



NEWS

Federal Communications Commission
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PRESS STATEMENT OF COMMISSIONER GLORIA TRISTANI

*Re: Enforcement Bureau Letter Ruling on WXQR (FM), Wilmington, North Carolina
Indecency Complaint*

The FCC Enforcement Bureau has issued a letter dismissing an indecency complaint filed by W.T. Schmid of Wilmington, N.C. Mr. Schmid's complaint against WXQR FM arose from an alleged broadcast on a Sunday afternoon that he heard in his car while traveling with his 13 year-old daughter. He stated he heard the following: "So then I dropped my pants and showed Stacy my penis. ... That was it. We were showing off our genitalia."¹ At that point Mr. Schmid turned the station off. He said he later called the station and alleges he was told the language was "medical" and "within FCC guidelines" and if he did not like it he, "could turn off the channel." He also stated he was told the language was part of a "promo" for the station's morning show that ran every 4-5 hours.

According to his complaint, he did not receive a promised return call from the station's manager. Mr. Schmid believes the station will continue to broadcast inappropriate content until the "FCC intervenes and straightens them out." The Enforcement Bureau dismissed this complaint because Mr. Schmid "did not provide sufficient context to enable us to determine that the material is obscene or whether the material meets the Commission's definition of indecency."²

Mr. Schmid's complaint exemplifies the difficult responsibilities the FCC shares with parents. While government has no place in regulating meaningful discussion about sexuality or anatomy, it is the context of a broadcast that best tells a listener whether a chosen theme is primarily prurient or educational. Context has many facets. Context involves, among other things, the nature

¹ See *Complaint Letter* at 1 (copy attached)

of the medium (broadcasting), the nature of the program (adult, sports, oldies music etc.), the time of broadcast and, the linguistic context of the words.

In this complaint we simply do not have sufficient information to determine whether the alleged promotion and/or language are indecent or not. The repeated use of anatomical language in conjunction with “showing off our genitalia” suggests the words were anatomical, but the linguistic context was not. The Bureau once again dismissed a complaint without seeking the information needed to answer the context question and construed 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.”³

Further development of the fact record would serve the broader purposes of the indecency statute, and better accommodate the Supreme Court’s concern that citizens can rarely 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 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 a 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. The cure for a deficient record is to improve it rather than turn a blind eye to our duty.

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.

² See *Dismissal Letter Ruling* at 1.

³ *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)