

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

In the Matter of) File No. EB-03-IH-0324
)
 Complaints against Fox Television Stations, Inc.)
 Regarding Its Broadcast of the “Keen Eddie”)
 Program on June 10, 2003)

MEMORANDUM OPINION AND ORDER

Adopted: October 5, 2004

Released: November 23, 2004

By the Commission: Commissioners Abernathy and Adelstein issuing a joint statement; Commissioners Copps and Martin dissenting and issuing separate statements.

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we deny multiple complaints filed by individuals alleging that Fox Television Stations, Inc. (“Fox”) broadcast indecent material over various of its owned and operated television stations during an episode of the “Keen Eddie” program on June 10, 2003, in violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999. For the reasons discussed below, we conclude that the subject material does not violate the Commission’s prevailing indecency standards, and we hereby deny the complaints.

II. BACKGROUND

2. Beginning in mid 2003 the Commission received a number of complaints against Fox Television Stations, Inc. relating to its broadcast during prime time on June 10, 2003, of an episode of the “Keen Eddie” program over various of its owned and operated stations. Specifically, the complaints alleged that the program in question contained indecent material. In response, the Enforcement Bureau directed a letter of inquiry to Fox requiring additional information about the broadcast.¹ Fox timely responded to the letter of inquiry and provided a video tape of the program.² Fox maintains that the program did not contain indecent material.³

3. The “Keen Eddie” episode that was broadcast on June 10, 2003, involved a plot about trafficking in horse semen on the black market. According to the video tape provided by Fox, three men apparently hire a prostitute to “extract” a horse’s semen for the artificial insemination of another

¹ See Letter to Fox Television Stations, Inc., Licensee, from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, dated November 21, 2003.

² See Letter to Sandra Watson, Investigations and Hearings Division, Enforcement Bureau, from John C. Quale, Fox Television Stations, Inc., dated January 6, 2004, (“*Response*”).

³ See *id.* at 1.

thoroughbred horse. Neither the script nor the images describe how the prostitute will accomplish this task. The episode includes the following dialogue between the men and the prostitute in a stable:

Prostitute: No, that's not natural.

First Man: Extraction for insemination. If you look at the picture on page 45 you'll see how natural it is.

Prostitute: Forget it!

Second Man: You're a 40-year old filthy slut, you'll do anything (referring to an advertisement by the prostitute to which the men responded).

Prostitute: With a human.

First Man: Think of it as science.

The videotape then cuts to another scene in the same stable, with the prostitute standing over a collapsed horse. She explains that she tried to arouse the horse by lifting up her shirt, but she is never shown doing so. She states that when she did so, the horse collapsed and died.

III. DISCUSSION

4. 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, profanity and obscenity. Specifically, it is a violation of federal law to broadcast obscene, profane 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

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 IIP*"), *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. Section 73.3999 implements the Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949 (1992).

5. 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

6. 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

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 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)).

¹² *Indecency Policy Statement*, 16 FCC Rcd 7999, 8002 ¶¶ 7-8 (2001) (emphasis in original).

¹³ *Indecency Policy Statement*, 16 FCC Rcd 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

7. Based on a thorough review of the information before us, we conclude that the program material in question is not actionably indecent. Although the episode contains references of a sexual nature that were broadcast at a time of day when children were likely to be in the audience, the specific material is not indecent. In this regard, the material contains no graphic or explicit dialogue, discussion, depiction or description of any particular sexual or excretory organ or activity. In addition, the characters do not dwell on or repeat at length any references to specific sexual or excretory organs or activities. The woman is at all times fully clothed, and is never seen touching or even approaching the horse. The entire episode lasts less than 28 seconds. Finally, the scene does not appear to have been intended to pander, shock, or titillate. While we understand that some viewers may have found the subject matter of this episode to be offensive, we have repeatedly held that subject matter alone is not a basis for an indecency determination.¹⁸

8. In view of the foregoing, we conclude that the broadcast of the “Keen Eddie” program by Fox Television Stations, Inc. over various of its owned and operated stations during prime time on June 10, 2003, did not contain indecent material.

V. ORDERING CLAUSES

9. ACCORDINGLY, IT IS ORDERED, that the complaints alleging that Fox Television Stations, Inc. broadcast indecent material over various of its owned and operated stations during the “Keen Eddie” program on June 10, 2003, 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 Parents Television Council, 707 Wilshire Boulevard, Suite 2075, Los Angeles, California 90017.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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”).

¹⁸ See *WPBN/WTOM License Subsidiary, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 1838, 1841 (2000).

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

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

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

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: Complaints against Fox Television Stations, Inc. Regarding Its Broadcast of the "Keen Eddie" Program on June 10, 2003, Memorandum Opinion and Order

In the face of thousands of complaints, the majority concludes that this episode concerning a prostitute and a horse contains "references of a sexual nature," but is not indecent as it is not intended to pander, shock, or titillate. I disagree with this entire analysis and therefore must dissent.

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

Re: Complaints against Fox Television Stations, Inc. Regarding Its Broadcast of the "Keen Eddie" Program on June 10, 2003, Memorandum Opinion and Order

This Order involves a television program that the majority admits "contains references of a sexual nature that were broadcast at a time of day when children were likely to be in the audience." Yet, the majority concludes that the program, in which a prostitute is hired to sexually arouse a horse by removing her blouse and to "extract" semen from the horse, is not indecent because the prostitute is "never seen actually touching" the horse. Despite my colleagues' assurance that there appeared to be a safe distance between the prostitute and the horse, I remain uncomfortable. I respectfully dissent.