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Federal Communications Commission
445 12th Street, S.W.
Washington, D. C. 20554

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FOR IMMEDIATE RELEASE
February 7, 2001

Contact: William J. Friedman
(202) 418-2300

PRESS STATEMENT OF FCC COMMISSIONER GLORIA TRISTANI

*Re: Enforcement Bureau Letter Ruling on KLOU (FM),
St. Louis, Missouri Indecency Complaint*

The FCC Enforcement Bureau has issued a letter dismissing an indecency complaint filed by Anne T. Shapleigh of St. Louis, Missouri. Ms. Shapleigh's complaint against KLOU-FM arose from a joke that included the line, "The wallet was found stuffed up the ass of a dead guy." Ms. Shapleigh described it as "a very offensive, sexually graphic dumb joke," that was "a horrible reference to excretory organs!" She also recited the date, the mid-afternoon time, the station's format and her distress at learning such language would be used on an "oldies" station. Her distress was magnified because she had "always thought it [the station] was a good choice for our young kid." I believe the foregoing states a complaint that deserves more than a dismissal noting "we do not have sufficient information to determine that the material about which you complain is indecent."¹

A. Applicable Jurisprudence

The statute the FCC enforces provides:

Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000 or imprisoned not more than two years, or both.²

The United States Supreme Court has affirmed the authority of this Commission to act to protect children against indecency through the broadcast media and the D.C. Circuit has reviewed several actions in light of that ruling.³ A special factor recognized by the Court as

¹ See *Bureau Letter Dismissing Complaint at ¶2*

² See 18 U.S.C. Sec. 1464; Communications Act, Sec. 503(b)(1)(D)

³ See *FCC v. Pacifica Foundation*, 438 U.S. 726, 739 n.13 (1978); *Action for Children's Television v. FCC*, 852 F.2d 1332, 1335 (D.C. Cir. 1988) (*Act I*); *Action for Children's*

justifying regulation of the broadcast media was its "invasive" nature.⁴ The Court also recognized that "prior warnings cannot completely protect the listener or viewer from unexpected program content."⁵ The ineffectiveness of prior warnings, combined with the invasive nature of broadcast media, means post-broadcast factual investigations and enforcement are the primary means of protecting children.

More recently this Commission has defined indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."⁶ Among the factors that the Commission examines to determine whether material is patently offensive include the actual words or depictions in context to see if they are, for example, "vulgar" or "shocking," and whether the material is dwelled upon or is isolated and fleeting.⁷

Requiring that parents supply, in their initial complaint, the factual context and an assessment of whether the indecency was isolated or fleeting or shocking or vulgar essentially requires complainants anticipate broadcast indecency and record it to provide the necessary factual information. The imposition of this burden conflicts with our affirmative obligation to enforce the statute. The Supreme Court has explicitly held the fact that the broadcast medium is ubiquitous and invasive is the reason it is subjected to heightened regulation. The Bureau's reasoning in dismissing Ms. Shapleigh's complaint stands the Supreme Court's holding on its head by turning these same facts into a *de facto* constitutional immunity for the speaker.

B. The Sanction of Dismissal is Improper on the Facts of this Case

The Bureau found Ms. Shapleigh's allegations insufficient and, without any further effort, concluded dismissal was proper. Thus, our Bureau read the facts alleged in Ms. Shapleigh's complaint in the *light most favorable to the broadcaster rather than the complainant*. This conflicts with well settled principles of civil law where dismissal of civil complaints is permissible only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations."⁸

Dismissal without even attempting to ascertain from the broadcaster (perhaps the only party in possession of the necessary facts) whether the elements of an indecent broadcast were present is unfair, particularly given the apparently indecent nature of the sentence Ms. Shapleigh described. Moreover, the statute does not require even *allegation* of the facts the Bureau

Television v. FCC, 932 F.2d 1504, 1508 (D.C. Cir. 1991) (*Act II*), *cert. denied*, 112 S.Ct. 1282 (1992); *Action for Children's Television v. FCC*, 58 F.3d 654, 657, 659 (D.C. Cir. 1995) (*Act III*), *cert. denied*, 116 S.Ct. 701 (1996).

⁴ *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 128 (1989).

⁵ *FCC v. Pacifica*, 438 U.S. at 748-49.

⁶ *See Enforcement of Prohibitions Against Broadcast Indecency*, 8 FCC Rcd 704, n. 10 (1993).

⁷ *See, e.g., Infinity Broadcasting Corp.*, 3 FCC Rcd 930, 931-32 (1987), *aff'd in part, vacated in part on other grounds, remanded sub nom. Act I*, 852 F.2d 1332 (D.C. Cir. 1988).

⁸ *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (discussing Federal Rule of Civil Procedure 12(b)(6)).

requires. It may be that constitutional precepts ultimately require such facts be proved prior to imposition of a penalty, but it does not require such proof at the outset of a proceeding. The Bureau's application of such a heightened evidentiary standard results in an expansion of what is necessary to state a violation under the statute.

Further development of the fact record would serve the broader purposes of the indecency statute, and better balance the Supreme Court's concerns that citizens generally cannot screen broadcast indecency due to its unexpected appearance. By failing to seek additional facts from the broadcaster, the Commission has failed to discharge its obligation to protect our children from indecent material on the public airwaves. Accordingly, the better rule is for this agency to vigorously complete the factual picture by obtaining information from the broadcaster. At a minimum, parents should be entitled to notice and an opportunity to amend the complaint to overcome any factual deficiency. This rule should apply in every case, unless it is manifestly clear that no amendment can cure the defect.

Unfortunately, this is not an isolated instance. The Commission appears so averse to indecency cases, and has erected so many barriers to complaints from members of the public, that indecency enforcement has become virtually non-existent. It's time for the Commission to begin taking indecency cases seriously again. It's our duty under the law, and, more importantly, our duty to our children.

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Federal Communications Commission
Washington DC 20554

In Reply Refer to:
EB-00-IH-0350
ID# 9626

February 7, 2001

Ms. Anne T. Shapleigh
440 South Price
St. Louis, Missouri 63124

Dear Ms. Shapleigh:

This is in response to your complaint against Station KLOU(FM), St. Louis, Missouri, for allegedly airing "a very offensive, sexually graphic dumb joke" at approximately 1:35 p.m. on October 14, 2000.

While I understand that you are offended by the programming you describe, I do not believe that any FCC regulatory action can be taken in this case. The Commission has defined indecency as material which, in context, depicts or describes sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the broadcast medium. In determining whether broadcast material is patently offensive we look to, among other things, the explicitness or graphic nature of the description of sexual or excretory organs or activities and whether the material dwells at length on such organs or activities. A reference to excretory organs alone is not sufficient to find material indecent, nor is it sufficient that some, or even most, people would find the material offensive. Based on the information you have provided, we do not have sufficient information to determine that the material about which you complain is indecent. Accordingly, we are dismissing your complaint.

To assist you further, I am including an information sheet regarding indecency enforcement. I recommend that you voice your concerns to station management, as the views of station listeners will often influence a change in programming.

Sincerely,

Charles W. Kelley
Chief, Investigations and Hearings Division
Enforcement Bureau

Enclosure