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PRESS STATEMENT OF COMMISSIONER GLORIA TRISTANI

Re: Enforcement Bureau Letter Rulings on WLAN, (FM), Lancaster, Pennsylvania and WBZZ (FM), Pittsburgh, Pennsylvania Indecency Complaints

The FCC Enforcement Bureau has summarily dismissed two complaints alleging broadcast indecency, one against WBZZ-FM of Pittsburgh, Pa. and one against WLAN-FM in Lancaster, Pa. The allegations in both complaints are similar in that both involved radio broadcasts of allegedly explicit and patently offensive sexual material. The Bureau dismissed the *Olson* complaint because the complainant failed to "provide sufficient context in terms of the language and wording used."[1] The *Johnson* complaint was dismissed because "we do not have sufficient information to determine that the material about which you complain is indecent."[2]

These complaints deserve more than summary dismissal. The FCC repeatedly fails to follow U.S. Supreme Court authority that mandates this agency answer a question of fact: whether an alleged patently offensive broadcast violated community standards for the broadcast medium. Instead the FCC is content to summarily dismiss complaint after complaint *without even reaching the single question the law mandates be answered.* The FCC's "one size fits none" approach to broadcast indecency benefits no one but broadcasters of indecent material.

Alleged Factual Background[3]

Imagine you are riding in your car listening to the radio with your teenage child. It is not the middle of the night. You are listening to a station playing popular music. A DJ begins talking about recent statistics regarding the ease with which children can access pornography on the Internet. As part of an experiment to see if it really is easy, the DJ obtains a phone number from a participant in an adult chatroom and calls. The DJ dupes the man on the phone by imitating a woman's voice and (apparently without the caller's knowledge) puts the man on the air. The DJ makes some kind of grunting noises and the listener tells him "that sounds good." The DJ demands that the person "take it off". After man apparently complies by removing clothing, the DJ tells him to "whack it against the phone." The sounds are broadcast. You change the station.

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[1] *See Olson Dismissal,* at p.1.

[2] *See Johnson Dismissal,* at p.1.

[3] The scenarios described in this section are taken from the two attached letter complaints.

You reset the dial to another station. A contest has been concluded, where the winner has submitted the "best" story of "sexual intercourse" in an office environment. The broadcast reports the winner has provided a video of his exploit. The show hosts, while viewing the tape, describe what they see to the listening audience. For fifteen minutes the hosts described the scene: a man having sexual intercourse with a party piñata. The announcers described his facial expressions and hand movements as he ejaculated into the piñata.

The Law

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. [4]

The United States Supreme Court and D.C. Circuit Court have consistently affirmed the authority of this Commission to act to protect children against broadcast indecency.[5] In *Pacifica*, the Court approved a ban on broadcast,

> [L]anguage that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience.[6]

Explicitly distinguishing regulation of indecent speech generally from indecent speech that is amplified by a radio transmitter the Court found, "broadcasting is uniquely accessible to children" and children were likely listeners to afternoon radio broadcasts.[7] In addition, the Court wrote, "the broadcast media have established a uniquely pervasive presence in the lives of all Americans," and "[p]atently offensive, indecent material . . . confronts the citizen, not only in public, but also in the privacy of the home."[8] Thus, it is beyond question that broadcast speech is subject to greater scrutiny than personal speech that may, without sanction, be exposed to the juvenile, the passerby, and the consenting adult alike. Unfortunately the FCC, instead of using

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[4] *See* 18 U.S.C. Sec. 1464; Communications Act, Sec. 503(b)(1)(D)

[5] *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 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).

[6] *Pacifica*, 438 U.S. at 732 (quoting 56 F.C.C.2d 94, 98 (1975).

[7] *Pacifica*, at 749-50.

[8] *Pacifica*, at 748.

the stricter standard for broadcast speech, uses a kind of average person standard, or what is worse, a totally insensitive person standard.

The Supreme Court has provided "a few plain examples" of patently offensive material:

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.[9]

The Court has explicitly said that "patent offensiveness is to be treated" as a question of fact, and is typically reserved for disposition by a jury.[10]

Comparing the Facts Alleged in These Complaints with Supreme Court Descriptions of Patent Offensiveness Demonstrates Summary Dismissal was Improper

In these two cases the complaints alleged a mid-day and early evening broadcast respectively. The *Olson* complaint alleged an approximately "15 minute" broadcast[11] and the *Johnson* complaint cited a discussion of a news report followed by a telephone conversation.[12] Neither complaint describes an isolated or fleeting reference.

The *Olson* complaint pleads a case within the contours of the *Miller* and *Memoirs v. Massachusetts'* examples of patent offensiveness. The theme of the broadcast was sexual intercourse in the office environment. Since minor children rarely work in offices, it can quickly be determined this was an adult theme. The "best" story purportedly won the contest and was supported by a video of the exploit. The video and broadcast "description" was of an "ultimate sexual act" with a non-human. The FCC's summary dismissal presumes the broadcast community standard can be determined without inquiry, and the listening community approves of describing to children the hand movements and facial expressions of a man having sex with a piñata. Descriptions of his facial expressions as he ejaculated into an inanimate object states a straightforward example of a *prima facie* case for patent offensiveness that requires further inquiry.

The *Johnson* complaint alleges an even simpler example of a *prima facie* case for patent offensiveness. First, the theme of the broadcast was access by minors to pornography. The

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[9] *Miller v. California*, 413 U.S. 15, 25 (1975); *see also Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966) ("the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters") Since *Miller* is an obscenity case, the offensiveness necessary to state a complaint for indecency is less.

[10] *See Miller,* 413 U.S. at 26, 30; *see also Hamling v. United States,* 418 U.S. at 104-105.

[11] *See Olson Complaint* at p.1.

[12] *See Johnson Complaint* at p.1.

thrust of this topic was that access and possession of Internet pornography by minors was improper but could not be stopped. To emphasize the point, the broadcast hosts manufactured (using false pretenses) a participatory broadcast with a purported adult pornography consumer. The listener was required to follow along in the hosts' deceitful duping of the caller. The ensuing action involving the caller and the hosts included sounds suggesting autoerotic activity on both ends of the call. The plain intent was to bring a voyeuristic pornography consumer into the homes and cars of listeners *on the voyeur's terms*. Summary dismissal of this *prima facie* case is improper.

Conclusion

The Supreme Court has imposed upon broadcasters a heightened duty to protect our nation's children from broadcast speech that falls below community standards. This agency is required to enforce observance of this duty. The public broadcast to children of descriptions of explicit sexual conduct for its own sake, and for ensuing commercial gain, is a proper subject for parents to raise with this agency. Since the question of whether particular speech is indecent or not is a question of fact, we should be developing better records rather than summarily dismissing complaints. 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. Both broadcasters and parents benefit when enforcement decisions are based on full records. Following this approach we avoid the suppression of legitimate speech and reduce the likelihood of the erroneous deprivation of constitutional rights.

But, once again the FCC dismissed complaints without seeking the information needed to answer the factual questions and construed the facts alleged in the complaints 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."[13] 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.

[13] *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)