

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

In the Matter of	)	
	)	
Various Complaints Regarding CNN's Airing of	)	File No. EB-04-IH-0329
the 2004 Democratic National Convention	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 17, 2005**

**Released: March 17, 2005**

By the Chief, Enforcement Bureau:

**I. INTRODUCTION**

1. In this *Memorandum Opinion and Order* (“*MO&O*”), we deny complaints alleging that on July 29, 2004, CNN aired live program material during the 2004 Democratic National Convention (“DNC”) that violated federal restrictions regarding the broadcast of obscene, indecent and profane material. As set forth below, the Commission has indicated that it does not regulate indecency and profanity on cable and satellite subscription services, so we deny that aspect of the complaints. Moreover, nothing in the record indicates that the material at issue meets the legal test for obscenity, so we also deny that aspect of the complaints.

**II. BACKGROUND**

2. The complaints assert that at the conclusion of Senator John Kerry’s address to the DNC, CNN, which is available through cable or satellite service,<sup>1</sup> carried a feed from a microphone located near members of the event’s support staff. The complaints allege that this microphone captured one staff member who, upset by problems with the balloon drop that was supposed to follow Senator Kerry’s speech, uttered the “F-word.”<sup>2</sup>

**III. DISCUSSION**

3. The Commission does not regulate cable indecency. In this regard, the Commission recently stated: “Indecency regulation is only applied to broadcast services,” not cable.<sup>3</sup> In declining to review

<sup>1</sup> “Unlike broadcast television, which sends over-the-air signals, cable television operates by transmitting programs to subscribers through coaxial cables or wires.” *Cruz v. Ferre*, 755 F.2d 1415, 1419 n.4 (11<sup>th</sup> Cir. 1985) (citations omitted). Satellite television is transmitted via “over-the-air signals” but, like cable, is available only to subscribers. See *Subscription Video*, Report and Order, 2 FCC Rcd 1001, 1005, ¶ 32 (1987) (subscription-based satellite services are not “broadcasting” as defined by the Communications Act), *aff’d sub nom. National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988).

<sup>2</sup> Specifically, the complainants allege that the staff member stated “goddammit...what the fuck are you guys doing up there.”

<sup>3</sup> See *Violent Television Programming and Its Impact on Children*, Notice of Inquiry, 19 FCC Rcd 14394, 14403, ¶ 21 (2004) (“*Violence NOF*”).

complaints regarding cable indecency, the Commission has said that cable services “are not broadcast services, but subscription-based services, which do not call into play the issue of indecency.”<sup>4</sup> Under 18 U.S.C. § 1464, the Commission has express statutory authority to impose sanctions for the broadcast of “any obscene, indecent, or profane language by means of radio communication.”<sup>5</sup> As the Commission recently stated: “. . . the criminal code restriction on indecency applies only to ‘means of radio communication’ and therefore not cable communications.”<sup>6</sup> Thus, the Commission does not regulate cable indecency. More generally, the Commission also has made clear that indecency restrictions do not apply to other subscription services: “[T]his case, which involves subscription as opposed to conventional broadcast service – does not call into play the issue of indecency.”<sup>7</sup>

4. We also deny the complaints to the extent that they allege that CNN’s broadcast of the DNC is obscene. The three-part obscenity test set forth in *Miller v. California* requires that (1) an average person, applying contemporary community standards, would find that the material, as a whole, appeals to the prurient interest; (2) the material depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable law; and (3) the material, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>8</sup> This test is designed “to isolate ‘hard core’ pornography from expression protected by the First Amendment.”<sup>9</sup> Nothing in the record indicates that CNN’s broadcast coverage of the DNC depicts the kind of “hard core pornography” covered by *Miller*, or that, *as a whole*, it appeals to the prurient interest or lacks serious literary, artistic, political, or scientific value.

5. Finally, although the Commission does not regulate cable indecency, we note that the Act provides a number of tools, available through current technology, for those who wish to selectively block unwanted television programming. As the Commission has noted, “[f]irst, as section 640 requires, a cable operator must block programming, using any means, if such a request is made by a particular

---

<sup>4</sup> *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Memorandum Opinion and Order, 17 FCC Rcd 23246, 23328, ¶ 213 (2002) (subsequent history omitted).

<sup>5</sup> 18 U.S.C. § 1464 (“Whoever utters any obscene, indecent, or profane language by means of radio communications shall be fined under this title or imprisoned not more than two years, or both.”); *compare id.* with 18 U.S.C. § 1468(a) (“Whoever knowingly utters any obscene language or distributes any obscene matter by means of cable television or subscription services on television, shall be punished by imprisonment for not more than 2 years or by a fine in accordance with this title, or both.”). *See also* Telecommunications Act of 1992, Pub. L. No. 102-356, § 16a, 106 Stat. 949, 954 (1992) (requiring Commission to implement indecency time of day restrictions on “radio or television broadcast station[s]”) (emphasis added); 47 C.F.R. § 73.3999 (applying indecency restrictions to broadcast but not to cable).

<sup>6</sup> *Violence NOI*, 19 FCC Rcd at 14403, n.45 (quoting 18 U.S.C. § 1464). The Commission also noted there that its rules regarding section 1464 do not apply to cable. The Commission’s authority over profanity and indecency derives from the same criminal statute and Commission rules. Because the Commission’s authority over profanity is coextensive with its authority over indecency, the limits on its authority over indecency on cable and satellite services also apply to its authority over profanity in the same circumstances.

<sup>7</sup> *See Harriscope of Chicago, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 757, 760 n.2 (1988) (subsequent history omitted) (indecency restrictions not applied to subscription service provided by television licensee; “Consistent with existing case law, the Commission does not impose regulations regarding indecency on services lacking the indiscriminate access to children that characterizes broadcasting.”); *see also Litigation Recovery Trust*, Memorandum Opinion and Order, 17 FCC Rcd 21852, 21856, ¶ 8 (2002) (indecency restrictions not applicable to satellite programming provided to hotels; “[s]uch subscription-based services do not call into play the issue of indecency.”).

<sup>8</sup> *Miller v. California*, 413 U.S. 15, 24 (1973).

<sup>9</sup> *Id.* at 29.

subscriber. Second, a cable subscriber may obtain a lock-box from the local cable operator if he or she wants to selectively block unwanted material.”<sup>10</sup> Satellite subscription services have similar tools.<sup>11</sup>

#### IV. ORDERING CLAUSE

6. Accordingly, IT IS ORDERED, that the complaints filed against CNN’s airing of the 2004 Democratic National Convention are hereby DENIED.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon  
Chief, Enforcement Bureau

---

<sup>10</sup> *Implementation of Section 505 of the Telecommunications Act of 1996*, Order, 16 FCC Rcd 20915, 20918, ¶ 9 (2001); see 47 U.S.C. §§ 544(d)(2), 560. For further information on how consumers can restrict access to unwanted television programming, see <http://www.fcc.gov/parents/>.

<sup>11</sup> See <http://www.directv.com/DTVAPP/learn/LocksLimits.dsp>;  
[http://www.dishnetwork.com/content/programming/parental\\_control/index.shtml](http://www.dishnetwork.com/content/programming/parental_control/index.shtml).