

**STATEMENT OF
CHAIRMAN MICHAEL K. POWELL**

Re: Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show

No television event has ever received as many complaints from the American public—over 540,000—as the Super Bowl XXXVIII halftime show produced by CBS. As countless families gathered around the television to watch one of our Nation’s most celebrated events, they were rudely greeted with a halftime show stunt more fitting of a burlesque show. The show, clearly intended to push the limits of prime time television, ultimately violated federal law that restricts indecent programming to times when children are less likely to be watching. The U.S. Constitution is generous in its protection of free expression, but it is not a license to thrill. “Anything goes,” is not an acceptable mantra for those that elect to earn their profit using the public’s airwaves.

Indecency determinations, however, must be made cautiously and with appropriate restraint. There is always a substantial danger that a regulatory authority buoyed by an outraged public will overstep and fail to heel to the commands of the First Amendment. Our decision stays in bounds, but I am troubled at the suggestion of some on the Commission that we should reach further and drop the hammer for the musical performances themselves—divorced from the infamous wardrobe malfunction—or for the commercials. I agree that some of the performances were risqué and that commercials were frequently crass and sophomoric, but they were hardly indecent within the bounds of federal law. To let loose governmental sanction on such a thin premise is to stray from our limited role in enforcing the indecency laws, into the role of national nanny—arbiter of taste, values and propriety.

One critical way in which we exercise restraint is by analyzing the alleged indecent material in the context in which it is presented to the viewer or listener. Broadcasters plead frequently that there should be clear prescriptions to guide their choices. While the desire for such comfort is understandable, it is not possible to write a “red book” of dos and don’ts, nor is it wise. There are simply too many subtleties and too many contexts in which a given form of speech might occur to generalize a set of rules. The individual facts and the context are critical to separating protected speech from unlawful speech.

Nonetheless, the Commission should explain the central elements of its decision in order to permit broadcasters to make reasonable assessments in their programming choices, based on analogous precedents. Nudity, while not necessarily indecent in itself, certainly should raise a red flag for a broadcaster contemplating its airing during the hours in which the law restricts indecency because children are likely in the audience. If a programmer opts to air nude content, he places great weight in the hope that its purpose and context will keep the program from running afoul of the law. In this case, the context of the half time show leads us to conclude that the breast-baring finale was intended (in the vernacular of the indecency law) “to pander, titillate and shock” those watching. The song’s lyrics leave little doubt where the show was going: “Hurry up cause you’re taking too long. . . better have you naked by the end of this song.” Well, he certainly did and judging by the complaints it had its intended shocking effect—and drew a penalty flag in the process.

Finally, although individual licensees are indeed responsible for what is broadcast over the airwaves to their individual communities, fundamental fairness dictates that in this instance we not sanction those affiliates not owned by Viacom. The Super Bowl is widely regarded as a

family event with as many as one in five children watching this year's edition. Past half time productions have generally reflected the family-friendly character of the event. While affiliates certainly are not exempt from their responsibility to guard against the airing of indecent material, I do not believe it is warranted under the circumstances before us, where one would not have reasonably anticipated the dramatic departure.

In contrast, Viacom was not so passively involved. Viacom is the parent company of not only the CBS network, which aired the program, but also of MTV, which developed, rehearsed and produced the program. The Viacom organization knew, or surely should have known, what was to come. The fact that Viacom promoted the half time show before it aired as one that would be shocking, gives credence to their culpability. Unquestionably, Viacom consciously took the risk and, thus, now bears the responsibility.

Enforcing the indecency laws is no easy task, but it is one that falls to the FCC. We must respond to public complaints and give meaning to the indecency prohibitions on the public airwaves. Just as importantly, however, we must exercise great care not to overstep our own Constitutional limits and smother the free expression that is the central tenet of our democracy.