened in advance by the Station—that anyone at the Station would have been able to see or discern that two of the women, apparently, were topless. As the Commission, itself, will see when the Promo is viewed as it was broadcast, it could not have been discerned by the Station or by its viewers that the women were not wearing tops. Indeed, undersigned counsel struggled repeatedly to "freeze" and isolate each frame to try to confirm the Complainant's assertion. It required, as the Commission's staff will find when it attempts to do so, no small effort.¹

Hearst-Argyle regrets the matter, but it had no knowledge, and could not reasonably have been expected to have knowledge when applying every reasonable standard of care, that when part

¹ One cannot help but wonder why this questionable frame was placed in the Promo and by whom. How, for example, did the Complainant know to look for it?

of one of the frames was paused and frozen in a DVR playback, the content appeared to be different from that which is seen when the Material was broadcast. Accordingly, as a preliminary matter, for the Commission to impose liability on the Station for the broadcast of this Promo would impose a standard of care and licensee responsibility that would be impossible to discharge.

Included with this Response is a DVD copy of the material broadcast on the Station the evening of December 14, 2006, including (1) the program content broadcast approximately one hour before the Promo and approximately 47 minutes after the Promo was broadcast; (2) the program content broadcast in the approximately two minute commercial break in which the Promo appeared; and (3) the 15-second Promo itself. Because the Material appears visually only, a written transcript of the recording is not being submitted herewith.²

The Complaint does not accurately reflect the substance of the Promo as broadcast by the Station. The Complaint alleges that, when frozen, “[f]or one frame, there were two topless girls in full view” appearing at 8:58:22 p.m. However, it appears that the Material occupied one field of one frame, appearing at 8:57:51 p.m. in Frame 28. A frame consists of two fields, one consisting of the odd-numbered scan lines and the other consisting of the even-numbered scan lines. In the professional opinion of Paul Nowakowski, Chief Engineer of the Station, the Material occupied just one field of one frame. Because 30 frames equals one second of video content, one field of one frame occurs in 1/60 of one second (or 0.0167 second). Therefore, the Material was broadcast for just 1/60 of one second. One field of one frame is the shortest amount of time any material could be broadcast. *See* Nowakowski Decl. at ¶ 5.

² On September 17, 2007, counsel for Hearst-Argyle and Mr. Bartolome discussed by telephone the nature of the Material. Mr. Bartolome agreed that a written transcript of the recording was not necessary under the circumstances and that a description of the Material would suffice.

The women appearing in the Material are not in full view nor is the image “very clear”—even when the one field of the frame is frozen—contrary to the statements in the Complaint. As the image consists of only one field, one-half of the actual video information is missing. The image appears to be of a scene shot at night. One of the women is in shadows, and it is not possible to make out any discerning characteristics. Both women appear to be standing in a crowded outdoor scene. There is no sexual context to the image.

The Station received no viewer complaints about the Material or any other content in the Promo.

This Response is supported by the attached Declaration of David J. Barrett, Chairman, President, and Chief Executive Officer of Ohio/Oklahoma Hearst-Argyle Television, Inc., by the attached Declaration of Richard Dyer, General Manager of WLWT, and by the attached Declaration of Paul Nowakowski, Chief Engineer of WLWT.

II. The Material Broadcast Is Not Actionably Indecent As Broadcast

The Commission has defined indecency as “language or material that, in context, depicts or describes in terms patently offensive, as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.” *Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999 (2001) (“*Policy Statement*”), ¶ 4 (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 732 (1978)). To be considered indecent, material that is broadcast must meet two requirements: (1) the material must depict or describe sexual or excretory activities or organs, and (2) the material must be *patently offensive* as measured by contemporary community standards for broadcasting. *See id.*, ¶¶ 7-8. In analyzing the second prong of the inquiry,

the Commission looks “not [to] the sensibilities of any individual complainant” but rather evaluates whether the programming at issue would be patently offensive to “an average broadcast viewer or listener.” *Id.*, ¶ 8 (internal quotation marks and citation omitted). The Commission has stated that “[i]n determining whether material is patently offensive, the *full context* in which the material appeared is critically important.” *Id.*, ¶ 9 (emphasis in original).

In the *Policy Statement*, the Commission summarized the principal factors used in determining whether material is patently offensive:

(1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; (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*.

Policy Statement, ¶ 10 (emphases in original). No single factor is determinative, and these factors (and possibly other, unidentified factors) are to be balanced in making an indecency determination. *See id.* Generally, the more explicit or graphic, repetitive, or titillating or shocking the material is, the more likely it is that the Commission will find the material to be indecent. *See id.*, ¶¶ 12, 17.

The Material clearly and unequivocally fails the “patently offensive” prong of the Commission’s indecency analysis for the obvious reason that, as broadcast, the Material could not have been seen by any viewer. Moreover, the fleeting image, when one-half of a single frame is stopped and frozen, apparently depicts two topless women standing in a crowd of other people who either will or just have run the Naked Mile of the movie’s title. There is no sexual activity of any type associated with the image. The fact that the women are apparently topless was not apparent or discernable when viewed as the Promo was actually broadcast. Only when recorded and part of one individual frame is played back, paused, and frozen can the fact that the women are topless be

discerned.

It is not possible for an image that cannot be perceived as broadcast to be regarded by television viewers as patently offensive. The Complainant admits that “[i]f you watch the commercial at regular speeds, you never see it. But if you step through it frame by frame, it is very clear.” But no one watches television still frame-by-still frame. And, in point of fact, the image is not clear at all.

In fact, it is physically impossible for anyone to have perceived and recognized the Material as it was broadcast by the Station. The Material lasted for 1/60 of one second, or just less than 17 milliseconds (msec). Relevant scientific literature demonstrates that it takes approximately 100 msec to identify a picture or image.³ It then takes another 300 msec for the brain to store the image in memory in order to understand it. However, if the initial image is followed by a new visual event before the memory storage has taken place, the consolidation into memory is disrupted by conceptual masking as the new image elicits conceptual processing and replaces the first image in memory.⁴ Here the Material was immediately followed (i.e., in the next field of a frame 1/60 of one

³ See, e.g., Helene Intraub, *Understanding and Remembering Briefly Glimpsed Pictures: Implications for Visual Scanning and Memory*, in *FLOATING MEMORIES: COGNITION OF BRIEF VISUAL STIMULI* 52-53 (V. Coltheart, ed., 1999), available at <[http://intraub.psych.udel.edu/1999%20Intraub%20\(Chapter\).pdf](http://intraub.psych.udel.edu/1999%20Intraub%20(Chapter).pdf)> (100 msec to identify picture); Aude Oliva, *Gist of the Scene*, in *ENCYCLOPEDIA OF NEUROBIOLOGY OF ATTENTION* 251 (L. Itti, G. Rees, and J.K. Tsotsos, eds., 2005), available at <<http://cvcl.mit.edu/Papers/Oliva04.pdf>> (approximately 100 msec to recognize basic-level category of scene (e.g., a street), spatial layout (e.g., a street with tall vertical blocks on both sides), as well as other global structural information (e.g., a large volume in perspective)); Simon Thorpe, *Ultra-Rapid Scene Processing: Temporal Constraints and Neural Computation*, available at <http://vision.cs.princeton.edu/VSS2007-NaturalScene/Thorpe_VSS07.pdf> (stating that processing time for faces is 100 msec, for animals 120 msec, and for other stimuli 140-180 msec).

⁴ See Intraub at 52-53.

second later) by a totally different scene. Thus, not only did the Material appear for a period of time far below the threshold for human visual perception, it was followed so closely by other images that it would not have been possible for the human brain to comprehend the image.

An image that is so ephemeral as to be imperceptible to humans cannot, as a simple matter of neurobiology, be explicit or graphic, dwell on or repeat the depiction, or shock or titillate the viewer.

The fact that the Complainant painstakingly scrutinized the Promo frame-by-frame—not when broadcast, but only when the Complainant played back the Promo on his DVR—removes this matter totally from the Commission’s statutory jurisdiction to police indecent broadcast content under 18 U.S.C. § 1464. What the Complainant complains of is not content that was viewable as broadcast; the ability to perceive the Material is not the result of “radio communication,” which is what the statute reaches. Rather it is the result of recordation and the playback of a frozen-frame recording over which the Commission has no statutory authorization.

In addition, the act of using a recording device to make a copy of *The Office*, the Promo, and the Material, together with their deliberate playback, is an *invitation* of the content into the home, just as a subscription to cable or satellite service is an invitation of content provided through such a service into the home. But such an invitation, at the choice of the viewer, also removes that matter from the Commission’s purview as a constitutional matter.

Even were the Commission to decide that the Material as broadcast satisfies both prongs of its indecency scheme, that scheme may not be constitutionally applied to the Station’s broadcast of the NBC network programming at issue here. This conclusion follows directly from *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), the governing Supreme Court precedent in this realm. The features

of the WLWT broadcast make it clear that the *Pacifica* decision and its rationale can provide no support for a Commission finding of indecency in this case.

The *Pacifica* decision makes it clear that the fleeting nature of the video image here—broadcast for absolutely the briefest amount of time possible—may not be proscribed, let alone sanctioned. As Justice Powell stated in his opinion, without which there would have been no majority:

This is not to say, however, that the Commission has an unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from *momentary* exposure to it in their homes. . . .

The Commission's holding, and certainly the Court's holding today, does not speak to cases involving the *isolated* use of a potentially offensive word in the course of a radio broadcast, as distinguished from the *verbal shock treatment* administered by respondent here.

Pacifica, 438 U.S. at 759-60, 760-61 (Powell, J., concurring in part and concurring in the judgment) (emphases added); *see also id.* at 757 (Powell, J., concurring in part and concurring in the judgment) (noting that the language “was repeated over and over as a sort of verbal shock treatment”). It is impossible to square the pre-recorded 12-minute Carlin monologue in *Pacifica*—a “verbal shock treatment” “repeated over and over”—with the utterly fleeting nature of the Material broadcast here, material that is not even perceptible by the human visual system as it was broadcast in real time.

That *Pacifica* demonstrates that the First Amendment does not tolerate a finding of indecency in this instance is further bolstered by Justice Brennan's opinion:

Having insisted that it seeks to impose sanctions on radio communications only in the limited circumstances present here, I believe that the FCC is estopped from using either this decision or its own orders in this case, 56 F.C.C.2d 94 (1975) and 59 F.C.C.2d 892 (1976), as a basis for imposing sanctions on any public radio broadcast other than one aired during the daytime or early evening

and containing the *relentless repetition, for longer than a brief interval*, of “language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs.” 56 F.C.C.2d, at 98. *For surely broadcasters are not now on notice that the Commission desires to regulate any offensive broadcast other than the type of “verbal shock treatment” condemned here*, or even this “shock treatment” type of offensive broadcast during the late evening.

Pacifica, 438 U.S. at 772 n.7 (Brennan, J., dissenting) (emphases added).

Supreme Court precedent, in short, provides no constitutional basis for the Commission to proscribe this WLWT broadcast.

Finally, since the Material was not perceptible when broadcast, the Station did not know, and there is no way the Station could have known, that the Promo, which was provided as part of the network broadcast, contained the Material. *See Dyer Decl. at ¶ 7*. It is impossible for the Station, or any station for that matter, to review every field of every frame of video in advance, and no delay procedure or other screening mechanism ever suggested by the Commission could have discovered the Material since the examination of material in connection with a delay procedure still occurs in real time. *See Dyer Decl. at ¶ 7; Nowakowski Decl. at ¶ 6*.

Conclusion

Hearst-Argyle respectfully submits that the broadcast of the Material beyond the limitations of human visual perception cannot be found to be actionable under controlling precedent. Accordingly, Hearst-Argyle respectfully requests that the Commission take no further action with respect to the instant Complaint.

Respectfully submitted,

**OHIO/OKLAHOMA HEARST-ARGYLE
TELEVISION, INC.**



Mark J. Prak
David Kushner

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Its Attorneys

October 3, 2007

Declaration of David J. Barrett

Declaration of David J. Barrett

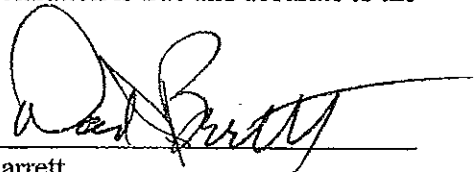
I, David J. Barrett, hereby declare, under penalty of perjury, as follows:

1. I am greater than eighteen years of age and am competent to make this Declaration.
2. I am the Chairman, President, and Chief Executive Officer of Ohio/Oklahoma Hearst-Argyle Television, Inc., the licensee of Station WLWT(TV), Cincinnati, Ohio. I have held this position since the time of the incident that gave rise to the complaint in the instant matter.
3. WLWT is the network affiliate of the NBC Television Network located in the Cincinnati Designated Market Area.
4. I understand that on December 14, 2006, during the Station's broadcast of prime time programming, the Station aired a 15-second national commercial announcement promoting the availability of the movie *American Pie Presents: The Naked Mile* on DVD (the "Promo"). The Promo appeared in a commercial block at the end of an episode of NBC's situation comedy *The Office*. Material broadcast in connection with the Promo is the subject of a letter of inquiry, dated September 4, 2007, from Benigno E. Bartolome concerning a complaint that the Promo contained material that is allegedly indecent (the "Letter").
5. I have directed and supervised the production of the Response to the Letter. Because I do not have personal knowledge of all of the facts related to this matter, I have directed and supervised the production of the Declaration of Richard J. Dyer, who is the General Manager of the Station and who does have personal knowledge of all relevant facts, and of the Declaration of Paul Nowakowski, who is the Chief Engineer of the Station and who also has personal knowledge of certain relevant facts.
6. To the best of my knowledge, the Station has not previously been the subject of a viewer complaint alleging that indecent material was broadcast by the Station.
7. I have reviewed the Response to the Letter and the Declaration of Richard J. Dyer and the Declaration of Paul Nowakowski and hereby verify the truth and accuracy of the information contained therein to the best of my knowledge, information, and belief. All of the documents and information requested by the Letter that are in the licensee's possession, custody, control, or knowledge have been produced to the Commission, except for a transcript of the broadcast, which I have been informed by counsel has been waived by Mr. Bartolome.

I declare, under penalty of perjury, that the foregoing Declaration is true and accurate to the best of my knowledge, information, and belief.

SEPT. 27, 2007

Date



David J. Barrett
Chairman, President, and CEO
Ohio/Oklahoma Hearst-Argyle Television, Inc.

Declaration of Richard J. Dyer

Declaration of Richard J. Dyer

I, Richard J. Dyer, hereby declare, under penalty of perjury, as follows:

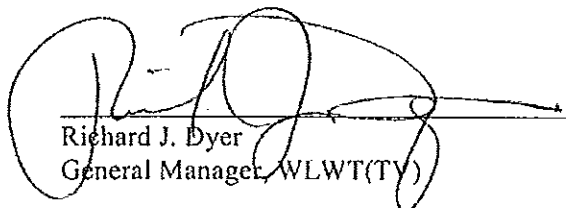
1. I am greater than eighteen years of age and am competent to make this Declaration.
2. I am the General Manager of Station WLWT(TV), Cincinnati, Ohio. I have held this position since December 2002.
3. WLWT is the network affiliate of the NBC Television Network located in the Cincinnati Designated Market Area.
4. On December 14, 2006, during the Station's broadcast of prime time programming, the Station aired a 15-second national commercial announcement promoting the availability of the movie *American Pie Presents: The Naked Mile* on DVD (the "Promo"). The Promo appeared in a commercial block at the end of an episode of NBC's situation comedy *The Office*. The Promo was broadcast from 8:57:44 pm to 8:57:59 pm.
5. The Promo begins with a fixed graphic shot lasting 2.6 seconds of the name of the movie and ends with another fixed graphic shot lasting 4.5 seconds of the cover of the DVD and its availability beginning Tuesday (December 19, 2006). In between these bookends, the Promo consists of approximately 8 seconds of 11 quickly-edited scenes from the movie. The Promo was provided to the Station by NBC as a national spot ad as part of its network feed of prime time programming.
6. A recording of the Promo, a recording of the commercial block in which it appeared, and a recording of the material broadcast approximately one hour before the Promo and the material broadcast approximately 47 minutes after the Promo are included on a DVD that is being provided with the Response. The DVD recording was produced under my supervision and contains a true representation of what was aired on the Station.
7. I had no knowledge, nor, upon my inquiry, did anyone else at the Station have knowledge, that the Promo, at the time of broadcast, contained the complained-of material consisting of one field of one frame apparently depicting two topless women standing outside in a crowded, dark nighttime scene. The complained-of material is not viewable or perceptible in real time as the Promo aired on the Station. In my professional opinion, it would be impossible for the Station, or for any television station, to review in advance every field of every frame of all of the video material that it broadcasts. I am not aware of any delay procedure or mechanism that could have been utilized to prevent the broadcast of the complained-of material since such procedures and mechanisms still rely on a real-time examination of the video content.
8. The Station received no viewer complaints about its broadcast of the Promo.
9. To the best of my knowledge, the Station has not previously been the subject of a viewer complaint alleging that indecent material was broadcast by the Station.

10. I have reviewed the Response of Ohio/Oklahoma Hearst-Argyle Television, Inc. to the September 4, 2007, Letter of Benigno E. Bartolome and hereby verify the truth and accuracy of the information contained therein. All of the documents and information requested by the letter of inquiry that are in the licensee's possession, custody, control, or knowledge have been produced to the Commission, except for a transcript of the broadcast, which I have been informed by counsel has been waived by Mr. Bartolome.

I declare, under penalty of perjury, that the foregoing Declaration is true and accurate to the best of my knowledge, information, and belief.

Date

9/27/07


Richard J. Dyer
General Manager, WLWT(TV)

Declaration of Paul Nowakowski

Declaration of Paul Nowakowski

I, Paul Nowakowski, hereby declare, under penalty of perjury, as follows:

1. I am greater than eighteen years of age and am competent to make this Declaration.
2. I am the Chief Engineer of Station WLWT(TV), Cincinnati, Ohio. I have held this position since December 2004.
3. At the request of Richard Dyer, I prepared the DVD recording of certain material broadcast by the Station on the evening of December 14, 2006, that accompanies the Response. The material was copied from the VHS aircheck with burned in timecode.
4. The complained-of material appears during a 15-second national commercial announcement promoting the availability of the movie *American Pie Presents: The Naked Mile* on DVD (the "Promo"). The Promo was broadcast from 20:57:44 to 20:57:59.
5. The complained-of material ("Material"), an image with two apparently topless women standing outside in a crowded, dark nighttime scene, appears at 20:57:51 right at the edit in Frame 28. Based on my examination of the VHS aircheck and of the transfer to DVD that I prepared, it is my professional opinion that the Material occupies just one field of one frame of video content. A frame consists of two fields, one consisting of the odd-numbered scan lines and the other consisting of the even-numbered scan lines. Because 30 frames equals one second of video content, one field of one frame occurs in 1/60 of one second (or 0.0167 second). Therefore, the Material was broadcast for just 1/60 of one second. In addition, one field of one frame is the shortest amount of time any material could be broadcast. It is possible that the Material appears in the Promo as a result of an edit by the editor of the Promo that was off by 1/60 of one second. The Material cannot be seen when the Promo is played or broadcast in real time.
6. I had no knowledge that the Promo, at the time of broadcast, contained the complained-of Material. In my professional opinion, it would be impossible for the Station, or for any television station, to review in advance every field of every frame of all of the video material that it broadcasts. I am not aware of any delay procedure or mechanism that could have been utilized to prevent the broadcast of the complained-of material since such procedures and mechanisms still rely on a real-time examination of the video content.

I declare, under penalty of perjury, that the foregoing Declaration is true and accurate to the best of my knowledge, information, and belief.

SEPT 27 2007
Date

Paul Nowakowski
Paul Nowakowski
Chief Engineer, WLWT(TV)