

Fairness Doctrine

License, Renewal of, Subject to Conditions

Personal Attack

Petition to Deny

License renewal application granted for short term subject to conditions. Petition to deny alleging violation of Fairness Doctrine and personal attack rule denied. Allegations failed to raise substantial and material question of fact as to whether renewal would serve public interest, convenience, and necessity.

-*Pacifica Foundation*

FCC 83-518

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of

PACIFICA FOUNDATION

File No. BRH-
810601VX

For Renewal of License for Noncommercial Station WPFW(FM), Washington, D.C.

MEMORANDUM OPINION AND ORDER

(Adopted: November 8, 1983 Released: November 30, 1983)

BY THE COMMISSION: COMMISSIONER RIVERA ABSENT.

1. The Commission has before it for consideration (i) the above-captioned timely-filed license renewal application of Pacifica Foundation ("Pacifica"), licensee of Station WPFW(FM), Washington, D.C.; (ii) a petition to deny that renewal application filed September 1, 1981 by the American Legal Foundation ("ALF"); (iii) an opposition to the petition to deny filed by Pacifica; and (iv) a reply to Pacifica's opposition filed by ALF.

2. ALF alleges that WPFW's license renewal application should be denied because the licensee violated the Commission's Fairness Doctrine and personal attack rule; made deliberate misrepresentations to the Commission in its application for a construction permit for WPFW; violated Section 399 of the Communications Act of 1934, as amended, 47 U.S.C. § 399, which prohibits noncommercial licensees from editorializing; violated Section 1464 of Title 18 of the United States Code, 18 U.S.C. § 1464, which prohibits the broadcast of "obscene, indecent or profane language"; broadcast programming which was "flagrantly offensive and vulgar"; violated Section 73.3527 of the Commission's rules, 47 C.F.R. § 73.3527, by failing to

annually place in its public file a "problems/programs list"; failed to adequately ascertain the problems, needs and interests of WPFW's service area; violated Section 73.503 of the Commission's Rules, 47 C.F.R. § 73.503, which prohibits announcements by a noncommercial licensee promoting the sale of a product or service; violated federal statutes which prohibit use of funds appropriated by Congress to influence or oppose legislation in Congress; and failed to comply with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976).

3. *Fairness Doctrine, Program Content and Personal Attack Allegations.* ALF asserts that WPFW has "consistently and deliberately failed" to present contrasting viewpoints on a number of controversial issues of public importance, including the conflict in El Salvador and U.S. involvement therein; the question of whether the United States is a "racist country"; U.S. development of nuclear weapons; extension of the Voting Rights Act; a Constitutional amendment to give the District of Columbia increased representation in Congress; the Air Traffic Controllers' strike; abortion; and the "New Right." In opposition, Pacifica argues that ALF's Fairness Doctrine allegations are procedurally and substantively deficient.

4. Under the Fairness Doctrine, when a broadcast licensee presents programming on one side of a controversial issue of public importance, that licensee must afford a reasonable opportunity in its overall programming for the presentation of contrasting viewpoints. Broadcast licensees are afforded "wide journalistic discretion" in fulfilling their Fairness Doctrine responsibilities. *Fairness Report*, 48 FCC 2d 1 (1974). Both sides of an issue need not be presented in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station or network, since it is the right of the public to be informed, rather than the right of any individual or group to broadcast his, her or its views, which the Fairness Doctrine is designed to protect. Each licensee must determine whether broadcast material presents, in an obvious and meaningful fashion, one side of a controversial issue of public importance. If so, the licensee selects the spokespersons to present contrasting viewpoints and the formats, scheduling and duration for such presentations. The Commission reviews Fairness Doctrine complaints only to determine whether the broadcaster can be said to have acted reasonably and in good faith. The Commission expects complainants to first contact the broadcaster with detailed complaints to allow the broadcaster to explain its compliance, or its plans for future compliance. In this way it is hoped any controversy may be satisfactorily resolved before the need for Commission involvement. If the complainant is not satisfied with the broadcaster's explanation, then a complaint should be submitted to the Commission. The complainant has the procedural and substantive burden of providing specific, detailed information sufficient to constitute a *prima facie* showing that the licensee has failed to fulfill

its Fairness Doctrine responsibilities, including reasonable grounds for the claim that the station or network broadcast only one side of the issue in its *overall* programming. *Fairness Report, supra*. This properly avoids placing an undue burden upon the broadcaster to respond to every complaint regardless of whether certain requisite information is provided.

5. In view of these requirements, it is clear that the Fairness Doctrine aspects of ALF's petition are deficient in several critical respects. Although ALF identifies eight issues about which it believes WPFW failed to present contrasting points of view, the petitioner indicates that it notified WPFW concerning only the El Salvador issue. Thus, WPFW was not properly afforded an opportunity to demonstrate compliance, or to indicate any plans it may have contemplated regarding the remaining issues. Further, ALF fails to provide the necessary information regarding WPFW's *overall* programming with respect to any of the identified issues. In fact, ALF's description of the period of time it considered is unclear, and ALF consistently fails to specify with sufficient particularity the nature and extent of its viewing habits. For example, with respect to the first three issues focused upon, ALF states "it is merely a small sample of what has been heard by a few individuals in the community who have listened to certain programming of WPFW." In addressing the remaining five issues it states "the extent to which WPFW ignores its Fairness Doctrine responsibilities is perhaps most clearly shown by the results of random monitoring . . . conducted *during the month of August*." However, a complaint must provide specific information to show that the licensee has failed to afford a reasonable opportunity for the presentation of contrasting viewpoints in its *overall programming*, not some finite period of time arbitrarily selected by the complainant. *Northern Plains Resource Council v. KGHL*, 59 FCC 2d 482 (1976); *John T. Harrison v. WBZ*, 57 FCC 2d 612 (1975), *application for review denied*, 58 FCC 2d 1387 (1976). ALF also submitted affidavits of eight individuals. However, not one affidavit contains sufficient information for either the broadcaster or the Commission to ascertain with any degree of certainty the nature and extent of any affiant's listening habits, or whether WPFW's *overall* programming was actually considered. The *Fairness Report, supra*, at 19, states that "[c]omplainants should specify the nature and extent of their viewing or listening habits, and should indicate the period of time during which they have been regular members of the station's audience." In this regard, the Commission has stated that:

[I]t did not intend that the mechanical repetition of the words "regular viewer" or the assertion that the complainant "routinely listens to [or views] the news, public affairs and other nonentertainment programs" [footnote omitted] broadcast by the station, without the additional specific information setting forth the "nature and extent" of the complainant's viewing habits . . . would be considered

an adequate basis for a Fairness Doctrine complaint. *John Howard*, 55 FCC 2d 777, 780-81 (1975).

The most detailed, although insufficient, description of listening habits is provided in an affidavit of Paul D. Kamenar and relates solely to the "El Salvador" issue. Mr. Kamenar states, "I have listened regularly over the past several months to WPFW's programming." Clearly, Mr. Kamenar has provided nothing more than a "mechanical repetition" of "regular" listening habits without any description of the "nature and extent" of those listening habits. The remaining affidavits do not even assert what period of time is focused upon, or in any meaningful manner describe the nature and extent of the affiants' listening habits. In addition, *as identified by ALF*, the issues of "race relations" and the "new right" are so amorphous that it is impossible to ascertain what particular controversy regarding these subjects is addressed. Unless a broadcaster is provided with a precise, well-defined identification of broad or complex issues, it may prove unduly burdensome, and indeed impossible, to demonstrate compliance. *American Security Council Educational Foundation v. F.C.C.*, 607 F.2d 438 (D.C. Cir. 1979). Accordingly, Pacifica is correct in arguing that ALF's Fairness Doctrine allegations are procedurally and substantively deficient. Therefore, ALF's Fairness Doctrine allegations fail to raise a substantial and material question of fact as to whether grant of WPFW's renewal application would serve the public interest, convenience and necessity.

6. However, in addition to its procedural and substantive arguments, Pacifica provides examples of its programming and describes its programming policies in an effort to "demonstrate that station WPFW has, in fact, aired a variety of viewpoints in connection with the broad areas described by the ALF." In attempting to "demonstrate" that it had aired "a variety of viewpoints," WPFW showed that it, in fact, does not know when or, indeed, whether particular persons or points of view were presented. It asserts with respect to its news programming that it "utilized virtually all reports supplied to it by the [Pacifica] National News Service", and relies heavily on such news reports. However, it continues, "while available station records do not reflect the time and date of broadcast of any particular news item, the [g]eneral [m]anager believes that all, or at least most, of the listed items were aired." In the *Fairness Report*, *supra*, at 20, the Commission stated:

While this Commission does not require the maintenance of a fairness log or diary, we expect that licensees will be cognizant of the programming which has been presented on their stations, for it is difficult to see how a broadcaster who is ignorant of such matters could possibly be making a conscious and positive effort to meet his fairness obligations. [Emphasis added.]

Thus, although it is not mandatory for broadcasters to maintain a list or log of their controversial public issue programming, the

licensee must implement *some* method of keeping track of such programming, particularly when an outside service is relied upon exclusively for news programming, and the broadcaster is otherwise unable to recall specific responsive programming.

7. Furthermore, outside the context of its news programming, WPFW relies substantially¹ upon the call-in feature of several talk shows to show contrasting viewpoints have been aired.² WPFW states with respect to one such program, "Salsa de las Americas," that "the dialogue resulting during this call-in program frequently features listeners on all sides of the issues under discussion." Again, the licensee does not indicate whether contrasting points of view on any particular issue were, in fact, presented. Further, while call-in programs may serve as useful vehicles for the presentation of contrasting viewpoints, "broadcast licensees have an affirmative duty generally to encourage and implement the broadcast of" contrasting viewpoints on controversial issues of public importance. *Report on Editorializing by Broadcast Licensees*, 13 FCC 1246, 1251 (1949). WPFW's statement in its opposition that "listeners' views are invited and, indeed, welcome" is insufficient without specifying the actual language which constituted an on-the-air invitation.³ In *Brandywine-Main Line Radio, Inc.*, 24 FCC 2d 18 (1970), *recon. denied*, 27 FCC 2d 565 (1971), *aff'd. sub nom. Brandywine-Main Line Radio, Inc. v. F.C.C.*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973), the Commission stated:

The Fairness Doctrine imposes upon licensees a responsibility on behalf of the public's right to hear contrasting views, and this responsibility is not exercised by leaving the expression of contrasting views to such happenstance as the remarks of an unknown person on a call-in program. 27 FCC 2d at 567.

8. Thus, although the information before the Commission is insufficient to find that there has been a Fairness Doctrine violation on any particular controversial issue of public importance, we are concerned about WPFW's apparent lack of affirmative effort to present contrasting viewpoints⁴ and its lack of actual knowledge as

¹ Apparently, the only issue on which WPFW made an affirmative effort to present contrasting viewpoints (outside of its uncertain news reports) was that of U.S. involvement in El Salvador; and such effort on the part of WPFW was made only after receiving a complaint from ALF alleging an imbalance of programming on that issue.

² For instance, with respect to "race relations," WPFW states that:

Since the ALF asserts that at least three editions of these [call-in] programs included some discussion of racism, it is clear that anyone interested in expressing an opinion on some aspect of that topic was given ample opportunity to do so . . . These opportunities, combined with ALF's failure to take advantage of them, totally undercut the ALF's claim that any Fairness Doctrine violation has occurred.

³ See *Mid-Florida Television Corporation*, 40 FCC 620 (1964).

⁴ In this regard, ALF cites Pacifica's statement in its construction permit applica-

to whether it in fact broadcast certain programming upon which it relies in large part for satisfaction of its Fairness Doctrine responsibilities. The fact that "available station records" are inadequate to enable Pacifica to know whether it had broadcast certain non-entertainment programming is even more disturbing in light of our ruling *infra* concerning WPFW's failure to maintain a problems/programs list in its public file as required by the Commission's rules. Accordingly, the grant of WPFW's renewal application shall be conditioned upon Pacifica's establishing some procedures to ensure that it remains cognizant of the controversial issue programming in connection with its Fairness Doctrine obligations. Such procedure might be as simple as contemporaneous notes taken by a program moderator while a discussion is underway. While the Commission wishes to keep the licensee's administrative requirements for the Fairness Doctrine to an absolute minimum, the licensee's obligation to be cognizant of viewpoints broadcast in connection with the Fairness Doctrine requires more than hopeful speculation as to whether contrasting viewpoints were, in fact, aired.

9. ALF also alleges that WPFW has "deliberately slanted and distorted its news coverage" to conform to its "ultra-leftist political philosophy." In support, ALF refers to comments in the "WPFW Paper," a monthly newsletter published by the station, and an on-the-air statement made by a WPFW announcer.⁵

10. The Commission is neither the national arbiter of the "truth" of a news event nor the judge of the wisdom, accuracy or adequacy with which it may have been handled on the air. The Commission does, however, act appropriately to protect the public interest where it receives extrinsic evidence of *deliberate* distortion of news programming. *Hunger in America*, 20 FCC 2d 143, 150 (1969). Such evidence would include testimony, in writing or otherwise,

tion for WPFW that it would present a program featuring the "Young Americans for Freedom" (YAF), and states that Pacifica never contacted the YAF concerning its participation. ALF characterizes this as a "misrepresentation", as well as evidence of "bad faith" in WPFW's Fairness Doctrine performance. However, as stated above, the Fairness Doctrine does not entitle any person or group to appear on a station to express his, her or its viewpoint. Thus, the presence or absence of a program featuring a particular group is irrelevant to a licensee's fulfillment of its Fairness Doctrine responsibilities. Further, inasmuch as nine years passed between the submission of Pacifica's construction permit application and the commencement of WPFW's operation, the failure of Pacifica to fulfill one programming proposal is clearly not a "misrepresentation" as characterized by ALF.

⁵ ALF refers to the following statement made during a discussion of Central America:

We at WPFW are presenting an *alternative look* at Central America. You can get the *other side* in the *Washington Post*, the *Star*, television, etc. The *point of view* we're presenting is not one you have ready access to. (Emphasis supplied by ALF.)

from "insiders" or persons who have direct personal knowledge of an intentional falsification of the news. The Commission has emphasized that it is particularly concerned with extrinsic evidence which reveals orders to falsify the news by a licensee, its top management or its news management. *Id.* at 150. In a democracy, dependent upon the fundamental rights of freedom of speech and the press, the Commission cannot authenticate the news that is broadcast, nor should it try to do so. ALF has provided no extrinsic evidence of deliberate distortion, but instead submits general conclusory or speculative allegations. However, the Commission will not infer an intent to distort. In *The Selling of the Pentagon*, 30 FCC 2d 150, 152 (1971), the Commission stated:

Lacking extrinsic evidence or documents that *on their face reflect deliberate distortion*, we believe that this government licensing agency cannot properly intervene. It would be unwise and probably impossible for the Commission to lay down some precise line of factual accuracy—dependent always on journalistic judgment—across which broadcasters must not stray. (Emphasis added.)

Accordingly, no further action is warranted regarding this aspect of ALF's petition.

11. ALF further asserts that WPFW violates Section 399 of The Communications Act of 1934, as amended, 47 U.S.C. § 399, which prohibits noncommercial broadcasters from "editorializing." In support ALF cites an instance where an unidentified announcer made reference to an "editorial pause." This allegation is obviously without merit and requires little comment. At the outset we note that in *League of Women Voters v. F.C.C.*, 547 F. Supp. 379 (C.D. Cal. 1982), the United States District Court for the Central District of California held that Section 399 is unconstitutional insofar as it prohibits noncommercial stations from editorializing on controversial issues of public importance. This matter has been appealed to the Supreme Court. *F.C.C. v. League of Women Voters* (Case No. 82-912, filed 12/1/82). However, even if the constitutionality of Section 399 is ultimately upheld, the Commission has consistently defined "editorializing" for the purpose of Section 399 as presentations which "are represented or intended as the official opinion of the licensee or its management," and not "the expression of views on public issues by employees of a noncommercial educational broadcast station . . ." *Accuracy In Media (WNET)*, 45 FCC 2d 297, 302 (1973). Thus, it is obvious that the mere loose use of the word "editorial" by a noncommercial station employee would not constitute "editorializing" within the meaning of Section 399 of the Communications Act.

12. ALF also alleges that WPFW has violated the personal attack rule, Section 73.1920 of the Commission's rules, 47 C.F.R. § 73.1920. ALF states that on August 10, 1981, during a discussion on the issue of whether "the United States is a racist country and . . . the government of the United States actively engages in racist activity"

and/or on "the neutron bomb and America's overall nuclear policy," an individual stated that President Reagan has a "Hilter-type mentality," and that "saying that someone has a mentality like that of Hitler who systematically murdered over six million people in his concentration camps is clearly an 'attack upon the honesty, character, integrity or like personal qualities' of that person." ALF further states that during discussions on President Reagan's budget cuts, "[r]acial motivations for the cuts have been expressed or implied"; and that on August 12, 1981, during a discussion on abortion, an individual stated that "the 'Moral Majority' organization was 'immoral.'" In opposition, Pacifica states that, with regard to the statement that President Reagan has a "Hitler-type mentality," it was "not clear" that the comment was made during a presentation on a controversial issue of public importance, and that the phrase "Hitler-type mentality" was not an attack on honesty, character, integrity or like personal qualities, but was, rather, "a [strong] characterization of the President's political or ideological approach." Pacifica states that the reference to the "moral majority" does not appear to have been directed to any one identifiable group, but rather to the "many and varied conservative groups throughout the country" in the context of "a discussion of the recent conservative tendencies in American society."

13. The personal attack rule, a particularization of the Fairness Doctrine, provides in pertinent part, that:

When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked:

- (1) Notification of the date, time and identification of the broadcast;
- (2) A script or tape (or an accurate summary if a script or tape is not available) of the attack; and
- (3) An offer of a reasonable opportunity to respond over the licensee's facilities.

The Commission's role is not to substitute its judgment for that of the licensee, but rather to determine whether the licensee can be said to have acted reasonably and in good faith. In order to review the reasonableness of broadcasters' judgments in this area, it is incumbent upon complainants to provide the Commission with certain specific information, including the language of the alleged personal attack and a well-defined description of the issue being discussed when the attack was made. Clearly, in light of ALF's failure to identify any specific comments aired concerning President Reagan's budget cuts, it has not provided sufficient information regarding its "racial motivation" allegation. Thus, no further action is warranted on that portion of ALF's petition.

14. With respect to the remarks concerning the "Moral Majori-

ty," in codifying the personal attack rule with its specific requirements on the licensee, the Commission relied on the fact that there is an identified person or group which is vitally affected and best able to inform the public of a contrasting viewpoint. *In re Amendment of Part 73 of the Rules*, 8 FCC 2d 721, 723 (1967). For the rule to apply, the group allegedly attacked must be such that the licensee could reasonably be expected to know exactly who or what finite group has been personally attacked. This is necessary so that the licensee will be able to comply with the rule's affirmative obligation to transmit to that person or group the requisite information and offer to respond. Thus, the licensee is called upon to make reasonable, good faith judgments on the facts of each situation as to whether a group or person is identified sufficiently to come within the rule. As emphasized above, the Commission's role is not to substitute its judgment for that of the licensee. The burden is on the complainant to establish that during the discussion of a controversial issue of public importance an attack was made upon the honesty, character, integrity or like personal qualities of an *identified* person or group. WPFW states that the "reference to the 'moral majority' does not appear to have been directed to any one identifiable group, but rather to the many and varied conservative groups throughout the country whose influence have been felt in a wide variety of contexts." ALF has provided no information to refute WPFW's judgment or to demonstrate that this reference was reasonably understood to apply to a particular identifiable group. To the contrary, in another part of its petition ALF acknowledges that the remarks were directed generally to "New Right" groups.⁶ Accordingly, in view of the absence of any material to show WPFW's judgment to be unreasonable, no further action is warranted on this aspect of ALF's petition.

15. Finally, with respect to the statement that President Reagan has a "Hitler-type mentality," we similarly conclude that ALF has failed to present *prima facie* evidence of a violation of the personal attack rule. As noted, to establish a personal attack violation, complainants must show that the attack occurred *during* the presentation of views on a controversial issue of public importance (47 C.F.R. § 73.1920; *Strauss Communications, Inc. v. F.C.C.*, 530 F.2d 1001, 1011 (D.C. Cir. 1976)), or that it "reasonably relates" to such a discussion. *Strauss Communications, Inc.*, 61 FCC 2d 460 (1976). The petitioner here has set forth numerous different descriptions of the issues allegedly under discussion during the program and no facts whatever regarding the context in which the "Hitler-type mentality"

⁶ In its Fairness Doctrine allegations, after stating "the activities of 'New Right' organizations such as the Moral Majority, NCPAC, and the Committee for the Survival of a Free Congress have been the source of widespread attention," ALF asserts that a speaker "vociferously attacked *these groups*" when she stated "they were a 'tiny, immoral minority.'"

remark was made. The affidavit appended to the petition recites simply that at some point during the hour-long call-in show "Upstream," the affiant "heard another caller say that Reagan had a 'Hitler-type mentality.'" By the petitioner's own account, callers and guests on the hour-long program apparently expressed views on a broad range of distinct topics, from the administration's arms control policies generally, to an asserted relationship between the neutron bomb and racial policies, to policies regarding South Africa, and foreign policies regarding terrorists.⁷ ALF has not established that all, or even most of the topics discussed on the program are controversial issues of public importance. While the petitioner asserts generally that the program concerned the "neutron bomb and America's overall nuclear policy," this depiction does not coincide with the petitioner's own description of the actual program. In fact, as set forth above, the discussions apparently departed considerably from such topic. The petitioner has provided no evidence that all facets of these issues, as actually discussed on the program, constitute matters of general public controversy. See *American Security Council Education Foundation v. F.C.C.*, *supra*. For example, the petitioner makes no attempt to show that the topic of whether administration policies regarding terrorists are racially motivated is a matter of vigorous debate within the community or nation. Accordingly, given the failure to describe with particularity the context of the remark in question, along with the failure to establish that all of the topics discussed were controversial public issues, we conclude that ALF has not sustained its burden of demonstrating a violation of the personal attack rule. In view of the above discussion, ALF's personal attack allegations fail to raise a substantial and material question of fact as to whether renewal of WPFW's license would serve the public interest.

16. *Indecent Language and/or Programming.* In support of its

⁷ The petition and affidavit state, *inter alia*, that:

the person being interviewed asserted that one of the reasons the neutron bomb was being developed was so that it could be deployed against black people in the United States. . . . A caller to the show stated a similar position contending that the neutron bomb was a "plot against black people" and would be used against them. He stated that the word terrorists was really a code word for black people and the Reagan administration campaign against terrorism was really directed against blacks. He further asserted that the United States would send the neutron bomb to South Africa so that South Africa could launch a nuclear attack against Nigeria without destroying American property in that country.

Petition at 13-14.

The guest also contended that President Reagan had not developed any substantive arms control policy and that the U.S. was conducting a "propaganda" campaign designed to make nuclear war seem survivable so that the possibility of it occurring would be increased.

Carvin Affidavit at para. 4.

allegation that Pacifica violated 18 U.S.C. § 1464, which prohibits the broadcast of "obscene, indecent or profane language," ALF states that on January 18, 1979, at 8:20 a.m. "a male announcer repeatedly used such words as 'motherfucker,' 'fuck' and similar indecent language"; and that WPFW's complaint file at the Commission contains two letters which indicate that on October 10, 1979, at 11:50 a.m. "such language as 'motherfucker' and 'shit'" was broadcast; and on May 21, 1978, from 9:30 a.m. to 11:30 a.m., an album which contains the words "fuck," "shit" and "assholes" was broadcast. ALF asserts that "[a]ll of the[se] words 'describe sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium,'" quoting from *Pacifica Foundation (WBAI-FM)*, 56 FCC 2d 94, 98, (1975), *aff'd. sub nom. F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978). ALF also asserts that WPFW's evening and late-night programming is "indecent" in that "[v]irtually every" broadcast of a program entitled "Shaved Face" includes "so-called 'comedy' albums" which contain "the repetitive use of 'motherfucker,' 'fuck,' 'shit,' and other indecent language"; and other WPFW evening and late night programming contains similar language.

17. In *WBAI-FM, supra*, the Commission defined "indecent" language for the purposes of 18 U.S.C. § 1464 as "language 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." *Id.* at 98. In affirming the Commission's ruling the Supreme Court

relied in part on the repetitive occurrence of the "indecent" words in question. The opinion of the Court specifically stated that it was not ruling that "an occasional expletive . . . would justify any sanction . . ." [438 U.S. at 750]. Further, Justice Powell's concurring opinion emphasized the fact that the language there in issue had been "repeated over and over as a sort of verbal shock treatment." [438 U.S. at 757]. He specifically distinguished "the verbal shock treatment . . ." from "the isolated use of a potentially offensive word in the course of a radio broadcast." [438 U.S. at 760-61]. *WGBH Educational Foundation*, 69 FCC 2d 1250, 1254 (1978).

The Supreme Court's affirmance of the Commission's *WBAI* ruling "affords this Commission no general prerogative to intervene in any case where words similar or identical to those in [*WBAI*] are broadcast. . ." *Id.* at 1254.

18. Applying these principles to the instant case, it is clear that the petitioner has failed to make a *prima facie* case that WPFW has violated 18 U.S.C. 1464. Although ALF cites a number of instances where language similar to that in *WBAI* was broadcast, such occurrences do not amount to the repetitious "verbal shock treatment" of *WBAI, WGBH, supra*. Although the use of such language may be more frequent than ALF would like, ALF has not shown that such use was more than "isolated use in the course of" a three year

license term. Accordingly, ALF's allegations concerning the broadcast of "indecent" language by WPFW fail to raise a substantial and material question of fact as to whether renewal of WPFW's license would serve the public interest, convenience and necessity.

19. ALF also asserts that WPFW has broadcast "offensive" and "vulgar" material. Without even addressing the subject matter of the programming which petitioner finds "offensive" and/or "vulgar," it is clear that the Commission "cannot base the denial of a license renewal application upon the 'subjective determination' of a viewer, or group of viewers, as to what is or is not 'good' programming." *WGBH, supra*, at 1251. The Commission has "consistently adhered to the policy that it will not - indeed cannot - insist that licensees abandon program material because it is offensive to some or even a substantial number of listeners." *Sonderling Broadcasting Corp.*, 41 FCC 2d 777, 784 (1973). See also, *WGBH, supra*, at 1252, and cases cited therein. Accordingly, ALF's allegations concerning "offensive" and "vulgar" material fail to raise a substantial and material question of fact.

20. *Ascertainment*. ALF alleges that Pacifica has failed to make "any 'reasonable' efforts to ascertain the needs and interests of the communities outside Washington, D.C. that are within WPFW's listening contours." ALF asserts that Pacifica interviewed only 11 individuals who work or reside outside of the District of Columbia; that certain "major" communities, such as Alexandria, Virginia and Annapolis, Maryland, had been ignored entirely; and that "the Commission has noted on a number of occasions that call-in shows are of little value in ascertaining community needs. . ." ALF also alleges that Pacifica's ascertainment of WPFW's community of license, Washington, D.C., is inadequate because the licensee allegedly failed to interview a sufficient number of community leaders, nor was its survey representative of all significant elements of the community. In support, ALF cites *Ascertainment of Community Problems by Broadcast Applicants ("1976 Renewal Primer")*, 57 FCC 2d 418 (1978).

21. In opposition, Pacifica states that in establishing ascertainment requirements for noncommercial broadcasters "the Commission intended to impose on noncommercial radio licensees a substantially less onerous burden than that which is imposed on commercial licensees," citing in support *Ascertainment of Community Problems by Noncommercial Educational Broadcast Licensees ("Noncommercial Renewal Primer")*, 58 FCC 2d 526, 537 (1976), where the Commission stated that noncommercial radio licensees could ascertain "by any reasonable methods." Pacifica asserts that it has met its ascertainment obligations by "maintaining close continuing contacts with representatives of many significant socio-economic elements throughout its service area." Pacifica also cites its frequent call-in programs and a survey of 300 residents of Washington, D.C.,

conducted under the auspices of Howard University. Finally, Pacifica states that it has not totally ignored the communities outside of Washington, D.C., but, "given its limited resources, the licensee has determined that it should direct the main thrust of its ascertainment efforts toward its community of license."

22. As Pacifica correctly observes, in establishing ascertainment obligations for noncommercial broadcasters, the Commission specifically declined to institute detailed ascertainment requirements or procedures such as those required at the time for commercial licensees.⁸ Indeed, due to the fact that the "educational radio service is not nearly as developed as its television counterpart," and the "financial support for educational radio [is] . . . less firm than for educational TV," the Commission determined that noncommercial radio licensees should not even be subject to the reduced ascertainment procedural requirements it was establishing for noncommercial television licensees. *Noncommercial Renewal Primer, supra*, at 536. Thus, noncommercial licenses were merely directed to "ascertain by any reasonable methods designed to provide them with an understanding of the problems, needs and interests of their service areas." *Id.* at 537.⁹

23. In the absence of specific required ascertainment procedures, a licensee must make "an honest and conscientious effort to ascertain the problems of its service area." *The Evening News Association*, 35 FCC 2d 366, 387 (1972). The Commission "can fault a noncommercial educational licensee's ascertainment efforts in the absence of required procedures only if, in the aggregate, the procedures employed by the licensee could not be said to constitute such 'an honest and conscientious effort.'" *Georgia State Board of Education*, 70 FCC 2d 948, 950 (1979). In view of the ascertainment efforts cited by Pacifica in its renewal application and its opposition to ALF's petition to deny, it cannot be said that Pacifica has failed to make "an honest and conscientious effort" to fulfill its ascertainment obligations as established for noncommercial radio licensees in *Noncommercial Ascertainment Primer, supra*.¹⁰ Accordingly, ALF's

⁸ Detailed ascertainment procedural requirements have since been eliminated for commercial radio licensees. See *Deregulation of Radio*, 84 FCC 2d 968, *reconsideration denied*, 87 FCC 2d 797 (1981), *aff'd. in part and remanded in part sub nom. Office of Communication of the United Church of Christ, et al. v. F.C.C.*, ___ F 2d ___ (D.C. Cir. No 81-1032, May 10, 1983). (The remanded portion did not affect the elimination of detailed ascertainment procedures for commercial radio licensees).

⁹ Thus, ALF's reference to ascertainment procedures and requirements established for commercial broadcasters in the *1976 Renewal Primer, supra*, is clearly inapposite.

¹⁰ In the *Noncommercial Ascertainment Primer, supra*, at 536-37, the Commission retained for each noncommercial radio licensee the secondary obligation to ascertain areas outside its community of license but within its broadcast signal contours. While WPFW's ascertainment outside of Washington, D.C., has been

allegations concerning WPFW's ascertainment fail to raise a substantial and material question of fact.

24. *Public File Requirements.* ALF observes that Section 73.3527(a)(7) of the Commission's rules provides that every year "on the anniversary date on which the station's renewal application would be due for filing" each noncommercial broadcast licensee must place in its public inspection file "a listing of no more than ten significant problems and needs of the area served by the station during the preceeding twelve months" together with "typical and illustrative programs or program series which were broadcast during the preceeding twelve months in response to those problems and needs," and states that WPFW apparently did not comply with this rule because the station answered the question on the renewal application concerning placement of the list in the public inspection file by stating that it had been "unable to locate" its problems/programs list for the first two years of the license term. In opposition, Pacifica states that although it was "unable to locate" the 1979 and 1980 lists, they "may have been prepared and placed in the public file at the appropriate times, only to be misplaced later," and that the station took steps "to assure substantial compliance" by "reconstruction" of the lists from station records.

25. The requirement of Section 73.3527(a)(7) is clear, simple and unequivocal: every noncommercial licensee "*shall maintain* for public inspection a file containing," among other information, the above described problems/programs list. In response to an obvious failure to "*maintain*" a problems/programs list for two consecutive years, Pacifica offers nothing more than speculation to the effect that the problems/programs list requirement "may have been" complied with, and the lists "may have been . . . misplaced" later. The purpose for placement of the problems/programs list in a station's public file is to provide the public with timely information at regular intervals throughout the license period as to the licensee's programming. *1976 Renewal Primer, supra*, at 432-33.¹¹ "Substantial compliance" is not achieved by "reconstruction" of such lists for the purposes of filing a license renewal application one or two years after the lists were supposed to be placed in the public file. Inasmuch as it is obvious from its renewal application and the pleadings in this proceeding that WPFW has presented a substantial amount of non-entertainment, news and public affairs programming, we do not believe that WPFW's failure to maintain a problems/programs list

minimal, its decision to "direct the main thrust of its ascertainment efforts towards its community of license" does not render its ascertainment efforts inadequate.

¹¹ Although this *Order* dealt with the ascertainment and public file requirements of commercial licensees, the reason for maintaining a problems/programs list is the same in both services.

in its public file raises a substantial and material question of fact concerning its license renewal.¹² However, we are concerned with WPFW's compliance with its record-keeping obligations. As stated above, the requirement for the maintenance of a problems/programs list is clear, simple and unequivocal. In view of WPFW's obvious failure to maintain this list, and its inability to state with any degree of certainty whether particular programming has been broadcast in connection with its Fairness Doctrine responsibilities (See paras. 6-8, *supra*), it appears that WPFW's record-keeping practices are, at best, haphazard. Our concern is heightened by the fact that licenses are now issued for seven year terms. It is apparent that the station's management did not become aware of the requirement for, or absence of, its problems/programs lists until it was time to file a license renewal application. Since the past license term was for a three year period, WPFW had to "reconstruct" only two problems/programs lists. Had the license term been for seven years rather than three, WPFW would have been hard pressed indeed to "reconstruct" problems/programs lists for all of the intervening years, especially in view of the licensee's inability to cite with any degree of certainty or specificity the programming which it had broadcast in connection with the issues enumerated in the Fairness Doctrine portion of this *Order*.

26. In addition, the lack of awareness on the part of the station's management as to the requirement for a problems/programs list, their substantial failure to make an affirmative effort to present contrasting viewpoints under the Fairness Doctrine, and their lack of actual knowledge as to whether certain programming was or was not in fact broadcast, causes us to question the amount of supervision and control which Pacifica, as licensee, exercises over the individuals who are conducting the day-to-day operation of the station. It is well established that each licensee is responsible for the acts of the employees charged with the management of such operation. See, e.g., *The McLendon Corporation*, 18 FCC2d 224, 228 (1969); *Continental Broadcasting, Inc.*, 15 FCC2d 120 (1968); *International Broadcasting Company*, 19 FCC2d 793 (1969); *Eleven Ten Broadcasting Corporation*, 32 FCC 706 (1962). As we stated in *Walton Broadcasting, Inc.*, 78 FCC2d 857 (1980), a licensee which delegates authority to supervise station operations must be held responsible for any failure to comply with the Commission's rules or policies under the concept of "respondent superior." Since the deficiencies in this case are

¹² As stated above, the purpose of the requirement to maintain the list is to provide the public with information concerning the licensee's programming. The Commission has received no complaints that any individual sought the problems/programs lists and was denied access, or that any individual lacked information concerning the content of WPFW's programming. Indeed, it is apparent that ALF became aware of WPFW's failure to maintain its problems/programs list not because of any thwarted attempt to inspect the station's public file, but because of WPFW's admission in its renewal application.

minor, they do not raise a substantial and material question of fact as to whether renewal of WPFW's license would serve the public interest. However, reporting conditions shall be imposed so that Pacifica will establish record-keeping procedures which will ensure its employees' knowledge of and compliance with the Commission's rules and policies.

27. ALF next charges WPFW with commercialization in violation of Section 73.503(d) of the Commission's rules. ALF states that Section 73.503(d) provides that "no announcements promoting the sale of a product or service shall be broadcast in connection with any program," and that an employee of WPFW twice made announcements promoting an "oldies" show which he produced at a local club. ALF asserts that on both occasions WPFW was warned by the Commission's Complaints and Compliance Division that this was a violation and was advised to adopt procedures to prevent its recurrence. ALF avers that despite those warnings, another announcer for WPFW subsequently urged attendance at a benefit for "RAP, Inc.", and yet another announcer who was interviewing a band asked a band member where interested listeners could purchase their record. ALF further contends that WPFW violated the rule by encouraging contributions and station membership in exchange for a "discount card" which entitles the holder to discounts at certain stores that are "promoted" by WPFW. ALF characterizes this discount card as a "continuous promotional device" for goods and services at selected stores. In opposition, Pacifica states that the two alleged instances of "commercialization" concerning the "oldies" show have been disposed of by action of the Commission's staff. It asserts that the other two occasions cited, the announcement of a benefit event and the inquiry into the purchase of a program guest's recording, are clearly within the stated limits of Section 73.503(d). It finally contends that the discount card it provided to the station's contributors was a "premium" which the station is permitted to describe to listeners.

28. Two of ALF's allegations of commercialization by WPFW have already been considered and disposed of by the Commission with no adverse action or finding against Pacifica.¹³ Those episodes do not warrant further consideration. ALF's contentions concerning WPFW's promotion of a public benefit event and announcing the availability of an interviewee's record album are based on its apparent misunderstanding as to the current rule. Section 73.503(d)

¹³ On two occasions an unpaid announcer urged attendance at an "oldies" show in which the announcer had a financial interest. On the first occasion Pacifica took prompt corrective action to prevent the further occurrence of such a violation. On the second, Pacifica terminated the program and the announcer. In response, the Commission's staff expressed its satisfaction with this resolution of the problem, and its expectation that Pacifica would continue its corrective procedures to prevent any further violation. Letter from Stephen Sewell, Complaints and Compliance Division, March 11, 1981. No further violations have occurred.

states now, as it did at the time of the announcements (August, 1981) and at the time ALF submitted its petition to deny (September, 1981): "No announcement shall be broadcast at any time in exchange for the receipt, in whole or in part, of consideration to the licensee, its principals, or employees." At the time that provision was adopted, the Commission specifically stated that licensees may describe community events "in any manner they choose, including mentioning price and urging attendance." *Public Broadcasting Service-Second Report and Order*, 86 FCC 2d 141, 151 (1981). According to the affidavit of WPFW's general manager, the station received no consideration for either announcement. ALF provides no evidence or argument that Pacifica did receive such consideration. Therefore, these announcements did not violate any Commission rule. Finally, WPFW's offering of a discount card to area merchants as a premium for subscribers to the station does not violate the rule. WPFW is permitted to describe such premiums to its listeners in order to establish their values, and in so doing it may identify the participating businesses.

29. *Statute Violations.* ALF charges Pacifica with violation of federal anti-lobbying laws, 18 U.S.C. § 1913, and Section 607(a) of the Treasury, Postal Service and General Government Appropriations Act of 1979. Those laws prohibit the expenditure of any federally provided funds on any activity designed to influence a Member of Congress concerning legislation.¹⁴ ALF asserts that in the *WPFW Paper*, the station once urged its listeners to write to Congress to protest proposed legislation concerning public stations, including cutbacks in funding for public stations. ALF also charges WPFW with violating Section 504 of the Rehabilitation Act of 1973¹⁵ by failing to provide accessibility to its studios and its bathroom facilities to wheelchair-bound persons. It asserts that access to the building in which WPFW is located is by outward-swinging doors, and that the bathroom on one floor is located in a corner and does not have facilities for the handicapped. ALF argues that compliance

¹⁴ 18 U.S.C. § 1913 states: "No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress." Section 607(a) Treasury, Postal Service and General Government Appropriations Act of 1979 (Public Law No. 95-429, 92 Stat. 1001, 1016) states: "No part of any appropriation contained in this or any other Act, or of the funds available for expenditure by any corporation or agency, shall be used for publicity or propaganda purposes designed to support or defeat legislation pending before Congress."

¹⁵ Section 504 provides that any program or activity receiving federal financial assistance shall not exclude a handicapped person due to his handicap. 29 U.S.C. § 794.

with the Rehabilitation Act was established as a relevant renewal consideration in *Gottfried v. F.C.C.*, 655 F.2d 297 (D.C. Cir., 1981).

30. With regard to the anti-lobbying laws cited by ALF, Pacifica responds that the monies received by WPFW from federal sources are grants for specific projects; that all such federal money is in fact spent on these projects; and that no federal funds are spent on the *WPFW Paper*. With regard to the Rehabilitation Act, Pacifica recognizes that its building's doors swing out and that its second floor bathroom is in a corner. It asserts, however, that ALF has not demonstrated that these features have a discriminatory effect. It avers that a wheelchair-bound quadriplegic has visited the studio facility with no problem or complaint, and points out that a blind person has worked at the station and encountered no difficulty. Pacifica further notes that during the summer of 1980 a number of mentally retarded persons worked at the station in connection with a city-sponsored summer employment program. Pacifica also contends that it is not within the Commission's expertise or jurisdiction to make a determination regarding possible discriminatory effects of WPFW's physical structure, distinguishing this case from *Gottfried, supra*, which involved a question concerning the programming responsibilities of licensees. Finally, Pacifica points out that in *Gottfried*, the Court found that Section 504 only requires "reasonable accommodation," so that the hardship on the licensee must be weighed against the difficulty for the handicapped in determining whether a violation exists. In this regard, it asserts that it cannot force the building owner to effect structural changes, and that if they were made, substantial burdensome expenses would be passed on to WPFW.

31. It appears from an unchallenged affidavit submitted by Pacifica that the monies received by WPFW from federal sources are earmarked for specific projects on which they are spent, whereas the *WPFW Paper* is funded by listener contributions. Accordingly, it is clear that no activity prohibited by federal anti-lobbying laws has occurred. ALF has also failed to demonstrate any violation of Section 504 of the Rehabilitation Act of 1973 by Pacifica. ALF has not supported its allegation that wheelchair-bound persons are denied ready access to WPFW's facilities. There is no evidence that any handicapped person has ever been denied access to WPFW's facilities for employment or participation in member activities. On the contrary, from the evidence concerning the involvement at the station of handicapped persons, it appears that WPFW shows a particular sensitivity to their needs. Thus, these allegations fail to raise a substantial and material question of fact as to whether renewal of WPFW's license would serve the public interest, convenience and necessity.

32. Accordingly, IT IS ORDERED, That the petition to deny filed by the American Legal Foundation IS DENIED.

33. IT IS FURTHER ORDERED, That the renewal application of Pacifica Foundation for station WPFW(FM), Washington, D.C., IS GRANTED, TO EXPIRE ON October 1, 1988, SUBJECT TO THE FOLLOWING CONDITIONS:

(a) THAT, the licensee shall establish procedures to ensure that it complies with the requirements of Section 73.3527(a)(7) of the Commission's rules concerning the maintenance of a problems/programs list in its public inspection file;

(b) THAT, the licensee shall establish procedures to ensure that it remains cognizant of the controversial public issue programming in connection with its Fairness Doctrine obligations;

(c) THAT, within 30 days of the release of this Order, the licensee shall submit to the Commission a report containing the following information:

(i) a narrative statement describing the procedures established in compliance with conditions (a) and (b), *supra*; and

(ii) copies of the problems/programs lists which the licensee was required by Section 73.3527(a)(7) of the Commission's rules to place in WPFW's public file on October 1, 1982, and October 1, 1983; and

(d) THAT, on October 1, 1984; October 1, 1985; October 1, 1986; and October 1, 1987, the licensee shall submit to the Commission copies of the problems/programs lists which it is required by Section 73.3527(a)(7) of the Commission's rules to place in WPFW's public file on those dates.

34. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, shall send, by Certified Mail - Return Receipt Requested, a copy of this Memorandum Opinion and Order to each of the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*