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CONCURRING STATEMENT
OF
COMMISSIONER JAMES H. QUELLO

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) (Quello concurring).

Never did I believe my words would be so prophetic. Twelve years later, the Commission faces the same issue with the same licensee. I still believe such language is garbage. The only difference being that after a dozen years, the garbage smells worse.

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. § 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. 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 out weighed 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 from today's decision 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. § 1464. This decision, together with the other decisions adopted today, will go a long way in correcting what has become an intolerable situation.

While my initial impression was to impose a severe fine, it would serve no purpose to impose a forfeiture and simply be overturned in court. I am, therefore, constrained by the stricture of existing precedent. I reluctantly concur with today's decision.