

**STATEMENT OF  
COMMISSIONER KATHLEEN Q. ABERNATHY**

*Re: Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, File No. EB-03-IH-0110*

Today, we take a strong stand against indecency on our public airwaves and a significant step in protecting our children. Indeed, use of the “f-word” on a nationally telecast awards ceremony is shocking, gratuitous, and offensive. I am pleased that the Commission has signaled that such language will no longer be tolerated.

I do recognize, however, that today’s decision is a departure from prior Commission’s precedent and policy. That is why I could not support a fine in this case. Prior Commissions not only failed to take action against an isolated use of the f-word, but in fact sanctioned such behavior. The Commission stated in the past that “[i]f a complaint focuses solely on the use of expletives, we believe that . . . deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency.”<sup>1</sup> A series of prior Commission and staff decisions, moreover, have indicated that isolated or fleeting broadcasts of the f-word, such as the case here, are not indecent.<sup>2</sup>

Nor do I believe it is reasonable to suggest that broadcasters should have been on notice that we would find this incident to be profane. Although I support applying the definition of “profane” as discussed in *Tallman*<sup>3</sup> to this particular incident, this too is a new finding by the Commission. The courts never applied the standard in *Tallman* to an isolated broadcast of the f-word and the FCC has never used this definition in any analysis of “profane” content, let alone the use of expletives. Rather, “profane language” has historically been interpreted in a legal sense to mean blasphemy.<sup>4</sup> Moreover, the Mass Media Bureau in a document entitled “The Public and Broadcasting” stated that “[p]rofanity that does not fall under one of the above two categories [indecency or obscenity] is fully protected by the First Amendment and cannot be regulated.”<sup>5</sup>

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<sup>1</sup> *Pacifica Foundation, Inc.*, 2 FCC Rcd 2698, 2699 (1987) (subsequent history omitted); *see also Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987) (“Speech that is indecent must involve more than the isolated use of an offensive word.”).

<sup>2</sup> *See, e.g. Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999 (2001) and cases cited in note 32 of this decision.

<sup>3</sup> *Tallman v. United States*, 465 F.2d 282, 286 (7<sup>th</sup> Cir. 1972).

<sup>4</sup> *See, e.g., Duncan v. U.S.*, 48 F.2d 128, 133-134 (9<sup>th</sup> Cir. 1931) (“[T]he defendant having referred to an individual as ‘damned,’ having used the expression ‘By God’ irreverently, and having announced his intention to call down the curse of God upon certain individuals, was properly convicted of using profane language within the meaning of that term as used in the act of Congress prohibiting the use of profane language in radio broadcasting.”), *cert. denied*, 383 U.S. 863 (1931).

<sup>5</sup> I recognize that the document itself states that “[t]his manual provides only a general review of our broadcast rules and policies. It is not intended to be a comprehensive or controlling statement of these rules and policies.” Yet, if the Mass Media Bureau was clearly unaware that the Commission would find *any* language to be profane, I fail to see how licensees are supposed to be on notice that we would find the isolated use of an expletive to be profane.

It is a fundamental principle of due process that a licensee must be on notice that its actions would be in violation of our rules before this Commission may impose sanctions.<sup>6</sup> Given that prior Commission statements and staff action in fact *permitted* the broadcast at issue here, retroactive application of our new policy to these broadcasters would have been fundamentally unfair, not to mention unlawful. I emphasize, however, that the law has now changed and all licensees are on notice that even isolated and fleeting broadcasts of the f-word may violate our restrictions on indecency and profanity.

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<sup>6</sup> See *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618 (D.C. Cir. 2000).