

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

In the Matter of)	
)	
NBC TELEMUNDO LICENSING CO.)	Facility ID No. 47904
Licensee of Station WRC-TV)	File No. EB-03-IH-0665
Washington, D.C.)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: February 14, 2005

Released: February 28, 2005

By the Commission:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we deny a complaint filed by the Parents Television Council (“PTC”) alleging that NBC Telemundo Licensing Co., licensee of Station WRC-TV, Washington, D.C., aired an episode of *Will and Grace* in violation of the federal restrictions regarding the broadcast of indecent material.¹

2. PTC alleges that WRC-TV and other television licensees affiliated with the NBC Television Network (“NBC Affiliates”) broadcast indecent material on November 13, 2003 at 9:00 p.m. Eastern time during the *Will and Grace* program. PTC complains about several scenes during the episode, which concerns a visit to a doctor’s office. According to the Complaint, “This episode contains a lot of references to drug use and some graphic sexual content.”² After review of the Complaint and a videotape of the subject episode 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

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

¹ See 18 U.S.C. § 1464 (2002); 47 C.F.R. § 73.3999 (2002).

² Letter from Lara Mahaney, Parents Television Council, to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission, dated November 12, 2003, at 2 (“Complaint”). A copy of the Complaint is provided as an Attachment. We note that the Complaint, dated November 12, 2003 and received by the Investigations and Hearings Division on November 25, 2003, predates the alleged broadcast of the episode in question by one day.

Commission from censoring program material and from interfering with broadcasters' freedom of expression.³ 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."⁴ Consistent with a subsequent statute and court case,⁵ 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..⁶ The Commission may impose a monetary forfeiture, pursuant to section 503(b)(1) of the Act,⁷ 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

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

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

³ U.S. CONST., amend. I; 47 U.S.C. § 326 (2002).

⁴ 18 U.S.C. § 1464.

⁵ 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*").

⁶ *See* 47 C.F.R. § 73.3999.

⁷ *See* 47 U.S.C. § 503(b)(1). *See also* 47 U.S.C. § 312(a)(6) (authorizing license revocation for indecency violations).

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 *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*.

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 the 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.").

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.

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

6. The material aired during the *Will and Grace* program arguably describes sexual and excretory organs and activities 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.

7. In making indecency determinations, the Commission has indicated that the “*full context* in which the material appeared is critically important,”¹³ 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.*”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. PTC complains about three scenes during the November 13, 2003, episode of *Will and Grace*. We have attached PTC’s complaint which quotes from the subject episode. After review of the Complaint and a videotape of the episode, we conclude that the material is not “patently offensive” as defined by Commission precedent, because the cited dialogue is not

726 (1978)).

¹² *Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency (“Indecency Policy Statement”)*, 16 FCC Rcd 7999, 8002 (2001) (emphasis in original).

¹³ *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.

¹⁴ *Indecency Policy Statement*, 16 FCC Rcd at 8003 (emphasis in original).

¹⁵ *Id.*

¹⁶ *Id.* at 8009 (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”).

sufficiently graphic or explicit. The three scenes at issue show no nudity or sexual or excretory activities, and none of the remarks cited by PTC are sufficiently graphic or explicit descriptions of sexual or excretory activity to render the program indecent. Consequently, we conclude that the material in question is not indecent.¹⁸

III. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, that the Complaint alleging that NBC Telemundo Licensing Co., Licensee of Station WRC-TV, Washington, DC, and other NBC Television Network affiliates, broadcast indecent material during the *Will and Grace* program on November 13, 2003, in violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999, is 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 WRC-TV, NBC Telemundo Licensing Co., 1299 Pennsylvania Avenue, N.W., Washington, D.C., 20004, and to the Parents Television Council, 707 Wilshire Boulevard, Los Angeles, California 90017.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁸ We note that in the Complaint, PTC quotes the following line as indecent: "Damn you, God, why? Damn you." The 9th Circuit held that such statements are not a violation under 18 U.S.C. § 1464. *See Gagliardo v. United States*, 366 F.2d 720, 725 (9th Cir. 1966) ("God damn it" not a violation under 18 U.S.C. § 1464) and *Warren B. Appleton*, 28 FCC 2d 36 (B'cast Bur. 1971) ("damn" not a violation under 18 U.S.C. § 1464); *see also Burstyn v. Wilson*, 343 U.S. 495, 505 (1952) (government shall not "suppress real or imagined attacks upon a particular religious doctrine"); *Raycom America (WMC-TV)*, Memorandum Opinion and Order, 18 FCC Rcd 4186 (2003).