In Re WUHY-FM, E. Educ. Radio, 4548 Mkt. St., Philadelphia, Pa., 24 F.C.C.2d 408 (1970)

18 Rad. Reg. 2d (P & F) 860, 24 F.C.C.2d 408, 1970 WL 17713 (F.C.C.)

FCC 70-346

FEDERAL COMMUNICATIONS COMMISSION (F.C.C.)

****1** In Re WUHY-FM, EASTERN EDUCATION RADIO, 4548 MARKET STREET, PHILADELPHIA, PA.

NOTICE OF APPARENT LIABILITY

(Adopted April 1, 1970; Released April 3, 1970)

***408** BY THE COMMISSION: CHAIRMAN BURCH CONCURRING IN THE RESULT; COMMISSIONER COX CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT; COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT; COMMISSIONER H. REX LEE ABSENT.

1. The constitutes Notice of Apparent Liability for forfeiture pursuant to Section 503(b)(2) of the Communications Act of 1934, as amended.

2. The facts. Noncommercial educational radio station WUHY-FM is licensed to Eastern Education Radio, Philadelphia, Pennsylvania. On January 4, 1970, WUHY-FM broadcasted its weekly program 'Cycle II' from 10.00 P.M. to 11:00 P.M. [FN1] This broadcast featured an interview with one Jerry Garcia, leader and member of 'The Grateful Dead', a California rock and roll musical group. The interview was recorded on tape in Mr. Garcia's hotel room in New York City on Saturday afternoon, January 3, 1970. The interview was conducted by Messrs. Steve Hill and David Stupplebeen, who are both architects in the Philadelphia area, and who have been engaged from time to time on a volunteer basis by WUHY-FM to assist in programming. Mr. Robert J. Bielecki, a full-time staff engineer for WUHY-FM, was in charge of the production as a volunteer producer; Mr. Bielecki had been allowed supervision of 'Cycle II' since its inception in November of 1969. Hill and Stupplebeen returned to Philadelphia Sunday afternoon about 4:00 P.M. (January 4, 1970) with the tape of the recorded interview. Hill spent the next three or four hours editing the tape; i.e., allowing for musical selections. Mr. Bielecki, who was engaged in routine engineering duties at the time, listened to portions of the tape from time to time. Neither Hill, Bielecki, nor Stupplebeen discussed the tape with Mr. Nathan Shaw, the station manager, nor did they seek his clearance in any way; Mr. Shaw, though not at the station, could have been reached at home.

***409** 3.During the interview, about 50 minutes in length, broadcast on January 4, 1970, Mr. Garcia expressed his views on ecology, music, philosophy, and interpersonal relations. See Appendix A for the example comments on these subjects, as set forth in the licensee's letter of February 12, 1970. His comments were frequently interspersed with the words 'f—k' and 's—t', used as adjectives, or simply as an introductory expletive or substitute for the phrase, et cetera. Examples are:

S—t man.

I must answer the phone 900 f——n' times a day, man.

Right, and it sucks it right f——-g out of ya, man.

That kind of s—t.

It's f——n' rotten man. Every f——n' year.

... this s—t.

... and all that s—t — all that s—t.

... and s—t like that.

... so f——-g long.

Everybody knows everybody so f——-g well that....

S—t.

S—t. I gotta get down there, man.

All that s—t.

Readily available every f——-g where.

****2** Any of that s—t either.

Political change is so f——-g slow.

4. At the conclusion of the Garcia interview, Mr. Hill presented a person known as 'Crazy Max', whose real name is not known to the licensee. 'Crazy Max' had been a visitor to the station, and he told Hill, while listening to the Garcia interview, that if there were time left in the program he wanted to make some remarks about computers and society. There was a short period left, and 'Crazy Max' delivered his message, which also used the word 'f—k.' The licensee states that Mr. Hill did not know what 'Crazy Max' was going to say in detail, or how he was going to say it. It adds that 'Crazy Max' will not be allowed access to the microphone again.

5. In its letter of February 12, 1970, written in response to the Commission's request for comments on the January 4th broadcast, [FN2] the licensee further states:

The licensee has a standing policy, known to all personnel including Mr. Bielecki, that all taped program material which contains controversial subject matter or language must be reviewed by Mr. Nathan Shaw, the station manager of WUHY-FM, Mr. Bielecki, the producer of this program, did not bring the program to Mr. Shaw's attention. Neither Mr. Shaw nor any other person in the station management heard or reviewed the program before it was aired. Mr. Bielecki has been removed as a producer because of this infraction of station policy. 'Cycle II' has been suspended as a program pending licensee review of this entire matter. Internal procedures to insure against a similar incident are being strengthened.

6. Discussion — policy. The issue in this case is not whether WUHY-FM may present the views of Mr. Garcia or 'Crazy Max' on ecology, society, computers, and so on. Clearly that decision is a matter solely within the judgment of the licensee. See Section 326 of the Communications***410** Act of 1934, as amended. Further, we stress, as we have before, the licensee's right to present provocative or unpopular programming which may offend some listeners. In re Renewal of Pacifica, 36 FCC 147, 149 (1964). It would markedly disserve the public interest, were the airwaves restricted only to inoffensive, bland material. Cf. Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367 (1969). Further, the issue here does not involve presentation of a work of art or on-the-spot coverage of a bona fide news event. [FN3] Rather the narrow issue is whether the licensee may present previously taped interview or talk shows where the persons intersperse or begin their speech with expressions like, 'S—t, man...', '... and s—t like that', or '... 900 f——n' times', '... right f——-g out of ya', etc.

7. We believe that if we have the authority, we have a duty to act to prevent the widespread use on broadcast outlets of such expressions in the above circumstances. For, the speech involved has no redeeming social value, and is patently offensive by contemporary community standards, with very serious consequences to the 'public interest in the larger and more effective use of radio' (Section 303(g)). As to the first point, it conveys no thought to begin some speech with 'S—t, man...', or to use 'f——-g' as an adjective throughout the speech. We recognize that such speech is frequently used in some settings, but it is not employed in public ones. Persons who might use it without thought in a home, job or barracks setting generally avoid its usage when on a public conveyance, elevator, when testifying in court, etc. Similarly, its use can be avoided on radio without stifling in the slightest any thought which the person wishes to convey. In this connection, we note that stations have presented thousands of persons from all walks of life in talk or interview shows, without broadcasting language of the nature here involved. However much a person may like to talk this way, he has no right to do so in public arenas, and broadcasters can clearly insist that in talk shows, persons observe the requirement of eschewing such language.

****3** 8. This brings us to the second part of the analysis — the consequence to the public interest. First, it WUHY can broadcast an interview with Mr. Garcia where he begins sentences with 'S—t, man...', or uses 'f——-g' before word after word, just because he likes to talk that way, so also can any other person on radio. Newscasters or disc jockeys could use the same expressions, as could persons, whether moderators or participants, on talk shows, on the ground that this is the way they talk and it adds flavor or emphasis to their speech. [FN4] But the consequences***411** of any such widespread practice would be to undermine the usefulness of radio to millions of others. For, these expressions are patently offensive to millions of listeners. And here it is crucial to bear in mind the difference between radio and other media. Unlike a book which requires the deliberate act of purchasing and reading (or a motion picture where admission to public exhibition must be actively sought), broadcasting is disseminated generally to the public (Section 3(0) of the

Communications Act, 47 U.S.C. 153(0)) under circumstances where reception requires no activity of this nature. Thus, it comes directly into the home and frequently without any advance warning of its content. Millions daily turn the dial from station to station. 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. [FN5] Further, in that audience are very large numbers of children. [FN6] Were this type of programming (e.g., the WUHY interview with the above described language) to become widespread, it would drastically affect the use of radio by millions of people. No one could ever know, in home or car listening, when he or his children would encounter what he would regard as the most vile expressions serving no purpose but to shock, to pander to sensationalism. Very substantial numbers would either curtail using radio or would restrict their use to but a few channels or frequencies, abandoning the present practice of turning the dial to find some appealing program. In light of the foregoing considerations we note also that it is not a question of what a majority of licensees might do but whether such material is broadcast to a significant extent by any significant number of broadcasters. In short, in our judgment, increased use along the lines of this WUHY broadcast might well correspondingly diminish the use for millions of people. It is one thing to say, as we properly did in Pacifica, ***412** that no segment, however large its size, may rule out the presentation of unpopular views or of language in a work of art which offends some people; and it is quite another thing to say that WUHY has the right to broadcast an interview in which Mr. Garcia begins many sentences with, 'S—t, man...', an expression which conveys not thought, has no redeeming social value, and in the context of broadcasting, [FN7] drastically curtails the usefulness of the medium for millions of people.

****4** 9. For the foregoing reasons, and specifically to prevent any emerging trend in the broadcast field which would be inconsistent with the 'larger and more effective use of radio', we conclude that we have a duty to act, if we have the authority to act. We turn now to the issue of our authority.

10. Discussion — Law (Authority).There are two aspects of this issue. First, there is the question of the applicability of 18 U.S.C. 1464, which makes it a criminal offense to 'utter any obscene, indecent, or profane language by means of radio communication.' This standard, we note, is incorporated in the Communications Act. See Sections 312(a)(6) and 503(b)(1)(E), 47 U.S.C. 312(a)(6); 503(b)(1)(E). The licensee urges that the broadcast was not obscene 'because it did not have a dominant appeal to prurience or sexual matters' (Letter, p. 5). We agree, and thus find that the broadcast would not necessarily come within the standard laid down in Memoirs v. Massachusetts, 383 U.S. 413, 418 (1965); see also Jacobelli v. Ohio, 378 U.S. 184, 191 (1963); Roth v. United States, 354 U.S. 476 (1956). However, we believe that the statutory term, 'indecent', should be applicable, and that, in the broadcast field, the standard for its applicability should be that the material broadcast is (a) patently offensive by contemporary community standards; and (b) is utterly without redeeming social value. The Court has made clear that different rules are appropriate for different media of expression in view of their varying natures. 'Each method tends to present its own peculiar problems.' Burstyn v. Wilson, 343 U.S. 495, 502-503 (1951). We have set forth in par. 8, supra, the reasons for applicability of the above standard in defining what is indecent in the broadcast field. We think that the factors set out in par. 8 are cogent, powerful considerations for the different standard in this markedly different field.

11. There is no precedent, judicial or administrative, for this case. There have been few opinions construing 18 U.S.C. 1464 (e.g., Duncan v. U.S., 48 F.2d 128 (C.C.A. Or. 1931), certiorari denied 283 U.S. 863; Gagliardo v. U.S., 366 F.2d 720 (1966)), and none in the broadcast field here involved. The issue whether the term, 'indecent', has a meaning different from 'obscene' in Section 1464 was raised in Gagliardo (366 F. 2d at pp. 725-26) but not resolved. Support for giving it a different meaning is indicated by U.S. v. Limehouse, 285 U.S. 424 (1932) which held that the word 'filthy' which was added to the postal obscenity law by amendment, now 18 U.S.C. § 1461, meant ***413** something other than 'obscene, lewd, or lascivious', and permitted a prosecution of the sender of a letter which 'plainly related to sexual matters' and was 'coarse, vulgar, disgusting, indecent; and unquestionably filthy within the popular meaning of that term.' However, in line with the principle set out above in Burstyn, the matter is one of first impression, and can only be definitively settled by the courts.We hold as we do, since otherwise there is nothing to prevent the development of the trend which we described in par. 8, from becoming a reality.

****5** 12. The licensee argues that the program was not indecent, because its basic subject matters '... are

obviously decent'; 'the challenged language though not essential to the meaning of the program as a whole, reflected the personality and life style of Mr. Garcia'; and 'the realistic portrayal of such an interview cannot be deemed 'indecent' because the subject incidentally used strong or salty language.' (Letter, p. 5). We disagree with this approach in the broadcast field. Were it followed, any newscaster or talk moderator could intersperse his broadcast with these expressions, or indeed a disc jockey could speak of his records and related views with phrases like, 'S—t, man..., listen to this mother f——r', on the ground that his overall broadcast was clearly decent, and that this manner of presentation reflected the 'personality and life style' of the speaker, who was only 'telling it like it is.' The licensee itself notes that the language in question 'was not essential to the presentation of the subject matter...' but rather was '... essentially gratuitous.' We think that is the precise point here — namely, that the language is 'gratuitous' — i.e., 'unwarranted or [having] no reason for its existence' (Websters Collegiate Dictionary, Fifth Ed., p. 435). There is no valid basis in these circumstances for permitting its widespread use in the broadcast field, with the detrimental consequences described in par. 8, supra.

13. The matter could also be approached under the public interest standard of the Communications Act. Broadcast licensees must operate in the public interest (Section 315(a)), and the Commission does have authority to act to insure such operation. Red Lion Broadcasting Co., Inc. v. F.C.C. 395 U.S. 367, 380 (1969). This does not mean, of course, that the Commission could properly assess program after program, stating that one was consistent with the public interest and another was not. That would be flagrant censorship. See Section 326 of the Communications Act, 47 U.S.C. 326; Banzhaf v. F.C.C., 132 U.S. App. D.C. 14, 27; 405 F. 2d 1082, 1095 (1968), certiorari denied, 395 U.S. 973 (1969). However, we believe that we can act under the public interest criterion in this narrow area against those who present programming such as is involved in this case. The standard for such action under the public interest criterion is the same as previously discussed — namely, that the material is patently offensive by contemporary community standards and utterly without redeeming social value. These were the standards employed in Palmetto Broadcasting Co., 33 FCC 483; 34 FCC 101 (1963), affirmed on other grounds, E. G. Robinson, Jr. v. F.C.C., 108 U.S. App. D.C. 144, 344 F. 2d 534 (1964), certiorari denied, 379 U.S. 843, where the Commission denied ***414** the application for renewal of a licensee which, inter alia, had presented smut during a substantial period of the broadcasting day. [FN8]

14. In sum, we hold that we have the authority to act here under Section 1464 (i.e. 503(b)(1)(E)) or under the public interest standard (Section 503(b)(1)(A)(B) — for failure to operate in the public interest as set forth in the license or to observe the requirement of Section 315(a) to operate in the public interest). Cf. Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367, 376, n. 5. However, whether under Section 1464 or the public interest standard, the criteria for Commission action thus remains the same, in our view — namely, that the material be patently offensive and utterly without redeeming value. Finally, as we stressed before in sensitive areas like this (Report and Order on Personal Attack Rules, 8 FCC 2d 721, 725 (1968)), the Commission can appropriately act only in clear-cut, flagrant cases; doubtful or close cases are clearly to be resolved in the licensee's favor.

****6** 15. Discussion — Application of the above principles to this case. In view of the foregoing, little further discussion is needed on this aspect. We believe that the presentation of the Garcia material quoted in par. 3 falls clearly within the two above criteria, [FN9] and hence may be the subject of a forfeiture under Section 503(b)(1)(A)(B) and (E). We further find that the presentation was 'willful' (503(b)(1)(A)(B)). We note that the material was taped. Further the station employees could have cautioned Mr. Garcia either at the outset or after the first few expressions to avoid using these 'gratuitous' expressions; they did not do so. [FN10] That the material was presented without obtaining the station manager's approval — contrary to station policy — does not absolve the licensee of responsibility. See KWK, Inc., 34 FCC 2d 1039, affirmed 119 U.S. App. D.C. 144, 337, F. 2d 540 (1964). Indeed, in light of the facts here, there would appear to have been gross negligence on the part of the licensee with respect to its supervisory duties.

16. We turn now to the question of the appropriate sanction. The licensee points out that this is one isolated occurrence, and that therefore the Palmetto decision is inapposite. We agree that there is no question of revocation or denial of license on the basis of the matter before us, even without taking into account the overall record of the station, as described in the licensee's letter, pp. 6-8. See also In re Renewal of Pacifica, 36 FCC 147 (1964). Rather, the issue in this case is whether to impose a forfeiture (since one of the reasons for the forfeiture provision is that it can be imposed for the isolated occurrence, such as

an isolated lottery, etc.). On this issue, we note that, in view of the fact that this is largely a case of first impression, particularly as to the Section 1464 aspect, we could appropriately forego the forfeiture and simply act prospectively in this field. See, Taft Broadcasting Co., 18 FCC 2d 186; Bob Jones University, 18 FCC 2d 8; ***415**WBRE-TV TV, Inc., 18 FCC 2d 96. However, were we to do so, we would prevent any review of our action and in this sensitive field we have always sought to insure such reviewability. See Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367, 376, n. 5. We believe that a most crucial peg underlying all Commission action in the programming field is the vital consideration that the courts are there to review and reverse any action which runs afoul of the First Amendment. Thus, while we think that our action is fully consistent with the law, there should clearly be the avenue of court review in a case of this nature (see Section 504 (a)). Indeed, we would welcome such review, since only in that way can the pertinent standards be definitively determined. Accordingly, in light of that consideration, the new ground which we break with this decision, and the overall record of this noncommercial educational licensee, we propose to assess a forfeiture of only $100.00.

CONCLUSION

****7** 17. We conclude this discussion as we began it. We propose no change from our commitment to promoting robust, wide-open debate. Red Lion Broadcasting Co. v. F.C.C., supra; Pacifica Foundation, supra. Simply stated, our position — limited to the facts of this case — is that such debate does not require that persons being interviewed or station employees on talk programs have the right to begin their speech with, 'S—t, man...', or use 'f——-g,' or 'mother f——-g' as gratuitous adjectives throughout their speech. This fosters no debate, serves no social purpose, and would drastically curtail the usefulness of radio for millions of people. Indeed, significantly, in this case, under the licensee's policy (which was by-passed by its volunteer employees), Mr. Garcia's views would have been presented without the gratuitous expressions, but with them, the public would never have heard his views.

18. In view of the foregoing, we determine that, pursuant to Section 503(b)(1)(A), (B), (E) of the Communications Act of 1934, as amended, Eastern Education Radio has incurred an apparent liability of one hundred dollars ($100).

19. Eastern Education Radio is hereby notified that it has the opportunity to file with the Commission, within thirty (30) days of the date of the receipt of this Notice, a statement in writing as to why it should not be held liable, or, if liable, why the amount of liability should be reduced or remitted. Any such statement should be filed in duplicate and should contain complete details concerning the allegations heretofore made by the Commission, any justification for the violations involved, and any other information which Eastern Education Radio may desire to bring to the attention of the Commission. Statements of circumstances should be supported by copies of relevant documents where available. Upon receipt of any such reply, the Commission will determine whether the facts set forth therein are sufficient to relieve Eastern Education Radio of Liability, or to justify either reduction or remission of the amount of liability. If it is unable to find that Eastern Education Radio should be relieved of liability, the Commission will issue an Order of Forfeiture and the forfeiture will be payable to the Treasurer of the United States.

***416** 20. If Eastern Education Radio does not file, within thirty (30) days of the date of receipt of this Notice, either a statement of non-liability or a statement setting forth facts and reasons why the forfeiture should be of a lesser amount, the Commission will enter an Order of Forfeiture in the amount of one hundred dollars ($100).

21. In accordance with our established procedures, we also state that if Eastern Education Radio does not wish to file a statement which denies liability and, in addition, it does not wish to await the issuance of an Order, it may, within thirty (30) days of the date of the receipt of this Notice, make payment of the forfeiture by mailing to the Commission as check, or similar instrument, in the amount of one hundred dollars ($100) drawn payable to the Treasurer of the United States.

****8** BY DIRECTION OF THE COMMISSION, BEN F. WAPLE, Secretary.

APPENDIX A

****15** Excerpts from licensee's letter of February 12, 1970:

'... During the interview, Mr. Garcia expressed his views on ecology, music, philosophy, and interpersonal relations. [footnote omitted] Some of Mr. Garcia's comments on these subjects are set forth below:

The problem essentially... the basic problem is how can you live on the planet earth without wreckin' it, right?

*

... like you know a couple of weeks ago the thing was in the paper that the headline was in the paper that there was no more clean air in the United States, period. Yeah, and it's like uh that kind of stuff is all of a sudden comin' up real fast. You know, and it's like it looks like that's the most important thing going on and that nothing else is as important as that as far as I know, that is the most important thing.

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For example, like uh I have friends who I've known since like they started college, you know, and like now it's eight years later and you know, and they're all Ph. Ds — stuff like that. It's just coming out in those terms, uh, I know quite a few of these people who have switched their major in the last year to Ecology and that kind of s—t, because it's like really important right. It's a big emergency going on Okay, so — and their approach to it is generally to get together on the level of bodies of influence — that is to say, governmental s—t, you know, things like that business and so forth, and stuff like that.

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****16** But the big thing is that it's really super, you know — it's... it's... it definitely looks bad outside man, When you fly over New York, it looks f——n' rotten, man, but it's like that way every f——n' where, man, you know, and like I'm from San Francisco, man, and there wasn't like five or six years ago when it was like the sky was blue, crystal clear, you know; you know and that whole thing that you hardly ever see any more, man — you know you just hardly ever see it any more.

*

What I'd really love to do would be live on a perfect, peaceful earth and devote all my time to music. But I can't do it man, because you just can't do that. You know, I mean it's a... there's a more important thing going on, that's all.

*

Politics is a form and music is a form and they're both ways of dealing with people, man. When you play music with people, though, you're not ***417** attacking them, you know. It isn't, it's not a competition between the two of you or the four of you or the seven of you, or however many of you. There are — it's like a cooperative effort which gets everybody high, so like that's and that's of course the thing that's really a great trip about music. It's really a great thing. It's really a good trip, right, and uh so like the things that that I've wanted to see happen and lots of other people you know it's like some way of getting people together to do things but having it be like music and not like business and not like politics, you know, uh just because that's a uh high watermark in a way. I mean it seems like people should be able to do that.

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If you get together with four or five people and produce something that's greater than yourself you know, and that also doesn't only reflect your attitude, but it's like a little closer to the center because it has to do with more perceptions than your own and like for a plan to work, I think, it has to be approached on those kinds of levels and those kind of terms because uh it won't work if uh this is a planet full of people, each of whom is in a universe of his own. Everybody has to agree to give a little, and so forth, and so on.‘

STATEMENT OF COMMISSIONER KENNETH A. COX, CONCURRING IN PART AND DISSENTING IN PART

I agree with a good deal that is said in the Notice of Apparent Liability, but do not agree with the result reached.

I agree that broadcasting differs in significant respects from books, magazines, motion pictures and other means of communications. I agree that this may lead the courts to apply different standards in determining the degree of control which government may exercise over the content of broadcast programming. And I agree that it would be well to get this matter resolved by the courts in the near future. But I do not agree that the problem is as great as the majority say it is, or that it is likely to become endemic. I do not agree that the licensee of WUHY-FM was grossly negligent in this case or merits any more than a warning because of this incident. And I am afraid that this precedent may cause licensees not to carry programming they would otherwise have broadcast, out of fear that someone will be offended,

will complain to the Commission, and the latter will find the broadcast improper. It should be noted that Cycle II has been suspended, so that whatever of value it had to offer will no longer be available to WUHY's audience.

At least the majority are now listing the words, and the usage of those words, which they regard as contrary to the public interest. I think that is desirable, although I am sure that broadcasters are going to worry about other words which they feel may be added to the list later on. And I applaud the majority for indicating that licensees will not be punished for presenting works of art or on-the-spot coverage of bona fide news events which may contain these words or others like them. I am glad they restrict their action to gratuitous use of words in circumstances where the offensive language has no redeeming social value.

However, I do not think the broadcast here involved posed a problem so serious as to justify the imposition of a sanction for the mere utterance of words. This weekly series was intended as an 'underground' program dealing 'with the avant-garde movement in music, ***418** publications, art, film, personalities, and other forms of social and artistic experimentation.' It was presented between 10 and 11 P.M. on Sunday night, and was designed to appeal to the large college population in Philadelphia and to alienated segments of the new generation. It seems clear that a program with such a purpose — a perfectly valid one, I'm sure everyone would agree — would be different in approach and content from programs aimed at children, or women 30 to 40 years of age, or professional men, or adults generally. And it seems likely, in view of the widespread ferment among young people and their rejection of many of the standards of their parents' generation, that not only the ideas discussed but the language used to express them will sometimes be offensive to the older generation. But people who do not like the ideas or the language do not need to listen to programs of this kind. WUHY received no complaints about the broadcast here in question, nor did the Commission. However, we had received earlier complaints about the 10 to 11 P.M. time period and were monitoring the station on the night of January 4, 1970. So far as I can tell, my colleagues are the only people who have encountered this program who are greatly disturbed by it.

****9** I agree that the language complained of is offensive to many and that it was gratuitous — that Mr. Garcia could have expressed the same ideas without using this language. However, I think it magnifies the impact of the words to set them out starkly, as the majority do in Paragraph 3 of the Notice, alone and out of context. I have not read the full transcript of the broadcast, and doubt if my colleagues have, but certainly a reading of the seven paragraphs quoted in the licensee's response gives a different perspective of the matter. While one might wish that Mr. Garcia had been able to express himself without using words which many people find offensive, it would appear that he was not trying to shock or titillate the audience. Apparently this is the way he talks — and I guess a lot of others in his generation do so, too. I find such poverty of expression depressing, and am afraid it may impair clarity of though. My concern is not limited to the words which trouble the majority. In the seven paragraphs quoted by the licensee, Mr. Garcia uses only four words cited by the majority. But he uses the word 'like' in an improper and redundant way sixteen times, and uses 'man' as a word of emphasis seven times. These patterns of speech seem common among today's young. But I expect our language will survive — as it has withstood the slang and fads of generation after generation.

WUHY decided that it wanted to let Mr. Garcia communicate his views in a number of important areas to the station's audience — a decision which no one questions. At least the station was trying to do something more than play records and read wire news. Assuming the propriety of the station's program judgment, how could it have achieved its desired result without getting into trouble with the Commission? The majority suggest, in Paragraph 7, that while Mr. Garcia may talk this way in many other places, he should have been told that he cannot do so on radio. However, while I have had very limited contact with people of his age and background, I am of the impression that such an approach might not have been productive. I think one of ***419** the reasons for their use of such language is that it is intended to show disrespect for the standards of their elders, which they regard as outmoded, without real basis, and 'irrelevant.' It might have been difficult for Mr. Garcia to change his habits of speech without interfering with the flow of his ideas — or he might simply have refused to give the interview at all on those terms. Admittedly this is speculative, but there is no way to explore these possibilities without making some assumptions — and I think mine are not unreasonable.

The only other alternative would have been to delete the offending language. The licensee, in its response

to the Commission's letter of inquiry, argued persuasively that the Garcia interview was neither obscene nor profane. I am glad that the majority agree that it was not obscene, and while they do not address themselves to the issue of profanity, they certainly make no claim that the language was profane. Instead, they hold that the language was indecent, within the meaning of 18 U.S.C. 1434, which makes it a crime to 'utter any obscene, indecent, or profane language by means of radio communication.' The licensee argued to the contrary in its letter:

****10** ... Nor was the program indecent simply because certain language not normally heard in polite circles, was uttered. The basic subject matters of the program — ecology, philosophy, music — are obviously decent. The challenged language though not essential to the meaning of the program as a whole, reflected the personality and life style of Mr. Garcia. In this sense, the interview was in the nature of a documentary. The realistic portrayal of such an interview cannot be deemed 'indecent' because the subject incidentally used strong or salty language....

I think this position has a good deal of merit. In addition, I think that the word 'indecent' in the statute may not have a clear enough meaning to satisfy the constitutional requirement that criminal statutes must put the public on notice of just precisely what conduct will constitute a violation.

Having made this contention, the licensee nonetheless said that it would not have aired the program had it been submitted for review by the station manager, as required by established station procedures. It went on to say:

Licensee would not have aired the Jerry Garcia interview because the questioned language was not essential to the presentation of the subject matter and its potential for offense was not outweighed by considerations of subject matter or artistic integrity. While the program had value in terms of subject matter and in depicting the total personality of Jerry Garcia, licensee does not believe that these values were sufficient to warrant airing the program, at least without deletion of the offending and essentially gratuitous passages. [FN11]

A licensee is responsible for everything broadcast over its station. WUHY therefore very properly has adopted a policy that all taped program material containing 'controversial subject matter or language' must be reviewed by the station manager. If those who produced and broadcast the Garcia interview had followed that procedure and the license had decided not to use the interview, or to do so only after deleting the language here in issue, that would have represented ***420** own judgment. What we have here is quite a different thing. The majority are exercising government power in the area of speech. They have imposed a sanction-though admittedly a nominal one-for a single broadcast [FN11] contaning what they, but not the licensee, regard as indecent matter. This action, binding on all licensees, is obviously far different from letting licensees make their own judgments-even if many of them would conclude, with the majority, that language of this kind should not be broadcast.

I'm afraid it has taken me a long time to get around to discussing an idea mentioned in the first sentence of the third paragraph back — the possible deletion of the offensive words. I think the licensee has pointed out some problems with this procedure in the footnote to the last quotation above. It says that bleeping out words may disrupt the program, and that it may not be too difficult for those who dislike such language to tell what was said despite the deletion — indeed, that this may actually emphasize the fact that language which the licensee apparently regards as improper had been used. It seems to me that WUHY — when put on notice that the Commission on its own motion is challenging the broadcast — is saying that it would not have broadcast the Garcia interview at all. I think that most licensees who may consider presenting similar programming in the future — that is taped material involving statements by blacks, students, or those who have dropped out of our society — will decide that if the use of words which may offend the Commission is interspersed too regularly throughout the tape to make deletion feasible, the safe course will be just not to broadcast the program. While I hold no brief for flooding the air with the views of members of these groups. I think it may be dangerous if we do not understand what they are trying to say — even if it sometimes involves the monotonous use of four letter words. Some of their complaints are probably well founded, and even if they are not, I think we need to know what troubles them and what they are talking about doing about these matters. It may be that using radio and television to help bridge the generation gap would be an example of 'the larger and more effective use of radio' which the majority are so eager to preserve.If, instead, we narrow our concept of the use of radio in order to protect the sensibilities of those who seem more concerned with suppressing words and pictures they find offensive than with solving the problems that are tearing our society

apart, I think we may find that the majority are wrong in stating — in Paragraph 7 — that we can exercise these words from radio 'without stifling in the slightest ***421** any thought which the person wishes to convey.' One safe course for the timid will be simply to avoid interviewing people who can be expected to use troublesome language, or inviting them to participate in panels, or asking them to comment on current developments. This may be 'safe' for the licensee but I'm not sure it will be safe for our society.

****11** This brings me, at last, to my principal problem with the majority's decision, which is that I think they are exaggerating this problem out of all proportion. It is true that in recent months we have been receiving more complaints about the broadcast of allegedly obscene, indecent, or profane matter, but most of these involve matters outside the ambit of this ruling. That is, they deal with claims that certain records contain cryptic references to the use of drugs, that others are sexually suggestive, that the skits and blackouts on the Rowan and Martin Langh-In are similarly suggestive, that the costumes on many variety programs are indecent, that the dances are too sensuous, that the performers are too free with each other, etc. But I think I could count on the fingers of both hands the complaints that have come to my notice which involve the gratuitous use of four letter words in situations comparable to the one in this case. This has simply not been a problem.

Nor do I agree that if we do not punish WUHY for this broadcast, there is going to be such 'widespread use' of the offending words as to 'drastically affect the use of radio by millions of people,' because 'very substantial numbers would either curtail using radio or would restrict their use to but a few channels.' I just do not believe there are many broadcasters waiting eagerly to flood the country with such language on an around the clock basis in the event we were to impose no sanction here. Indeed, if the Commission had not decided to make a test case of this incident, I doubt if many people would ever have heard of it. Actually, if the majority's theory is right, they are running a rather serious risk. If the courts do not sustain their action, that would be a signal to the industry that it could freely engage in the 'widespread use' of four letter words which the majority fear they are anxious to embark upon. But I don't think many of our licensees have any desire to follow such a course, nor do I believe that there is any great audience to be won by such tactics. I think most broadcasters have too high a regard for their profession and its responsibilities to fall into the patterns the majority envisage in Paragraphs 7 through 9.

Similarly, I think there is a great and clear difference between presenting an occasional late night program featuring people not on the staff of the station who use offensive language and employing newscasters and disc jockeys and allowing them to use similar expressions all day long. It is one thing to permit certain elements in society to use such language on the air so that interested members of the public can find out how they think about various problems. It is quite different to turn the operation of a station over to people who talk that way. I think this, like the more generalized claim that we are about to be inundated with indecent language, is a figment of the majority's imagination designed to justify the intrusion of governmental power into this sensitive area.

****12 *422** I have studied broadcasting for some time, and while I think we may expect to hear strong language on the air somewhat more often in the future as a reflection of our troubled times, I simply do not believe there is any likelihood that licensees will broadcast indecent language to such an extent that they will drive millions of listeners away from radio entirely. Broadcasters make money by attracting audiences. They have developed a number of ways to win the attention of differing segments of the total audience. I do not think that four letter words are likely to become the format of the future, since I doubt if even people who use such language themselves would regard it as enhancing a station's service.

Finally, I think it should be noted that the majority have held that someone involved in this broadcast violated a criminal statute. This means that such person or persons can be prosecuted and subjected to rather severe penalties. However, I do not think this is likely to happen because I suspect that the United States Attorney in Philadelphia has more important matters to occupy his time and that of his staff. (See my dissent in the Commission's letter addressed to Jack Straw Memorial Foundation, dated January 21, 1970. FCC 70-93.) I submit that the same thing should be true of the Federal Communications Commission.

PRELIMARY DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

'Oaths are but words, and words but wind.' — Samuel Butler, Hudibras (1664).

What this Commission condemns today are not words, but a culture — a lifestyle it fears because it does not understand. Most of the people in this country are under 28 years of age; over 56 million students are in our colleges and schools. Many of them will 'smile' when they learn that the Federal Communications Commission, an agency of their government, has punished a radio station for broadcasting the words of Jerry Garcia, the leader of what the FCC calls a 'rock and roll musical group.' To call The Grateful Dead a 'rock and roll musical group' is like calling the Los Angeles Philharmonic a 'jug band.' And that about shows 'where this Commission's at.'

Today the Commission simply ignores decades of First Amendment law, carefully fashioned by the Supreme Court into the recognized concepts of 'vagueness' and 'overbreadth,' see, e.g., Zwickler v. Koota, 389 U.S. 241, 249-50 (1967), and punishes a broadcaster for speech it describes as 'indecent' — without so much as attempting a definition of that uncertain term. What the Commission tells the broadcaster he cannot say is anyone's guess — therein lies the constitutional deficiency.

Today the Commission turns its back on Supreme Court precedent, see, e.g., Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968), citing Holmby Productions, Inc. v. Vaughn, 350 U.S. 870 (1954), as well as recent federal court precedent, see, e.g., Williams v. District of Columbia, No. 20, 927 (D.C. Cir., June 20, 1969) (en banc), which invalidated statutes with similarly vague descriptions of allegedly 'indecent' speech.

****13 *423** Today the Commission decides that certain forms of speech and expression are 'patently offensive by contemporary community standards' — although neither the station nor the FCC received a single complaint about the broadcast in question, and the FCC conducted not a single survey amoung the relevant population groups in Philadelphia, nor compiled a single word of testimony on contemporary community standards, nor attempted even to define the relevant 'community' in question.

I am aware that there are members of the public who are offended by some of what they hear or see on radio or television. I too am offended by much of what I hear or see on radio or television — though more often for what it fails to do than what it does. I am sympathetic to the outrage of any minority group — Black or Puritan — that feels its values are not honored by the society of which it is a part. (What the Commission decides, after all, is that the swear words of the lily-white middle class may be broadcast, but that those of the young, the poor, or the blacks may not.) There are scenes, subjects and words used on television which I would not use personally as a guest on camera. The words used here fall in that category. But I do not believe I sit here as an FCC Commissioner to enforce my moral standards upon the nation. Yet four other Commissioners do precisely that.

Furthermore, when we do go after broadcasters, I find it pathetic that we always seem to pick upon the small, community service stations like a KPFK, WBAI, KRAB, and now WUHY-FM. See, e.g., Pacifica Foundation (KPFK-FM), 36 F.C.C.. 147 (1964); United Federation of Teachers (WBAI-FM), 17 F.C.C. 2d 204 (1969); Jack Straw Memorial Foundation (KRAB-FM), FCC 70-93 (released Jan. 21, 1970). It is ironic to me that of the public complaints about broadcasters' 'taste' received in my office, there are probably a hundred or more about network television for every one about stations of this kind. Surely if anyone were genuinely concerned about the impact of broadcasting upon the moral values of this nation — and that impact has been considerable — he ought to consider the ABC, CBS and NBC television networks before picking on little educational FM radio stations that can scarcely afford the postage to answer our letters, let alone hire lawyers. We have plenty of complaints around this Commission involving the networks. Why are they being ignored? I shan't engage in speculation.

Today this Commission acts against a station that broadcasts 77 hours a week of locally-originated fine music, public and cultural affairs, and community-oriented programming. Ironically, the Commission censures language broadcast by the station that received one of the Corporation for Public Broadcasting's first program grants for its experimental program in participatory democracy, 'Free Speech.' In 1969 alone, WUHY-FM received two 'major' Armstrong Awards, one of the highest achievements in radio, two awards from Sigma Delta Chi, a professional journalism group, and the Corporation for Public Broadcasting's 'Public Criteria' award — the only such award given to a Philadelphia station. I do not believe it a coincidence that this Commission has often moved against the programming of innovative and experimental stations (such as KPFK, WBAI and KRAB). I do not see how licensees (particularly ones that rely on ***424** the help of talented volunteers) can develop new and creative

programming concepts without approaching the line that separates the orthodox from the unconventional and controversial. I believe today's decision will deter the few innovative stations that do exist from approaching that line.

****14** Today the Commission rules that the speech in question has 'no redeeming social value,' although Professor Ashley Montagu, a leading authority on the subject, believes that such speech 'serves clearly definable social as well as personal purposes.' A. Montagu, The Andtomy of Swearing 1 (1967).

Today the Commission declares that a four-letter word 'conveys no thought' — and proceeds to punish a broadcaster for speech which apparently conveys so much thought that it must be banned.

Today the Commission punishes a licensee for speech in order to encourage the courts to do our work for us — forgetting that the First Amendment binds this agency as well as the courts. I do not believe any governmental body can stifle free speech merely to produce a 'test case.' We cannot, constitutionally, abdicate our responsibilities to the courts. Yet today this is what we have done.

I believe it is our responsibility to adopt precise and clear guidelines for the broadcasting industry to follow in this murky area, if we are to wade into it at all — the wisdom of which I seriously question. I believe no governmental agency can punish for the content of speech by invoking statutory prohibitions which are so broad, sweeping, vague, and potentially all-encompassing that no man can foretell when, why, or with what force the Commission will strike.

In Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952), the Supreme Court held that the First Amendment protected motion pictures as well as normal speech. There, the Court invalidated a New York statute banning 'sacrilegious' films. The Court said:

This is far from the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society. In seeking to apply the broad and all-inclusive definition of 'sacrilegious' given by the New York courts, the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies.... [It] is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them....

If the term, 'sacrilegious,' is subject to the dangers of sweeping all-inclusive interpretations, what then of 'indecent'? The FCC has not attempted even a 'broad and all-inclusive definition' of 'indecent,' as the New York courts did of 'sacrilegious.' Rather, the FCC has cast itself adrift upon the 'boundless sea' of a search for 'indecency' without compass or polestar for guidance. We have only the obscure charts of the orthodox (presumably represented by a majority of Commissioners) to guide us on our way.

Groups in this country interested in civil liberties and speech freedoms should understand that the Commission today enters a new and untested area of federal censorship — censorship over the words, thoughts and ideas that can be conveyed over the most powerful medium of communication known to man: the broadcasting medium. To my knowledge, there are no judicial precedents, no law review ***425** articles, no FCC decisions, and no scholarly thinking that even attempt to define the standards of permissible free speech for the broadcasting medium. Should this case be appealed, therefore, these questions may be posed. All those who hold speech freedoms dear should participate. It will be regretable if the Federal Communications Bar Association, like the big broadcasting industry generally, once again proves itself to be more interested in profitable speech than free speech. We will be waiting to see if they vigorously enter an amicus appearance in this case.

An anonymous poet has written:

Oh perish the use of the four- letter words Whose meanings are never obscure:

The Angles and Saxons, those bawdy old birds, Were vulgar, obscene and impure.

But cherish the use of the weaseling phrase That never says quite what you mean.

You had better to known for your hypocrite ways Than vulgar, impure and obscene.

Let your morals be loose as an alderman's vest If your language is always obscure.

Today, not the act, but the word is the test Of vulgar, obscene and impure.

Whatever else may be said about the words we censor today, their meanings are not ‘obscure.’ I cannot say as much for the majority's standards for ‘indecency.’

In 1601, William Shakespeare wrote in Twelfth Night (III, iv), ‘Nay, let me alone for swearing.’ Most of the fresh and vital cultures in our country, not the least of which are the young, have learned this lesson. This Commission has not.

I regret the double standard that causes many significant matters to lanquish in FCC files for years, which rushing other, more questionable matters to decision within days. It is extraordinary that the majority would choose to act on an issue of this consequence without even taking the time to read, let alone carefully consider, the full dissenting and concurring opinions of all Commissioners in this case. I may, nevertheless, take the time to prepare such a fuller opinion in the future for the record. Meanwhile, I feel it useful to put forward at least these views today, as the majority announces its decision. I dissent.

FN1 The licensee states that this is a one-hour, weekly broadcast which is ‘underground’ in its orientation and ‘is concerned with the avant-garde movement in music, publications, art, film, personalities, and other forms of social and artistic experimentation.’ It is designed to reach youthful persons (e.g., the large college population in Philadelphia and ‘so-called 'alienated’ segments of the new generation' — p. 1. WUHY Letter of February 12, 1970). ‘Cycle II’ is the successor program to a similar program entitled ‘Feed.‘

FN2 While the license states that it received no complaints concerning this January 4th broadcast (nor, we note, did the Commission), the Commission had received several complaints concerning this 10:00 P.M. slot on WUHY-FM (directed to the similar ‘Feed’ program, which ‘Cycle II’ succeeded in November, 1969); it therefore did monitor the broadcast, and specifically that of January 4th.

FN3 In this connection, we note licensee's apt statement of policy (pp. 5-6, Letter of February 12, 1970): ‘The question whether to air a program which contains controversial subject matter or language is among the most difficult a licensee is called upon to resolve. In determining whether to air any program which contains material or language which is potentially offensive or disagreeable to some listeners, licensee balances a number of considerations: The subject matter of the program; its value or relevance to the segment of listeners to which it is directed; whether the program is a work of art; whether it is a recognized classic; and whether the potentially offensive language or material is essential to the integrity of the presentation. Licensee also takes into account such factors as the time of the broadcast, the likelihood that children may be in the audience, and the necessity for appropriate cautionary announcements to listeners in advance of potentially disagreeable programming.‘

FN4 To give but one further example, suppose a disc jockey or a moderator on a talk show for sensational or shock purposes aimed at particular audiences, began using expressions such as ‘Listen to this mother f——-g record [or person].’ There is no question but that such use of this vulgar term for an incestuous son is utterly without redeeming social value and, on radio, taking into account its nature (see above paragraph), patently offensive. See discussion, par. 10, infra.

FN5 In a very real sense, the situation here is the very opposite of Stanley v. Georgia, 394 U.S. 557 (1969), which involved the private possession or use of obscene material.

FN6 For example, the following tables point up the children's audience in the evening hours for radio and television:
Average quarter-hour radio audience of teenagers (12 to 17 years) as a percentage of all teenagers in metro area, 1969

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Children (2 to 17 years) viewing TV as percentage of total persons viewing based on New York and Los Angeles survey February-March

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

FN7 We stress that our analysis is limited to broadcasting because of its unique nature of dissemination into millions of homes. The difference is pointed up by this very document. It is perfectly proper, in the analysis here, to use the pertinent expressions of Mr. Garcia. There is no other way to deal intelligently with the subject. But in any event, it takes a conscious act by someone interested in the subject to obtain this document and study its content.

FN8 The Commission there found the programming patently offensive by contemporary community standards and no evidence that it '... in some way served the needs and interests of the area.'

FN9 There does not appear to be any factual dispute. However, the licensee has the opportunity to advance any pertinent factual considerations in response to this Notice and may of course obtain a trial de novo of the matter in the district court. See Section 504(a).

FN10 Indeed, one of the station participants stated at the outset of the interview, 'We are going to do a lot of illegal things before this is over.'

FN11 Licensee does not believe that editing and deletion are an automatically acceptable solution to this kind of problem. Such deletions often damage the entire program. Moreover, they do not protect the sensibilities of the listener. Indeed such censorship may be more distracting than the deleted language itself.
A licensee is responsible for everything broadcast over its station. WUHY therefore very properly has adopted a policy that all taped program material containing 'controversial subject matter or language' must be reviewed by the station manager. If those who produced and broadcast the Garcia interview had followed that procedure and the licensee had decided not to use the interview, or to do so only after deleting the language here in issue, that would have represented a licensee's efforts to discharge its responsibilities in the exercise of its own judgment. What we have here is quite a different thing. The majority are exercising government power in the area of speech. They have imposed a sanction — though admittedly a nominal one — for a single broadcast n11 containing what they, but not the licensee, regard as indecent matter. This action, binding on all licensees, is obviously far different from letting licensees make their own judgments — even if many of them would conclude, with the majority, that language of this kind should not be broadcast.

FN12 It is important to keep in mind that we are dealing with a single incident, within the doctrine of in re Renewal of Pacifica, 36 FCC 147, rather than with a substantial pattern of coarse, vulgar, or suggestive material such as was involved in Palmetto Broadcusting Corporation, 34 FCC 101. In the last sentence of Paragraph 15, the majority find the licensee guilty of gross negligence with respect to its supervisory duties. I think this is an unfair effort to bolster the action here, and that this conclusion is without basis in the record before us. The licensee adopted appropriate procedures for review of programming, and there is no suggestion in the majority's opinion — nor was any offered during our discussion of this matter — that it has knowingly permitted disregard of its policies. So far as we know, this is the time an employee of WUHY has failed to present a questionable program for review. So far as we know, the licensee has taken steps regularly to remind its staff of this requirement. There is no pattern of laxity or open disregard for paper policies such as we have found in other cases where we have ruled that licensees had been guilty of failure to enforce policies essential to the discharge of their responsibilities. The majority are saying that a licensee whose sound policies to detect objectionable matter are disregarded in a single case, resulting in the broadcast of language which the majority regard as indecent, can be subjected to a forefeiture. The reference to 'gross negligence' is sheer window dressing.

18 Rad. Reg. 2d (P & F) 860, 24 F.C.C.2d 408, 1970 WL 17713 (F.C.C.)