

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN
CONCURRING IN PART, DISSENTING IN PART**

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

The Super Bowl XXXVIII halftime show was arguably one of the most shocking incidents in the history of live broadcast television. Indeed, the Super Bowl was the most-watched program of the entire 2003-04 television season and American viewers, collectively, expressed their disappointment and disapproval. The Commission, entrusted with the responsibility to execute faithfully broadcast indecency laws, responded swiftly and appropriately.

While I agree with the ultimate outcome of today's Order on Reconsideration, I concur in part because the Commission again has not provided much-needed clarity and guidance to our decision-making process in indecency enforcement. In addition, I dissent in part because I continue to believe the Commission has erred in fining only CBS owned and operated stations, not all stations that broadcasted the indecent material.

Considering the substantial public confusion that pervades the Commission's indecency enforcement, we should, whenever possible, opt for clear statements of Commission policy. Until today, Commission policy has been to refrain from considering third-party polls or opinion surveys in assessing whether a program is indecent as measured by contemporary community standards. Regardless whether the poll or survey attempts to reflect the views of the national or local audience, the Commission simply does not consider opinion polls in indecency cases and polls are not a factor in determining the contemporary community standards. To suggest otherwise, as the instant Order does, is contrary to long standing Commission policy.¹

I also have grave concerns with the failure of this Order to provide clear guidance on the nature of the Commission's new fine imposition policy announced in the March 15th, 2006, Omnibus TV Order. Rather than stating what the new policy is *not*, as today's Order does,² the Commission should state affirmatively the key features of our new "more limited approach towards the imposition of forfeiture penalties."³ After all, it is still unclear how the Commission determines the sufficiency of a viewer's complaint in light of this new enforcement policy.⁴

¹ While the Commission, in today's Order, maintains that it rejects the use of third-party polls as "determinative" and that it does not "rely" upon any third-party polls, we should provide clear guidance as to whether the Commission, as a matter of policy, even "considers" polls in its indecency analysis. The answer to that inquiry should be an unequivocal "no." Rather than making this point clear, the Commission engages in a gratuitous discussion about the adequacy of the polls cited by CBS. The Commission argues that the opinion polls cited by CBS were unavailing because the polls did not answer the central legal question – namely, "whether the Super Bowl broadcast was patently offensive under contemporary community standards." Order at ¶ 14. This discussion is misleading because the Commission does not consider polling data, notwithstanding the artfulness of the questions asked by pollsters.

² Order at ¶ 30.

³ Complaints Regarding Various Television Programs Broadcast Between February 2, 2002 and March 8, 2005, FCC 06-17 (released March 15, 2006) (Omnibus TV Order) at ¶ 71.

⁴ In a failed attempt to address this significant concern, the instant Order states that "it is sufficient that viewers in markets served by each of the CBS Stations filed complaints with the Commission identifying the allegedly indecent program broadcast by the CBS Stations." This is a mere restatement of fact, not a policy statement of the essential components of a sufficient and adequate complaint.

Finally, I dissented in part in our initial Super Bowl decision (the September 22nd, 2004, *Notice of Apparent Liability*),⁵ and I do so again today. I continue to believe the Commission has decided erroneously to fine only CBS owned and operated stations, not all stations that broadcasted the indecent material. Notwithstanding the fact that this Commission has always purported to apply a national indecency standard on the broadcast medium, the Commission has failed to penalize the vast majority of stations that actually broadcasted the offending halftime performance.

I believe now, as I believed then, that this is not the restrained enforcement policy the Supreme Court advised in *Pacifica*. Consistent with the values of First Amendment, this Commission should exercise restraint and caution in its determination of the type of expression that is indecent. But once the indecency determination is made, the Commission should apply a uniform fine imposition policy across the broadcast medium.

The Commission has an obligation to provide clarity and guidance whenever possible. Equally, the Commission is obligated to enforce a consistent fine imposition policy across the broadcast medium. Sadly, today's Order fails to meet our obligation on both counts. Accordingly, I concur in part and dissent in part to this Order on Reconsideration.

In the Omnibus TV Order, the sole guidance the Commission provided was that it would propose forfeiture against only the licensee whose broadcast of the material was actually the subject of a viewer complaint. Omnibus TV Order at ¶ 71. Yet in the same order, based on a California viewer's complaint of indecent material against a local Washington, D.C. affiliate *and* the entire network, the Commission proposed forfeiture only against the local D.C. affiliate. The California viewer did not even assert that she viewed the program in Washington, D.C. Further, in the same case, it was completely unclear whether the complainant even watched the program on over-the-air broadcasting or on cable. The Commission is obligated to resolve or clarify these legitimate concerns.

⁵ See Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show, Notice of Apparent Liability for Forfeiture, FCC 04-209 (released September 22, 2004) (Commr. Jonathan S. Adelstein, approving in part and dissenting in part).