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PRESS STATEMENT OF COMMISSIONER GLORIA TRISTANI

Re: Enforcement Bureau Letter Ruling on WGR (AM) Buffalo, New York Indecency Complaint

The FCC Enforcement Bureau has issued a letter dismissing an indecency complaint filed by Michael Palko of Buffalo, New York. Mr. Palko's complaint against WGR (*AM*) arose from words uttered during the "Bauerle and the Bull Dog" show. Mr. Palko alleged the station undertook a

> [M]onth long piece where the station has purchased urinal splash guards with National Hockey League emblems on them to distribute to local bars and restaurants. Throughout this campaign, the co-hosts would regularly talk about who they would like to "piss on" and callers were invited to call in to talk about who in the NHL they would "piss on." The co-hosts regularly discuss "pissing" on NHL Commissioner Gary Bettman.[1]

Mr. Palko also noted the show is a "morning sports talk" show and he believed the "on-going bit" relied on "gratuitous use of excretory references." Mr. Palko also complained of Mr. Bauerle's use of the phrase "sawed off little prick" and repeated use of the word "prick." He reported his belief that Mr. Bauerle had been "reprimanded" previously for using the same phrase.

The Division Chief dismissed the complaint: "Because the discussion you describe does not describe sexual or excretory activities or organs in a patently offensive manner, I am dismissing your complaint." The Bureau also noted the challenged remarks were "brief" and "subject matter alone is not sufficient."[2] Based on the record before us, I cannot agree. Mr. Palko stated a *prima facie* case for indecency sufficient to survive dismissal. As I discuss below, this is one of the rare complaints where each portion of the complaint comports with recognized examples of indecent broadcast material.

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[1] *See Letter Complaint.*

[2] *See Bureau Letter Dismissing Complaint at ¶2.*

A. Applicable Law

I start, as always, with the statute the FCC enforces:

> 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.[3]

Our definition of an indecent broadcast is:

> [l]anguage 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.[4]

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 reference to it is isolated and fleeting.[5]

The Supreme Court has pointed out that what constitutes a "patently offensive" broadcast:

> [D]epends on context (the kind of program on which it appears), degree (not "an occasional expletive"), and time of broadcast (a "pig" is offensive in "the parlor" but not the "barnyard").[6]

The context question focuses first on the type of medium, here it is broadcasting[7], and second on the "type" of program, here a "morning sports talk" show. The "degree" of offensiveness

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[3] *See* 18 U.S.C. §1464; *see also* 47 U.S.C. §§ 312(a)(6), 312(b)(2), and 503(b)(1)(E) (1970 ed. and Supp. V) (FCC may impose civil penalties because the Communications Act incorporates § 1464); *see* 47 U.S.C. §§ 312(a)(6), 312(b)(2), and 503(b)(1)(E).

[4] *See Enforcement of Prohibitions Against Broadcast Indecency*, 8 FCC Rcd 704, n.10 (1993). The Commission's jurisprudence does not indicate whether the "patently offensive" and "indecent" determinations should be made with respect to the broadcast community's vision of what is necessary to protect minors or the sensibilities of the broadcast community as an adult whole.

[5] *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).

[6] *FCC v. Pacifica*, 438 U.S. 726, 748 (1978)

[7] *See e.g. Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975)(observing "[e]ach medium of expression . . . may present its own problems."); *see also Denver Area Ed.*

requires the remarks be distinguished from an "occasional" expletive and the time of day is referenced primarily to draw attention to the fact that children may be listening. In *Pacifica* the Court also said:

> In this case, it is undisputed that the content of Pacifica's broadcast was "vulgar," "offensive," and "shocking."

The "content" at issue in *Pacifica* was a seven word list that was part of a lengthier monologue repeatedly employing the seven words. One of the words in the seven word list at issue in *Pacifica* was "piss," [8] the repeated use of which is at issue here. In *Pacifica* the parties did not dispute the FCC's finding that the monologue was indecent.

In a separate setting, the Court has said the discharge of urine is "an excretory function traditionally shielded by great privacy."[9] In *U.S. v. Harvey*, 991 F.2d 981 (2nd Cir. 1993), a defendant's criminal conviction for possession of child pornography was overturned because, *inter alia*, the prosecution introduced testimony regarding the content of some adult videos, seized from defendant, that did not involve children. The testimony included depictions of video content "of people engaging in gross acts involving human waste," and describing "people urinating on each other."[10] The Second Circuit reversed the conviction because the testimony was introduced to create, "disgust and antagonism toward [the defendant], and resulted in overwhelming prejudice against him."[11]

In 1997, Senator Joseph Lieberman described a disturbingly similar scene in a video game brought to his attention by a concerned parent:

Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 774 (1996) (SOUTER, J., concurring) ("Reviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said"); *Id.* 518 U.S. at 803 (1996) (KENNEDY, J., concurring and dissenting) ("Emphasizing the narrowness of its holding, the Court in *Pacifica* conducted a context-specific analysis of the FCC's restriction on indecent programming during daytime hours."). The Court has repeatedly recognized special factors as justifying regulation of the broadcast media -- the history of extensive government regulation of broadcasting, *see, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 399-400; the scarcity of available frequencies at its inception, *see, e.g., Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 637-638; and its "invasive" nature, *see Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 128.

[8] *FCC .v Pacifica, Appendix to the Opinion of the Court* (setting forth "a verbatim transcript" of the "Filthy Words" monologue).

[9] *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995) *citing Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 626 (1989).

[10] *Harvey*, 991 F.2d at 994.

[11] *Id.* at 996.

> What makes Primal Rage novel, however, is a scene known among teenage players as the "Golden Showers" in which an ape-like creature celebrates the killing of his opponent by actually urinating on the corpse.[12]

Senator Lieberman described the scene as both "repulsive" and "degrading."[13] *See also U.S. v. Prytz*, 822 F.Supp. 311 (D.S.C. 1993) (criminal defendant purchased video tapes the Court described as "depicting sexual activity involving urination," and the defendant described as "golden shower" tapes).

The foregoing should leave no doubt in anyone's mind that Mr. Palko's allegations should not be dismissed. The U.S. Supreme Court has noted urination is excretory and is not a subject for routine public viewing. The repeated broadcast of the word "piss" has been unquestioningly accepted as meeting the contour of a "vulgar" and "shocking" broadcast by the Court. Urination on others is so offensive to the community's sense of decency and so inflammatory that *a conviction for possession of child pornography was thrown out because such imagery was among the degrading subjects discussed before a jury.* If the Constitution may bar discussion of such inflammatory imagery in a criminal trial, why should it be approved for broadcast when children are listening? Proposing to routinely urinate on someone to express disagreement with that person's sports affiliations (the NHL teams) or job performance (the NHL Commissioner) is the kind of degrading and pointless personal attack that possesses little political value. Like "fighting words,"

> [S]uch 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.[14]

Taken together these points should have counseled hesitation by the Bureau sufficient to at least issue a letter of inquiry to this station.

B. Dismissal is Improper on the Facts of this Case

The facts alleged by Mr. Palko demonstrate the "type" of program was a regularly scheduled morning radio program obviously targeting listeners traveling to their morning destinations and was not an adult only program. It contained a vulgar and apparently repeated reference to urinating on other people and at least one target of this behavior was identified by name. Urination on other people appears to have been a *promoted theme of the program* rather than anything that could be considered isolated or fleeting. The broadcast was made during the normal hours children are riding in cars on their way to school and are thus likely listeners.

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[12] *See* Lieberman, J., 15 Cardozo Arts and Entertainment Law Journal 147, 149 (1997).

[13] *Id.*

[14] *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

The Bureau concluded no further investigation was needed. However, the review of the thankfully thin caselaw on how to treat speech, whether video or radio, that involves urinating on others demonstrates that once again our Bureau *read the facts alleged in the 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."[15] Moreover, it is difficult to discern what more specific allegations are necessary to state a *prima facie* violation of the statute. 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.

It seems the Bureau ignored the allegation that this was a shameless month-long campaign to discredit individuals and teams of individuals by covering them with human waste. Callers were also apparently encouraged to use vulgarities like the word "prick." I am at a loss to explain the failure to even seek further review. This decision adds weight to the public's conclusion that the FCC's indecency enforcement program is ineffective. Our children deserve better.

- FCC -

[15] *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).