

REMARKS BY FCC COMMISSIONER JAMES H. QUELLO

AT THE OEBIE AWARDS LUNCHEON

OHIO STATE UNIVERSITY, ATHENS, OH

JUNE 5, 1987

Thank you for the gracious introduction and particular thanks for honoring me today with the prestigious OEBIE award. It will be proudly displayed in my office as a constant reminder of the distinctive and distinguished public service provided by the twelve Ohio Educational TV stations and by public broadcasting at large.

As a longtime believer in public broadcasting, I am concerned not only by the ever constant need for more adequate financing but by new problems of inadequate TV carriage and possible erosion in government and public support. I am compelled also to warn public radio that obscene or indecent language cannot be merely excused as "that is a student program." University and colleges have a licensed responsibility for all programming on their stations. Stations are subject to a charge of abrogation of licensee responsibility if students violate laws or rules. Remember the University of Pennsylvania had its license revoked some ten years ago for abrogation of licensee responsibility. Recently the University of California at Santa Barbara received an official warning for students broadcasting indecent language on the radio.

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I shall explain our FCC position on the current indecency controversy, but first let me emphasize that I share your distress of the widespread channel switching and carriage dropping of public stations. Unfortunately, the solution to these critical problems is a return to full must carry for all stations. This is impossible at this time due to a disastrous court decision that abolished must carry. You know that the FCC was able to provide some special considerations for public TV -- at least one station carried on all systems including the otherwise exempt 20 channel cable systems and carriage of two stations on all cable systems with 54 or more channels. Also, public stations received special consideration for eligibility in the pool for carriage by being exempt from the 2 percent audience share and 5 percent net weekly circulation requirement for all other TV stations. This FCC proposal that provides preferences for public broadcasting not included in the cable-broadcasting industry compromise, is also subject to court review.

The critical must carry problems and the continuing need for funding are separate items that merit full separate texts by themselves. As a former Chairman of the TCAF committee, I am somewhat familiar with the structure and means of funding public broadcasting. I welcome opportunities such as meeting with you today, exchanging viewpoints and informally updating my information, away from the speaker's platform.

There are many other current issues in broadcasting worthy of discussion including the newly released "Broadcasting Improvement Act of 1987," now being analyzed by the FCC, which seems destined for a heated debate. Other contentious broadcast subjects include Fairness Doctrine codification by Congress, minority preferences, private radio and UHF land mobile sharing, signal scrambling, syndicated exclusivity, 3 year holding antitrafficking rule, cross ownership rules, deregulation, public trustee concept for broadcasting, etc.

I was perfectly willing to give brief bottom line opinions on major subjects today, but my bright young legal advisor said give the students the sizzling current topic of the day they can all identify with -- give them the latest developments in broadcast obscenity and indecency!

I trust his judgment. He has proven worthy of trust. So he vetoed my two best blue stories on obscenity. He even cleaned up my FCBA speech gag about "it is redundant to keep an airbag in a lawyer's car." He said by simply substituting "commissioner" for "lawyer" it would find much more acceptance with thousands of lawyers in Washington and the 272 at the FCC.

As you know, the Commission is caught in a crossfire of first amendment purists and a growing public outcry for action against indecency on the air. This subject has a full load

of journalistic adversarial zeal with editorials criticizing FCC actions in such prestigious publications as Broadcasting magazine, Wall St. Journal and the Washington Post.

It strikes me as paradoxical that so many writers and commentators critical of the FCC's comprehensive deregulation, lack of enforcement or the FCC unwillingness to enforce its regulatory mandate are the most vociferous in demanding full first amendment protection for purveyors of indecency and obscenity on the air.

It also strikes me as paradoxical that some organizations like the ACLU, so vociferous in demanding full civil rights for all kinds of criminals and questionable causes, are so aggressive in opposing full first amendment rights for broadcasters by advocating retention of the restrictive Section 315 and, also, the controversial fairness doctrine.

I want to emphasize at the outset, the FCC is not on a Salem moral witch hunt to exorcise evil disc jockeys or lewd students. We are simply enforcing an established law. We are not creating a new law. We are finding means of enforcing an established statute prohibiting the broadcast of indecent or obscene speech and material. Previous FCC decisions interpreted a former Pacifica case so narrowly that they had the practical effect of obstructing or preventing the prosecution of patently indecent or obscene language on the air.

We are re-interpreting the Commission's legal precedent in a broader more practical manner to enable us to act on egregious violations.

As a strong first amendment advocate and former President of the Michigan Association of Broadcasters, I am personally wary of government intrusion in programming. We are all well acquainted with Section 326 and the prohibition against any form of government censorship.

Then too, I normally should be the least likely of any of the current commissioners to lead a charge against obscenity. I served in the army for over five years. I served overseas for 33 consecutive months, finally as a combat infantry battalion commander in France and Germany. I assure you that I heard all variations of expletives in the heat of battle. As far as the most commonly over-used sexually oriented single word is concerned, I heard it, used it and done it. But there are places, occasions and times where it is improper and even disgusting. Of course, I have to admit that I now prefer playing R rated movies backwards because at my age, I like to see people get dressed and go home.

In its recent controversial action against Pacifica Foundation, Inc., licensee of KPFK-FM, Los Angeles, CA, the Commission responded to complaints of indecent broadcasts made during programs entitled 'IMRU' and "Shocktime U.S.A."

The Commission evaluated the legality of the two programs separately. The program "IMRU," which was a 10:00 p.m. broadcast, preceded by a warning as to content, contained excerpts from a play entitled "Jerker" that included explicit descriptions of sexual encounters. It determined that the material broadcast described sexual and excretory activities and organs in a patently offensive manner as measured by contemporary community standards for the broadcast medium. The Commission concluded that the broadcast constituted indecency, and that the evidence demonstrated that there was still a reasonable risk that children would be in the listening audience. Consequently, the FCC issued a warning in this case. Also, the Commission referred the IMRU broadcast to the U.S. Department of Justice for possible criminal prosecution for obscenity.

The complaint against the "Shocktime U.S.A." program involved the broadcast of certain expletives made by a participant on a live program. Because the remarks were not part of a planned script and were made during a live broadcast of the program, and because subsequent action to remedy the violation was taken immediately by expelling the member from the group and withdrawing the program from KPFK, the Commission determined that the "Shocktime U.S.A." broadcast did not involve actionable indecency.

The Commission also issued a warning to KCSB-FM, which is licensed to the Regents of the University of California at Santa Barbara. In this case we were responding to a complaint regarding the broadcast of recorded music containing indecent lyrics. The Commission found that the song "Makin' Bacon" contained a number of patently offensive references to sexual organs and while not obscene it was determined to be indecent as measured by the contemporary community standards for broadcasting. Even though the music was aired at 10 PM, the Commission found there was a reasonable risk that children may be in the audience. Furthermore, the Commission directed the Mass Media Bureau to make further inquiries as to whether the university exercised the degree of control over KCSB-FM required of Commission licensees.

The language in the program titled "Jerker" is too repulsive to be repeated here and far surpasses the seven dirty words used by George Carlin in the Pacific case of 1978. For example, the language in "Jerker" goes way beyond the over-used vulgarism for an incestuous son. It is unbelievable that any responsible licensee would claim that such language is permissible under 18 U.S.C. Section 1464. However, a judgment from a local jury is required for a legal finding of obscenity unlike indecency where the FCC can take direct action. It is sometimes difficult to obtain a decision of obscenity because it must meet a three pronged test (Miller v. California, U.S. Supreme Court 1973).

Roughly the three prong test is:

1. Material as a whole must appeal to the prurient interest of the average person applying contemporary community standards.
2. Material depicts or describes in a patently offensive way sexual conduct specifically defined by applicable state law.
3. Material taken as a whole must lack serious literary, artistic, political or scientific value.

In general the material must contain some redeeming social value.

The federal indecency test as promulgated by FCC v. Pacifica Foundation, Supreme Court 1978 does not appear to require a jury verdict. It roughly requires:

1. Language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for broadcasting, sexual or excretory activities or organs.
2. Broadcast at time of day when there is a reasonable risk that children may be in the audience.

The federal indecency statute reads: 18 U.S.C. Section 1464, "Whoever utters any obscene, indecent, or profane language by means of radio communications shall be fined not more than \$10,000 or imprisoned not more than two years or both."

The FCC can impose civil fines or revocation of license for indecency on the air and the Justice Department can seek criminal prosecution.

I was quoted last month in several trade publications that "If proven guilty of indecency, we should nail somebody with a license revocation proceeding or a \$10,000 fine. Our forefathers didn't guarantee freedom of speech for repulsive, obscene purposes. FCC action would have a much needed deterrent on smut on the air." The repulsive language in the "Jerker" program and in the University of California case would be prime examples of what I had in mind in calling for corrective action. Now that the public notice is published in the federal register, the FCC is now able to effect direct sanctions under the updated indecency test. Remember, we are correcting a former overly-narrow interpretation of indecency. We also realize that any regulatory action taken by the FCC may be subject to a court appeal. However, our actions have been sustained by the courts in a great majority of cases.

I would like to touch upon an important part of this decision that somehow gets lost in the first amendment hyperbole. Our policies regarding indecent speech, as opposed to obscene material which may be banned altogether, are designed to reduce the risk that children will be exposed to such material. The imposition of reasonable time, place and manner restrictions are a judicially acceptable tool to accomplish this task.

Time, place, and manner restrictions have been upheld in the context of adult movie theaters, school speeches, and even displays of printed material.

Then too, there are different standards that apply to broadcasting as differentiated from print. There is no indecency statute for print. In broadcasting it is extremely difficult to separate the child audience from the adult audience. I think we all agree that the sensitivities of the child audience should not dictate the entire program fare of broadcasting. Nevertheless, protecting children from indecent speech is an important, indeed a compelling, government interest.

In this regard, we have determined that presenting programming with indecent material after 10:00 p.m. does not guarantee a safe harbor for licensees. Audience data demonstrate that there are substantial numbers of children in the radio audience after 10:00 p.m. We recognize that alledged violations must be considered on an individual case-by-case basis considering factors of time and context. Again, let me remind licensees, especially university licensees, you cannot abrogate licensee responsibility to adventurous students trying to outshock the big city shock radio jocks.

The FCC action last week was in response to a growing public outcry for corrective action. The Mass media Bureau estimates that over 20,000 complaints were received in 1986 regarding obscenity or indecency on the air and the FCC was picketed for one month. This pattern of complaints has accelerated in 1987. The actions taken last week against indecency and repulsive language would be overwhelmingly approved in a nationwide public referendum. The FCC action strives to encourage constructive social values and maintain reasonable decency in the most accessible and pervasive of all media - TV and Radio.

The correct time is now _____ PM. So, if some one asks you how the speech went, you can always say he didn't say a helluva lot, but he did give us the right time.