

decide whether the FCC's strict policy was constitutional. After further remanding the case to the FCC, the Second Circuit found the FCC's indecency policy with respect to "fleeting expletives" was unconstitutionally vague and invalidated the FCC's indecency policy entirely.⁵

In *Fox II*, the Supreme Court reversed the Second Circuit decision. It agreed that the FCC's policy with respect to the Fox and ABC broadcasts at issue⁶ was indeed unconstitutional, but on Due Process, not First Amendment grounds. The Court instead found that application of the FCC's 2004 indecency policy to programs broadcast in 2003 failed to give fair notice to Fox and ABC.

The implications of *Fox II* for future applications of the FCC's indecency policy are contained in Section III of the decision. There, the Court makes three pointed "observations." First, it observed that it has not reconsidered its 1978 ruling in *Pacifica*.⁷ Second, it observed that in *Fox II* it was "unnecessary for the Court to address the constitutionality of the current indecency policy as expressed in the *Golden Globes* Order and subsequent adjudications." Finally, and most pointedly, the Court observed that *Fox II* "leaves the Commission free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements."

Taken together, these observations, while they do not mandate particular modifications to the *Golden Globes* indecency policy, remind the FCC that it has a unique opportunity to refine its policy before the Court *does* consider whether *Pacifica* is now out of date, whether the *Golden Globes* standard *will* sustain First Amendment scrutiny, and whether the FCC *has* taken into account all "applicable legal requirements."

⁵ *Fox Television Stations v. FCC*, 613 F.3rd 317, 327 (2010).

⁶ [cite]

⁷ *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

This proceeding is that opportunity. The following comments suggest ways in which the Commission can modify its “indecent polices and enforcement to ensure that they are fully consistent with vital First Amendment principles,”⁸ particularly with respect to NCE stations such as KUCR.

KUCR

KUCR radio, operating at the campus of the University of California at Riverside, has a staff of over one-hundred university students and faculty members. The station is representative of numerous small non-commercial college and university-based broadcasters across the nation. Despite its relatively small size and budget, the station takes itself seriously. The training process for new staff is rigorous: 4 hours of classroom instructions, taught over 4 weeks, on FCC Rules and Regulations and their practical application to broadcasting. There is a training segment just on the EAS equipment and procedures. A week is spent on indecency, how to recognize and eliminate it. Then, there are weeks of technical training. Reading is assigned and tests are administered. That is followed by on-the-air trial programs, supervised by staff. There can be four to ten or more of these sessions. Once novice DJ/programmers are fully ready, they are then allowed to go on the air solo. The thoroughness of KUCR’s approach to training was demonstrated when the station received a surprise inspection by an FCC field inspector on the morning of June 17, 2013. All was in order, no violations were found.

Why do students and faculty at UC Riverside want to do programs on KUCR radio? They do it to share their passion for music, for discussion, for engagement with the community of listeners. This is hand-made radio, by people broadcasting to their community. The value of a radio station such as KUCR is that 1) it provides entry-level training into broadcasting that

⁸ Public Notice, ¶ 1.

would not be available otherwise; 2) the station creates a pool of broadcasters who advance localism by creating programming that is of, by and for the community; 3) the programs are often out-of-the-box originals, not otherwise heard in the broadcast marketplace. Representative examples would be classic beautiful Mexican Trios Boleros Romanticos, vintage jazz, discussion programs on sustainability. There is much more. The goal of KUCR's programming is not to make money but to contribute to the public good. DJs and program hosts are unpaid, but free to express their passion for creative content, without regard to ratings and advertising pressure. Their creation of diverse programs of social and artistic merit vividly achieves the FCC's goal for the non-commercial band.

KUCR is concerned, however, that with all the training, all the precautions, all the good-faith, intelligence and devotion of our volunteer staff, and an 8-second delay – with all of that – accidents may still occur. For KUCR, with its small budget, an indecency fine would be catastrophic. The legal costs of responding to an FCC inquiry would be crippling, even if no fine were imposed. Clearly, the maximum \$325,000 per incident fine is meant to chasten a corporate broadcaster who may have previously viewed a mere \$32,500 fine simply as a cost of doing business by providing a racy language edge in the competitive world of drive-time morning zoo sensationalistic commercial radio. A fine of this magnitude might cause the CEO of a Fortune 500 broadcaster to restrict language for bottom-line interests. However, not all broadcasters are Fortune 500 companies. Many are small NCE stations with large volunteer staffs and lots of specialized programs running 24 hours a day, 365 days a year. KUCR is terrified that something unintentional may go over the air, resulting from a misunderstanding, a mistake, a spontaneous remark that inadvertently lets an indecent word or phrase slip through. For a small NCE broadcaster that momentary lapse is not an expensive cautionary lesson, but is fatal to its entire

operation and to the valuable local service that a “hand-made” broadcaster such as KUCR provides. The punishment for a small broadcaster in no way fits the violation. In fact, it ultimately punishes the local community that supports the station.

In modifying its indecency policies, the FCC should temper those policies to stations like KUCR. We ask that the definition of indecency allow for the possibility of good-faith human error and encourage rather than punish programs of artistic and social merit. We also ask that the FCC’s enforcement policy give realistic weight to the scale, function and purpose of the station involved, that the FCC recognize the simple difference between big and little, commercial and noncommercial, and between sanctions that chasten and those that destroy.

Back to the Future

The Public Notice broadly asks whether the Commission should “make changes to its current broadcast indecency policies or maintain them as they are.” One need not be a medium to devine that maintaining the current standard places the FCC’s indecency policy a high risk of being invalidated entirely – as it was once before by the Second Circuit.

At a minimum, KUCR therefore recommends that the FCC revert to the pre-*Golden Globes* standard and refrain from pursuing every isolated and fleeting utterance or image. Witch hunts not only damage witches, but the hunters as well. Devoting its resources and reputation to distinguishing “piss” from “pissed off,” “kiss my ass” and “fire her ass,” and the infinite shadings of meanings between “vulgar,” “coarse,” “puerile,” “lewd,” “upsetting,” “profane,” “indecent,” and “obscene,”⁹ serves only to spawn more indecency complaints.¹⁰ It does not

⁹ See Notices of Apparent Liability and Memorandum Opinion and Order, FCC 06-17 (2005).

¹⁰ It is hardly a coincidence that the number of indecency complaints has fallen precipitously during the period in which enforcement of the FCC’s indecency polices was suspended pending judicial review.

demonstrably improve the quality of broadcast programming.¹¹ Accordingly, KUCR urges the FCC to return to a policy that allows broadcasters at least that measure of freedom from governmental regulation that speakers are customarily afforded under the First Amendment.

In addition, KUCR urges the Commission to go beyond a return to its pre-*Golden Globes* policy by refining its indecency policy in ways that recognize particular considerations that characterize NCE stations such as KUCR. Although the Commission has repeatedly stated that its indecency policy is designed to consider the “full context in which the material appeared,”¹² its indecency rulings have not explicitly recognized a number of factors inherent to the operation of college and other NCE stations.

Some of those factors were recently articulated in a *Policy Statement and Order* related to violations of the FCC’s “public file” requirements.¹³ Although the ruling is limited to certain reporting and filing requirements by student-run stations, rather than “substantive” requirements such as compliance with indecency policies, the factors recognized are characteristic of the way in which NCE stations operate. These factors include limited operating budgets, heavy reliance upon unpaid or volunteer staff, high turn over in on-air personnel, and a focus on an educational and cultural mission¹⁴ rather than on profitability. KUCR does not disagree with the Commission’s assertion that “All licensees, including NCE licensees, have an unconditional and

¹¹ In the Public Notice the FCC noted that between September 2012 and April 2013, it had dismissed more than one million complaints by investigating only “egregious” cases. It did not note any corresponding degradation in broadcast content.

¹² Policy Statement, 16 FCC Rcd 7999.

¹³ *William Penn University*, DA 13-1074 (released May 13, 2013).

¹⁴ The Commission noted that the licensee’s “mission statement” calls for an educational experience that instills certain values, advances technology education, and affords an opportunity to learn the skills needed for employment in both traditional and new media.

ongoing responsibility to train and supervise their staffs, volunteers or otherwise ...,”¹⁵ but KUCR also believes that the noncommercial nature of a station and the mission to which it is dedicated are essential facts that cannot be ignored in evaluating the “context” in which a broadcast occurs. By narrowing “context” to the material necessary to determine whether the subject matter is of a sexual or excretory nature,¹⁶ the Commission limits the First Amendment freedom that the concept of “context” is designed to protect.¹⁷

By unnecessarily restricting the scope of “context,” the FCC’s *Golden Globes* standard also gives short shrift to “merit.” One of the cardinal distinctions between the definition of obscenity and the FCC’s current definition of indecency is that works of “serious literary artistic, political or scientific value” cannot be obscene,¹⁸ but may be indecent. In *Golden Globes*, the Commission notes that the broadcaster did not claim “that there was any political, scientific or other independent value of use of the words here ...,”¹⁹ but goes on to add, “This is not to suggest that the fact that the broadcast had a social or political value would necessarily render use of the “F-Word” permissible.” The Commission approvingly quotes dicta in which the D.C. Circuit observes that the Commission’s definition of indecency would encompass works of James Joyce, D.H. Lawrence, James Baldwin and other great writers.²⁰ The Commission should take this opportunity to recognize the importance of “merit” and to encourage broadcast stations to air works of serious artistic merit, not exile those works to other media.

¹⁵ *William Penn*, ¶ 9.

¹⁶ Cite.

¹⁷ See *Policy Statement* at ¶ 9, “It is not sufficient, for example, to know that explicit sexual terms or descriptions were used, just as it is not sufficient to know why that no such terms or descriptions were used.”

¹⁸ See *Miller v. California*, 413 U.S. 15 (1973).

¹⁹ *Golden Globes*, 19 FCC Rcd at 4979.

²⁰ *Id.* at 4979, quoting *Action for Children’s Television*, 852 F.2d at 1340.

Factors relevant to determining whether a broadcast program is indecent are also relevant to the sanction that may be imposed for the broadcast of indecent material. Current policy applies the same forfeiture standards to commercial and noncommercial stations alike. This enforcement policy, like the policy of giving only lip service to “merit,” has the perverse effect of spurring the use of indecent material as a device for attracting a mass audience. Commercial stations with sufficient revenues can view indecency fines simply as a cost of doing business, while noncommercial stations are discouraged from airing an acclaimed documentary by a distinguished director on an acknowledged American art form, “the blues,”²¹

Conclusion

The Commission has a unique opportunity to align its indecency policies with First Amendment values, recognize the important role that noncommercial stations perform and encourage broadcast stations to air works of serious artistic merit. The recommendations contained in these comments are designed to help the Commission achieve those goals.

Respectfully submitted,

RADIO STATION KUCR (FM)

By: _____/s/_____
John Crigler
Its Attorney
GARVEY SCHUBERT BARER
1000 Potomac St., N.W. Suite 500
Washington, DC 20007

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²¹ See Complaints Against Various Television Licensees Between February 2, 2002 and March 8, 2005, 21 FCC Rcd 2664 (2006).