Before the
FEDERAL COMMUNICTIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Complaints Against Various	)	**File No. EB-03-IH-0110**
Broadcast Licensees		)
Regarding Their Airing of the	)	
"Golden Globe Awards" Program		)

To the Commission

COMMENTS (IN THE NATURE OF AN AMICUS BRIEF) IN SUPPORT OF THE COMMISSION'S DETERMINATION THAT BROADCAST OF THE 'F-WORD' DURING THE GOLDEN GLOBE AWARDS WAS INDECENT AND PROFANE

I. FIRST AMENDMENT CONSIDERATIONS

Introduction

Most Americans understand the difference between right and wrong. They understand the difference between cherished liberty and ruinous license. They understand that if a democracy is to function, reasonable compromises are necessary. They understand that if the entertainment industry has an absolute right to distribute whatever it wants, wherever it wants and whenever it wants, citizens no longer have a right to live and raise children in a safe and decent society. They understand that there is a necessary role of law in preserving *ordered* liberty.

It is also clear, however, that in interpreting the scope of the First Amendment some (including not a few judges) ignore the history and purpose of the freedom of speech and press clause and instead interpret that cherished right in light of their personal ideological views. In so doing, they have become stone deaf to the warning enunciated in Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, at ___ (1973):

> "Thus, in evaluating the First Amendment claims ... we must afford great weight to the decisions of Congress ... Professor Chafee aptly observed: 'Once we get away from the bare words of the [First] Amendment, we must construe it as part of a Constitution which creates a government for the purpose of performing several very important tasks. The Amendment should be interpreted so as to not cripple the regular work of government.'"

While the Supreme Court has, on more than one occasion, ignored its own warning, it has

yet progressed to the licentious and anarchist views espoused by some libertarians. It will therefore be helpful to review some of what the Supreme Court has said about the right of government to maintain a decent society and to protect the privacy of the home and children.

First Amendment Does Not Protect Every Utterance

As the Supreme Court noted in *Roth v. United States*, 354 U.S. 476, 483-484: "The unconditional phrasing of the 1st Amendment was not intended to protect every utterance... The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. This objective was made explicit as early as 1774 in a letter of the Continental Congress to the inhabitants of Quebec:

> 'The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality and arts in general, in its diffusion of liberal sentiments on the administration of governments, its...communication of thoughts between subjects, and its consequential promotion of union, among them, whereby oppressive officers are ashamed and intimidated, into more honorable and just modes of conduct.' 1 *Journals of the Continental Congress* 108 (1774)."

The Court in *Roth* continued, quoting from its opinion in *Chaplinsky v. New Hampshire*:

> "'There are certain well-defined and narrowly limited classes of speech the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene...It has been well observed that such utterances are *no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality*.'" [*Roth*, 354 U.S. at 485] [Italics added]

The matter italicized above is almost a direct quote from the book, *Free Speech in the United States*, by Zechariah Chafee, Jr. (1941); and in footnotes 4 and 5, the *Chaplinisky* Court cites Chafee's book at pp. 149-150, where we find the following:

> "But the law punishes a few classes of words like obscenity, profanity...because the very utterance of such words is considered to inflict a present injury on listeners...This is a very different matter from punishing words because they express ideas thought to cause future danger to the state...[P]roperly limited they fall outside the protection of the free speech clauses...[P]rofanity, indecent talk and pictures, which do not form an essential part of any exposition of ideas, have a very slight social value as a step towards truth, which is clearly outweighed by the social interest in order, morality, the training of the young and the peace of mind of those who hear and see...The man who swears in a street car is as much of a nuisance as the man who smokes there."

Mr. Justice Stevens, writing in *FCC v. Pacifica Foundation*, 438 U.S. 726, 744 (1978), also found Professor Chafee's observations persuasive. Having concluded that the indecent words at issue in *Pacifica* offended "for the same reason that obscenity offends," Justice Stevens said that the words were "'no essential part of any exposition of ideas'" and that whatever benefit they might have was "'clearly was clearly outweighed by the social interest in order and morality.'"

Broadcast Indecency Is A Form of Nuisance Speech

In concluding that indecency can be proscribed in broadcasting, the Federal Communications Commission [*In the Matter of a Citizen's Complaint Against Pacifica Foundation Station WBAI*, 56 FCC 2d 94, at 98 (2/21/75)] applied a nuisance rationale: "We believe that patently offensive language, such as that involved in the Carlin broadcast, should be governed by principles which are analogous to those found in cases relating to public nuisance. *Williams v. District of Columbia*, 136 U.S. App. D.C. 56 (*en banc* 1969)."

In *Williams*, the District of Columbia Court of Appeals upheld the constitutionality of District of Columbia disorderly conduct law enacted by Congress that remained virtually unchanged since 1898. In so holding, the *Williams* [419 F.2d at 644-646] court stated:

> "That portion of Section 1107 which makes it illegal for any person 'to curse, swear, or make use of any profane or indecent or obscene words' is on its face extraordinarily broad...An examination of the relevant interests involved, as well as a recognition of the serious constitutional problems...leads us to believe Section 1107 could be validly applied only if it were construed to require something more than simply the utterance of profane or obscene language in a public place...We therefore conclude that Section 1107 would not be invalid if the statutory prohibition against profane or obscene language in public were interpreted to require an additional element that the language be spoken in circumstances which threaten a breach of the peace. And for these purposes a breach of the peace is threatened either because the language creates a substantial risk of provoking violence or because it is, under 'contemporary community standards'...so grossly offensive to members of the public who actually overhear it as to amount to a nuisance."

In so holding, the *Williams* court noted that the legislative history of Section 1107 was "not inconsistent with the view" that what Congress intended to prevent was "behavior which disturbed the 'public peace and order' and not simply to prescribe a code of morals for private action." [419 F.2d at 644, n.13] Presumably, similar concerns prompted Congress to include provisions prohibiting indecency in the Radio Act of 1927 and Communications Act of 1934.

In *Pacifica*, 438 U.S. at 750, the Court noted that the FCC's decision "rested entirely on a

nuisance rationale under which *context* is all important" (emphasis supplied). In distinguishing *Pacifica* from the "context" in *Cohen v. California,* 403 U.S. 15 (1971), the *Pacifica* Court said:

> "The importance of context is illustrated by the *Cohen* case. That case arose when Paul Cohen entered a Los Angeles courthouse wearing a jacket emblazoned with the words 'F—k the Draft.' After entering the courthouse, he took the jacket off and folded it...So far as the evidence showed, no one in the courthouse was offended by the jacket...In contrast, in this case [*Pacifica*] the Commission was responding to a listener's strenuous complaint, and Pacifica does not question its determination that this afternoon broadcast was likely to offend listeners." [*Pacifica*, 438 U.S. at 747, n.25]

> "First, the broadcast media have established a uniquely presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home...Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying the remedy for an assault is to run away after the first blow." [438 U.S. at 749-750]

> "Outside the home, the balance between the offensive speaker and the unwilling audience may sometimes tip in favor of the speaker, requiring the offended listener to turn away ...As we noted in *Cohen*: '...this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue...'" [at 749, n.27]

> "Second, broadcasting is uniquely accessible to children, even those too young to read. Although Cohen's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant." [at 749]

As the *Pacifica* Court observed, "a 'nuisance may be merely a right thing in the wrong place—like a pig in the parlor, instead of the barnyard'...We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene." [*Pacifica*, 438 U.S. at 750-751]

In *Hess v. Indiana*, 414 U.S. 105, at 107-108, the Court said this about public nuisances:

> "Indiana's disorderly conduct statute was applied...to punish only spoken words. It hardly needs repeating that 'the constitutional guarantees of freedom of speech forbid the States to punish words or language not within 'narrowly limited classes of speech'"...In the first place, it is clear the Indiana court specifically abjured any suggestion that Hess' words could be punished as obscene...By the same token, any suggestion that Hess speech amounted to 'fighting words'...could not withstand scrutiny...In addition, there was no evidence to indicate Hess' speech amounted to a *public nuisance* in that privacy interests were invaded...*Cohen v. California, supra*, at 21." [Italics supplied]

Enforcement Of The Broadcast Indecency Law Will Not Prevent All Discussion About Sex

The notion that the broadcast indecency law prohibits all discussion about sex is absurd. Morality in Media and other organizations concerned about the proliferation of pornography and the erosion of standards of standards of decency in the media regularly "take to the public airwaves" to talk about human sexuality and the abuse thereof. As Justice Stevens noted in *Pacifica*, 438 U.S. at 743, n.18, "A requirement that indecent language be avoided will have its primary effect on the form rather than the content of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language."

Furthermore, while program content can be indecent even though it has serious artistic, literary, scientific and political value, serious value is part of the context that the FCC considers when determining whether language is indecent. For example, it is one thing for a radio shock jock to refer in a vulgar or lewd manner to an excretory organ in order to get a laugh out of his morally challenged audience and to maintain his Nielsen ratings and another matter for a doctor to refer to an excretory organ while discussing colon cancer.

In an article entitled "Obscenity Law and the Supreme Court" (*Where Do You Draw the Line*, pp. 102-103, Victor B. Cline, editor, Brigham Young University Press, 1974), attorney Paul J. McGeady explains why it would be foolhardy to give broadcasters an absolute right to air patently offensive depictions and descriptions of sexual or excretory activities on radio and TV, if the same were shown to have serious literary, artistic, political or scientific value:

> "Literally, the quality of lack of serious value which obscenity must have means that even where you have pruriency (appeal to lust) and patently offensive hardcore sexual conduct...it is legal to publish or present it if the work has serious literary or artistic value. Let us now apply that [serious value] concept to a form of media, for example, television...It would appear that most Americans obviously would not tolerate this...
>
> "From this exposition it is quite obvious that different standards must be applied to TV, radio...Television and radio communications certainly partake of the nature of a public thoroughfare (albeit an electromagnetic one), and what may be prohibited on the public street should be equally prohibited on TV and radio...
>
> "These programs come into the home, and under the doctrine of *Breard v. Alexander*, 341 U.S. 622 (1951), the usual broad play afforded free speech may be curtailed...
>
> "What is the quality in public nudity that permits the law to inhibit it without proof of obscenity?...We suggest that the quality is 'Intrusiveness' (as in *Breard*)...Just as a citizen

is entitled to walk down a street without necessity of having to avert his eyes [and his or her children's eyes] to avoid a public nude performance, so too he is entitled to 'flip the dial' without viewing intrusive nudity or explicit hardcore sex."

Having driven much of their audience away because of program content that is both creatively and morally bankrupt, our nation's broadcast TV networks now argue that to compete with cable they must be able to air programs similar to those shown on HBO and Showtime, both of which air program content that by almost any definition is pornographic.

Government Has A Role To Play In Protecting Children

In *Ginsberg v. New York*, 390 U.S. 629, at 639-641 (1968), the Supreme Court, in upholding the New York harmful to minors law, stated that two governmental interests justified the law's limitations upon the availability of sex materials to minors:

"The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility...The State also has an independent interest in the well-being of its youth...'While the supervision of children's reading habits may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them.'

"...this Court, too, recognized that the State has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men [and women] and citizens.'"

The *Pacifica* Court noted that in *Ginsberg* "we held...that the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household' justified the regulation of otherwise protected expression'...The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting."

Common sense ought to inform us that the well being of children is indeed a proper subject within the government's power to regulate. First, it is clear that many children do not enjoy the blessings of even one responsible parent. Second, no parent can monitor his or her children every hour of every day from birth until age eighteen. Third, while most parents do their best, many still fight a losing battle against a "media culture" that is at war with everything they try to teach their children. Fourth, even if parents succeed in raising the perfect child who not only

knows right from wrong but also possesses the inner strength to act on that knowledge, they can't guarantee that someone else's imperfect children won't harm their child.

Gregarious in nature, humans form governments to help order the communities in which they live and to protect themselves from irresponsible and evil persons who would harm the community or individuals in it—including children, who often need *special* protections.

Enforcing The Broadcast Indecency Law
Will Not Reduce Adults To Hearing Only What Is Fit For Children

In *Butler v. Michigan*, 352 U.S. 380 (1957), the Supreme Court invalidated a state law making it illegal to distribute to persons of any age material manifestly tending to corrupt the morals of youth. The Michigan approach was to "burn the house to roast the pig" and "to reduce the adult population of Michigan to reading only what is fit for children."

As pointed out in *Pacifica*, 438 U.S. at 750, n.28, however, adults who choose to hear or view indecent but nonobscene language can "purchase tapes and records or go to theatres and nightclubs." Time of day is also an important variable to be considered in determining whether program content is indecent [at 750]. Some programs that are inappropriate for children could, therefore, be appropriately aired after 10 p.m. or11 p.m. or, in some cases, after midnight. Cable and satellite TV systems also offer a variety of subscription channels and could offer more. Mainstream motion picture theaters are also an option for films and documentaries.

The Commission's Definition Of Indecent Is Not Vague

In *Pacifica*, 438 U.S. at 740, the Supreme Court noted that the "normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality." As defined by the Commission, however, the term "indecent" is limited to language that depicts or describes, in a patently offensive manner, depictions and descriptions of sexual or excretory activities or organs. The Commission's definition is similar to the second prong of the Supreme Court's three-part obscenity test, enunciated in *Miller v. California*, 413 U.S. 15 (1973). In concluding that the obscenity test was not vague, the *Miller* Court stated, at pages 25-26:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene material unless these materials depict or describe patently offensive 'hardcore' sexual conduct specifically defined...We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution. If the inability to define regulated materials

with ultimate, god-like precision altogether removes the power of the State or the Congress to regulate, then 'hard core' pornography may be exposed without limit to the juvenile, the passerby, and the consenting adult alike, as, indeed, Mr. Justice Douglas contends...In this belief, however, Mr. Justice Douglas now stands alone."

In a much earlier case involving obscenity, *Rosen v. United States*, 161 U.S. 29, at 42 (1896), the Supreme Court wrote, "Every one who uses the mails of the United States for carrying papers and publications must take notice of what, in this enlightened age, is meant by decency...in social life." It would appear that some broadcasters no longer know what decency in social life is—which, at bare minimum, ought to raise questions about their fitness to fulfill their statutory obligation as broadcast licensees to serve the public interest.

Some broadcasters apparently confuse profitability with acceptability. Take, for example, the Howard Stern Show. Nielsen recently reported that in the New York City metropolitan area, 7% of the radio audience tuned into Stern's program. With ratings like that, it is no wonder Stern is a "cash cow" for Infinity Broadcasting. But Stern's Nielsen ratings don't add up to community acceptance, even in New York. Even assuming that 7% of the (adult?) *radio audience* listens to Stern, that means that 93% of the *radio audience* doesn't listen to his radio version of a mean-spirited burlesque show. And many if not most New Yorkers aren't listening to radio. They are watching TV or surfing the net or enjoying a few moment of peace and quiet.

Some broadcasters apparently assume that if people watch TV they must not be offended by any program content. Opinion polls, however, have consistently found that large numbers of adult Americans are offended by (and concerned about) sex and vulgarity on TV. For example:

* **In a national survey conducted by Nielsen** (4/29/04), 78% of American families who had recently been part of the Nielsen "People Meter" panel wanted more shows "without profanity or swear words."
* **In a national opinion poll for *TV Guide*** (8/2/03), 57% of TV viewers said they "noticed an increase in offensive material on television lately."
* **In a national opinion poll for Common Sense** ("New Attempt to Monitor Media Content," *NY Times*, 5/21/03), 64% of parents with at lease one child between the ages of 2 and 17 believed media products in general were inappropriate for their families. Only one in five "full trusted" the industry-controlled rating systems.
* **In a national survey by Public Agenda** ("Parent's feel they're failing to teach values," *USA TODAY*, 10/30/02), "about 90% [of parents] say TV programs are getting worse every year because of bad language and adult themes in show that air from 8 to 10 p.m."
* **In a national FAMILY CIRCLE poll** (10/8/02), 67% of those surveyed said they are worried about the amount of sex on TV and 69% believe TV sex is increasing. When asked about specific scenes in programs such as *Sopranos, The Shield, West Wing*, and *Sex in the City*. Large percentages (from 48% to 76%) found the scenes "unacceptable."

* **In a national FAMILY CIRCLE poll** (5/15/01), 72% of men and women said there is too much sex in media, and 77% said there is a problem with sexual content on TV.
* **In a national study from Universal McCann Media Research** (*Media Wire*, 8/21/00), 35% of all adult Americans, regardless of whether or not they live with children, report viewing TV content "in the past few weeks" that they find personally offensive or morally objectionable, and such material is more commonly reported as "profane language, sexually suggestive language and situations and excessive violence. "Curiously, most Americans remember seeing this offensive material on the established networks even though these outlets are subject to stricter regulation than other viewing sources, like basic cable."
* **In a national opinion poll for Annenberg Public Policy Center** (6/26/2000), "more parents" were concerned about children's TV use than any other medium and 43% of families could not name one TV program they encourage their children to watch.
* **In a national opinion poll for USA TODAY** (9/24/99), adults were asked what *most* bothered them about network TV: 45% said sexual situations or lewd/profane language.
* **In a national opinion poll for the Kaiser Family Foundation** (5/10/99), 87% of parents were concerned about sexual content on TV and 84% about adult language.
* **In a national opinion poll for Morality in Media** (2/12/98), 59% of adult Americans thought the FCC needed to work harder to enforce the broadcast indecency law; only 28% thought a rating system and V-Chip combination would be an effective alternative.
* **In a national study for Broadcasting & Cable** (10/20/97), adults gave TV a letter grade based on how well TV fulfills its role "to teach character and values to children and teens." The results: 10% gave As; 13% Bs; 25% Cs; 22% Ds and 29% Fs.

Some broadcasters apparently assume that if people don't make complaints about programming, they must not be offended. But while only 8% of adult Americans polled last year (*TV Guide*, 8/2/03) said they had called a TV network to complain about something that offended them, 57% said they "noticed an *increase* in offensive material on television *lately*." There are a number of reasons why most people don't complain to broadcasters, including the following. First, broadcasters don't encourage viewer feedback, and most people don't know where or to whom complaints can be sent. Second, complaints to broadcasters about program content usually fall on deaf ears; and for that reason, when citizens do complain, they usually complain to program sponsors. As for complaints to the FCC, for almost two decades pro-decency organizations have had to tell citizens, in so many words, "The FCC will not act on the [indecency] complaint without a tape or video of the offending material or...a written transcript of the relevant content" (*Strangers in the House*, Morality in Media, 2000). Most in the broadcast audience aren't taping programs when assaulted by indecent broadcast content.

Some broadcasters seem unconcerned about the fact that large numbers of children listen to radio and watch TV and that in determining whether program or advertising content is indecent, the FCC properly takes that into consideration. Even assuming that most adults have become as

amoral or jaded as the New York and Los Angeles based entertainment media, only a fool would assume that five year olds and ten year olds and fifteen year olds can handle the floodtide of irresponsible and morally debilitating entertainment they are exposed to on TV and radio.

Decades ago, broadcasters had an industry code and self-imposed internal standards that generally reflected community standards. No longer. Despite their protestations, however, the problem is not that broadcasters can no longer discern what the community standards are. The problem is that many broadcasters are no longer concerned about community standards. The question they now ask is not whether program content would offend community standards—but rather, for one reason or another, whether they can still get away with airing it.

Enforcement Of The Broadcast Indecency Law
Does Not Constitute 'Censorship'

There is a difference between a *prior restraint* upon publication and *subsequent punishment* of what is contrary to the public welfare. As stated in *Near v. Minnesota*, 283 U.S. 697 (1931):

> "In determining the extent of the constitutional protection [speech and press], it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication...The liberty deemed to be established was thus described by Blackstone: '...Every freeman has an undoubted right to lay what sentiment he pleases before the public; to forbid this is to destroy freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences...'
>
> "The criticism upon Blackstone's statement...[is] chiefly because the immunity cannot be deemed to exhaust the conception of the liberty guaranteed by the state and federal constitutions. The point of criticism has been...'that the liberty of the press might be rendered a mockery and a delusion...if, while every man was at liberty to publish what he pleased the public authorities might nevertheless punish him for harmless publications'...But it is recognized that punishment for abuse of the liberty accorded to the press is essential to the protection of the public..." [283 U.S. at 713-715]

In rejecting the argument that enforcement of the broadcast indecency law constituted forbidden "censorship," the Court in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) stated:

> "The prohibition against censorship unequivocally denies the Commission any power to edit proposed broadcasts in advance and to excise material considered inappropriate for the airwaves. The prohibition, however, has never been construed to deny the Commission the power to review the content of completed broadcasts in the performance of its regulatory duties." [438 U.S. at 735]

The *Pacifica* Court went on to quote approvingly from Judge Wright's opinion in *Anti-Defamation League of B'nai B'rith v. FCC*, 131 U.S. App. D.C. 146, at 150-151, n.3 (1968):

"'This would not be prohibited 'censorship'...any more than would the Commission's considering on a license renewal application whether a broadcaster allowed 'coarse, vulgar, suggestive, double-meaning' programming; programs containing such material are grounds for denial of a license renewal.'"

II. THE PETITIONS FOR RECONSIDERATION

PART A
Petitioners Represented by
Robert Corn-Revere and Ronald G. London, Attorneys at Law

Petitioners Have Not Complied with 47 U.S.C. 405

We bring to the attention of the Commission the Threshold Question of whether the entities that claim the status of "Petitioners" have any "standing" under the statute to file or join in a "Petition for Reconsideration". It appears to us that the only Petitioners who may be a "person aggrieved or whose interests are adversely affect thereby" under 47 U.S.C. 405 are NBC and certain of its affiliates.

The "Petition" filed by Messrs Corn-Revere and Ronald G. London of Davis Wright Tremaine L.L.P. dated April 19, 2004 on behalf of various entities should be summarily dismissed on the ground of lack of standing for failure to fall within the statutory requirement of a person "aggrieved" or "whose interests are adversely affected".

We say this because these "Petitioners" have nothing presently at stake of a monetary or reputational nature or a threat to their licenses. In fact, many of these parties, as far as we know, do not hold a license from the FCC at all. There is no present jeopardy to any of the Petitioners. It is a case of their "Fleeing where none pursue". Cf. Saint Martin's Press v. Carey, 605 F. 2d 41, at 45 (2d Cir .1979); see also Proverbs 28:1.

Now, the "Petitioners" apparently believe that they have the same "standing" that they would have in attacking a statute that deprived them of what they considered to be their First Amendment Rights. But, we are not dealing here with the terms of such a statute. We have a specific procedural statute, to wit, 47 USC 405, which spells out who has standing. If they want to file a "Petition for Reconsideration" they will have to come within its terms, just as they would be required to follow Federal Procedure relative to standing in mounting a constitutional attack on a federal statute. See St. Martin's Press, Supra. The mere fact that a claim of First Amendment rights may be an issue does not, ipso facto, confer standing either ordinarily or in filing a Petition for Reconsideration under 47 USC 405.

The leading construction of the standing requirements of 47 USC 405 is found in In Re Application of Nevada Radio-Television Inc., 40 FCC 2d 444 (1973 FCC LEXIS 1857), adopted by the Commission on March 29, 1973.

This was a case where Las Vegas Valley Broadcasting Company (Valley) filed a "Petition For Reconsideration or Clarification". Valley was an applicant for a construction permit. It feared that a motion before a review board of a rival, Nevada, if granted, would jeopardize its chances of obtaining a construction permit. It asked that the grant of qualification for a construction permit to its rival, Nevada be, in effect, rescinded.

The Commission said:

> "Section 405 of the Communications Act of 1934, as amended confers standing to seek reconsideration upon persons who are aggrieved or whose interests are adversely affected by a Commission Action, not upon those who may be aggrieved or whose interests may be affected upon the happening of some contingent event in the future. Valley is not aggrieved and its interests are not adversely affected by a filing of a motion to enlarge issues and we find therefore that Valley is without standing (Underling added).

It is plain, from the document filed by the Petitioners that they are seeking "Reconsideration" (See Footnote 2 of the "Petition") and actually cite 47 USC 405 as a basis for their Petition (which of course does not support their action).

We could stop here and simply rest on our suggestion that the "Petition" be dismissed, but we shall continue in order to show that they are not persons aggrieved.

In footnote 4, the "Petitioners" cite 47 CFR Section 1.106(b)(1) as authority for seeking Reconsideration. That regulation applies only if the Petitioners are aggrieved parties or whose interests are adversely affected thereby. The word, "thereby", requires that they bring themselves within the plain meaning of the ruling. The Bono ruling was made in a factual context with the use of the F-word. Stripped of legalese, the "Petitioners" are looking for reconsideration of a holding that the use of the F-word is indecent and profane by any person in any context. As indicated below, such a holding does not exist. If that were the holding, the only way that the Petitioners could be "aggrieved" would be because they might like to use that word in future broadcasts. That type of aggrievement is not the type of aggrievement contemplated by the statute as the Nevada case, supra, holds. Such a contingent event (viz. use of the F-word in a future broadcast) is not sufficient to confer standing. These Petitioners do not differ from any other corporation or individual who might like to use that term in a future broadcast. Do they all have standing? Obviously not!

If we examine the "Petitions" of the Petitioners we find these requests:

(1) That the Commission reconsider its aggressive new approach to regulating broadcast indecency.
(2) That the Commission abandon its newly crafted profanity standard.

These objectives are inappropriate in a Petition to Reconsider a particular factual ruling and fail to confer "standing" under the statute.

Petitioners Have Not Complied With 47 CFR 1.106

The Petitioners object to the fact that the Bono ruling "puts broadcast licensees on notice that the Commission in the future will punish broadcasters for isolated or fleeing expletives. The Petitioners cannot achieve standing under Nevada for a future contingent event. 47 USC 405 is a "here and now" statute. Petitioners have failed to fulfill the requirement (at least in these arguments) that in a Petition for Reconsideration under 47 CFR 1.106, it is necessary to "state with particularity the manner in which the person's interests are adversely affected by the action taken, and show good reason why it was not possible for him to participate in the earlier stages of the proceeding".

The Petitioner's have not complied with this requirement in that they have not shown with particularity the manner in which their interests are adversely affected by the Bono ruling nor have they indicated why they did not intervene or request intervention prior to the Commission ruling. The statement in footnote 4 that the Petitioners did not intervene because "It was not foreseeable the Commission would adopt standards of general application in an indecency adjudication involved in a single program aimed at specific licensees is unacceptable and fails to comply, since it was generally known that in January of 2004, the Commission was prepared to review the staff ruling that Bono's use of the F-word was not a violation of 18 USC 1464.

Incidentally, where are the "standards of general application"? All the Commission has done is to interpret the statute to the effect that NBC and other "licensees" "use of the F-word during the live broadcast of the Golden Globe Awards violated 18 USC 1464".

The Commission simply adjudicated the factual situation, as it was obliged to do. It did say "Broadcasters are on clear notice that, in the future, they will be subject to potential enforcement for any broadcast of the F-word or a variant thereof in situations such as that here". That action hardly meets the definition of the phrase "standards of general application". This is a ruling restricted to situation such as the live broadcast of the Golden Globe Awards. This is not a "standard" at all, except perhaps in the restricted situations the Commission describes and it certainly does not have "general application". It is not even a warning that, if used in ordinary broadcasts, that anyone is in jeopardy. The Petitioners cannot make it a "standard of general application" by simply stating that it is, when it is not. For these reasons the Petitioners claim that they have shown "good reason" with particularity should be rejected and a holding made that the "Petitioners" have not complied with 47 CFR 1.106.

The complaint of the Petitioners that the FCC has announced an intention to impose "magnified fines and possible license revocation as sanctions" is inconsequential. The statue has always permitted this. Even though the industry has enjoyed lax enforcement in the past that is no reason to protest adequate enforcement in the future. There is nothing illegal or improper in enforcing the law's sanctions.

Other Deficiencies in this Petition

Precinding for the moment from lack of standing and failure to comply with the procedural statute, Morality In Media, Inc. notes the following deficiencies, incorrect statements or incorrect interpretations in the "Petition".

(1) On page 6 the Petitioners claim that the Commission statement that its aggressive new policy is "not inconsistent" with Pacifica is error.

Comment

As previously indicated, the Commission did not make a ruling that every use of the F-word, regardless of context, is cause for punitive action. If we examine its statement we find that it said:

> "We now depart from this portion of the Commissioner's 1987 decision as well as the cases cited...and any similar cases holding that isolated or fleeting use of the F-word or any variant thereof in situations such as this is not indecent and conclude that such cases are not good law to that extent...We also find...that the use of the phrase at issue here in the context and at a time of day here constitutes 'profane' language under 18 USC 1464". (Underlining added).

In the first place there is nothing "aggressive" in that statement. It is simply a conclusion from an application of existing law. Again it did not say every use of the F-word is actionable.

Indicating that its decision is not inconsistent with Pacifica, the Commission stated:

> "We believe that even isolated broadcast of the F-word in situations such as that here" could do so as well (viz. "enlarge a child's vocabulary in an instant") (Underlining added).

We conclude that the Commission has rendered a very restricted decision that is confined to facts similar to the Bono "context". It has not issued a rule of general application and is consistent with Pacifica. If the Petitioners believe that the announced decision is inconsistent with Pacifica, their Petition presents no facts or valid arguments to sustain that claim. In fact, the Petitioner's quote Justice Powell to the effect that "certainly the court holding today, does not speak to cases involving the isolated use of potentially offensive words" This is plain English. How then could the Commission's decision be inconsistent with something not decided?

(2) On page 7 the Petitioners say, "The court has confirmed that indecent speech is fully protected by the First Amendment and is not subject to diminished scrutiny as 'low value' speech as three justices who joined the Pacifica plurality opinion had suggested."

Comment

The Petitioners cites cases relating to cable television (Denver Area Consortium) and the Internet (Reno v. ACLU) for this erroneous conclusion.

Denver Area Consortium and Reno v. ACLU are both inapposite to that assertion. Pacifica still "rules the waves," and no subsequent Supreme Court case has weakened its application. If we read what Reno v. ACLU (1997) actually said, we find the following:

> "Outside the Broadcast context, we have adhered to the view that the governmental interest in protecting children from harmful materials does not justify an unnecessarily broad suppression of speech addressed to adults" (at 875).

Turning to Denver Area, rather than casting doubt on Pacifica or relaxing it, we find the Court quoting it with approval when it said:

> "The problems Congress addresses here is remarkably similar to the problem addressed by the FCC in Pacifica with the balance we approved there"..."The (Pacifica) Court found this ban" (viz.-on indecency) "constitutionally permissible primarily because 'broadcasting is uniquely accessible to children'"..."In addition" (the Pacifica Court wrote) "The broadcast media have established a uniquely pervasive presence in the lives of all Americans"... "[Patently] offensive indecent materials...confronts the citizen, not only in public, but also in the privacy of the home generally without sufficient prior warning to allow the recipient to avert his or her eyes or ears". (Underlining added).

Morality In Media suggests that the Petitioners have confused indecent speech in broadcasting with "indecent speech" generally. Numerous other U.S. Supreme Court cases since Pacifica have cited it and none unfavorably:

1. Ashcroft v. ACLU, 535 U.S. 564 (2002).
2. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).
3. U.S. v. Playboy, 529 U.S. 803 (2000).
4. Reno v. ACLU, supra
5. National Endowment for the Auto v. Finley, 524 U.S. 569 (1998).
6. Denver Area v. FCC, 518 U.S. 727 (1996) (Justice Steven's concurrence)
7. U.S. v. X-Citement Video, 513 U.S. 64 (1994). (Justice Scalia)
8. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).
9. Frisby v. Schultz, 487 U.S. 474 (1998).
10. City of Newport v. Iacobucci, 479 U.S. 92 (1986) (Justice Steven's) dissent).
11. Bethel School District, 478 U.S. 675 (1986).
12. Jacobson v. U.S., 503 U.S. 540 (1992).
13. Maryland v. Craig, 497 U.S. 836 (1990).
14. Bolger v. Young's Drug Products, 463 U.S. 60 (1983).
15. New York v. Ferber, 458 U.S. 747 (1982).

16. Pico, 457 U.S. 853 (1982).

17. Metro Media v. City of San Diego, 453 U.S. 490 (1981).

18. Consolidated Edison v. PSC, 447 U.S. 530 (1980).

(3) On page 8 the Petitioners state that the Supreme Court in Pacifica was not empowering the Commission to act in "isolated instances" and emphasized that the context in which words are used is "'all important."

Comment

This statement again implies that the Commission has said that the use of the F-word is forbidden at all times places and contexts. That is not so. The Commissioner's "ruling" in Golden Globe takes context into consideration, as we have indicated above, and is restricted to "situations such as that here" (viz. similar to the context of the Golden Globe Awards).

(4) On page 8 the Petitioners imply that the Golden Globe ruling 'needlessly reduces broadcast content to only what is fit for children.

Comment

This is not so. More than children were offended by Bono. The Pacifica court found that one of the reasons for upholding the indecency standard was that:

> "Patently offensive indecent material, presented over the airwaves, confronts the citizen...in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of the intruder". (Underlining added).

Obviously more than children's concerns are at stake here. The FCC was concerned both with children and unconsenting adults.

(5) On page 9 the Petitioner's complain that the reference to merit as a factor in deciding whether the program is indecent does not fit the "taken as a whole" concept.

Comment

In the first place, there is no room in the concept of indecency to incorporate the "taken as a whole" concept. This moves the definition into another of the obscenity requirements and is improper. Footnote 15, in Pacifica, notes that Justice Harlan in Manual Enterprises used "indecency" as a shorthand term for "patent offensiveness"'... "a usage strikingly similar to the Commissioner's definition in this [the Pacifica] case". It is obvious that the Pacifica case equates patent offensiveness with indecency. It is further obvious that patent offensiveness, as used in Miller, has no 'taken as a whole' concept and it would have disastrous consequences for the broadcast audience if it did. It would move the indecency concept much too close to the obscenity requirement.

In fact, it is quite doubtful if the Commission can use "merit" as a factor (other than, perhaps, as an element of context). Merit is no part of the patent offensive prong—even in an obscenity determination. It opens the door to using literary or artistic merit as a wedge to broadcast indecent depictions and language not at all sanctioned by Pacifica or its definition of "non conformance with accepted standards of morality". Will "Oh Calcutta" be next on prime time TV because some believe it has artistic value?

(6) On page 11, at footnote 2, the Petitioners indicate that they also seek reconsideration of other March 18 Indecency Orders.

Comment

Again the Petitioners make short shift of the statute, 47 USC 405 and the code of Federal Regulations 47 CFR Section 1.106(b)(1). They are not aggrieved or have interests that are adversely affected thereby under the statute as interpreted by Nevada, supra. In addition, they have failed to comply with 47 CFR Section 1.106(b)(1) relative to these March 18 "Indecency Orders" in that they have not shown with particularity the manner in which their interests are adversely affected by these "other March 18 orders" and have not indicated why they did not previously intervene or attempt so to do. It is also inappropriate to try to lug-into a Reconsideration request by means of a footnote in another Petition. If the Petitioners had standing, the correct method would require not one, but four Petitions for Reconsideration. There is no short cut.

(7) On page 11 the Petitioners claim that the Commission intends to prohibit "vulgar and coarse language".

Comment

Once more, Morality In Media suggests that the Petitioners have expanded what was actually said. It should be noted (although not noted by the Petitioners) that that phrase was not used in reference to "indecency" but "profanity" and the actual Commission language was:

> "The use of the phrase at issue here in the context and at the time of day here constitutes 'profane' language under Section 1464. The term 'profanity' is commonly defined as 'vulgar, irreverent or coarse language...In the context at issue here as also the kind of vulgar and coarse language that is commonly understood to fall within the definition of 'profanity'". (Underlining added).

It is important to note the distinction between what these Petitioners say the Commission said or meant and what the Commission did not say. The Commission did not ban "vulgar" or course language. It did indicate that in similar circumstances (to the Bono context) and at a similar time of day it might find actionable coarse and vulgar language that can be labeled profane if such language is commonly understood to fall within the definition of "profanity".

(8) On page 13 the Petitioner's claim that the Bono determination on profanity requires that "Broadcasters must now excise any words or images that may be 'indecent, blasphemous or vulgar'".

Comment

However, that is not how the Commission ruled. It did not say, that in the future, such words must be excised. It ruled that in the Bono or similar contexts the F-word or its derivatives or other profanities may be cause for Commission action as a "nuisance".

(9) On page 16 the Petitioners complain that a tape or transcript is no longer required.

Comment

The law never required such. This was an inordinate requirement of the FCC (since abandoned) that required a complainant to make a prima facie case. The FCC has the prime responsibility to investigate and enforce 18 USC 1464, not the citizen who brings a meritorious complaint, but without a transcript, that obviously requires the FCC to investigate.

(10) On page 16 the Petitioners refer us to Section 503(b) of the Act and assert that no forfeiture may be assessed unless the violation is "willful" or "repeated".

Comment

We cannot read 503(b) in that fashion. We refer the Commission to the provisions of 503(b) (1) (D) relative to a violation of 18 USC 1464.

(11) On page 17 the Petitioner's complain that the Commission is in the same boat as Bantam Books.

Comment

But the Bantam Books Commission was exercising a "prior restraint," a species of censorship. Pacifica tells us that the action of the Commission now or in the future, after the fact, is not a species of prior restraint or censorship.

(12) On page 17 the Petitioners tell us that the Golden Globe Ruling has caused the industry to take defensive steps.

Comment

The difficulty with that argument is that the Commission has not mandated those efforts and thus cannot be successfully accused of "chilling" speech. All the Commission has done is to enforce the law as it sees it. All other actions are voluntary on the part of industry. Years of lax enforcement in favor of the broadcast industry do not grant those lax efforts the force of law or binding precedent.

CONCLUSION

This Petition should be summarily dismissed for failure to come within the terms of 47 USC 405 and 47 CFR (1) 106.

PART B
Petition Of David Tillotson

Petitioner Has No Standing To File A Petition For Reconsideration

Mr. Tillotson's statement that he represents radio and television licensees does not demonstrate that he is a person "aggrieved" or "whose interests are adversely affected". He has no financial or other stake in the Bono decision, nor is he a licensee.

In addition, he has failed to bring himself within the requirements of 47 CFR 1.106. He has not shown with particularity the manner in which his interests are adversely affected. He gives no details on this aspect of his Petition.

Under such circumstances his "Petition" should be summarily rejected and any arguments he raises should be inadmissible.

He indicates on the last page of his Petition that certain broadcast licensees (which he names) join as Petitioners. Here again the licensees are not person's aggrieved or who have interests that are adversely affected. They are no different from other licensees. It is not enough to say that they are concerned that they may be subject to a forfeiture or fine if they use the F-word in the future. The Nevada case, 40 FCC 2d 444 (1973 FCC LEXIS 1857, 3/29/73) indicates that such a future contingent event does not establish standing under 47 USC 405.

Nor have these licensees "shown with particularity how their interests are adversely affected under 47 CFR 1.106 and, in fact, they are unable to show such adverse effect "in praesenti". Cf. Pacific Gas and Electric v. FERC, 106 F. 3d 1190 (5th Cir. 1997) cert denied, 522 US 511 ("A person is not 'aggrieved' unless its injury is present and immediate").

For all these reasons, the Petition of these licensees should also be summarily dismissed.

PART C
Petition of the National Broadcasting Network (NBC)

NBC may be a person aggrieved or whose interests are adversely affected since the ruling, in effect, determined that it has violated 18 USC 1464. It is, however, questionable as to whether it has described, with particularity, the manner in which its interests are adversely affected.

The NBC petition also has serious defects which we shall attempt to outline:

(1) On page 2 the Petitioner makes a statement that "the courts have stressed that even in the context of the broadcast medium, the FCC must identify a compelling governmental interest that warrants regulation". (For this it quotes ACT I, 852 F. 2d at 1343, n.18; and see Cable Communications, 492 U.S. 115 (1989)).

Comment

The difficulty with these citations is the fact that they do not represent the law on the government's interest in Broadcast Regulation. The government need not show a compelling interest. The DC Circuit opinion is just that, a Circuit Court opinion. It is trumped by the United States Supreme Court opinion in FCC v. League of Women Voters, 468 U.S. 364 (1984), where that Court states, in no uncertain terms, that the government need not show a compelling governmental interest. It said at page 375:

> "But as the Government correctly notes, because broadcast regulation involves unique consideration, our cases...have never gone so far as to demand that such regulation serve "compelling governmental interests" (Underling added).

It is quite obvious that a compelling governmental interest is not required in "broadcast regulation". The Supreme Court of the United States says so in plain English. The Supreme Court reference to "our cases" in the year 1984 includes the 1978 Pacifica opinion. The Petitioner is just flat wrong. The lower court, in FCC v. League of Women Voters, had required a compelling interest and was reversed on that aspect by the Supreme Court which said the governmental interest need only be a "substantial" interest in broadcast regulation. The interest must be "substantial" but need not be "compelling". In League of Women Voters the Supreme Court mentioned that the interest in Pacifica was substantial.

It does no good for the Petitioner to cite Sable Communications. This was a telephone (not a Broadcasting) case.

Another United States Supreme Court precedent is Columbia Broadcasting v. Democratic National Committee, 412 U.S. 94 (1973) which is applicable. Quoting Red Lion that court said:

> "It is idle to posit an unbridgeable First Amendment right to Broadcast comparable to the right of every individual to speak, write or publish".

Quoting Professor Chafee, the CBS court also said:
"The [First] Amendment should be interpreted so as not to cripple the regular work of government".

The United States Supreme Court has never backed away from Pacifica which indicates that indecency in Broadcasting is a form of unprotected Nuisance Speech. Pacifica has not been weakened nor has it been overruled (cf. Part A where Pacifica Supreme Court progeny is detailed).

(2) On page 2 (f. 4), the Petitioner make reference to the V-chip and other protections

Comment

18 USC 1464, as interpreted in Pacifica, makes it crystal clear that it is up to the purveyor to avoid indecent broadcasting. There is no obligation on the recipient to install protective devices to avoid a nuisance.

(3) On page 2 there is a reference to television programming not subject to 1464, as indicating a change in the broadcast environment.

Comment

This is inapposite since the issue is broadcasting that is subject to 18 USC 1464. The fact that Cable TV is raunchier is a quirk in the law permitting Cable to "push the envelope". It does not set the community standard for Broadcast TV.

(4) On page 3 the Petitioner apparently is claiming that broadcast indecency is protected speech.

Comment

Pacifica never said that. It did indicate that "Indecent Speech" might be protected "in other contexts". If indecent broadcasts are protected speech then Pacifica was wrongly decided. It is too late in the game to make that claim.

(5) On page 3 the Petitioner claims that the Commission has adopted a "per se" rule on profanity that disregards context and sweeps newscasts, sporting events and other live programming within its purview.

Comment

We have examined the Bono ruling and we cannot find any indication that that is what the Commission decided. In fact, we find no reference to newscasts or sporting events. We do find that the Commission's ruling is quite narrow. It said, at paragraph 12:

> "We now depart from this position of the Commission's 1987 Pacifica decision...holding that isolated and fleeing use of the F-word or a variant thereof in situations such as this is not indecent" (Underlining added).

In relation to profanity, it said in paragraph 13:

> "Use of the 'F-word' in the context at issue here...is commonly understood to fall within the definition of profanity".

It also said in paragraph 14:

> "The Commission in the future...depending on the context, will also consider under the definition of profanity, the 'F-word' and those words or variants thereof that are as highly offensive as the 'F-word' to the extent such language is broadcast between 6 a.m. and 10 p.m...."

In paragraph 16, we find:

> "We believe that even isolated broadcasts of the 'F-word' in situations such as that here" "could have enlarged a child's vocabulary in an instant...in a manner that many, if not most parents would find highly detrimental and objectionable".

Now, what do we make of all this? It certainly does not mean that the use of the "F-word", or any variant thereof, or words as highly offensive, have been banned from the airwaves. We must give meaning to "In situations such as this", "In the context at issue here" and "depending on the context" (in the future). The actual ruling itself was confined to the Bono context. That context included the following factors:

1. A live broadcast.
2. A performer who purportedly use the "F-word" in the prior 1994 Grammy Awards Broadcast.
3. Licensees who were "on notice" that an award presenter or recipient might use offensive language during the broadcast.
4. Licensees who had the ability to put in a time delay and "bleep" the offending words.
5. Use of the "F-word".
6. Aired on Prime Time Television.
7. Aired by a national network that could potentially reach every American home.
8. A program subject matter attractive to both adults and children with many children believed to be watching.

It was in that context that the Commission found the program both Indecent and Profane.

It is obvious that this is not a "per se" ruling. It was granted in a specific context.

From all of the above, we can, with justification, state that the Commission in the Bono ruling did not say that in the future every use of the F-word or its variants or words as highly offensive as the "F-word" will be actionable. These words can, and without doubt, will be used in other contexts. (See Petition footnote 13). The statement on pages 5 and 6 of the Petition that the Commission's order "impermissibly disregards the context of offensive utterances" is to disregard the plain use of the word "context" by the Commission.

(6) On page17 the Petitioner claims that the Commission collapsed the distinct meanings of "obscene, indecent or profane".

Comment

A look at the ruling itself will demonstrate that this statement is in error. We cannot find that Indecent or Profane are equated with Obscene in the ruling. (See also Footnote 38).

(7) On page 8 the Petitioner claims that under existing precedent there was no violation of law and that the Commission should remove references indicating that it violated the law.

Comment

Now what does this mean? It is true that the Commission, in paragraph 15, said:

"Existing precedent would have permitted this Broadcast."

But it is obvious that the Commission is speaking about Administrative Commission Precedent and not decided cases when it says in paragraph 14 that:

"The Commission's limited case law on profane speech has focused in the context of blasphemy".

The Commission goes on to say:

"Nothing in these cases suggests that the statutory definition of profane is limited to blasphemy".

The Commission refers us to footnote 37 where it quotes, for example, Raycom, Inc., 18 FCC Rcd, 4186 (2003) and Warren B. Appleton, 28 FCC 2d 36. In both of these "cases," existing *court* cases are cited as back-up for the Commission ruling. It is noted that the Commission does not use the words "case law" but *Commission's* case law. It is also apparent that the Commission does not feel itself bound by its prior Commission rulings, in light of its adoption of the Seventh Circuit definition, since none of those administrative precedents precluded its departure. It should be noted that Commissioner Abernathy calls it "a departure from prior Commission's precedent.

Marbury v. Madison, 5 U.S. 137, at 177 (1803) says:

"It is emphatically the province and duty of the judicial department to say what the law is".

The Petitioner claims that it cannot be penalized "for the conduct that complied with the law at the time it was undertaken". This treats Commission precedents as "the law". They are, of course, not "the law." They are interpretations of the law and do not create binding precedent nor do they prevent the Commission from departing from prior interpretations. Interpretations may be entitled to great weight but not be precedential. The Congress (or the Courts) make the law not an Administrative Agency. Its new interpretation is now entitled to great weight. Cf. Clarke v. Securities Industry Association, 479 U.S. 388 (1989).

The action of the Commission in holding that a violation has occurred without imposing a penalty does not violate Satellite Broadcasting Company v. FCC, 824 F. 2d (1987) in that no fine, no penalty, has been imposed by the Commission nor will the ruling be taken into

consideration at the time of renewal. The claim that the violation is memorialized in the record or that it is inherently coercive or that the Commission may reverse its disclaimer does not add up to a "penalty".

The Satellite Broadcasting case, cited by the Petitioner is inapposite. There a Commission "Rule" (See Petitioner's footnote 20) was apparently at issue. Here the FCC had no "rule" but simply an interpretation of a statute viz. 18 USC 1464. The Satellite case does not stand for the proposition that the Commission is locked into any prior interpretation and must change its interpretation by a proceeding prior to applying it to new circumstances.

As a matter of fact, the Commission has not changed its general interpretation that an occasional or fleeting use of the F-word does not violate the statute. It's ruling is strictly bounded by the use of modifiers including "in situations such as this" and "in the context at issue here" or "in situations such as that here". Close examination of the determination shows that the Commission has not made any general ruling that any use of the F-word or its variants is actionable. At all events no "penalty" has been imposed. There is no economic loss, no fine, no revocation of a license, no indelible mark to complicate renewal of the license.

For all of the above, Morality in Media suggests that the Petition of NBC for Reconsideration be denied by the Commission.

Respectfully Submitted,

Morality In Media, Inc.

By: _____
Robert W. Peters

_____
Paul J. McGeady
475 Riverside Drive Suite 239
New York, NY 10115
(212) 870-3232
Its Attorneys

May 14, 2004