

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of ) File No. EB-04-IH-0590  
)  
Complaints Against Various Television Station )  
Licensees Regarding the ABC Television )  
Network’s November 15, 2004, Broadcast of )  
“Monday Night Football” )

MEMORANDUM OPINION AND ORDER

Adopted: March 3, 2005

Released: March 14, 2005

By the Commission: Commissioner Copps issuing separate statement.

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we deny complaints alleging that various television station licensees that are affiliates of the ABC Television Network (“ABC”) aired indecent material during their broadcast of ABC’s “Monday Night Football” on November 15, 2004, at 9 p.m. Eastern Standard Time, in violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999. For the reasons discussed below, we conclude that the material in question does not violate the Commission’s indecency prohibition.

II. BACKGROUND

2. At 9:00 p.m. Eastern Standard Time, on November 15, 2004, as the introductory segment to the broadcast of the National Football League game between the Philadelphia Eagles and Dallas Cowboys, ABC aired a scene featuring Eagles wide receiver Terrell Owens and actress Nicollette Sheridan, appearing as her character in the ABC program “Desperate Housewives.” During the scene, Sheridan and Owens, who is fully suited for the game, are alone in the Eagles’ locker room. Sheridan, wearing only a towel, seeks to seduce Owens. After he rebuffs her advances, telling her that the game is about to start and that his team needs him, she drops her towel. The camera shows her from the back, nude from the waist up. The viewer cannot see her body below the waist. He responds, “Aw, hell, the team’s going to have to win without me” and she then leaps into his arms. The scene concludes with two other characters from “Desperate Housewives” watching the locker room encounter on their television, who remark how “desperate” Sheridan appears and then change the channel to the game, repeating the traditional Monday Night Football introduction, “Are you ready for some football?!” The game broadcast then commences.

3. Following ABC’s broadcast, the Commission received many complaints alleging that the “Monday Night Football” scene contained indecent material. The Commission subsequently reviewed a videotape of the broadcast.

### III. DISCUSSION

4. The Federal Communications Commission is authorized to license radio and television broadcast stations and is responsible for enforcing the Commission's rules and applicable statutory provisions concerning the operation of those stations. The Commission's role in overseeing program content is very limited. The First Amendment to the United States Constitution and section 326 of the Communications Act of 1934, as amended, (the "Act") prohibit the Commission from censoring program material and from interfering with broadcasters' freedom of expression.<sup>1</sup> The Commission does, however, have the authority to enforce statutory and regulatory provisions restricting indecency, profanity and obscenity. Specifically, it is a violation of federal law to broadcast obscene, profane or indecent programming. Title 18 of the United States Code, Section 1464 prohibits the utterance of "any obscene, indecent or profane language by means of radio communication."<sup>2</sup> In addition, section 73.3999 of the Commission's rules provides that radio and television stations shall not broadcast obscene material at any time, and, consistent with a subsequent statute and court case,<sup>3</sup> shall not broadcast indecent material during the period 6 a.m. through 10 p.m.<sup>4</sup>

5. Any consideration of government action against allegedly indecent programming must take into account the fact that such speech is protected under the First Amendment.<sup>5</sup> The federal courts consistently have upheld Congress's authority to regulate the broadcast of indecent speech, as well as the Commission's interpretation and implementation of the governing statute.<sup>6</sup> Nevertheless, the First Amendment is a critical constitutional limitation that demands that, in indecency determinations, we proceed cautiously and with appropriate restraint.<sup>7</sup>

6. The Commission defines indecent speech as language that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium.<sup>8</sup>

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<sup>1</sup> U.S. CONST., amend. I; 47 U.S.C. § 326 (2002).

<sup>2</sup> 18 U.S.C. § 1464.

<sup>3</sup> Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949 (1992) (setting the current safe harbor of 10 p.m. to 6 a.m. for the broadcast of indecent material); *see also Action for Children's Television v. FCC*, 58 F. 3d 654 (D.C. Cir. 1995) (*en banc*) ("ACT IIP"), *cert. denied*, 516 U.S. 1072 (1996) (affirming restrictions prohibiting the broadcast of indecent material between the hours of 6 a.m. and 10 p.m.).

<sup>4</sup> *See* 47 C.F.R. § 73.3999. Section 73.3999 implements the Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949 (1992).

<sup>5</sup> U.S. CONST., amend. I; *see Action for Children's Television v. FCC*, 852 F.2d 1332, 1344 (D.C. Cir. 1988) ("ACT P").

<sup>6</sup> 18 U.S.C. § 1464; *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). *See also ACT I*, 852 F.2d at 1339; *Action for Children's Television v. FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 914 (1992) ("ACT II"); *ACT III*, 58 F. 3d 654.

<sup>7</sup> *ACT I*, 852 F.2d at 1344 ("Broadcast material that is indecent but not obscene is protected by the First Amendment; the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what people may say and hear."); *id.* at 1340 n.14 ("the potential chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy").

<sup>8</sup> *Infinity Broadcasting Corporation of Pennsylvania*, Memorandum Opinion and Order, 2 FCC Rcd 2705 (1987)

Indecency findings involve at least two fundamental determinations. First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition—that is, the material must describe or depict sexual or excretory organs or activities. . . . Second, the broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast medium.<sup>9</sup>

7. In our assessment of whether broadcast material is patently offensive, “the *full context* in which the material appeared is critically important.”<sup>10</sup> Three principal factors are significant to this contextual analysis: (1) the explicitness or graphic nature of the description; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material appears to pander or is used to titillate or shock.<sup>11</sup> In examining these three factors, we must weigh and balance them to determine whether the broadcast material is patently offensive because “[e]ach indecency case presents its own particular mix of these, and possibly, other factors.”<sup>12</sup> In particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent,<sup>13</sup> or, alternatively, removing the broadcast material from the realm of indecency.<sup>14</sup>

8. We conclude that the material in question is not patently offensive, and thus, not indecent. In particular, the “Monday Night Football” segment, although sexually suggestive, is not graphic or explicit.<sup>15</sup> Owens is fully dressed throughout the segment, and, with the exception of a moment when her bare back is exposed to the audience, Sheridan is at all times fully covered with a towel. No sexual or excretory organs are shown or described, and no sexual activities are explicitly depicted or described. Furthermore, the scene where Sheridan drops her towel and jumps into Owens’s

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(subsequent history omitted) (citing *Pacifica Foundation*, Memorandum Opinion and Order, 56 FCC 2d 94, 98 (1975), *aff’d sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)).

<sup>9</sup> *Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency (“Indecency Policy Statement”)*, 16 FCC Rcd 7999, 8002, ¶¶ 7-8 (2001) (emphasis in original).

<sup>10</sup> *Id.* at 8002, ¶ 9 (emphasis in original).

<sup>11</sup> *Id.* at 8002-15, ¶¶ 8-23.

<sup>12</sup> *Id.* at 8003, ¶ 10.

<sup>13</sup> *Id.* at 8009, ¶ 19 (citing *Tempe Radio, Inc (KUPD-FM)*, Notice of Apparent Liability, 12 FCC Rcd 21828 (Mass Media Bur. 1997) (forfeiture paid) (extremely graphic or explicit nature of references to sex with children outweighed the fleeting nature of the references); *EZ New Orleans, Inc. (WEZB(FM))*, Notice of Apparent Liability, 12 FCC Rcd 4147 (Mass Media Bur. 1997) (forfeiture paid) (same)).

<sup>14</sup> *Indecency Policy Statement*, 16 FCC Rcd at 8010, ¶ 20 (“the manner and purpose of a presentation may well preclude an indecency determination even though other factors, such as explicitness, might weigh in favor of an indecency finding”).

<sup>15</sup> *Complaints Against Various Broadcast Licensees Regarding Their Airing of the UPN Network Program “Buffy the Vampire Slayer” on November 20, 2001*, Memorandum Opinion and Order, 19 FCC Rcd 15995, 15998 (2004) (“*Buffy the Vampire Slayer Order*”).

arms is brief. Although the scene apparently is intended to be titillating, it simply is not graphic or explicit enough to be indecent under our standard.<sup>16</sup>

#### IV. ORDERING CLAUSE

9. ACCORDINGLY, IT IS ORDERED, that the complaints alleging that various television station licensees that are affiliates of the ABC Television Network aired indecent material during their broadcast of ABC's "Monday Night Football" on November 15, 2004, in violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999, ARE HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>16</sup> See *NBC Telemundo License Co.*, Memorandum Opinion and Order, FCC 04-235 at ¶ 7 (rel. Nov. 23, 2004) (scenes from "Coupling" program not indecent; *Buffy the Vampire Slayer* Order, 19 FCC Rcd 15995, 15998 (2004) (scene from "Buffy the Vampire Slayer" program not indecent).

**STATEMENT OF COMMISSIONER MICHAEL J. COPPS**

*Re: Complaints Against Various Television Station Licensees Regarding the ABC Television Network's November 15, 2004, Broadcast of "Monday Night Football"*

Although the Commission finds that this broadcast does not violate 18 U.S.C. §1464, it does raise the issue of broadcasters acting responsibly when deciding what to air during the hours when children are likely to be in the audience. At a time when recent surveys show that a substantial majority of parents are very concerned that children are being exposed to too much inappropriate content, I would hope that television broadcasters would go the extra mile in exercising self-discipline when airing or promoting programming that may not be appropriate for younger viewers. There wasn't much self-discipline in this particular promotion. As stewards of the public airwaves, broadcasters can and should do better.