

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

In the Matter of)
)
 Complaint Against Various) File No. EB-03-IH-0407
 Broadcast Licensees)
 Regarding Their Airing Of)
 The UPN Network Program “Buffy)
 the Vampire Slayer” on November 20, 2001)

MEMORANDUM OPINION AND ORDER

Adopted: August 4, 2004

Released: August 9, 2004

By the Commission:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*,¹ we deny the complaint received from the Parents Television Council (“PTC”), which alleged that various television station licensees, airing UPN programming, including specifically Station WDCA(TV), Washington, DC, broadcast the “Buffy the Vampire Slayer” program on November 20, 2001, in violation of the federal restrictions regarding the broadcast of indecent material.²

II. BACKGROUND

2. The complaint, filed August 22, 2003, alleges that at 8:00 p.m. Eastern/Pacific time, and 7:00 p.m. Central time, the licensees aired an episode of the “Buffy the Vampire Slayer” program that contained allegedly indecent material. According to the complaint, the episode depicted the characters Buffy and Spike fighting one another before engaging in what is alleged in the complaint to be sexual intercourse.³ PTC provided a videotape of the program.

¹ The Enforcement Bureau has referred this matter to the full Commission pursuant to Section 0.5(c) of the Rules. 47 C.F.R. § 0.5(c)(2002). This *Memorandum Opinion and Order* denies a complaint the Commission received concerning broadcasts of this program.

² See 18 U.S.C. § 1464 (2002), and 47 C.F.R. § 73.3999 (2002).

³ See Letter to David Solomon, Chief, Enforcement Bureau, from Lara Mahaney, Director of Corporate and Entertainment Affairs, Parents Television Council, dated August 22, 2003 (“*Complaint*”). The *Complaint* specifically alleged that Station WDCA, Washington, D.C., aired the program in question.

III. 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 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.⁴ The Commission does, however, have the authority to enforce statutory and regulatory provisions restricting indecency and obscenity. Specifically, it is a violation of federal law to broadcast obscene 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."⁵ 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,⁶ shall not broadcast indecent material during the period 6 a.m. through 10 p.m.⁷

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 as the Commission's interpretation and implementation of the governing statute.⁹ Nevertheless, the First Amendment is a critical constitutional limitation that demands that, in indecency determinations, we proceed cautiously and with appropriate restraint.¹⁰

⁴ U.S. CONST., amend. I; 47 U.S.C. § 326 (2002).

⁵ 18 U.S.C. § 1464.

⁶ 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 III"), *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.).

⁷ See 47 C.F.R. § 73.3999.

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 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.

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

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

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

In our assessment of whether broadcast material is patently offensive, “the *full context* in which the material appeared is critically important.”¹³ 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.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

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”).

¹¹ *Infinity Broadcasting Corporation of Pennsylvania*, 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)).

¹³ *Indecency Policy Statement*, 16 FCC Rcd 7999, 8002, ¶¶ 7-8 (2001) (emphasis in original).

¹⁴ *Id.* at 8002, ¶ 9 (emphasis in original).

¹⁴ *Id.* at 8002-15, ¶¶ 8-23.

¹⁵ *Id.* at 8003, ¶ 10.

¹⁶ *Id.* at 8009, ¶ 19 (citing *Tempe Radio, Inc (KUPD-FM)*, 12 FCC Rcd 21828 (MMB 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))*, 12 FCC Rcd 4147 (MMB 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”).

6. The November 20, 2001 episode involves a scene depicting Buffy kissing and straddling Spike shortly after fighting with him. Based upon our review of the scene, we did not find that it is sufficiently graphic or explicit to be deemed indecent. Given the non-explicit nature of the scene, we cannot conclude that it was calculated to pander to, titillate or shock the audience. Consequently, we conclude that the material is not patently offensive as measured by contemporary community standards for the broadcast medium.¹⁸

IV. CONCLUSION

7. In view of the foregoing, we conclude that the various licensees, including that of Station WDCA(TV), Washington, DC, that aired the “Buffy the Vampire Slayer” program on November 20, 2001, did not violate the law, and, therefore, no action is warranted.

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that the *Complaint* filed against the broadcast of the “Buffy the Vampire Slayer” program on November 20, 2001, is hereby DENIED.

9. IT IS FURTHER ORDERED, that a copy of this *Memorandum Opinion and Order* shall be sent by Certified Mail Return Receipt Requested to Lara Mahaney, Director of Corporate and Entertainment Affairs, Parents Television Council, 325 South Patrick Street, Alexandria, VA 23114.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁸ The “contemporary standards for the broadcast medium” criterion is that of an average broadcast listener and with respect to Commission decisions, does not encompass any particular geographic area. *See id.* at ¶ 8 and n.15.