



NEWS

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FOR IMMEDIATE RELEASE
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PRESS STATEMENT OF COMMISSIONER GLORIA TRISTANI

Re: Enforcement Bureau Letter Ruling Regarding Indecency Complaints Against WKQX (FM), Chicago, Illinois

The FCC's Enforcement Bureau has dismissed an indecency complaint filed by David E. Smith of Chicago, Illinois against WKQX (FM). Mr. Smith's complaint states that on February 23, 2000, WKQX broadcast discussion of sexual intercourse between a 27 year old man and a nine year old child. This complaint makes a strong case that WKQX violated the Commission's ban on indecent broadcasting. At a minimum, the Bureau should not have dismissed this complaint for lack of "context" without attempting to contact Mr. Smith to further develop the record.

Background

David Smith filed three complaints with the FCC's Enforcement Bureau describing a total of five separate instances of allegedly indecent broadcasting by WKQX (FM). According to Mr. Smith, all of these broadcasts on WKQX occurred in the course of "Mancow's Morning Madhouse" show hosted by Eric "Mancow" Muller.

Two of the five incidents described Mr. Smith ultimately led the Enforcement Bureau to issue a Notice of Apparent Liability against WKQX.¹ The Bureau dismissed the three remaining complaints because, in the Bureau's view, they did not constitute indecency violations on their face.

Of the three complaints dismissed, one alleges that, between 7:50 and 8 in the morning:

Mancow and his staff talked euphemistically and directly about the particulars of adult-child sexual intercourse. During this broadcast, Mancow sanctions statutory rape by claiming that at age 27, he had sex with a 9 year old.²

Mr. Smith said he wrote to the FCC because he believes "this type of material is indecent and extremely inappropriate for broadcast on the public's airwaves."³

¹ *In the Matter of Emmis FM License Corp. of Chicago, Licensee of Station WKQX (FM), Chicago, Illinois*, Notice of Apparent Liability for Forfeiture (File Nos. EB-00-IH-0401)(rel. Apr. 6, 2001).

² Letter from David Edward Smith to Linda Blair, Mass Media Bur., F.C.C. (Feb. 23, 2000).

³ *Id.*

Discussion

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

In *FCC v. Pacifica Foundation*, the U.S. Supreme Court approved the FCC's ban on broadcast material 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.⁵

The Court has identified "perverted sexual acts" as a plain example of patently offensive material.⁶

The Commission has previously fined a station for broadcasting material similar to the material described in Mr. Smith's complaint. In 1997, the Commission fined KUPD(FM) of Tempe, Arizona for a brief on-air joke about adult-child sexual intercourse.⁷ That case provided guidance to radio stations that discussing adult-child sexual intercourse in a humorous or pandering manner is actionably indecent.

According to Mr. Smith's complaint, Mancow conducted a detailed discussion at approximately 8 a.m. of adult-child sexual intercourse and even claimed that, at age 27, he had had sex with a nine year old child. If ever there were a case for a per se violation of the indecency laws, this is it. Discussion of sexual intercourse between an adult and a child is clearly a "perverted sex act" within the Supreme Court's description of patently offensive material. Moreover, the sexual act that Mancow claims to have performed is actually *illegal* in Illinois,⁸ where this broadcast allegedly occurred. Even in the absence of any additional linguistic "context," the fact that the discussion of adult-child sexual intercourse was broadcast on a humor and entertainment radio program should be probative as to context. Thus there would seem to be little doubt that this discussion was not a bona fide newscast, but instead was a segment intended to pander or an attempt at raunchy humor.

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

⁵ *FCC v. Pacifica Foundation*, 438 U.S. 726, 732 (1978).

⁶ *Miller v. California*, 413 U.S. 15, 25 (1975).

⁷ *In the Matter of Tempe Radio, Inc. (KUPD(FM))*, 12 FCC Rcd 21828 (File No. 1800C1-JEE)(rel. Dec. 17, 1997).

⁸ 720 Ill. Comp. Stat., 12-14.1 (2001)("The accused commits predatory criminal sexual assault of a child if ... (1) the accused was 17 years or age or over and commits an act of sexual penetration with a victim who was under 13 years of age when the act was committed.")

Given an opportunity to respond, the station did not deny that the broadcast occurred. In the absence of any countervailing evidence to Mr. Smith's complaint, and in view of the *KUPD* case, the information strongly suggests that WKQX violated the ban on indecent broadcasting when it aired the material described in Mr. Smith's complaint.

Even if the Bureau believed that Mr. Smith's complaint lacked sufficient context to constitute an indecency violation, the Bureau should not have dismissed the complaint given the facts alleged. The Bureau took the correct first step when it sent a Letter of Inquiry to the station. The problem is that the investigation ended when the station failed to provide any evidence implicating itself. At that point, the Bureau easily could have contacted Mr. Smith to inquire whether he could provide any additional information regarding his complaint. Instead, the Bureau dismissed his complaint due to lack of "context."

The Bureau's failure to contact Mr. Smith in this case highlights a serious problem with the Commission's indecency enforcement. When the Bureau sends Letters of Inquiry to stations regarding indecency complaints, many stations respond that they lack a tape or transcript of the alleged incident. Thus the Letter of Inquiry is the first and last step of most investigations. I believe more should be done. *In instances where the Bureau believes there is a reasonable likelihood that additional information regarding "context" would lead to an indecency finding, the Bureau should contact both the complainant and the station as a routine practice.* Contacting both the station and the complainant should not impose unreasonable burdens on Commission staff, and obtaining additional information from complainants would undoubtedly result in more thorough records to evaluate indecency complaints.

In sum, the Bureau's disinclination to seek information from complainants results in too many citizens' complaints to be dismissed for "lack of context." I would urge the Bureau to begin contacting both the broadcaster *and* the complainant whenever indecency investigations are conducted. This would permit the Commission to enforce Congress's anti-indecency statute far more effectively.

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