

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
WPBN/WTOM LICENSE)
SUBSIDIARY, INC.)
)
Licensee of Stations WPBN-TV,)
Traverse City, and WTOM-TV,)
Cheboygan, Michigan)

MEMORANDUM OPINION AND ORDER

Adopted: January 11, 2000

Released: January 14, 2000

By the Commission:

1. In this Order, we deny a "Petition for Reconsideration," filed on September 25, 1998, by Thomas B. North ("North"). North seeks reconsideration or review of an August 26, 1998, letter from the Mass Media Bureau ("MMB"), acting pursuant to delegated authority, explaining MMB's earlier action effectively denying his complaint alleging that two Michigan television stations, WPBN-TV, Traverse City, and WTOM-TV, Cheboygan, broadcast indecent material when, on February 23, 1997, they broadcast the NBC network presentation of the film *Schindler's List*. For the reasons stated below, North's request is denied.¹

Background

2. On March 3, 1997, North filed a complaint alleging that the nudity contained in the network presentation of *Schindler's List*, specifically that which was broadcast before 10 p.m., is actionably indecent. By letter dated April 30, 1997, the Chief, Complaints and Political Programming Branch of MMB's former Enforcement Division ("C&PP"), advised North that the material identified in the complaint did not meet the legal standard for indecent programming.² See, e.g., *FCC v. Pacifica*

¹ North suggests that, as an alternative, the Commission consider his September 25, 1998, pleading as an Application for Review under Section 1.115 of the Commission's Rules. This is North's third attempt to require the imposition of sanctions for this particular broadcast of *Schindler's List*. In the interest of efficiency, therefore, we will treat his current pleading as an application for Commission review of an action taken by the staff pursuant to delegated authority. See 47 C.F.R. § 1.106(a)(1).

² "Indecent programming" is defined as material "that (depicts or) describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *Infinity Broadcasting Corp.*, 3 FCC Rcd 930 (1987), *aff'd in part and remanded in part sub nom. Action For Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988). Indecent material is actionable under the Commission's Rules if it is aired between 6 a.m. and 10 p.m. 47 C.F.R. §73.3999(b).

Foundation, 438 U.S. 726 (1978). That letter further explained that subject matter alone does not render material indecent and that nudity is not *per se* actionably indecent.

3. On August 19, 1997, North sought further clarification of the staff's response to his complaint. North specifically questioned the authority of the Chief, C&PP, to address his complaint, and alleged that the April 30, 1997, staff letter was a "summary conclusion that appears to be without basis." By letter dated August 26, 1998, North was informed by the Chief, C&PP, that his complaint was evaluated by MMB staff pursuant to the authority delegated in Section 0.283 of the Commission's Rules, 47 C.F.R. §0.283. Moreover, that letter expanded on and further explained the basis for the staff's conclusion that the adult frontal nudity he viewed in this particular presentation of *Schindler's List* does not meet the legal definition of indecency and therefore does not warrant further Commission action. Specifically, the staff letter explained that broadcast material such as that he objected to is actionably indecent when presented in a patently offensive manner, and that material which may be patently offensive in one context may not be so if presented under other circumstances. The staff concluded that although this airing of *Schindler's List* did contain incidental frontal nudity, the material broadcast depicted a historical view of World War II and wartime atrocities which, viewed in that context, was not presented in a pandering, titillating or vulgar manner or in any way that would be considered patently offensive and, therefore, actionably indecent.

4. In his September 25, 1998, pleading, North alleges that the staff exceeded its delegated authority as set forth in Section 0.283 of the Commission's Rules because his original complaint "*may contain new or novel arguments not previously considered by the Commission, and/or present facts or arguments which appear to justify a change of Commission policy*" (italics added). In this regard, he maintains that the Commission has historically misapplied or misinterpreted the relevant legal standard to enforcement matters relating to indecent broadcasts, resulting in actions that are contrary to federal law. Among those errors, he asserts, are the staff's findings that, in this case, the adult frontal nudity shown prior to 10 p.m. is not actionably indecent.

5. North contends that the staff employed the wrong standard to evaluate his complaint by emphasizing the "context" of the broadcast rather than whether its depictions or descriptions were patently offensive as measured by contemporary community standards. North argues that it is contemporary community standards, not context, that determine whether something is patently offensive under the definition of indecent programming, and "then and only then should the Commission look to the context to see if it negates any finding of patent offensiveness." In this regard, North contends that the "Commission's [August 26, 1998] letter, answering [his] request as to which elements [of indecency] are not present, does not anywhere contend that the complained of nudity in the movie is not in violation of contemporary community standards, and [the Commission] therefore admits that element in agreement with [him]." Moreover, North states, it "cannot be disputed with any amount of intelligence . . . [that] there is nothing in human existence, short of death, severe injury, or legal obscenity that is more disturbing to the mind or emotions that [sic] the uninvited sight of adult frontal nudity."³

³ In his original complaint, North alleged that this material was patently offensive as measured by contemporary community standards for the broadcast medium. In support, he asserted that the broadcast medium standards in every community in the United States are and always have been that adult's sexual organs simply not be shown on television in any context. These standards have not ever changed -- if they could change, they would not be 'standards' because 'standards' by definition are something that do not change, so that other things could be measured by them. Community standards throughout the nation are that some things are off limits to public broadcast and that includes the showing of sexual organs.

6. North also challenges the staff's conclusions based on the context of the presentation. He concedes, as the staff concluded, that the portions of the movie he objects to were not presented to pander or titillate, and he does not claim that the movie was otherwise without merit. However, North asserts that the staff's consideration of those factors improperly establishes additional requirements for the evaluation of whether particular programming is indecent. Similarly, he objects to the staff's conclusions that the material was not presented in a shocking or vulgar manner and that the viewer advisories aired during the broadcast of the film are relevant. He asserts that the viewer advisories were not part of this movie, are not part of the context to be considered, and therefore have no bearing on whether this broadcast was indecent or not. Moreover, North argues that even if the presentation of something "vulgar" or "shocking" were an element of the indecency definition, any reasonable person would agree that adult frontal nudity meets that definition, and "when that nudity is presented in the context of the Holocaust, a further degree of 'shock' is added." Thus, he maintains that this broadcast of *Schindler's List* was clearly presented in a vulgar and shocking manner, contrary to the staff's conclusion.

7. Finally, North concedes that it is not illegal to air an unedited version of *Schindler's List*. Rather, he argues, it was illegal to do so, prior to 10 p.m., without editing out the adult frontal nudity. Noting the concern for the protection of children and unconsenting adults against intrusion by offensive broadcasts, North states that, if the frontal nudity in *Schindler's List* is not indecent, the practical effect of that ruling would be that such nudity can be legally broadcast by any television station during any part of the day, including those times when children and unconsenting adults are likely to be in the audience.

Discussion

8. We have reviewed the staff's actions of April 30, 1997 and August 26, 1998, and affirm them.⁴ Rather, we find it was within the Bureau's delegated authority to address the original complaint, which applied an established indecency standard to the facts at issue. 47 C.F.R. § 0.283. From a procedural standpoint, we note that the allegation that the staff exceeded its delegated authority because his original complaint "may have" contained new or novel arguments not previously considered by the Commission fails to set forth with any particularity the new or novel questions he contends were improperly addressed by the staff. Review of his prior submissions indicates that such new or novel arguments were neither pleaded nor apparent. Moreover, North has not set forth with any particularity how the staff may have otherwise exceeded its delegated authority, and we find no support for his allegation in that regard.

9. From a substantive perspective, we concur with the staff's rejection of North's fundamental premise that the presentation of adult frontal nudity prior to 10 p.m. *per se* constitutes indecent programming, mandating further Commission action in all cases, including this particular presentation of *Schindler's List*. Indecency findings involve at least two distinct determinations. First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition -- *i.e.*, the material must describe or depict sexual or excretory organs or activities. Once the Commission determines that the material aired falls within that definition, we must then evaluate whether the broadcast is patently offensive as measured by contemporary community standards for the broadcast medium. *See Infinity Broadcasting Corp.*, 3 FCC Rcd 930 (1987), *aff'd in part and remanded in part sub nom. Action*

⁴ Our decision affirming the Division Order effectively moots North's delegated authority argument. *See Motions For Declaratory Rulings Regarding Commission Rules and Policies for Frequency Coordination in the Private Land Mobile Radio Services*, Memorandum Opinion and Order, 14 FCC Rcd 12752 (1999); *Beehive Telephone, Inc. v. Bell Operating Cos.*, Memorandum Opinion & Order, 12 FCC Rcd 17930, 17938-39 (para. 16) (1997) (delegation of authority rules are a matter between the Commission and its staff and do not give private parties rights), *petition for review dismissed in part and denied in part, Beehive Telephone Co., Inc. v. FCC*, 179 F.3d 941 (D.C.Cir. 1999).

for *Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988). There is no dispute that the program at issue, as aired, satisfies the first component of this standard. We agree with the staff's view, however, that the material, as aired, was not patently offensive.

10. The determination as to whether certain programming is patently offensive is not a local one and does not encompass any particular geographic area. Rather, the standard is that of an average broadcast viewer or listener and not the sensibilities of any individual complainant. See *Sagittarius Broadcasting Corporation*, 5 FCC Rcd 7291, 7292 (MMB 1990) (citations omitted), *aff'd*, 7 FCC Rcd 6873 (MMB 1992), *vacated pursuant to a settlement agreement*, 10 FCC Rcd 12245 (1995). Nor is subject matter alone the basis for an indecency determination. The full context in which the material appeared must be considered in determining whether material is patently offensive. See *Infinity Broadcasting Corp.*, *supra*. See also *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991); *Letter to Peter Branton*, 6 FCC Rcd 610 (1991); *appeal dismissed sub nom. Branton v. FCC*, 993 F.2d 906 (D.C. Cir. 1993); *cert. denied*, 511 U. S. 1052 (1994). It is not sufficient, for example, to know simply that explicit sexual terms or descriptions were used. *Pacifica Foundation v. FCC*, 438 U.S. 726, 750 (1978). Contextual determinations involve a host of potential variables. The interplay of these variables will vary depending on the facts presented in any given case.⁵ Thus, all of the possible contextual factors that might bear on an evaluation of the patent offensiveness of any particular material cannot simply be cataloged comprehensively and applied mechanically. Accordingly, we reject North's contention that because the staff did not specifically list which elements of indecency were *not* present in its evaluation of his complaint concerning this particular showing of *Schindler's List*, the Commission, presumably by default, agrees with or concedes to his assessment that this material is patently offensive.⁶

11. Contrary to North's ultimate conclusions, nudity itself is not *per se* indecent. If the definition of what constitutes actionably indecent programming were as absolute as claimed by North, there simply would be no need for or practical impact of the remainder of that definition -- that the programming in question be measured against the contemporary community standards for the broadcast medium. Moreover, we find no legal basis to conclude that "the contemporary community standards for the broadcast medium" are as inflexible as North describes, preclude Commission evaluation of the full context of the presentation of the subject programming, or, even considering the context of the presentation, compel a finding that nudity shown before 10 p.m. is so "vulgar" as to render it necessarily indecent.

12. Finally, North's assertion that unless the broadcast of this programming is sanctioned, he faces the probability of exposure in the future to indecency over the airwaves does not present a basis for further action in this case. The staff's conclusion that the material he objects to in this broadcast of *Schindler's List* is not actionably indecent is confined to the specific facts before it and does not depart

⁵ The Supreme Court has observed that contextual assessments may involve (and are not limited to) an examination of whether the actual words or depictions in context are, for example, "vulgar" or "shocking," a review of the manner in which the words or depictions are portrayed, and an analysis of whether the allegedly indecent material is isolated or fleeting. The merit of a work is also one of the many variables that that make up a work's context. *Pacifica Foundation v. FCC*, at 747-750 & n.29.

⁶ In this regard, the staff responded to the specific allegations made concerning the programming objected to in the presentation of this movie, and North's apparent displeasure with that outcome does not obviate the responsibility to set forth allegations which, if true, establish a *prima facie* case of licensee misconduct warranting further action. That burden of pleading rests with the complainant, not with the Commission or its staff. See, e.g., *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

from our established policies. Thus, we cannot agree that the effect of this response is to authorize the indiscriminate presentation of nudity at any time of the day or in any context without regard to those in the audience.

13. In this specific case, the staff properly concluded that the material North objects to in this particular broadcast of *Schindler's List* is not patently offensive as measured by contemporary community standards for the broadcast medium. That determination was properly based on the full context of its presentation as outlined by the staff in response to North's complaints -- including the subject matter of the film, the manner of its presentation, and the warnings that accompanied the broadcast of this film -- and not the standards of any particular community or individual viewer or complainant. Other than North's continuing objection to this result, he has not shown that the staff misapplied the law in this case, and his instant pleading presents no basis to revisit the staff's actions. Thus, we affirm the previous actions of the Mass Media Bureau effectively denying his complaints.

14. ACCORDINGLY, IT IS ORDERED, that North's "Petition for Reconsideration" is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary