

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

In the Matter of

Enforcement of Prohibitions
Against Broadcast Obscenity and
Indecency in 18 U.S.C. § 1464

ORDER

Adopted: December 19, 1988; Released: December 21, 1988

By the Commission: Commissioner Dennis concurring
and issuing a separate statement.

1. On October 1, 1988, the President signed into law Pub. L. No. 100-459, which contains appropriations for the Commission for fiscal year 1989.¹ This legislation also contains the following provision:

By January 31, 1989, the Federal Communications Commission shall promulgate regulations in accordance with section 1464, title 18, United States Code, to enforce the provisions of such section on a 24 hour per day basis.

2. In compliance with this law, we are adopting a new rule pursuant to which the Commission will enforce the provisions of Section 1464 of the United States Criminal Code on a twenty-four hour a day basis.

3. Under previous interpretations of Section 1464, the Commission and the courts had applied this law to prohibit the broadcast of obscene programming during the entire day and indecent programming only when there was a reasonable risk that children might be in the audience.² Initially, the Commission had suggested that this risk might be sufficiently diminished after 10 p.m. to permit broadcasts aired after that time.³ In a 1987 ruling, however, the Commission stated that its current thinking was that such broadcasts would not be permissible until after 12:00 midnight.⁴ Thereafter, the United States Court of Appeals for the District of Columbia Circuit remanded two Commission rulings concerning post-10 p.m. indecent broadcasts in *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (*ACT*), for a further explanation justifying its "new, more restrictive channeling approach."⁵ The court instructed the Commission to create a more complete and thorough record to support channeling prescriptions.⁶ In order to comply with the explicit mandate of the recent legislation, however, we must now abandon our plans to initiate a proceeding in response to the concerns raised by the court's decision.

4. The directive of the appropriations language affords us no discretion. It directs us to exercise our authority under the Communications Act to enforce the restrictions of Section 1464 of the Criminal Code on a twenty-four hour a day basis.⁷ Consequently, in accordance with this legislative mandate and pursuant to our authority under Title 47, we will now enforce the indecency restrictions of Section 1464 twenty-four hours a day under our new rule. In enforcing this rule, the Commission will continue to

apply its generic definition of indecency, which has been upheld by the courts.⁸ Under this definition, broadcast indecency is language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.⁹

5. Pursuant to the Administrative Procedure Act, 5 U.S.C. § 553, the Commission finds good cause for promulgating the rule herein without prior public notice and comment. Section 553(b)(3)(B) provides that an agency may promulgate a rule without notice and comment "when the agency for good cause finds. . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B). Because the recently enacted appropriations legislation mandates implementation of a twenty-four hour indecency ban, the Commission's task in promulgating the rule is purely ministerial and leaves no room for discretion. No purpose would thus be served by affording the public an opportunity to comment on this rule before its promulgation.

PAPERWORK REDUCTION ACT STATEMENT

The decision contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980, and found to contain no new or modified form, information collection, and/or recordkeeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

6. Authority for the action taken herein is contained in Sections 4(i), 303(r), 312(a)(6), 312(b), and 503(b)(1)(D) of the Communications Act of 1934, as amended, and Pub. L. No. 100-459 (signed October 1, 1988).

7. Accordingly, IT IS ORDERED that Part 73 of the Commission's Rules and Regulations is amended as described above and set forth in Appendix A below.

8. IT IS FURTHER ORDERED that pursuant to the Administrative Procedure Act, 5 U.S.C. Section 553(d)(1), the amendments to the Commission's Rules and Regulations shall become effective 30 days after publication in the *Federal Register*.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Chapter I, Title 47, Part 73 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 73 continues to read as follows: Authority: 47 U.S.C. §§ 154, 303, 312 and 503.

2. A new section 73.3999 is added to the Commission's Rules, which will read as follows:

Section 73.3999 Enforcement of 18 U.S.C. § 1464 (Restrictions on the transmission of obscene or indecent language)

The Commission will enforce the provisions of Section 1464 of the United States Criminal Code, 18 U.S.C. § 1464, on a twenty-four hour per day basis in accordance with Public Law No. 100-459.

FOOTNOTES

¹ *Making Appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies for the Fiscal Year Ending September 30, 1989, and for Other Purposes*, Pub. L. No. 100-459 (signed October 1, 1988).

² See *Pacifica Foundation*, 56 FCC 2d 94 (1975) (WBAL-FM), *aff'd*, *Pacifica Foundation*, 438 U.S. 726 (1978) (*Pacifica*); *Pacifica Foundation Inc.*, 2 FCC Rcd 2698 (1987), *The Regents of the University of California*, 2 FCC Rcd 2703 (1987), and *Infinity Broadcasting Corp. of Pa.*, 2 FCC Rcd 2705 (1987), order on reconsideration, *Infinity Broadcasting Corp.*, 3 FCC Rcd 930 (1987) (*Reconsideration Order*), *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) (ACT).

³ *WBAL-FM*, 56 FCC 2d at 98.

⁴ *Reconsideration Order*, 3 FCC Rcd at 937 n.47.

⁵ ACT, 852 F.2d at 1334. The court affirmed a Commission ruling that a morning broadcast violated Section 1464.

⁶ *Id.*

⁷ The legislative history of H.R. 4782 also makes clear that Congress adopted the indecency amendment in order to eliminate any so-called safe harbor for the broadcast of indecent material. See 134 Cong. Rec. S9912 (daily ed. July 26, 1988) (remarks of Sen. Helms).

⁸ See *Pacifica*, 438 U.S. at 726; ACT, 852 F.2d at 1334.

⁹ *Reconsideration Order*, 3 FCC Rcd at 930.

SEPARATE STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

In Re: Enforcement of Prohibitions Against Broadcast Obscenity and Indecency in 18 U.S.C. Section 1464.

I concur in the result, but I write separately to recognize the constitutional question this decision raises. The majority correctly concludes "[t]he directive of the appropriations language affords us no discretion. . ." in this matter. Nevertheless, I have serious doubts whether our new rule will pass constitutional muster.

The Supreme Court in *Pacifica Foundation* upheld the Commission's finding that an indecent monologue broadcast in the early afternoon constituted cause for granting a complaint against the station which had broadcast the monologue. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). The Court however, emphasized that its ruling was narrow, and was based on "consideration of a host of variables. . ." (*id* at 750), of which the first mentioned was the time of day of the broadcast. *Id* at 750.

Recently the U.S. Court of Appeals for the District of Columbia struck down part of two Commission rulings regarding indecent broadcasts. The Court found that the Commission had not properly justified its choice of the hours midnight to 6 a.m. for the channeling of indecent speech. The Court directed the Commission to reopen its examination of the time limitation:

. . . in a manner sensitive to these considerations: (1) the speech at issue. . . is protected by the first amendment; (2) the Commission's avowed objective is not to establish itself as a censor but to assist parents in controlling the material young children will hear." [emphasis in original] *Action for Children's Television v. F.C.C.*, 852 F. 2d 1332, 1334 (1988).

The Court held that:

Broadcast material that is indecent but not obscene is protected by the first amendment; the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what people say and hear. *Id.* at 1344.

Finally, the Court noted:

Content-based restrictions ordinarily "may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540, 100 S.Ct. 2326, 2334, 65 L.Ed. 2d 319 (1980). . . Here, the precision necessary to allow scope for the first amendment shielded freedom and choice of broadcasters and their audiences cannot be accomplished, we believe, unless the FCC adopts a reasonable safe harbor rule. *Id.* at 1343, n. 18. [emphasis added]

Both these rulings suggest that the courts would not uphold an outright ban on the broadcast of indecent speech. In the face of those decisions, I have grave misgivings about the constitutionality of the appropriations language. Our mandate from Congress, however, is unambiguous, and therefore I must support the action taken in this *Order*.