

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

In the Matter of)	
)	File Nos. EB-03-IH-0466, EB-03-IH-0467
WBDC Broadcasting, Inc.)	
)	
Licensee of Station WBDC-TV)	Facility ID No. 30576
Washington, D.C.)	

MEMORANDUM OPINION AND ORDER

Adopted: October 1, 2004

Released: November 23, 2004

By the Commission: Commissioners Abernathy and Adelstein concurring and issuing a joint statement, Commissioners Capps and Martin dissenting and issuing separate statements.

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we deny two complaints filed by the Parents Television Council (“PTC”) alleging that WBDC Broadcasting, Inc., the licensee of Station WBDC-TV, Washington, D.C., aired indecent material on October 3 and 10, 2002, at approximately 9:30 p.m. Eastern Standard Time, during episodes of the WB Television Network (“WB”) program “Off Centre.”¹ After review of the complaints and the videotapes of the subject episodes 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

2. 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.² 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.”³ Consistent with asubsequent

¹ See Letters from Lara Mahaney, Parents Television Council, to David H. Solomon, Chief, Enforcement Bureau, Federal Communications Commission, dated August 22, 2003 (Attachment) (collectively, the “Complaints”). PTC seeks enforcement action against not only WBDC Broadcasting, Inc., but also all other television licensees affiliated with WB that aired the episodes in question. By letter dated August 13, 2004, the Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission sent a letter of inquiry to WB, which filed a response by letter dated August 20, 2004.

² U.S. CONST., amend. I; 47 U.S.C. § 326 (2002).

³ 18 U.S.C. § 1464.

statute and court case,⁴ 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.⁵ The Commission may impose a monetary forfeiture, pursuant to Section 503(b)(1) of the Act,⁶ 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

3. Any consideration of government action against allegedly indecent programming must take into account the fact that such speech is protected under the First Amendment.⁷ 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.⁸ Nevertheless, the First Amendment is a critical constitutional limitation that demands that, in such determinations, we proceed cautiously and with appropriate restraint.⁹

4. 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.¹⁰

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.¹¹

5. The complained-of material contained in the October 3 and 10 episodes of the "Off Centre"

⁴ 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").

⁵ See 47 C.F.R. § 73.3999. See also *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards,"* Memorandum Opinion and Order, 19 FCC Rcd 4975, para.14 (2004).

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

⁷ U.S. CONST., amend. I; See *Action for Children's Television v. FCC*, 852 F.2d 1332, 1344 (D.C. Cir. 1988) ("ACT I").

⁸ *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*.

⁹ *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 potentially chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy.").

¹⁰ *Infinity Broadcasting Corporation of Pennsylvania*, Memorandum Opinion and Order, 2 FCC Rcd 2705 (1987) (subsequent history omitted) (citing *Pacifica Foundation*, 56 FCC 2d 94, 98 (1975), *aff'd sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)).

¹¹ *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).

program describes excretory activities and sexual organs, respectively, 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.

6. In making indecency determinations, the Commission has indicated that the “*full context* in which the material appeared is critically important,”¹² 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.*”¹³ 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.”¹⁴ In particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent,¹⁵ or, alternatively, removing the broadcast material from the realm of indecency.¹⁶

7. After reviewing the transcripts and videotapes of the episodes provided by PTC, we conclude that, although each episode presents a close case, the complained-of material is not sufficiently explicit or graphic to be indecent. The October 3 episode focuses upon a character’s dilemma in stopping up the toilet at the apartment of a woman that he has just met and with whom he hopes to have a relationship. The dialogue between the characters includes sustained and repeated references to excretory activities, with bowel movements the constant theme of the program, and thus meets the second prong of our indecency analysis. Under the third prong, the cumulative effect of such repeated references appears to render the material shocking, titillating, or pandering to the viewing audience. We conclude that our findings with respect to these two factors are outweighed in this instance by the first component of our analysis, lack of explicit or graphic depiction or description, particularly because the broadcast does not depict excretory organs or activities and the specific words used are not sufficiently explicit or graphic to be indecent in context. Consequently, we conclude that the material, in context, is not patently offensive as measured by contemporary community standards for the broadcast medium and, therefore, not indecent.¹⁷

¹² *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.

¹³ *Indecency Policy Statement*, 16 FCC Rcd at 8003 (emphasis in original).

¹⁴ *Id.*

¹⁵ *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).

¹⁶ *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”).

¹⁷ The “contemporary standards for the broadcast medium” criterion is that of the average broadcast listener and with respect to Commission decisions, does not encompass any particular geographic area. *See id.*, 16 FCC Rcd at 8002, ¶ 8.

8. The complained-of material in the October 10 episode is a scene in which two of the male characters are in an elevator with a young woman and a urologist who has treated one of the men. The scene involves the young man's embarrassment at the urologist's references to the nature of the man's genital problem that was the subject of the treatment. The dialogue between the characters includes sustained and repeated references to the young man's sexual organ, and thus meets the second prong of our indecency analysis. Under the third prong, the cumulative effect of such repeated references appear to render the material shocking, titillating, or pandering to the viewing audience. As in the case of the October 3 episode, we conclude that our findings with respect to these two factors are outweighed in this instance by the first component of our analysis, lack of explicit or graphic depiction or description, particularly because the broadcast does not depict any sexual organ and the specific words used are not sufficiently explicit or graphic to be indecent in context. Consequently, we conclude that the material, in context, is not patently offensive as measured by contemporary community standards for the broadcast medium and, therefore, not indecent.

III. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, that the Complaints alleging that WBDC Broadcasting, Inc. aired indecent material over Station WBDC-TV during the "Off Centre" programs broadcast on October 3 and 10, 2002, in violation of 18 U.S.C. §1464 and 47 C.F.R. § 73.3999, ARE 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 Parents Television Council, 325 South Patrick Street, Alexandria, Virginia 22314, to WBDC Broadcasting, Inc., licensee of Station WBDC-TV, 2121 Wisconsin Avenue, N.W., #350, Washington, D.C. 20007, and to Arthur H. Harding, Esquire, counsel for the WB Television Network, Fleischman and Walsh, L.L.P., 1919 Pennsylvania Avenue, N.W., Suite 600, Washington, D.C. 20006.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

Attachment A

Bringing Responsibility To The Entertainment Industry



West Coast PTC Office
 707 Wilshire Blvd., #2075 • Los Angeles, CA 90017
 Tel (213) 629-9255 • Fax (213) 629-9254
 (800) TV-COUNTS

East Coast PTC Office
 325 South Patrick Street • Alexandria, VA 22314
 Tel (703) 684-1699 • Fax (703) 683-9736

FCC ENFORCEMENT BUREAU

2003 OCT -8 A 9:06

INVESTIGATIONS &
 TELEVISION

August 22, 2003

David Solomon
 FCC Enforcement Bureau
 445 12th St. SW
 Washington, DC 20554

Dear Mr. Solomon,

On behalf of the Parents Television Council and its over 800,000 members, I am filing an indecency complaint against the WB network television program *Off Centre*. The episode that contained the indecent material originally aired at 9:30 p.m. ESP/PT & 8:30 p.m. CT/MT on October 3, 2002. This program was seen in homes across the country on the WB network, and in Washington, D.C. the program appeared on WBDC-TV.

If the content is found to be indecent, then Notice of Apparent Liability should be levied against each affiliate that aired the indecent broadcast.

A transcript of the indecent segment follows on a separate page. I would be happy to provide you with a videotape of this episode to further demonstrate the indecency of this episode.

I look forward to your timely judgment and response.

Sincerely,

Lara Mahaney
 Director of Corporate and Entertainment Affairs
 Parents Television Council

Cc:
 Chairman Powell
 Commissioner Abernathy
 Commissioner Copps
 Commissioner Martin
 Commissioner Adelstein

Sen. Hollings
 Sen. McCain
 Sen. Brownback
 Sen. Dorgan
 Sen. Hutchinson
 Sen. Smith
 Sen. Shelby

Rep. Tauzin
 Rep. Dingell
 Rep. Upton
 Rep. Markey
 Rep. Shimkus
 Rep. Greenwood



Partial Transcript of:

OFF CENTRE, WB, 9:30 p.m. ESP/PT & 8:30 p.m. CT/MT

Air Date: October 10, 2002

- o Euan: "Well, you've timed your breakup perfectly because Mike has been crapping up a storm. Honestly, he's taking this high fiber stuff –cilium seed?"
- o Carmen: "Hey, would you walk me back to our building? I could give you something to suck on." (Mike's tongue is pierced and sore.)
- o Carmen: "You know what I like about you, Mike? You're funny. You're just the kind of guy I can hang out with in sweats and a T shirt."

Mike: "Yeah I am. Could it be a short little T-shirt?"

Carmen: "You might see some underboob."

Mike: "My second favorite part of the boob." (she leaves for a minute; and Mike runs to the guest bathroom, claspng his legs together; he obviously has to go to the washroom.

- o Mike, after finishing an implied defecation as he looks into the toilet bowl and smiles: "Nice." He flushes, then looks and notices that the toilet is starting to overflow.

"Go down. Whoa, go down, no, come on buddy, no go down. Please. Come on, you wouldn't do this to your old dad, huh?" He then screams in horror as the toilet overflows.

- o Later, Mike finds a large amount of feces in his toilet and wonders if Carmen had left it in retaliation for overflowing her toilet. "Carmen must've found it. Great, now she'll always think of me as the guy who left the giant one in her toilet."

Mike: "You're right, you're right. And I know what it is. Carmen climbed up the fire escape, into our window and grunted out some payback in our toilet!"

Chau: "She is pure evil. And so freaking hot!"

- o Mike and Euan are wondering who was in their bathroom when Liz, Mike's ex-girlfriend, enters.

Liz: "What I just came to drop off my key."

Mike: "Uh-huh. Did you happen to drop off anything else recently?"

Liz: "No....I'm sorry! I had a job interview around the corner, and I really had to go because of the cilium seed, and it wouldn't flush..."



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Director of Corporate and Entertainment Affairs
Parents Television Council

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Commissioner Adelstein

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Sen. McCain
Sen. Brownback
Sen. Dorgan
Sen. Hutchison
Sen. Smith
Sen. Shelby

Rep. Teuzin
Rep. Dingell
Rep. Upton
Rep. Markey
Rep. Shimkus
Rep. Greenwood



Partial Transcript of:

OFF CENTRE, W/B, 9:30 p.m. ESP/PT & 8:30 p.m. CT/MT

Air Date: October 10, 2002

- o Mike and Euan are in an elevator. A young woman and Dr. Wasserman, their urologist, enter the elevator.

Euan: "Dr. Wasserman!"

Mike: "It's pee pee doc!"

Dr. Wasserman: "Mike, Euan, young woman. How are those penises? I'm speaking to the gentlemen now."

Euan: "Smashing."

Mike: "Never better."

Euan: "Dr. Wasserman here is our urologist."

Mike: "Not that we would need an urologist."

Dr. Wasserman: "Mike, has the, uh, redness gone away? And what about the flaking and peeling? Are you still using the lotion twice a day?"

Mike: "Yeah, yeah. Sometimes more. I broke up with my girlfriend."

Dr. Wasserman: "And you Euan, how's uh, old 'Snuffleupagus,' huh? I hope you remember that the uncircumcised penis poses challenges to hygiene. I mean, smegma (*NOTE BELOW) may be a funny word, but it's no laughing matter, believe you me." (The girl, disgusted, gets off at the next stop)

Euan: "...So doc, what are you doing here?"

Dr. Wasserman: "I just moved in, I'm now a proud resident of the Hadley on Centre Street...Ever since my wife's death, you know, the house was just too hard to keep clean."

Mike: "Kinda like Euan's penis."

Dr. Wasserman: "Well said, well said. Although I can't really compare my house to Euan's penis. Because as far as I know, my wife didn't leap to her death from the roof of Euan's penis. Also our house was quite large."

- o Dr. Wasserman: "I think it's very important for a man your age to self examine. Roll the testicle like a grape, but don't squeeze too hard or you'll make wine (laughs)."

(*NOTE) According to *The American Heritage® Dictionary of the English Language: Fourth Edition, 2000*: Smegma is defined as "a sebaceous secretion, especially the cheesy secretion that collects under the prepuce or around the clitoris."

**JOINT STATEMENT OF COMMISSIONERS
KATHLEEN Q. ABERNATHY AND JONATHAN S. ADELSTEIN**

Re: In the Matter of WBDC Broadcasting, Inc., Licensee of Station WBDC-TV, Washington, D.C., File Nos. EB-03-IH-0466, EB-03-IH-0467; Facility ID No. 30576

Re: Complaints against Fox Television Stations, Inc. Regarding Its Broadcast of the "Keen Eddie" Program on June 10, 2003, File No. EB-03-IH-0324

Balancing First Amendment protections with our restriction on indecency requires a careful, measured approach that does not infringe upon fundamental constitutional rights. We have had to review many programs, which, as parents, we certainly would not want our children to watch. Yet, whether a program is suitable for our children is not the standard that as Commissioners of this agency we must apply. Certainly, there is a great deal of material that is not directed towards children and that many may find objectionable or in bad taste, yet the material does not rise to the level of being indecent. The programs in these complaints fit within that category. As other radio and television cases demonstrate, we have not shied away from enforcing restrictions on indecency when the matter at issue does violate our rules. We are, however, compelled by the Constitution not to overreach our limited authority in this area and impose our taste and personal judgments on the rest of America. If we overstep our authority, we run the risk of having our limited authority curtailed forever. As parents and Commissioners, we have carefully applied the law with the long-term sustainability of our enforcement authority in mind.

**DISSENTING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: WBDC Broadcasting, Inc., Licensee of Station WBDC-TV, Washington, DC

I disagree with the decision not to impose a fine against this broadcaster for violating the indecency statute. If analogous dialogue had occurred on a radio broadcast, I believe the Commission, under its existing precedent, would have found the program to be indecent. We must ensure that we do not impose a different standard for television than for radio.

**DISSENTING STATEMENT OF
COMMISSIONER KEVIN J. MARTIN**

*Re: WBDC Broadcasting, Inc., Licensee of Station WBDC-TV, Washington, D.C., Memorandum
Opinion and Order, October 01, 2004*

This Order acknowledges that one of the shows in question contains “sustained and repeated references” to excretory activities which are “the constant theme of the program,” and that “the cumulative effect of such repeated references appears to pander to a vulgar interest.” The Order similarly acknowledges that another show contains “sustained and repeated references” to sexual organs, and that “the cumulative effect of such repeated references appears to pander to a vulgar interest.” Yet, the Order concludes neither show is indecent. This decision appears to be inconsistent with our precedent. In the past, if similar references, in similar contexts, have been made on radio shows, the Commission has fined the radio station. I believe the Commission should apply the same standard to television and radio broadcasts.