

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

In the Matter of)	
)	
WBDC BROADCASTING, INC.)	Facility ID No. 30576
)	File No. EB-03-IH-0710
Licensee of Station WBDC-TV)	
Washington, D.C.)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: February 14, 2005

Released: February 25, 2005

By the Commission:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we deny a complaint filed by the Parents Television Council (“PTC”) alleging that WBDC Broadcasting, Inc., licensee of Station WBDC-TV, Washington, D.C., aired an episode of the program *Angel* in violation of the federal restrictions regarding the broadcast of indecent material.¹

2. PTC alleges that WBDC-TV and other television licensees affiliated with The WB Television Network (“WB Affiliates”) broadcast indecent material on November 19, 2003, during the *Angel* program, which was broadcast by WBDC-TV at 9:00 p.m. Eastern Standard Time. PTC complains about several scenes during the episode, which involves, *inter alia*, a rivalry between the program’s characters Angel and Spike.² After review of the Complaint and a videotape of the subject episode provided by PTC, we find that the material is not “patently offensive,” as defined by Commission precedent, and therefore does not violate our indecency prohibition.

II. DISCUSSION

3. 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

¹ See 18 U.S.C. § 1464 (2002); 47 C.F.R. § 73.3999 (2002).

² Letter from Lara Mahaney, Parents Television Council, to David H. Solomon, Chief, Enforcement Bureau, Federal Communications Commission, dated December 4, 2003, at 2 (“Complaint”). A copy of the Complaint is provided as an Attachment.

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.³ The Commission does, however, have the authority to enforce statutory and regulatory provisions restricting obscenity, indecency and profanity. Specifically, it is a violation of federal law to broadcast obscene, indecent or profane 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.”⁴ Consistent with a subsequent statute and court case,⁵ section 73.3999 of the Commission’s rules provides that radio and television stations shall not broadcast obscene material at any time, and shall not broadcast indecent material during the period 6 a.m. through 10 p.m..⁶ The Commission may impose a monetary forfeiture, pursuant to section 503(b)(1) of the Act,⁷ upon a finding that a licensee has broadcast obscene, indecent or profane material in violation of 18 U.S.C. § 1464 and section 73.3999 of the rules.

A. Indecency Analysis

4. Any consideration of government action against allegedly indecent programming must take into account the fact that such speech is protected under the First Amendment.⁸ The federal courts consistently have upheld Congress’s authority to regulate the broadcast of indecent speech, as well the Commission’s interpretation and implementation of the governing statute.⁹ Nevertheless, the First Amendment is a critical constitutional limitation that demands that, in such determinations, we proceed cautiously and with appropriate restraint.¹⁰

5. 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.¹¹

³ U.S. CONST., amend. I; 47 U.S.C. § 326 (2002).

⁴ 18 U.S.C. § 1464.

⁵ Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949 (1992), *as modified by Action for Children’s Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (*en banc*), *cert. denied*, 516 U.S. 1043 (1996) (“*ACT III*”).

⁶ *See* 47 C.F.R. § 73.3999.

⁷ *See* 47 U.S.C. § 503(b)(1). *See also* 47 U.S.C. § 312(a)(6) (authorizing license revocation for indecency violations).

⁸ U.S. CONST., amend. I; *See Action for Children’s Television v. FCC*, 852 F.2d 1332, 1344 (D.C. Cir. 1988) (“*ACT I*”).

⁹ *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*.

¹⁰ *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 the people may say and hear.”); *id.* at 1340 n.14 (“the potentially chilling effect of the FCC’s generic definition of indecency will be tempered by the Commission’s restrained enforcement policy.”).

¹¹ *Infinity Broadcasting Corporation of Pennsylvania*, Memorandum Opinion and Order, 2 FCC Rcd 2705

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.¹²

6. The material aired during the *Angel* program depicts sexual activities and, therefore, warrants further scrutiny to determine whether it is patently offensive as measured by contemporary community standards. For the reasons set forth below, however, we conclude that the material is not patently offensive, and therefore, not indecent.

7. In making indecency determinations, the Commission has indicated that the “*full context* in which the material appeared is critically important,”¹³ and has articulated three “principal factors” for its analysis: “(1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; (3) *whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.*”¹⁴ 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.”¹⁵ In particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent,¹⁶ or, alternatively, removing the broadcast material from the realm of indecency.¹⁷

8. PTC complains about two scenes – several minutes apart-- during the November 19, 2003, episode of *Angel*. We have attached PTC’s Complaint which summarizes these scenes

(1987) (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)).

¹² *Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999, 8002 (2001) (“*Indecency Policy Statement*”) (emphasis in original).

¹³ *Id.* (emphasis in original). In *Pacifica*, the Court “emphasize[d] the narrowness of [its] holding and noted that under the Commission rationale that it upheld, “context is all-important.” 438 U.S. at 750.

¹⁴ *Indecency Policy Statement*, 16 FCC Rcd at 8003 (emphasis in original).

¹⁵ *Id.*

¹⁶ *Id.* at 8009 (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).

¹⁷ *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”).

from the subject episode. After review of the Complaint and the videotape of the episode provided by PTC, we conclude that the material is not “patently offensive” as defined by Commission precedent, because the cited material is not sufficiently graphic or explicit. Both scenes are brief. Neither scene at issue contains any nudity and neither is sufficiently graphic or explicit to render the program patently offensive as measured by contemporary community standards.¹⁸ Consequently, we conclude that the material in question is not indecent.

III. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, that the Complaint alleging that WBDC Broadcasting, Inc., licensee of Station WBDC-TV, Washington, DC, and other WB Television Network affiliates, broadcast indecent material during the *Angel* program on November 19, 2003, in violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999, is hereby DENIED.

10. IT IS FURTHER ORDERED, that a copy of this *Memorandum Opinion and Order* shall be sent by Certified Mail Return Receipt Requested to the licensee of Station WBDC-TV, WBDC Broadcasting, Inc., 2121 Wisconsin Avenue, N.W., Suite 350, Washington, D.C., 20007, and to the Parents Television Council, 707 Wilshire Boulevard, Los Angeles, California 90017.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁸ See, e.g., *KSAZ License, Inc. (KSAZ(TV))*, Memorandum Opinion and Order, 19 FCC Rcd 15999 (2004); *Complaint 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 (2004).