BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of

Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program	))))	File No. EB-03-IH-0110

PETITION FOR RECONSIDERATION

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Summary

The Commission's declaration ("Declaration") that the term "indecency" as used in 18 U.S.C. §1464 applies to broadcasts of "the F-Word" and its variants in *any* context between the hours of 6 a.m. and 10 p.m. and that the term "profane" as used in that section means any "vulgar, irreverent, or coarse language" exceeded the extremely limited authority to regulate non obscene speech accorded to the Commission by a divided Supreme Court in the *Pacifica* case and violates the First Amendment and Section 326 of the Communications Act. By issuing the Declaration, the Commission has abandoned the "cautious" and limited approach to regulating non obscene speech which two of the Justices who voted to sustain the Commission's ruling that the broadcast at issue in *Pacifica* was "indecent" had relied upon in joining the majority and has placed a deep "chill" on the exercise of First Amendment rights by broadcasters.

The Commission's Declaration is based on false predicates. First, the Commission is simply wrong when it states that the "core" meaning of all variants of the "F-Word" has a sexual connotation. Dictionaries establish that the particular variant of the "F-Word" that prompted the issuance of the Declaration has no sexual connotations whatsoever, and is used only as an "intensive" or as "a more violent form of

'bloody'" which, "when used in foul language [is] a vague epithet expressing anger, resentment, detestation. . . ." Second, the Commission's assertion that the use of any variant of the "F-Word" is patently offensive under contemporary community standards for the broadcast medium begs the question as to whether, absent the threat of censure from the Commission, contemporary community standards for the broadcast industry differ from those of the community at large. Third, the Commission's assertion that the particular use of a variant of the "F-Word" that prompted the Declaration was "gratuitous" ignores the "emotive" element of speech which the Supreme Court held in *Cohen v. Califorina* is fully protected by the First Amendment even when it involves the word "fuck." Finally, the Commission's claim that it has the authority to penalize the utterance of "fuck" or any of its variants regardless of the context based on its "responsibility to safeguard the well being of the nation's children from the most objectionable, most offensive language" is the assertion of the very censor's role that the Commission is forbidden to exercise by Section 326 of the Communications Act and by the First Amendment.

The Commission's Declaration that the use of the word "profane" in 18 USC §1464 gives it the authority to prohibit

the broadcast of language which is not obscene or indecent but is merely "vulgar, irreverent, or coarse language," is also fundamentally flawed. Contrary to the Commission's assertion, the term "profane" is not "commonly defined as 'vulgar, irreverent or coarse.'" The core meaning, and indeed only meaning ascribed to "profane" by dictionaries at the time 18 USC §1464 was enacted was "blasphemous" or "sacrilegious." This is the meaning that was given to the term in ***Duncan v. United States,*** 48 F 2d 128 (9th Cir. 1928) (construing "profane" as used in the word for word precursor to 18 USC §1464). As "profane" had no meaning other than blasphemous or sacrilegious at the time Congress enacted 18 USC §1464, the Commission clearly lacks authority to expand the meaning of "profane" as used in the statute based upon the fact that, as a consequence of changes in usage, the definition of the word has evolved over the course of 70 years.

The Declaration also violates the First Amendment through its chilling effect on speech. The Commission has provided no clues as to what words it considers to be "as highly offensive as the "F-Word," leaving broadcasters to guess at what words would be included in this list. If broadcasters must guess what words are forbidden, and if a wrong guess can subject a broadcaster to a quarter of a million dollar fine and even

loss of its license, broadcasters are going to be extremely careful to make sure that no word goes out over their stations that a majority of the Commissioners might in their subjective judgment deem to be as offensive as “fuck.”

The Commission’s declaration that it will henceforth punish as “profane” the “‘F-Word’ and those words (or variants thereof) that are as highly offensive as the ‘F-Word’,” but that it will only identify what words fall into this category of *verborum prohibitorum* on a case by case basis, violates the Fifth Amendment as it clearly does not satisfy the requirement of that Amendment that regulations which impose criminal sanctions give “fair” notice of the conduct that will result in punishment. The Commission’s suggestion that the chilling effect of the Declaration is mitigated by the fact that technology makes it possible to “bleep” out an offending word without “blocking or disproportionately disrupting the message of the speaker or the performer” reflects an appalling lack of understanding of how such technology works in the real world and an appalling insensitivity to the fact that words which some might regard as offensive are often an important part of a speaker’s or a performer’s message.

Finally, by bending to political winds and issuing the Declaration ostensibly to protect children from the harm of

hearing an occasional “dirty word,” the Commission has ignored its primary obligation which is to encourage the robust, wide open, discussion and debate which is essential to a free society and which, at times, will include words and ideas that are offensive, even patently offensive, to many listeners.

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PETITON FOR RECONSIDERATION

David Tillotson, an attorney who represents radio and television licensees and is responsible for providing them with reliable advice concerning the applicability of the Communications Act and the Commission's Rules and Regulations to their business activities and a regular listener to radio and television hereby petitions for reconsideration of the Commission's *Memorandum Opinion and Order* FCC 04-43 (the "Order") released March 18, 2004, in the above-captioned proceeding.

In the Order, the Commission, in the mistaken belief that a Ministry of Vice and Virtue is needed to protect the nation's youth from depravity and arrogating this role to itself, has expanded its definition of the term "indecency" as used in 18 U.S.C. §1464 to cover broadcasts of "the F-Word" and its variants in *any* context between the hours of 6 a.m. and 10 p.m. and it has expanded the definition of the term

"profane" as used in that section as meaning "vulgar, irreverent, or coarse language." Petitioner submits that the Order misconstrues the extremely limited authority of the Commission to regulate non obscene speech accorded to the Commission by a divided Court in *FCC v. Pacifica Foundation,* 438 U. S. 726 (1978)(*"Pacifica")* and blatantly violates the First Amendment and Section 326 of the Communications Act which prohibits the Commission from engaging in censorship.

I. The Limits of the FCC's Authority to Regulate Offensive Language

As the Commission correctly notes, "the First Amendment is a critical constitutional limitation" placed on its authority to regulate the broadcast of non obscene speech "that demands that . . . we proceed cautiously and with appropriate restraint." In fact, the authority accorded to the Commission to regulate "indecent" language by the *Pacifica* decision was extremely limited. The majority decision held only that the Commission had not exceeded its authority in declaring that the broadcast of George Carlin's "filthy words" monologue in the early afternoon when children were in the audience was "indecent." The majority opinion emphasized that "we have not decided that an occasional expletive . . . would justify any sanction, or, indeed, that this broadcast would

justify a criminal prosecution."[1] Moreover, there would not have been a majority even for the extremely limited holding in the case were it not for the fact that Justices Powell and Blackmon were persuaded by the Commission's brief that "the Commission's ruling was limited to the facts of the case" and that "the Commission may be expected to proceed cautiously, as it had in the past" and, therefore, there was no reason for concern that upholding the Commission's authority to declare the particular broadcast in question would have "an undue 'chilling' effect on broadcasters exercise of their rights." 438 U.S. 761, n. 4.

The four dissenting justices in *Pacifica* were not sanguine as to the likelihood that the Commission would exercise the sort of cautious restraint and respect for the First Amendment that Justices Powell and Blackmon believed they could be counted upon to exercise. As the dissenters pointed out, the two justifications that the majority had cited for upholding the Commission's ruling regarding that the

1 The statement that the Court had not decided that the particular broadcast in question would justify a criminal prosecution under 18 U.S.C. §1464 was a tacit acknowledgement of Court's decisions which had held that the term "indecent" was too vague and imprecise to support a criminal charge unless the term was construed as having the same meaning as "obscene." *Pacifica, dissenting opinion; Hamling v. United States,* 418 U.S. 87 (1974); *United States v. 12 200-foot Reels of Super 8 Film,* 413 U.S. 123 (1973); *United States v. Simpson*, 561 F. 2d 53 (7th Cir. 1977). In *Reno v. ACLU*, S. Crt. the Court reiterated that in *Pacifica* "we expressly refused to decide whether the indecent broadcast 'would justify a criminal prosecution.'"

particular broadcast in question was “indecent” – the intrusiveness of radio and the presence of children in the audience – are

> plagued by a common failing; the lack of principled limits on their use as a basis for FCC censorship. No such limits come readily to mind. Taken to their logical extreme, these rationales would support cleansing the public airwaves of any “four letter words.” The rationales could justify the banning from radio of a myriad of literary works, novels, poems and plays by the likes of Shakespeare, Joyce, Hemmingway, Ben Johnson, Henry Fielding and Chaucer; they could support the suppression of a good deal of political speech, such as the Nixon tapes; and they could even provide for imposing sanctions for the broadcast of certain portions of the Bible.

438 U.S. at 770-771.

In the Order, the Commission has abandoned the “cautious” and limited approach to regulating non obscene speech which Justices Blackmon and Powell, who were needed to sustain the Commission’s ruling that the broadcast at issue in *Pacifica* was “indecent,” had relied upon in joining the majority and has placed a deep “chill” on the exercise of First Amendment rights by broadcasters.

II. The FCC’s Order Violates the First Amendment and Section 326 By Its “Chilling Effect” On Protected Expression

The Commission’s rationale for declaring that “fuck” and all of its variants is “indecent” within the meaning of that term as used in 18 U.S.C. §1464 is predicated upon the

Commission's "belief" that "given the core meaning" of the word, "any use of that word or a variation in any context, inherently has a sexual connotation." The mere assertion of this "belief" does not make it so. The best sources for the "core" meaning of words are dictionaries. The *American Heritage Dictionary of the English Language* [1971] gives these definitions of "fuck," without designating any one of them as "core":

1. To have sexual intercourse with
2. To deal with in an aggressive, unjust or spiteful manner
3. To mishandle, bungle. Usually used with *up*
4. To meddle, interfere. Used with *with*

The same dictionary defines "fucking," the word used by Bono which is at the "core" of the Order as meaning "Damned. Used as an intensive; Very. Used as an intensive." The *Oxford English Dictionary,* Second Edition, Vol VI [Oxford Press, 2001] states that "fucking" is "used esp. as a mere intensive" and is "a more violent form of '*bloody*'" which, according to the OED, "when used in foul language [is] a vague epithet expressing anger, resentment, detestation; but often a mere intensive . . . ." Perhaps in the minds of the

> Commissioners "fuck" in all of its variants has a sexual connotation, but according to the OED and respected dictionaries, and in common usage by the public at large, "fuck" in combination with words such as "up," "with" and "about" and its variants such as "fucking" used as an intensive have no sexual connotation whatsoever. And surely, when Bono said "this is fucking brilliant," no significant segment of the audience thought of sex.

The Commission's conclusion that the broadcast of the phrase "fucking brilliant" was indecent because it was "patently offensive under community standards for the broadcast medium" is flawed for several reasons. First, the conclusion is predicated on the Commission's clearly erroneous belief that any use of the word "fuck" or a variant of the word "invariably invokes a coarse sexual image. Second, the conclusion is predicated on the Commission's assertion, without any evidentiary basis, that the utterance of a word containing the root "fuck" is "patently offensive under contemporary community standards for the broadcast medium" regardless of the context of the utterance. This tautological reasoning begs the question of whether, but for fear of Commission censure, there are contemporary community standards for the broadcast medium that are different from contemporary

community standards in general.[2] Petitioner submits that there are not. Third, the Commission's assertion that the utterance of the phrase in question was "gratuitous" ignores the "emotive" element of speech which the Supreme Court has held is fully protected by the First Amendment even when it involves the word "fuck." *Cohen v. California,* 403 U.S. 15 (1971). Bono, obviously elated at receiving an award, was merely using "fucking" as an intensive to express such elation.

Finally, the Commission's claim that it has the authority to penalize the utterance of "fuck" or any of its variants regardless of the context based on its "responsibility to safeguard the well being of the nation's children from the most objectionable, most offensive language" is the assertion of the very censor's role that the Commission is forbidden to exercise by Section 326 of the Communications Act and by the First Amendment. It is a well established that governmental regulation of the content of expression may only be tolerated where it concerns expression which presents a direct and

2 According to the Commission, Bono used the "F-Word" at the 1994 Grammy Awards and Cher used it at the 2002 Billboard Awards; yet there appears to have been no public outcry such as would surely have occurred if the use of the word in the context of the ceremonies were patently offensive. The fact that the Commission may have received "hundreds" of complaints concerning Bono's use of the word "fucking" at the 2003 Golden Globe Awards Ceremony does not establish that the utterance was patently offensive under contemporary community standards as the broadcast was heard by millions.

immediate threat to an important societal interest. *Cohen v. Californina, supra; Erzonznik v. City of Jacksonville,* 95 S. Ct 2268 (1975); *Spence v. Washington,* 418 U.S. 405 (1974); *Roth v. United States,* 354 U.S. 476 (1957); *Thornhill v. Alabama,* 310 U.S. 88 (1940); *Cantwell v. Connecticut,* 310 U.S. 296 (1940). The Court's decision in *Pacifica* is not inconsistent with this line of authority.

There are thousands of words and images that parents may wish that their children not see or hear. But the mere desire of some parents that their children not hear certain words that many, perhaps a majority, of parents would consider inappropriate for children's tender ears does not raise this parental desire to the level of such an important societal interest that the Commission has the authority, let alone the "responsibility," to create an index of *verborum prohibitorum* to protect children from

"dirty words." In the real world, where contemporary community standards are at play, children hear the "F-word" and hundreds of other words which the Order bans from the airwaves when children are likely to be in the audience on the playground, from their older siblings, and often, in moments of exasperation ("oh shit"), frustration ("fuck!") or anger ("you bitch," "you prick") from the very parents who are now demanding that the government protect their children from hearing these words. Children who have never heard the offending words, or are too young to understand, them are not likely to notice the words in a broadcast let alone be affected by them.[3] For children who have heard the words from friends, parents, siblings, or merely in the agora, the fact that they might also on occasion hear them on radio or television cannot possibly damage them,[4] and may even provide opportunities for parents to have a serious dialogue with them as to what the parents and the community regard as proper and improper language.

The most troubling aspect of the Commission's Order is

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3 As the Court noted in *Pacifica*, "even a prime time recitation of Chaucer's Miller's tale would not likely command the attention of many children who are both old enough to understand and young enough to be adversely affected by passages such as "as prively he caught her by the queynte." 438 U.S. 726, n. 29.

4 The Commission does not actually claim that hearing an occasional dirty word on radio or television is in any way harmful to children. Apparently what the Commission is concerned about is that some parents, and more importantly, some Congressmen and Senators, want the government to shelter children from "dirty

its overbreadth. In *Pacifica* the Court emphasized that context was all important. In the Order, the Commission states that context is irrelevant. Is this really so? Does the gauntlet laid down by the Commission mean that it will issue quarter million dollar forfeiture orders against stations that have the temerity to broadcast between 6 a.m. and 10 p.m. unexpurgated versions of:

(a) *The Bible,* I Samuel 25:22 "So and more also do God unto the enemies of David, if I leave all that pertain to him by the morning light any that pisseth against the wall";

(b) *Romeo and Juliet,* II, iii, l 118-119: ". . . for the bawdy hand of the dial is now upon on the prick of noon" or *Henry VI, Part II,* IV, vi, l. 2-5: "I charge and command, that of the city's cost, the pissing-conduit run nothing but claret wine this first year of our reign."

(c) The Nixon White House tapes where Nixon used such un-Presidential words as “shit” or the Johnson White House tapes which are punctuated with “shit” and “piss”?

(d) An interview with David Halberstram, author of *The Best and the Brightest,* in which the author brings Lyndon Johnson to life with some of LBJ’s more quotable quotes: Johnson telling his staff he "wanted no more of this coup shit," Referring to a Kennedy aide: "He doesn't have enough sense to pour piss out of a boot with instructions written on the heel;" Recogninzing that it would be difficult to get rid of J.Edgar Hoover: "Well, it's probably better to have him inside the tent pissing out , than outside pissing in."

(e) Live news coverage of events in Iraq where a soldier, in the stress of the moment, uses an “offensive word.”

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words.”

Further examples of works of literature and political/historical material which, if the Commission truly means what it says could not be aired unexpurgated between 6 a.m. and 10 p.m., are set out in the Appendix hereto. It is respectfully suggested that the

Commission should reflect long and hard as to whether the First Amendment and Section 326 of the Communications Act permit it to ban the broadcast of such a wide range of material with unquestionable literary, political and social value.

III. "Profane" as Used in 18 USC §1464 Can Only Be Construed In a Religious Sense

The Commission's determination that the use of the word "profane" in 18 USC §1464 gives it the authority to prohibit the broadcast of language which is not obscene or indecent but is merely "vulgar, irreverent, or coarse language," is fundamentally flawed.

First, contrary to the Commission's assertion, the term "profane" is not "commonly defined as 'vulgar, irreverent or coarse.'" While it is true that *some* modern dictionaries give as one definition of "profane" "vulgar or coarse,"[5] the "core" meaning of "profane" is "blasphemous" or "sacrilegious." Moreover, and most importantly, when Section 29 of the Radio Act of 1927 (the precursor section to 18 USC §1464) was adopted and when 18 USC §1464 was adopted by the Communications Act of 1934, "profane" had no other meaning than blasphemous or sacrilegious.6 *See Duncan v. United*

5 American Heritage Dictionary [1973]
6 *Id.; The Oxford English Dictionary, Second Edition* Vol XII [Oxford Press, 2001]; *Webster's New Collegiate Dictionary* [1981].

States, 48 F 2d 128 (9th Cir. 1928) (construing "profane" as used in Section 29 of the Radio Act); *Webster's New International Dictionary of the English Language* [Second Edition, Unabridged 1939]. The Seventh Circuit's *dicta*[7] in *Tallman v. United States,* 465 F. 2d 282 (7th Cir. 1971) that "profane" could be construed as meaning "vulgar, irreverent or coarse" as used in 18 USC §1464 does not trump the Ninth Circuit's *holding* in *Duncan* that "profane" as used in the word for word precursor to 18 USC §1464 means "irreverence towards God or holy things," "speaking or acting in contempt of sacred things," "blasphemous," "imprecation of divine vengeance or implying divine condemnation." The fact that nothing in Commission decisions "suggests that the statutory definition of profane is limited to blasphemy" is utterly irrelevant to the issue at hand.

Duncan, a definitive court construction of the meaning of "profane" issued shortly after the precursor to 18 USC §1464 was enacted and shortly before the current version of this section was enacted, established the meaning of the term as

7 The conviction before the court in *Talman* was upheld solely on the grounds that the utterance on which the conviction was based was obscene. However, in discussing the appellant's claim that the word "profane" as used in 18 USC §1464 was to vague to support a criminal charge, the court noted that "profane" was indeed capable of "an overbroad interpretation encompassing protected speech" and then offered what it suggested would be a sufficiently narrow, though novel, definition, which might be sufficiently narrow to survive an overbreadth challenge.

used in the statute. The Commission does not have the authority to expand the definition of the profane as used in the statute based upon the fact that over the course of 70 years the definition of the word has evolved, as words do through usage, to mean more than it meant when 18 USC §1464 was enacted.

IV. The Commission's Expanded Definitions of "Indecent" and "Profane" Are Overbroad

The Commission's Order clearly exceeds the limited authority conferred upon the Commission by the *Pacifica* decision to regulate non obscene speech for the benefit of children. In *Pacifica,* the Court was careful to make it clear that its holding did not authorize the Commission to prohibit the isolated or occasional broadcast of certain "dirty words" and that the context in which words are uttered is all important. Yet the Order announces an absolute ban on the "F-word" and all of its derivatives, as well as all other words "that are as highly offensive as the 'F-Word'" between the hours of 6 a.m. and 10 p.m. without regard to context. The chilling effect of this far reaching ruling cannot be overstated. As the Commission has provided no clues as to what words it considers to be "as highly offensive as the "F-Word," broadcasters are left to guess at what words would be

included in this list.[8] Therein lies the truly chilling effect on speech. If broadcasters must guess what words are forbidden, and if a wrong guess can subject a broadcaster to a quarter of a million dollar fine and even loss of its license, broadcasters are going to be extremely careful to make sure that no word that goes out over their stations which a majority of the Commissioners might in their subjective judgment deem to be as offensive as "fuck." The vagueness, and subjectiveness, of the Commission's definition of "profane" " raises special First Amendment concerns because of its obvious chilling effect on free speech. . . . [as] [t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." *Reno v. ACLU*, 521 US 844, 872 (1997); *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965).

What is especially disturbing about the Order is that it reflects "a depressing inability to appreciate that in our

8 Since the Commission regards "fuck" as "one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language," a word so powerful that even the Commission must print it in code, it could be argued that "fuck" is in a class of its own; that no word which does not incorporate this horrible word is on a par with it in degree of offensiveness. Indeed the fact that the Commission has not provided a list of words which, like "fuck" cannot be uttered when children are likely to be in the audience, strongly suggests that the Commission could not agree as to what words should be on the list. But leaving broadcasters to guess as to what words will cost them a quarter of a million dollars, or at least tens of thousands of dollars in legal fees challenging the Commission's authority to punish the broadcast of non obscene speech, is not acceptable. Saying that such words exist and promising to punish their utterance, but not telling broadcasters which ones

land of cultural pluralism, there are many who think, act and talk differently from the Members [of the Commission], and who do not share their sensibilities." *Pacifica,* dissenting opinion 438 US 775.

The Commission's suggestion that the chilling effect of its Order is mitigated by the fact that "technological advances have made it possible as a general matter to prevent the broadcast of a single offending word or action without blocking or

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they are is the very essence of exhaling a chilling effect.

disproportionately disrupting the message of the speaker or the performer" reflects an appalling lack of understanding of how such technology works in the real world and an appalling insensitivity to the fact that that words that some might regard as offensive are often an important part of a speaker's or a performer's message.[9] What the Commission proposes is that every broadcaster who presents a live interview or a live event install a tape delay mechanism so that any offensive words can be bleeped out before the reach sensitive ears. While the cost of acquiring such technology may not be great, in order to utilize it as the Commission envisions, a person other than the interviewer or reporter needs to be engaged to monitor the broadcast and to make decisions in a matter of seconds as to what words need to be bleeped. Because of the penalties for allowing a "bad" word to air, the persons responsible for making the decisions as to what words to bleep will invariably overbleep to the point that bleeping may well

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9 the Supreme Court pointed out more than 60 years ago in *Cantwell v. Connecticut* 310 US 296, 310 (1940):

> To persuade others to his own point of view, the pleader . . . at times resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But people of this nation have ordained in light of history that in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

distract from the performance or message. Moreover, the costs associated with acquiring the "technology" and employing the "bleeper" will certainly persuade many broadcasters to avoid live coverage and live interviews entirely. And a "bleep" would not have solved the Bono problem. Anyone whose understanding of English was sufficient for him or her to have been offended by hearing "it's fucking brilliant" would subconsciously have inserted the offending word upon hearing "its [bleep]. . . ing brilliant." Technology can neither mitigate the impermissible chilling effect on protected speech emanating from the Order nor save the public from the evil of hearing an occasional bad word.

V. The Order Violates the Fifth Amendment

It is well established that in order for a regulation to satisfy the "due process" requirement of the Fifth Amendment, the regulation must be sufficiently clear and specific to give a reasonably prudent person, familiar with the conditions that the regulations are meant to address and the objectives that the regulations are meant to achieve, fair warning of what the regulation requires. *See Freeman United Coal Min. Co. v. Federal Mine Safety and Health Review Commission,* 108 F. 3d 358 (D.C. Cir 1997); *Walker Stone Co., Inc. v. Secretary of*

Cf. Cohen v. California, supra.

Labor, 156 F. 3d 1076 (10th Cir. 1998); *Bama Tomato Co. v. U.S. Dept. of Agriculture*, 112 F. 3d 1542 (11th Cir. 1997). The Commission's declaration that it will henceforth punish as "profane" the "'F-Word' and those words (or variants thereof) that are as highly offensive as the 'F-Word'," but that it will only identify what words fall into this category of *verborum prohibitorum* on a case by case basis, clearly does not satisfy the Fifth Amendment's fair notice requirement for regulations which impose criminal sanctions.

It is unquestionable that any determination of what words are "as highly offensive as the 'F-Word'" is highly subjective and will be highly dependent upon the decision maker's educational and cultural background, ethnicity, and even appreciation, or lack there of, of the richness of the English language. The only way that the Commission can set the stage for imposing sanctions against broadcasters for broadcasting "offensive words" which are not legally obscene, or even "indecent" under the definition of that term which was upheld by the Court in *Pacifica*, is to publish an actual index of *verborum prohibitorum.* While such a list would not begin to address the First Amendment problems with the Commission's Order that are discussed above, creation of such a list is the only way that the Commission can satisfy the "fair notice"

requirement of the Fifth Amendment.

VI. The Order Contravenes the Commission's Duty to Encourage and Foster Robust, Wide Open, Discussion and Debate

While justifying its Order by claiming that it has an obligation to protect children from exposure to offensive words (an obligation not found in the Communications Act), the Commission has ignored its primary obligation which is to encourage the sort of robust, wide open, discussion and debate which is essential to a free society. *See, Cantwell v. Connecticut, supra.* In fact, as public officials, Commissioners are sworn to "uphold and defend the Constitution." In exercising their responsibilities to uphold and defend the Constitution, and in obedience to the express prohibition against the Commission engaging in censorship, the Commission had an obligation to brace itself against the political winds kicked up by the original "Bono" ruling and to address the free speech issues raised by the controversy in a dispassionate and reasoned way. The Commission had the duty to balance the concerns of some members of the public and some members of Congress about exposure of children to "dirty words" against the chilling effect on the free exercise of expression that would result from absolute ban on the utterance of "dirty words" except late at night that the

Commission adopted. Reconsideration will afford the Commission to reflect upon its responsibilities to protect the rights of speakers, listeners and broadcasters and to back away from its ill considered decision to become the Ministry of Vice and Virtue.

Respectfully submitted,

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April 12, 2004

CERTIFICATE OF SERVICE

I, David Tillotson, do hereby certify that a copy of the foregoing Petition for Reconsideration has been sent via first class United States mail, postage pre-paid, this 12th day of April 2004, to:

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