

GOODMAN

Law Offices of Jack N. Goodman

jack@jackngoodman.com

202-776-2045

202-251-7507

Fax: 202-776-2222

April 26, 2013

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Attn: Melissa Marshall, Enforcement Bureau

Re: Station WDBJ(DT), Roanoke, VA (Facility ID No. 71329)
File No. EB-12-IH-1363

Dear Ms. Dortch:

On behalf of WDBJ Television, Inc. ("WDBJ"), licensee of the above-referenced television station, this responds to the Enforcement Bureau's Letter of Inquiry dated March 8, 2013 ("LOI").¹ The LOI attached copies of seven complaints relating to a program broadcast on WDBJ(DT) at approximately 6:00 pm on July 12, 2012.²

A DVD showing the newscast segment addressed in the complaints and the remainder of the news program in which it appeared is being submitted with this response.³ Also attached is

¹ By e-mail dated March 15, 2013 from Jeffrey J. Gee, the Bureau extended the date by which WDBJ was required to respond until April 26, 2013.

² Two of the attached complaints (12-WB14998196 and 12-WB14998131) appear to be identical complaints submitted twice from the same viewer. Another complaint (12-WB14998169) does not include any allegation concerning the broadcast of depictions of sexual or excretory acts or organs in violation of the Commission's Rules. It instead complains that the story "included a link to the actual porn on the left side of the screen". In fact, while a screen shot of the results of a Google™ search were briefly shown on screen, the actual links to websites were blurred, could not be seen, and certainly did not include actual links. In any event, the Commission does not regulate the broadcast of website links in programming not intended for a child audience. This complaint should, therefore, be dismissed.

³ Although the LOI requested video of the programming that aired both before and after the complained-of segment, the segment was broadcast at the beginning of the 6:00 pm News on

a transcript of the news segment; the Declaration of Jeffrey A. Marks, President and General Manager of WDBJ Television, Inc., attesting to the truth and accuracy of the information provided herein; and the Declaration of Trevor D. Fair, the photojournalist who edited the segment in question.

* * * *

A woman who previously appeared in pornographic films retired from that career and moved to the Roanoke area. She volunteered for service in a local rescue squad using the name "Harmony Rose," the name under which she appeared in adult films. Her involvement in the rescue squad attracted public interest, as well as a legal question of whether the rescue squad could or should decline her services based on her previous employment. WDBJ(DT)'s news staff determined that this was a story of interest to the Roanoke community.

The program segment was broadcast as part of the 6:00 pm News on WDBJ(DT) on July 12, 2012. The entire segment ran for just over three minutes. The segment included a setup of the issue by a reporter, pictures of Ms. Rose during her film career that did not show either sexual organs or activities, interviews with the public concerning the propriety of her serving as a volunteer, and quotations from an inquiry from the County Fire Chief to the County Attorney asking about propriety of her service and whether it would be permissible to decline her participation because of her previous career, and the response from the County Attorney.

The station used several screen shots of Ms. Rose showing her head or a scene of her clothed on a bed as context for the story. These scenes were taken from video available on the internet from a distributor of Ms. Rose's films. At the far right edge of these videos appeared parts of several "boxes" showing video from other films available from the film distributor. One of these "boxes," which appeared on the screen for less than three seconds, appears to show a male actor holding his penis.

The edited story was reviewed by the News Director and other management personnel at WDBJ(DT) before it was aired. Because the scenes of the other films were on the far right edge of the screen shots taken from the distributor's video, they did not appear on the monitors in the station's editing bay. Thus, the "boxes" showing the other material were not visible, and the pictures on the edge of the screen were not seen by the editor or other station personnel who reviewed the story prior to broadcast. See Declaration of Trevor D. Fair. WDBJ nonetheless acknowledges that the segment as broadcast inadvertently included parts of these "boxes," one of which showed a fleeting, small image of a penis that could be seen at the very far right edge of wide-screen televisions.

WDBJ(DT); the immediately preceding program was *The Andy Griffith Show*, for which WDBJ does not possess the rights to copy and distribute. Further, the material in that program in no way related to the content of the news program during which the segment at issue appeared. The submitted DVD, therefore, shows the entire 6:00 pm News program during which the segment appeared, but not the previous unrelated program.

After the segment was broadcast, the station received several complaints from viewers, which first alerted it to the image inadvertently included in the segment. The station immediately decided not to rebroadcast the story in the same form in any later newscast, and also removed it from the station's website, www.wdbj7.com.

WDBJ regrets that this incident occurred. It has reviewed story editing procedures with newsroom staff and has instituted controls to make sure that all parts of the visible picture in news stories including potentially offensive material are reviewed in advance of broadcast to make sure that inappropriate images are not unintentionally included in a news story.

Nonetheless, the broadcast of this extremely fleeting and partial image of a penis during a news story does not provide any basis for the Commission to find that WDBJ violated the Commission's Rules, and certainly no foundation for the Commission to impose any forfeiture or take other enforcement action against WDBJ. The Supreme Court last year in *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012), made clear that, before penalizing a broadcast station for airing indecent material, the Commission must provide "fair notice of conduct that is forbidden or required." *Id.* at 2317. The constitutional requirement of advance notice is even more significant when regulation of speech is involved; in those cases, "rigorous adherence to these requirements is necessary to ensure that ambiguity does not chill protected speech." *Id.*

This principle bars imposition of any sanction on WDBJ for at least three reasons:

First, the Commission has itself acknowledged that, as a result of the decision in *Fox* holding that the Commission's decisions failed to give broadcasters notice of what speech could be deemed indecent, as well as other decisions raising questions about the constitutional validity of the Commission's indecency policies, those policies must now be reexamined "to ensure that they are fully consistent with vital First Amendment principles." Public Notice, *FCC Reduces Backlog of Broadcast Indecency Complaints by 70%; Seeks Comment on Adopting Egregious Cases Policy*, GN Docket No. 13-86, DA 13-581 (rel. April 1, 2013). The Commission asked for comment on broad questions concerning the scope of its indecency rules and the enforcement policies it should follow. In the interim, it stated that "the Chairman directed the Enforcement Bureau (Bureau) to focus its indecency enforcement resources on egregious cases," although the Public Notice did not define what cases might be deemed "egregious," what factors would be involved in that determination, or whether the policies on which the Commission specifically sought comment would or would not apply during the Commission's reexamination. Thus, the April 1 Public Notice repeats the same errors that lead to the Commission's reversal in *Fox* – future indecency enforcement efforts will apparently be governed by an ambiguous standard that allows the Commission to make individual enforcement decisions without regard to an articulable governing standard, and thus provides no notice to broadcasters of the speech that will lead to FCC sanction and the speech that will not. Because the Commission has not provided clear notice to broadcasters of the kinds of speech that will be subject to sanction, the Commission cannot impose any punishment on WDBJ.

Second, the story concerning Ms. Rose appeared during a regularly-scheduled news program on WDBJ(DT). It concerned a topic of broad interest to the Roanoke community and

one that had engendered controversy among local public officials and in the community. Thus, it was an entirely appropriate subject for the station's news programming.

The Commission's varying policy concerning indecent speech in news programming is, as the courts have noted, a particularly conspicuous example of the Commission's inconsistent indecency enforcement efforts. For many years, the Commission generally declined to impose indecency sanctions on speech during news programming.⁴ It then, without discussion of these precedents, abruptly reversed itself and concluded that the use of an isolated word in CBS' *The Early Show* was indecent, denying that there was any exemption for news programming except in "unusual circumstances."⁵ After CBS appealed that decision, the Commission asked for a remand and changed its mind once again. In *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 13299, 13327 (2006)(*Remand Order*), although stating that "there is no outright news exemption from our indecency rules," it decided that "it is imperative that we proceed with the utmost restraint when it comes to news programming," and dismissed the complaint the Commission had previously granted.

As the Second Circuit concluded, these decisions provide broadcasters with no notice as to which news programming will be actionable and which will not:

The policy may maximize the amount of speech that the FCC can prohibit, but it results in a standard that even the FCC cannot articulate or apply consistently. Thus, it found the use of the word "bullshitter" on CBS' *The Early Show* to be "shocking and gratuitous" because it occurred "during a morning television interview," before reversing itself because the broadcast was a "bona fide news interview." In other words, the FCC reached diametrically opposite conclusions at different stages of the proceeding for precisely the same reason – that the word "bullshitter" was uttered during a news program.⁶

In the three years since the Second Circuit's *Fox* decision, the Commission has not offered any further guidance about what news programs may be punished under the indecency rules. It could be, under the standard established in the *Remand Order*, that any "bona fide" news programming will not be found indecent. If not, the Commission has not explained what factors it will consider in determining whether news content should be held to be indecent, and certainly has not provided notice to broadcasters of a different standard. Further, in considering complaints

⁴ See, e.g., *Peter Branton*, 6 FCC Rcd 610 (1991)(declining to find that repeated use of offensive language in news programming was indecent).

⁵ *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 2664, 2699-2700 (2006).

⁶ *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 332 (2d Cir. 2010)(internal citations omitted).

regarding news, it is also important that the Commission recognize that news programming, by its very nature, is assembled with little time for review and the necessarily restricted opportunities for review of news stories is another reason that the Commission should not penalize content inadvertently broadcast during news.

The news segment aired on WDBJ(DT) was without doubt part of a regular news story and related to events of interest to the Roanoke area. Under the standard applied in the *Remand Order*, it was bona fide news programming and deserving of the Commission's "utmost restraint" in applying its indecency rules. In any event, the Commission has provided no notice to stations that material in a bona fide newscast, particularly the kind of fleeting and inadvertent content involved here, could be subject to indecency enforcement. Without having done so, the Commission cannot impose any sanction on WDBJ for this brief, inadvertent nudity in a news program.⁷

Third, the complained-of image appeared for less than three seconds. One of the Commission's established factors in determining whether a broadcast is indecent is "whether the material dwells on or repeats at length descriptions of sexual or excretory organs."⁸ The Commission elaborated: "[w]here sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency."⁹ In *Fox*, the Commission contended that its policy of not sanctioning fleeting sexual references applied only to utterances and not to images. The Supreme Court rejected that distinction, pointing to repeated instances where the Commission found that brief images of nudity were not actionably indecent because they were shown only briefly.¹⁰

The Court pointed to an earlier Commission ruling that "deemed 30 seconds of nude buttocks 'very brief' and not actionably indecent."¹¹ The Court concluded that those decisions did not give "constitutionally sufficient notice" to ABC that seven seconds of nudity in an episode of *NYPD Blue* could be found indecent. Since the Supreme Court's decision in *Fox*, the Commission has not conducted a proceeding to adopt a different policy or given notice to broadcasters like WDBJ that fleeting nudity can support an indecency finding. Thus, the

⁷ See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 557-59 (Breyer, J., dissenting)(FCC indecency enforcement policy must preserve stations' ability to cover local events).

⁸ *Industry Guidance on Commission's Caselaw Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999, 8003 (2001).

⁹ *Id.* at 8008.

¹⁰ *Fox*, 132 S. Ct. at 2319, citing *WGBH*, 69 FCC 2d 1250, 1251, 1255 (1978); *WPBN/WTOM License Subsidiary, Inc.*, 15 FCC Rcd 1838, 1840 (2000).

¹¹ *Fox*, 132 S. Ct. at 2319-20, citing *Letter from Norman Goldstein to David Molina*, FCC File No. 97110028 (May 26, 1999). This involved the broadcast of *Catch-22* and also included ten seconds of full-frontal male nudity. The Court also pointed to *Letter from Edythe Wise to Susan Calvin*, FCC File No. 91100738 (Aug. 13, 1992), which found 31 seconds of female frontal nudity "not actionably indecent."

Ms. Marlene H. Dortch

April 26, 2013


Page 6

Supreme Court's conclusion that Commission precedent bars finding "momentary nudity" indecent fully applies to the WDBJ broadcast which was shorter than any of the cases cited by the Court where the Commission dismissed indecency complaints concerning fleeting images. *See also FCC v. Pacifica Foundation*, 438 U.S. 726, 760-61 (1978)(Powell, J., concurring)(stressing that the Court did not approve sanctioning isolated indecency).

Each of these reasons, standing on their own, prevent the Commission from concluding that the July 12, 2012 broadcast on WDBJ(DT) is indecent or imposing any punishment or sanction on WDBJ. In addition, while the Supreme Court in *Fox* did not reach arguments that the Supreme Court's decision in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), can no longer sustain regulation of indecent speech on broadcast stations, "because the rationale of that case has been overtaken by technological change and the wide availability of multiple other choices for listeners and viewers,"¹² those arguments remain standing. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 530-35 (Thomas, J., concurring), 544-46 (Ginsburg, J., dissenting)(2009); *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 325-27 (2d Cir. 2010); *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 462-66 (2d Cir. 2007), *rev'd on other grounds*, 556 U.S. 502 (2009); Brief for Respondents ABC, Inc.; KTRK Television, Inc.; and WLS Television, Inc., *FCC v. Fox Television Stations, Inc.*, U.S. No 10-1293 (November 2011) at 37-56. WDBJ agrees that any regulation of the speech addressed in the LOI should be subject to strict constitutional scrutiny and adopts and incorporates the arguments of ABC, Inc., *et al.* and others that the Commission's indecency rules cannot be constitutionally sustained.

For the foregoing reasons, the Commission should dismiss the complaints against WDBJ(DT).

Respectfully submitted,



Jack N. Goodman

Counsel for WDBJ Television, Inc.

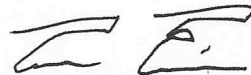
Attachments

¹² *Fox*, 132 S. Ct. at 2320.

Declaration of Trevor D. Fair

Trevor D. Fair declares as follows:

1. I am a Photojournalist on the staff of WDBJ Television in Roanoke, Virginia. I have served in that capacity for almost five years.
2. I obtained the screen shots from the video distributor used in the segment on Harmony Rose broadcast on WDBJ on July 12, 2012. When I recorded the screen shots off of a computer, I did not notice the small "boxes" at the right of the screen showing other films available from the distributor.
3. I was also responsible for editing the Harmony Rose segment. The monitors in the WDBJ editing bay did not display the full screen that could be seen on wide-screen televisions, and in particular did not show the "boxes" that appeared on the right edge of the story when broadcast. Therefore, I was unaware of the material contained in those boxes. Had I seen that material, I would have either edited it out of the picture or asked management for a decision on whether it should be deleted.
4. The edited story was reviewed by the WDBJ News Director before it was broadcast. He also reviewed it on the editing bay monitor and, therefore, did not see the material at the edge of the broadcast picture.
5. I declare under penalty of perjury that the above statements are true and correct.



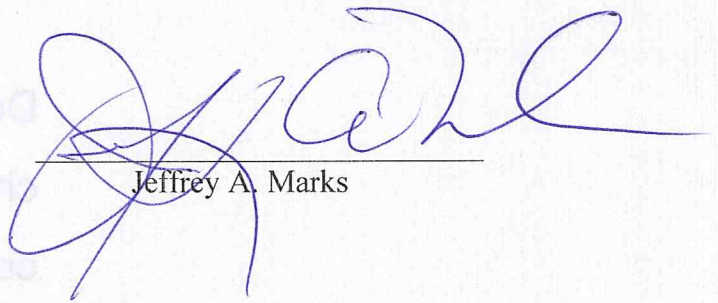
Trevor D. Fair

April 25, 2013

Declaration of Jeffrey A. Marks

Jeffrey A. Marks declares as follows:

1. I am the President of WDBJ Television, Inc. and the General Manager of Television Station WDBJ(DT), Roanoke, Virginia.
2. I have read the Response of WDBJ Television, Inc. to the Federal Communications Commission's Enforcement Bureau Letter of Inquiry dated March 8, 2013, and, to the best of my knowledge and belief, the factual statements contained in the Response are true and correct.
3. I declare under penalty of perjury that the above statements are true and correct.



Jeffrey A. Marks

April 25, 2013

Transcript of *WDBJ7 at Six*

Anchor: I'm Chris Hurst. Our top story...an ex-porn star is starting her life over at a local rescue squad. It is generating plenty of controversy and county leaders can't do much about it.

WDBJ7's Justin McLeod joins us live from the Cave Spring rescue squad. Justin what have you learned?

Reporter: Well Chris, Roanoke County doesn't have much say because this is a volunteer rescue squad but it's clear county leaders aren't happy that an ex-porn star is working here. Most people though we talked to say it's no big deal.

The Cave Spring rescue squad has been around for more than 60 years. In that time it's probably never had a volunteer like Harmony Rose. She's a former porn star. Just Google her name and you'll find hundreds of pornographic videos of her's, most of the titles too explicit for TV. The 29-year old apparently left the porn industry in the last two years and is now an EMT with the Cave Spring rescue squad. We're told Rose passed a criminal background check and has been training with the squad for months.

Interview #1: I-I don't think it is a good idea but--but I am not going to comment on that.

Interview#2: No, I wouldn't hire her. No way.

Reporter: But most people we talked to are sticking up for Rose.

Interview #3-Lisa Azar: Well, I mean if she's good at her job. I mean, you know, the new job, not the old job, ah, I don't have a problem with it.

Interview #4-Pam Ellington: We all may have the opportunity to make choices. Some we regret. Some we don't. That was her choice.

Interview #5: We all have to - we all make mistakes in life, okay. That's the way I look at it.

Interview #6: I don't think it would affect her ability to care for the sick or the wounded.

Reporter: The issue, however, prompted Roanoke County Fire Chief Rick Burch to recently seek advice from the county attorney.

In a letter obtained by WDBJ7, the county attorney points out Roanoke County doesn't typically interfere in the internal membership decisions of volunteer rescue squads like Cave Spring. Those decisions are left to the volunteers. But, the letter points out safety personnel are held to a higher standard than other employees. The letter states 16 and 17 year old volunteer trainees are present in public safety facilities and questions whether parents will be willing to allow their minor children to participate under these

circumstances. The county attorney recommends that the fire chief support the decision if Rose's membership is terminated.

But some people say that if she's saving lives, that's all that matters.

Interview #6-Cory Campbell: I was just in a horrible car accident and she comes along and she saves my life and I was of the school that I didn't like her because she was a porn star at one time. But, she just saved my life. Does it even matter then?

Reporter: The chief of the rescue squad tells me that Rose is on a six-month probation period which is standard for all new volunteers. Now, Chris, once those six months are up, the squad members will vote and decide whether she in fact becomes a permanent member.

Anchor: So Justin, did you have a chance to talk to Rose at all?

Reporter: Well, I put in a request through the squad's chief. That was last night, Chris. As of today, I haven't heard from Rose.

Anchor: We have put the entire letter from the county attorney on our Website. You can read it for yourself at wdbj7.com.