

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

In the Matter of)
)
COMPLAINTS AGAINST VARIOUS)
BROADCAST LICENSEES REGARDING) File No. EB-03-IH-0110
THEIR AIRING OF THE "GOLDEN GLOBE)
AWARDS" PROGRAM)

To: The Commission

**COMMENTS OF THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION IN
SUPPORT OF PETITIONS FOR RECONSIDERATION**

The Radio-Television News Directors Association ("RTNDA"), by its attorneys, and pursuant to Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, hereby submits its comments in support of the Petition for Reconsideration and Petition for Partial Reconsideration (collectively, the "Petitions") filed by the American Civil Liberties Union *et al.* and the National Broadcasting Company (collectively, "Petitioners"), respectively, in the above-captioned proceeding. RTNDA is the world's largest professional organization devoted exclusively to electronic journalism. RTNDA represents local and network news executives in broadcasting, cable and other electronic media in more than 30 countries. RTNDA submits these comments to emphasize to the Commission the deleterious and chilling effect its Memorandum Opinion and Order in *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, FCC 04-43 (March 18, 2004) (the "*Golden Globes Order*") has had and will have on broadcast journalism.

Indeed, it has been RTNDA's practice over the past three decades, as courts have considered this sensitive aspect of broadcast content regulation and as the Commission's indecency rules and policies have evolved accordingly, to stress, both before the courts and

before the Commission, that efforts to regulate indecent programming must be tailored so as not to limit accurate and insightful reporting.¹ RTNDA submits that in its *Golden Globes Order*, the Commission has violated the precept that the government must tread lightly where it ventures into the area of broadcast censorship.

While the United States Supreme Court held in *FCC v. Pacifica Foundation*² that the FCC may constitutionally regulate indecent broadcasts, the relevant judicial foundation also specifically and emphatically recognizes how limited is the scope of the accommodation to the demands of decency. The Court afforded the FCC some latitude in regulating indecent broadcasts because it expected the agency to “proceed cautiously” and to consider carefully the chilling effect any standards it adopted would have on broadcast speech.³ Since *Pacifica*, the Court has made clear that content-based regulations of protected speech require the strictest forms of review, and noted that “encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.”⁴

Thus, FCC indecency enforcement traditionally has walked the fine line between restricting the broadcast of “indecent” material into homes at times when children may be watching and upholding the First Amendment protections to which such speech is entitled. While the FCC never has chosen specifically to exempt news and public affairs programming

¹ See, e.g., *FCC v. Pacifica Foundation*, 428 U.S. 726 (1978); *Action for Children’s Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988); *Action for Children’s Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991) (RTNDA participating as *amicus curiae*). See also *Peter Branton v. FCC*, 72 RR 2d 1259 (D.C. Cir. 1993) (RTNDA participating as Intervenor); *RTNDA Petition for Clarification or Reconsideration of a Citizen’s Complaint against Pacifica Foundation, Station WBAI(FM), New York, NY*, 59 F.C.C. 2d 892 (1976).

² 438 U.S. 726 (1978).

³ *Id.* at 761 (Powell, J., concurring).

⁴ *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 826 (2000); *Reno v. ACLU*, 521 U.S. 844, 855 (1997).

from indecency enforcement, it has accorded considerable deference to the reasonable good faith judgments of broadcasters. Consistent with *Pacifica's* teaching, the Commission repeatedly has emphasized that the “context” in which complained-of material appears is critically important.⁵ Consequently, the agency has rejected the idea that discrete words and phrases, in and of themselves, are indecent *per se*, in the absence of a contextual framework.⁶ Under this approach, FCC staff actions held that isolated or fleeting utterances of curse words during a newscast or a live interview, or where such language might be integral to a *bona fide* news story, were not indecent.⁷

The *Golden Globes Order*, however, eschews the measured and restrained approach to indecency enforcement mandated by *Pacifica* and subsequent cases.⁸ While paying lip service to the notion that “[t]he First Amendment is a critical constitutional limitation that demands that . . . [the FCC] proceed cautiously and with appropriate restraint,”⁹ the Commission proceeds to overturn years of well-reasoned precedent by creating strict liability for certain words regardless of their fleeting nature or context. In addition, the *Golden Globes Order* announces an “independent ground” for regulating broadcast content and creates a vague and disturbing new definition of “profanity,” which now includes, among other things, “vulgar and coarse language,” or language that is “so grossly offensive to members of the public who actually hear

⁵ *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency* (“*Indecency Policy Statement*”), 16 FCC Rcd 7999, 8002 (2001).

⁶ *Id.*

⁷ See, e.g., *Peter Branton*, 6 FCC Rcd 610 (1991) (subsequent history omitted); *Lincoln Dellar, Renewal of License for Stations KPRL(AM) and KDDB(FM)*, 8 FCC Rcd 2852 (1993).

⁸ See *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (“*ACT I*”); *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 913 (1992) (“*ACT II*”).

⁹ *Golden Globes Order* ¶ 5.

it as to amount to a nuisance.”¹⁰ Most importantly, in determining that Bono’s fleeting and isolated use of the “F-word” during the Golden Globes telecast was “indecent” and “profane” regardless of context, the FCC appears to have abandoned, as Petitioners note, those interpretive restraints that have served to ensure that its policies do not cross the constitutional line.¹¹ The Commission’s actions have further muddied the already vague definition of indecency, left broadcasters to guess which words and phrases will subject them to strict liability, and offers no guidance as to when, if ever, the context of a given program will outweigh its presumed offensiveness.

The background of the *Golden Globes Order*, its constitutional infirmities, and its already chilling effect on broadcast entertainment programming have been addressed at length by Petitioners and will not be repeated herein. Lest the Commission assume that the censorial effects of its decision will not reach broadcast newsrooms, however, RTNDA wishes to supplement the record with a discussion of how the *Golden Globes Order* has and will exert a substantial chilling effect on this particular area of constitutionally-protected speech.

As stated above, it is now apparently the Commission’s position that certain words are *per se* so offensive that any consideration of the context in which they were spoken is irrelevant. As a result, the *Golden Globes Order* directly conflicts with the FCC’s longstanding abhorrence for interfering with the editorial discretion of broadcasters. In 1991, for example, the Commission dismissed a complaint filed against National Public Radio (“NPR”) alleging that a segment about reputed organized crime figure John Gotti was indecent.¹² The program

¹⁰ *Golden Globes Order* ¶ 13.

¹¹ *ACLU Petition* at 8.

¹² *Peter Branton*, 6 FCC Rcd 610 (1991) (subsequent history omitted) (“*Gotti*”).

contained a wiretap of a telephone conversation in which Gotti reportedly used variations of the word “fuck” ten times in seven sentences. The FCC “recognize[d] that the repetitious use of coarse words is objectionable to many persons,” and acknowledged that the complainant may have been offended. Still, the Commission found that the use of such words in a legitimate news report was not “patently offensive.” The Commission explicitly noted that it had been “reluctant to intervene in the editorial judgments of broadcast licensees on how best to present serious public affairs programming.”¹³

Indeed, implicit in the *Gotti* decision was the FCC’s deference to NPR’s editorial judgment that airing this piece of tape without deletion was necessary to inform the audience and to establish the character of the alleged leader of a New York organized crime syndicate. Similarly, the Commission held that a licensee’s decision, after careful consideration, to air “Murder at Kent State” (which contained offensive language) was appropriate, since the language was not broadcast for shock or sensationalism, but rather for the purpose of presenting a vivid and accurate account of a disastrous incident in our nation’s history.¹⁴

Broadcast journalists make editorial decisions like these every day, and they are determinations that, consistent with the fundamental principles embodied in the First Amendment, should be left to journalists. The First Amendment exists to protect the people from the government, not to protect the public from the media. Where journalists are not responding appropriately to the needs and sensitivities of the listening and viewing public, there exist any number of means through which the public may voice its discontent without invoking

¹³ *Id.* at 611 (quoting *Syracuse Peace Council*, 2 FCC Rcd 5043, 5051 (1987), *recon. denied*, 3 FCC Rcd 2035 (1988), *aff’d sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 107 L.Ed. 2d 737 (1990)).

¹⁴ *Jack Straw Memorial Foundation*, 29 FCC 2d 334 (1971).

government censorship, the simplest being hitting the “off” button, turning the dial, or changing the channel.

Broadcast journalists historically have exercised reasonable judgment, responsibility and sensitivity to the public's needs and tastes in their newscasts. Recently, a Los Angeles television station aired a story on a protest where a car was vandalized and marked with a slew of expletives. The car was shown during the story but with the expletives digitally tiled so they could not be read. That decision was made prior to the *Golden Globes Order*. It was the judgment of the journalists involved that the story could be told effectively without showing the expletives.

In other instances, however, it may be the broadcaster’s judgment that depicting epithets or including vulgar or coarse language is integral to a story. Last month, President Hugo Chavez of Venezuela characterized President Bush as a “pendejo.” While reported translations of the word “pendejo” have varied from “idiot,” to “asshole,” to “dick,” the word is, by all accounts, “vulgar.” Unlike their newspaper, online and print brethren, however, under the regulatory regime announced in the *Golden Globes Order*, broadcast journalists are forced to wrestle with additional and unconstitutional constraints in relating the newsworthy incident to the public. Given the ambiguous nature of the Commission’s decision and the severe nature of potential penalties, it is not absurd to suggest that broadcasters—uncertain as to whether the use of “pendejo” or its English translations would incur FCC sanctions—might avoid the story altogether, or reduce it to the banal (“President Chavez called President Bush a bad word.”). Similarly, broadcasters might refrain from presenting stories involving sex education, or medical pieces concerning, for example, mammograms, sexually transmitted diseases, or safe sex. In the current regulatory environment, it is probable that, given the language contained in scenes from

inside the World Trade Center, licensees would be hesitant if not unwilling to broadcast CBS's compelling documentary "9/11." To include such language was, in the judgment of the filmmakers and journalists involved, critical to portraying accurately the events of that day.

Certainly, the "play it safe" attitude engendered by the *Golden Globes Order* strikes at the heart of broadcast news which, by its very nature, is live and uncensored. RTNDA members are being forced to rethink entirely how they present local and national news. In the past, the FCC wisely recognized that "in some cases, public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing."¹⁵ In those instances, the Commission stated that it would be "inequitable to hold a licensee responsible for indecent language."¹⁶ Now, the Commission appears to have retreated entirely from that position. The *Golden Globes Order*, combined with the specter of enterprise-threatening fines and license revocation, will make broadcasters hesitant to use audio and video actualities of angry political demonstrations, and even structured political debate, interviews and conversations. Given the risk that certain "offensive" language might be heard on the battlefield, had the Commission issued the *Golden Globe Order* a year ago, it is questionable whether we would have seen the compelling live reports of journalists embedded with U.S. troops in Iraq. Broadcast journalists will be hesitant to cover those persons who, for whatever reason, may publicly use language that the Commission may consider to be indecent or now, "profane." And we may no longer hear live audio or see live footage from coverage of an arraignment or trial, an emotionally charged demonstration, a locker room interview, or the scene of breaking news such as a disaster or terrorist attack.

¹⁵ *RTNDA Petition for Clarification or Reconsideration of a Citizen's Complaint against Pacifica Foundation, Station WBAI(FM), New York, NY*, 59 F.C.C. 2d 892 (1976).

¹⁶ *Id.*

The FCC offers as a solution to the “live problem” the suggestion that networks and broadcasters undertake to delay broadcasts “for a period of time sufficient for them to effectively bleep the offending word.”¹⁷ As a preliminary matter, implementing such a delay will be costly and inefficient for most local broadcasters. Others, however, may feel they have no choice under the FCC’s new enforcement standards. LIN Television, for example, this week announced that it had purchased equipment to impose a delay on all of its news and sports programming.¹⁸ LIN’s President is quoted as saying, “[n]ews organizations can’t control what is being said on the air all the time.” Indeed, they cannot and should not. To suggest that coverage of news events be sanitized, as the Commission has now done, is in and of itself a form of censorship. The *Golden Globes Order* has the practical effect of altering the very nature of broadcast news, which relies heavily on live reporting. The Commission’s action threatens to dilute the first-hand, eyewitness images, sounds and accounts unique to broadcast journalism, and inevitably will result in the public receiving less information. RTNDA submits that the government’s interest in protecting children from those relatively rare instances where language that may potentially be offensive to some makes its way into a story simply cannot justify eviscerating the live broadcast, long heralded as a hallmark of our free society.

Finally, the FCC states that it does not “envision that today’s action will lead to licensees abandoning program material solely over uncertainty surrounding whether the isolated use of a particular word is indecent.”¹⁹ The Commission could not be more wrong. As stated above, while the FCC prefaces its *Golden Globes Order* with the statement that its role in regulating

¹⁷ *Golden Globes Order* ¶ 11.

¹⁸ Steve McClellan, *LIN Will Delay News, Sports*, BROADCASTING & CABLE, April 26, 2004.

¹⁹ *Golden Globes Order* n. 30.

broadcast content is necessarily limited, it proceeds to rule that the utterance of the F-Word on television without regard its fleeting nature or context violates its indecency rules, overturns years of precedent, and leaves broadcasters guessing as to what other words or depictions might subject them to similar strict liability. While possible in some future scenario that the Commission will conclude that a particular program was not actionably indecent “in context,” it is clear that no broadcaster wants to be the test case. “When in doubt, leave it out” will inevitably govern in many instances. Certainly a broadcast licensee will now be more inclined to avoid certain topics or types of coverage rather than risk prolonged administrative and judicial proceedings to vindicate the First Amendment freedoms of itself and its audience. And station owners and managers will be less likely to support the editorial discretion exercised by their newsrooms in the name of good journalism where a “wrong guess” could result in a \$500,000 (or multiple thereof) fine or the loss of a station’s license.

Such a chilling result, particularly given the tenuous nature of the constitutional basis on which the FCC regulates broadcast content, is unacceptable. In its haste to curb the gratuitous use of “vulgar and coarse” language on radio and television, the *Golden Globes Order* has had and will continue to have the practical effect of making broadcast journalism less accurate, less insightful, and less thought provoking. “Reduc[ing] the adult population to seeing and hearing only what is fit for children,”²⁰ as the Commission has now done, is constitutionally impermissible.

In sum, RTNDA submits that the FCC indecency enforcement policy as announced in the *Golden Globes Order* disserves the public and violates the First Amendment rights of broadcast journalists. As the Supreme Court has duly recognized, “it is a characteristic of speech such as

²⁰ *ACT I*, 852 F.2d at 1335.

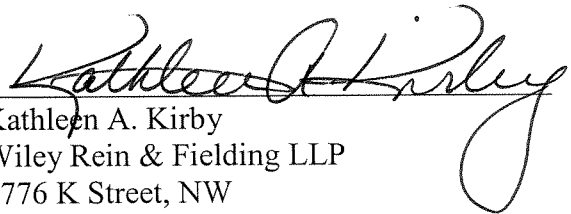
this that both its capacity offend and its social value vary with circumstances.”²¹ The *Golden Globes Order* is ambiguous as to whether any contextual factors, such as newsworthiness, are to be taken into consideration, and offers no protection for other forms of live or informative programming. Our system of government demands more when rights protected by the First Amendment are curtailed.

When dedicated journalists who use radio and television to bring news and information to their audiences broadcast language the FCC might now consider “indecent” or “profane” because, in their considered judgment, it is important in the context of the programming, or inadvertently permit its use under circumstances, it is not in the public interest to penalize them. Indeed, to do so violates the Communications Act and the Constitution. The *Golden Globes Order* is misguided and inconsistent with those fundamental principles of free speech on which our society is based. RTNDA urges the Commission to reconsider its decision so as to bring its use of indecency regulatory within constitutional bounds, and to remove the current chilling effect on broadcast speech, including news programming.

²¹ *Pacifica*, 478 U.S. at 738.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments in Support of Petitions for Reconsideration of the Radio-Television News Directors Association was sent via first-class, U.S. mail on this 29th day of April 2004 to the following:

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