

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of

Pacifica Foundation, Inc.  
d/b/a PACIFICA RADIO  
Los Angeles, California

Licensee of KPFK-FM  
Los Angeles, California

MEMORANDUM OPINION AND ORDER

Adopted: April 16, 1987

Released: April 29, 1987

By the Commission: Commissioner Quello concurring  
and issuing a statement.

1. The Commission has before it two complaints with respect to certain programming aired on KPFK-FM, Los Angeles, California, alleging violations of Title 18, United States Code, Section 1464. Under Section 503(b)(1)(D) of the Communications Act, the Commission has authority to impose a forfeiture or other sanction upon a licensee who has violated Section 1464. At issue is whether the broadcasts constitute a violation of Section 1464, and if so, what penalties, if any, should be imposed upon licensee Pacifica Foundation, Inc. for such violations.

I. BACKGROUND

2. On July 10, 1986, and on September 8, 1986, the Commission received complaints that certain programming (more fully described below) aired on Station KPFK-FM, Los Angeles, CA, violated Title 18, United States Code, Section 1464. That section of the United States Criminal Code provides that: "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."

3. More specifically, on July 10, 1986, the Commission received a complaint alleging that on June 28, 1986, at approximately 7:45 p.m., local time, KPFK-FM aired a program entitled "Shocktime America" ("Shocktime, U.S.A.") which allegedly contained a narration and song lyrics utilizing words and phrases such as "eat shit," "mother-fucker" and "fuck the U.S.A." The complaint did not include a transcript or tape recording of the show, and did not indicate whether the use of the expletives described was repetitive.

4. On September 22, 1986, the Chief, Mass Media Bureau sent letter to Mr. Jack O'Dell, the Chairman of Pacifica Foundation, Inc., enclosing the above-described complaint letter and asking for Pacifica's comments. On October 21, 1986, the Commission received Pacifica's response. In that response Pacifica indicates that "Shocktime, U.S.A." is a live KPFK program that is produced by a Los Angeles-based performance art group. On the particular program in question, Pacifica indicates that one of the group's members made remarks that were

not scripted and which members of the listening audience might well have found offensive. Furthermore, Pacifica asserts that as a result of this incident the other members of the group met and expelled the subject individual. Additionally, the licensee indicates that the program producers, in recognition that "the nature of this spontaneous commentary was so inappropriate," withdrew the program from KPFK. Pacifica expresses regret for the incident and states that it has re-emphasized to all program producers their responsibility to the station and to the listening audience.

5. On September 8, 1986, the Commission received a complaint alleging that on Sunday, August 31, 1986, between 10:00 and 11:00 pm, local time, KPFK-FM aired a program "I Am Are You?" ("IMRU") that featured excerpts from a play entitled "Jerker." The complaint alleged that these excerpts involved dramatic readings of sexual fantasies and contained language highly descriptive of sexual and excretory activities.

6. In its September 22, 1986, letter to Pacifica, the Chief, Mass Media Bureau also enclosed this complaint and asked for the licensee's comments. In its response, Pacifica states that the program "IMRU" is a regularly aired program directed to the gay population of Los Angeles. Pacifica represents that the play, "Jerker," deals with the issue of Acquired Immune Deficiency Syndrome and that the mood of the play is "the need to affirm life in the face of death." Pacifica contends that the complaint provided no context to the complained-of words and phrases and was, therefore, misleading. In an effort to comply with Commission advice in earlier decisions,<sup>1</sup> the following warning was broadcast prior to the commencement of "IMRU" on the night in question:

The Supreme Court of the United States has directed that broadcasters must be especially aware of the effect of the use of so called "indecent" language during the hours when children may be listening. KPFK's policy is to allow the freest possible expression consistent with that ruling.

The following program contains material which some listeners may find objectionable. If you would be disturbed by the use of such sensitive material, please tune out for the next . . . . . minutes.

7. Finally, Pacifica asserts that at the time the subject program was broadcast "children would not ordinarily be in the listening audience," and that Arbitron ratings confirm that KPFK's listening audience rarely consists of children. Pacifica also supplied a tape recording of the August 31, 1986, "IMRU" program.

II. DISCUSSION

8. Our task in this matter is to determine whether or not the material aired by KPFK-FM meets the legal test for indecency as articulated by the Commission in its *Pacifica* decision and affirmed by the United States Supreme Court. *Pacifica Foundation*, 56 FCC 2d 94 (1975), *aff'd sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

9. In *Pacifica*, the Commission concluded that "indecent" matter proscribed under 18 U.S.C. Section 1464 is not identical to "obscene" matter. 56 FCC 2d at 97-98. In *Miller v. California*, 413 U.S. 15 (1973), the

Supreme Court found that the standard for obscenity is: 1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; 2) whether the work depicts or describes in a patently offensive way sexual conduct specifically defined by applicable state law; and 3) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. *Id.* at 24.

10. In *Pacifica* we found that indecent speech involves the description or depiction of sexual or excretory activities or organs in a patently offensive manner. Indecent language was described in the Supreme Court's *Pacifica* decision as speech that is "patently offensive as measured by contemporary community standards for the broadcast medium." *FCC v. Pacifica Foundation*, 438 U.S. at 732. Further, as noted by the Court, what is indecent "is largely a function of context" and cannot adequately be judged in the abstract. *Id.* at 742. In making this determination, the Court relied upon a nuisance rationale when it affirmed the Commission, and spoke of channeling indecent speech to a time when children were not likely to be in the broadcast audience.<sup>2</sup>

11. When making determinations as to whether certain speech is "indecent," we recognize and rely upon the Court's holding in *Pacifica* as setting forth the legal test for indecency. We do not, however, necessarily rely upon all aspects of the rationale initially articulated in the Commission's *Pacifica* decision, as upheld by the Court. For example, we no longer consider the argument of spectrum scarcity to provide a sufficient basis for this type of regulation. Rather, we rely upon and emphasize the continued validity of the nuisance rationale articulated by the Commission and endorsed by the Court. Furthermore, we do not believe that any purported diminished First Amendment rights of broadcasters justify more expansive restrictions than would apply to other media. On the contrary, restricting indecency in broadcasting is required by law, and we believe that the restrictions we apply herein are consistent with the First Amendment protection applicable to the print media.

12. As to the parameters of indecent material, the licensee of KPFK-FM argues that the holding in *Pacifica* limits a finding of indecency to deliberate, repetitive use of the seven words actually contained in the George Carlin monologue determined to be indecent in *Pacifica*. While Commission action subsequent to the *Pacifica* decision may have indicated this to be the Commission's position, we take this opportunity to state that, notwithstanding any prior contrary indications, we will not apply the *Pacifica* standard so narrowly in the future. We find that the definition of indecent broadcast material set forth in *Pacifica* appropriately includes a broader range of material than the seven specific words at issue in *Pacifica*. Those particular words are more correctly treated as examples of, rather than a definitive list of, the kinds of words that, when used in a patently offensive manner as measured by contemporary community standards applicable to the broadcast medium, constitute indecency.

13. While speech that is indecent must involve more than an isolated use of an offensive word, see *Pacifica Foundation*, 95 FCC 2d 750, 760 (1983), repetitive use of specific words or phrases is not an absolute requirement for a finding of indecency. If a complaint focuses solely on the use of expletives, we believe that under the legal standards set forth in *Pacifica*, deliberate and repetitive use in a patently offensive manner is a requisite to a

finding of indecency. When a complaint goes beyond the use of expletives, however, repetition of specific words or phrases is not necessarily an element critical to a determination of indecency. Rather, speech involving the description or depiction of sexual or excretory functions must be examined in context to determine whether it is patently offensive under contemporary community standards applicable to the broadcast medium. The mere fact that specific words or phrases are not repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent.

14. It has long been held that the government may impose reasonable time, place and manner restrictions on speech,<sup>3</sup> so long as they are narrowly tailored to further a significant government interest. *Renion v. Playtime Theatres*, 106 S. Ct. 925 (1986); *Young v. American Mini-Theatres*, 427 U.S. 50 (1976). The time, place and manner restrictions that are constitutionally permissible will necessarily vary, however, based on the characteristics of the medium involved. Because of the physical characteristics of the print medium, it is easier to restrict the access of minors to indecent material by, for example, instituting a reasonable requirement that such material be placed behind store counters or under opaque covers and preventing its sale to minors. Movie theaters can likewise close their doors to minors. In these cases, children's access can be limited without affecting adult access.

15. This physical separability of adults from children, however, is generally not available in broadcasting. Broadcast material is available to anyone who has a radio or television. Accordingly, the only effective means of restricting the access of minors to indecent programming is to channel such programming to a time during which there is not a reasonable risk that children may be in the audience. Hence, it is the physical attributes of the broadcast medium, not any purported diminished First Amendment rights of broadcasters based on spectrum scarcity or licensing, that justify channeling of indecent material. Indeed, we believe that requiring indecent programming to be broadcast only at a time when there is not a reasonable risk that children may be in the audience is a reasonable and narrow time, place and manner restriction that is consistent with the same First Amendment protections afforded the print media.

16. In prior determinations related to the broadcast of indecent material, the Commission has indicated that such broadcasts may be legally permissible if they are aired after 10:00 pm and are preceded by a warning.<sup>4</sup> Current evidence concerning the presence of children in the broadcast audience, however, warrants a reevaluation of this position. Our evidence indicates that there is a reasonable risk that children are still in the audience at 10:00 pm, at least on weekends (when the program "IMRU" was aired).<sup>5</sup> Although the percentage of children in the audience declines as the evening hours progress, significant numbers of children remain in the audience on Sunday evenings as late as midnight. Studies indicate that approximately 112,200 children aged 12-17 are in the Los Angeles metro survey area radio audience per average quarter hour between 7 p.m. and midnight on Sunday night. *Arbitron Ratings - Radio*, Los Angeles, Fall 1986, Metro Survey Area, Sunday 7:00 p.m. - Midnight, Average Quarter Hour Estimate, Teens. Thus, we have determined that mechanistically relying on a specific time for broadcasting indecent material no longer satisfies the requirement that indecent material be channeled to a time when

there is not a reasonable risk that children may be present in the broadcast audience. With this standard in mind, we now address the specific broadcasts that are the subject of the complaints.

#### Shocktime, U.S.A.

17. It is uncontested that the June 28, 1986, edition of the "Shocktime, U.S.A." program contained the language at issue. However, we are unable to determine whether the broadcast was indecent within the meaning of 18 U.S.C. Section 1464, under the *Pacific* standard, because we do not have sufficient information or evidence concerning this particular broadcast upon which to make a fair determination of indecency. The complainant has merely stated that four specific phrases were used during the course of the broadcast. Without additional information, we cannot determine precisely the context or whether the use of patently offensive speech was isolated.<sup>6</sup> Thus, we have no basis upon which to make the requested determination as to indecency.

18. Furthermore, given the circumstances under which the material at issue was aired (*i. e.*, it was live, spontaneous and unscripted), and the remedial action taken by Pacifica and the performance art group that produced "Shocktime, U.S.A.," even if we could determine that the broadcast was in fact indecent, we would decline to take action in this situation. The Commission has previously indicated that the isolated use of unplanned expletives during live coverage of news or public affairs programming will not necessarily be actionable so long as the licensee exercises reasonable judgment, responsibility and sensitivity to the public's needs and tastes to avoid patently offensive broadcasts. We believe that Pacifica has followed these guidelines with respect to "Shocktime, U.S.A." Accordingly, we will take no further action with respect to the June 28, 1986 program.

#### IMRU

19. We now turn to the "IMRU" broadcast of August 31, 1986. We have reviewed the tape of the program. That review reveals that the program commenced with an interview, by the host of "IMRU," of the director and two actors appearing in the Los Angeles production of the play "Jerker," and was followed by excerpts from the play itself. The play, which was characterized during the interview with its director, Michael Kearns, as being "blazingly erotic," concerned the telephone relationship of two men who had met accidentally over the telephone, but never in person, apparently when one called a wrong number.

20. The conversations broadcast made extensive use of language that describes or depicts sexual or excretory organs or activities in a patently offensive manner. In the first of the three vignettes presented, the words "shit" and "fucking" were used repetitively. In addition, during the first vignette, one character says to the other:

"Yeah, it was loving even if you didn't know whose cock it was in the dark or whose asshole you were sucking."

21. At another point, one of the characters states that he was in Vietnam and that after what he had seen there, no one could tell him that he was immoral if he loved

"sucking ass." "taking piss from a guy's cock," or if he had "a quickie blow job in the Union Square men's room."

22. As the presentation moved to the second vignette, the scene shifted to one character's description of an anonymous sexual encounter in which he had participated. He was told by the listening character to "make it hot" and to keep in mind that he would be "playing with" himself while being told the story. That story contained the following language by way of example:

"I'll give you the gentlest fuck west of the Mississippi."

"We cuddled and played around a bit before he started working on my ass."

"I remember he was kneeling between my legs and he worked my asshole with lube for the longest time — just gettin' it to relax so there was no tension, no fear."

"He lowered himself on top of me and slid his dick in all the way, but so gently, so smoothly, there wasn't even a bit of pain."

"His cock felt warm inside me — and full — so nice and full. So he began sliding his cock back and forth inside of my ass — but so gently, so gently."

"I don't think I've ever had such a gentle, sensitive fuck before or after. Well, he must gone at it for twenty minutes at the very least, just slidin' his cock back and forth inside of my ass."

"And then he whispered to me, 'You're gonna feel me come inside of you.' And I did. Man, I could feel the cum pulse up his shaft inside of my ass. I could count the pulses and it felt warm and good."

And later in the program this exchange:

Actor 1: "You better get yourself ready for some brother-to-brother, sweaty, down and dirty pig sex, you understand?"

Actor 2: "Yeah!"

1: "None of this nicey-nice, lovey-dovey stuff. I want to make you eat ass, suck my balls, and drink my piss like you never have before. You get me?"

2: "Hot throbbing cocks, hard pounding muscles."

1: "You've got it."

23. We believe that the material contained in the aired portion of "Jerker," of which the foregoing is exemplary but by no means exhaustive, supports a finding that the licensee broadcast indecent material within the meaning of 18 U.S.C. Section 1464. The material describes sexual and excretory activities and organs in a patently offensive manner as measured by contemporary community standards for the broadcast medium. Notwithstanding the licensee's assertion, we do not believe the context dilutes or ameliorates the patently offensive manner in which the sexual activity was described.

24. We are unpersuaded by Pacifica's argument that "KFPK's listening audience rarely consists of children except where programs are specifically focused on them." First, we would point out that the test of indecency focuses on the risk of the presence of children in the audience. As we have stated previously, "While particular stations or programs are oriented to specific audiences, the fact is that by its very nature, thousands of others not within the 'intended' audience may also see or hear portions of the broadcast. Further, in that audience are very large numbers of children." *Eastern Education Radio*, 24 FCC 2d 408, 411 (1970) (footnotes omitted). Second, we note the Supreme Court's observance that radio listeners tune into a station generally without the benefit of a schedule of programs or warning as to potentially offensive content. *FCC v. Pacifica Foundation*, 438 U.S. at 760 n.2 (Powell and Blackmun, JJ., concurring). Finally, we note that listeners often switch indiscriminately from station to station and are thus easily exposed to indecent material not properly channeled to a time during which there is not a reasonable risk that children may be in the broadcast audience.

25. Based upon our review of the material, we conclude that the "IMRU" broadcast falls within the ambit of indecency as prohibited by Section 1464 under the standards set forth herein. Thus, we have determined that at a minimum this material warrants restricting children's access. Given our finding that there is a reasonable risk of children remaining in the listening audience at 10:00 p.m. on Sundays, the fact that this program was broadcast at 10:00 p.m. with a warning does not render it permissible. However, because prior Commission actions have indicated that airing programs containing indecent material at 10:00 p.m. might in certain cases be permissible,<sup>8</sup> we hereby limit our action to warning you and all other broadcast licensees that this material would be actionable under the indecency standard as clarified today.<sup>9</sup>

26. We do not decide here whether, based upon the applicable local community standards, the subject material also meets the tests for obscenity set forth in *Miller*.<sup>10</sup> We do believe, however, that there is sufficient possibility of such a finding. We are therefore directing the General Counsel to forward the complaint and tape recording of the subject "IMRU" program to the Department of Justice for its consideration as to whether a criminal prosecution pursuant to 18 U.S.C. Section 1464 is appropriate.

27. ACCORDINGLY, IT IS ORDERED, That the General Counsel shall forward the complaint and the tape recording of the subject "IMRU" program, along with a copy of this Order, to the Department of Justice for its consideration as to whether a criminal prosecution pursuant to 18 U.S.C. Section 1464 is appropriate.

28. IT IS FURTHER ORDERED, That the Mass Media Bureau will send a copy of this Memorandum Opinion and Order to the licensee at its address of record and to the persons who filed the complaints relating to the "Shocktime U.S.A." and the "IMRU" broadcasts.

## FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico  
Secretary

CONCURRING STATEMENT  
OF  
COMMISSIONER JAMES H. OUELLO

Re: Complaints Against Pacifica Foundation, Inc Licensee of Station KPFK-FM, Los Angeles, CA. Regarding Allegedly Obscene or Indecent Broadcasts.

In 1975, I concurred with the Commission's *Pacifica* decision stating:

I am concerned that our new standard for indecent language is adulterated to the extent that it becomes an invitation to a few broadcasters to seize on the late evening hours as a showcase for similar types of garbage programming under the guise of literary, artistic, political or scientific value. They will note that the audience is composed of a minimum of children, and their preprogramming caveats will be considered to be sufficient warning for the unsuspecting listener. Then this Commission will sooner or later be faced with judging the content of such programming on the merits under the standard adopted today.

*Pacifica Foundation Station (WBAI)*, 56 F.C.C.2d 94, 103 (1975) (Ouello concurring).

As I predicted, we are confronted with a licensee that has presented obviously indecent material, yet followed our standards for channeling so called indecency into late evening hours. The language in the program, entitled "Jerker" is patently indecent and probably obscene. I find it difficult to believe that any licensee would reasonably believe such language to be permissible under 18 U.S.C. Sec. 1464.

I always have believed myself to be a strong advocate of the First Amendment. If there were any connection between such language and free and open discussion of public issues, then I would be the first to defend its use. On matters of public importance, open and robust discussion of issues is integral to the operation of our system of government and an informed citizenry, therefore, entitled to the most exacting degree of First Amendment protection. See e. g., *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978).

Our founding forefathers did not guarantee freedom of speech for repulsive obscene purposes. Given the language in the instant case, I must agree with Justice Stevens in *FCC v. Pacifica Foundation, Inc.*, 438 U.S. 726, 746 (1978), when he said:

These words offend for the same reasons that obscenity offends. Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said "such utterances are not

essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (Citations omitted.)

If the decision were mine alone, I would assess a substantial forfeiture against the licensee. I am advised, however, that the Commission's interpretation of *Pacifica* is so narrow that the language here would not fall within the scope of indecency as presently defined. I am simply astonished that the Commission has placed itself in such an "obscene" legal position.

While my preference would have been to assess a fine, I do believe today's decision takes significant steps to rectify our present situation. It should be abundantly clear that the Commission will no longer confine *Pacifica* to the facts of that case. In addition, we are directing the staff to submit this record to the Justice Department for criminal prosecution under the obscenity provisions for 18 U.S.C. Sec. 1464. This decision, together with the other decisions adopted today, will go a long way in correcting what has become an intolerable situation. Therefore, I concur.

#### FOOTNOTES

<sup>1</sup> See, e.g., *Pacifica Foundation*, 56 FCC 2d 94, 99 (1975), *aff'd sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

<sup>2</sup> Nuisance law generally speaks to channeling behavior rather than prohibiting it. While indecent transmissions to adults may not, in and of themselves, be unlawful, indecent transmissions to children are inappropriate. Under the nuisance rationale, channeling indecent broadcasts to times when there is not a reasonable risk that children may be in the audience avoids the inappropriate broadcast of such material to children. See *Pacifica Foundation*, 56 FCC 2d at 98; see also *FCC v. Pacifica Foundation*, 438 U.S. at 749-51.

<sup>3</sup> Our regulation of indecent speech is a valid time, place and manner restriction because our objective is not to proscribe the expression of any particular type of protected speech. Rather, our purpose is to promote the content-neutral and significant governmental interest in safeguarding the well-being of the nation's youth, while preserving the ability of adults to receive the material during the times of day when there is not a reasonable risk that children may be in the audience. See generally *Renton v. Playtime Theatres*, 106 S.Ct. 925 (1986).

<sup>4</sup> *Pacifica Foundation*, 36 FCC 147 (1964); see also *Pacifica Foundation*, 56 FCC 2d 94, 99, 100 (1975).

<sup>5</sup> We are here addressing the risk of children in the audience during the time frame and with regard to the market before us. Of course, indecent material could be broadcast at a time when there is not a reasonable risk that children may be in the audience.

<sup>6</sup> The Commission has been advised that neither a tape recording nor a transcript of the program is available to provide a more detailed review of the words used, the context or the level of repetitiveness.

<sup>7</sup> Accordingly, we do not believe a warning preceding a broadcast program is sufficient to restrict the access of children to indecent material at times of day when there is a reasonable risk that children may be in the audience. Nevertheless, we continue to expect advance warnings to be given when broadcasters choose to air indecent programming at a time when there is not a reasonable risk that children may be in the

broadcast audience. See *Regents of the University of California (KCSB-FM)*, FCC Rcd., FCC 87-139, fn.8. (adopted April 16, 1987).

<sup>8</sup> See, e.g., *Pacifica Foundation*, 36 FCC 147, 149 (1964); see also *Pacifica Foundation*, 56 FCC 2d 94, 98 (1975).

<sup>9</sup> The Commission has the authority to issue declaratory rulings in order to remove uncertainty in complicated areas of the law such as this, see 5 U.S.C. §554(e), and this Memorandum Opinion and Order is intended to serve as such a ruling. Although this case addresses the particular facts herein, this decision will have precedential effect on other broadcast licensees as well.

<sup>10</sup> If this material is determined to meet the *Miller* test of obscenity based upon local community standards, the broadcast of such material would be entirely prohibited, regardless of the time of day, since it would not be constitutionally protected speech at any time.