

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )

File No. EB-05-IH-0035

Complaints Against Various Television Licensees )  
Concerning Their December 31, 2004 Broadcast )  
of the Program *Without a Trace* )

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**MOTION TO VACATE NOTICE OF APPARENT LIABILITY  
AND SUPPLEMENT TO OPPOSITION  
OF 93 LOCAL TELEVISION BROADCAST STATIONS  
AFFILIATED WITH THE CBS TELEVISION NETWORK**

June 12, 2006

## CONTENTS

I.	<b>INTRODUCTION AND SUMMARY .....</b>	<b>1</b>
II.	<b>THE NOTICE SHOULD BE VACATED BECAUSE NO ACTIONABLE COMPLAINT WAS FILED.....</b>	<b>5</b>
A.	VIRTUALLY NONE OF THE 4,211 CORRESPONDENTS CLAIMS TO HAVE ACTUALLY VIEWED THE EPISODE. ....	7
B.	NO “COMPLAINT” WAS FILED FOR ALMOST TWO WEEKS AFTER THE EPISODE WAS BROADCAST NATIONALLY. ....	10
III.	<b>CONCLUSION .....</b>	<b>13</b>



station's community of license has filed a "complaint" with the Commission against that station.<sup>3</sup> The Commission reaffirmed that view on May 31, 2006.<sup>4</sup>

The licensees of 93 of the 95 local television stations affiliated with the CBS television network that were named in the Notice (the "Affiliates") now have reviewed each of the 4,211 form emails on which the Notice was based.<sup>5</sup> That review demonstrates conclusively that none of the virtually identical emails submitted to the Commission qualifies as a true viewer complaint sufficient to justify an inquiry or sanction against any of the Affiliates.<sup>6</sup> Accordingly, the Notice should be vacated. This conclusion is made inescapable by several essential facts:

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<sup>3</sup> See *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Mem. Op. & Order, FCC 06-17, at ¶¶ 32, 42 and 86 (rel. March 15, 2006) ("*Omnibus Notice*"), *app. pending*, *Fox Television Stations, Inc. v. FCC*, No. 06-1760-AG (2d Cir. filed Apr. 13, 2006).

<sup>4</sup> See *Complaints Against Various Television Licensees Concerning their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, Order on Reconsideration, File No. EB-04-1H-0011, FCC 06-68, at ¶ 30 (May 31, 2006) (*Super Bowl Reconsideration Order*). Indeed, the policy of requiring a viewer complaint to be filed as a condition precedent to an indecency notice appears to have applied to this proceeding as well, because not all CBS affiliates in the Central and Mountain time zones were named in the Notice.

<sup>5</sup> Two days after the Notice was issued, the Affiliates filed a Freedom of Information Act request for copies of the complaints on which the Notice was based. Although the Enforcement Bureau granted an extension of time for the Affiliates to respond to the Notice in order to permit them to review the documents that would be provided in response to this FOIA request, the Commission did not make the documents available until late in the day on May 5, 2006, the extended date on which the Opposition was due to be filed. Because this massive outlay of documents was provided on the afternoon of the date upon which the Affiliates' Opposition was due, of course, it was impossible for those documents to be reviewed prior to the filing of the Opposition. See Opposition at 2 n.2 (reserving right to supplement opposition in light of the evaluation of documents produced in response to FOIA request).

<sup>6</sup> For purposes of this motion, we assume that each of the 4,211 emails received in response to the Affiliates' FOIA request was a unique email. It is impossible for the Affiliates to assess the correct number of emails received, however, because the emails are mostly identical and because the Commission has redacted identifying information

- Not one of the 4,211 “complaints” was received through any source other than websites operated by two advocacy groups — the Parents Television Council (“PTC”) and, to a much lesser extent, the American Family Association (“AFA”).
- More than 8.2 million Americans watched the Episode on December 31, 2004.<sup>7</sup> Even so, not one of the 4,211 “complaints” was submitted contemporaneously with the broadcast. In fact, none was submitted for almost two weeks following the Episode’s air date. All of the emails were, however, submitted shortly after PTC and AFA issued “e-alerts” on January 12 and 17, 2005, respectively, exhorting their members to send email complaints concerning the broadcast. The lack of true viewer concern about the Episode is corroborated by the fact that only a total of 17 emails or letters about the Episode were received by stations directly from their viewers in all 93 markets combined, which comprise 43.5

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from the documents provided to the Affiliates, purportedly to protect the privacy interests of the authors. It thus is virtually certain that the actual number of unique emails received is far fewer than 4,211, given that multiple copies of a single complaint copied to multiple FCC email addresses are counted by the Commission as individual complaints. It is unclear, however, why this information was withheld from the FOIA response provided to the Affiliates. The Commission recently publicly filed with the United States Court of Appeals for the Second Circuit approximately 915 pages filled with several thousand names and email addresses of purported complainants who filed emails in another indecency case that is being challenged on appeal. In light of this public filing, the Affiliates request that parallel information be provided to them for emails relating to the Episode as well so that duplicates may be eliminated.

<sup>7</sup> Nielsen ratings for the night of December 31, 2004 confirm that 8,283,000 viewers watched the Episode, and that at least 95 percent of the audience for that broadcast was over the age of 18.

million television homes.<sup>8</sup> (None of the few viewers who commented on the program directly to their local stations, to the Affiliates' knowledge, filed an FCC complaint or emailed the Commission.)

- Only two of the 4,211 “complaints” actually stated that their authors had watched the program in question. And even these two apparently refer not to the full broadcast, but only to the brief, out-of-context segment of the Episode that PTC hosted on its website.

To be actionable under the Commission’s rules, a complaint must, at a minimum, contain a demonstration that it is submitted by an actual broadcast viewer of the program in question in the service area of the station against which the complaint is filed. This policy is bottomed on the obvious notion that the enforcement resources of the federal government should not be deployed against a Commission licensee unless an actual broadcast viewer of the program claims harm from the program sought to be penalized. This is particularly important in an era when a single violation will shortly result in a fine of up to \$325,000 per occurrence.<sup>9</sup>

A generic, national campaign of stock emails sponsored by one or more advocacy groups simply cannot satisfy this test. This type of email campaign has its place, of course — the Commission certainly is entitled to take the positions of PTC and AFA, as demonstrated by thousands of uniform, look-alike email messages, into consideration on *policy* matters. But the Commission’s own expressed policies and procedures preclude it from issuing significant fines for violations of federal law, with the

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<sup>8</sup> See Opposition at 31 and Attachment A (summarizing comprehensive survey of Affiliate stations). Fewer negative reactions were received from viewers of the original 2003 broadcast of the Episode — only eight in all 93 Affiliate markets.

<sup>9</sup> See S. Bill 193, passed by the House of Representatives on June 7, 2006.

accompanying stigma such an enforcement effort inevitably attaches to the penalized broadcast licensees, based solely on a form email generated with a few keystrokes by followers of advocacy groups who were not viewers of the program in question. Such a course of action raises fundamental First Amendment issues, and imposing fines on the basis of generic email campaigns when the Commission's rules require true complaints is arbitrary and capricious. The Notice should be vacated.

## **II. THE NOTICE SHOULD BE VACATED BECAUSE NO ACTIONABLE COMPLAINT WAS FILED.**

The Commission has expressly held that it will act solely on “documented complaints . . . received from the public.”<sup>10</sup> The Commission also has stated that “[i]f a complaint does not contain [sufficient] supporting material . . . it is usually dismissed by a letter to the complainant advising of the deficiency.”<sup>11</sup> As we have noted, this longstanding policy concedes the imprudence of punishing a local station for airing content as to which no actual viewer or listener has claimed harm.<sup>12</sup> As the *Omnibus*

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<sup>10</sup> Policy Statement, 16 FCC Rcd. 7999, ¶ 24 (2001) (“Industry Guidance”).

<sup>11</sup> *Id.* After the broadcast of the Episode and the “complaints” that are the subject of this proceeding, the Commission indicated that complainants “are not required to submit a transcript or an audiotape, videotape, CD/DVD or other recording in support of [their] complaint” but that doing so “may help expedite the processing” of complaints. *See FCC Announces OMB Approval of New Obscene, Profane and/or Indecent Material Complaint Form and Revised General Complaint Form*, DA 05-2930, Nov. 7, 2005, at 4. Nonetheless, something more than a hearsay indication of the content of the program is embodied in the notion that complaints must be “documented.”

<sup>12</sup> *Omnibus Notice* at ¶¶ 32, 42, and 86. For this reason, the Commission's new form for indecency complaints specifically asks for the “station on which you viewed/heard the material” and the “city and state where [the] program was viewed/heard.” FCC Form 475B (emphasis added). This is not to say, of course, that a complainant must have Article III standing to file a complaint against a Commission licensee. But the Commission has made clear that it still will base its enforcement efforts only on actual assertions of harm by residents of a station's community of license, for constitutional and prudential reasons.

*Notice* explained, the Commission’s “commitment to an appropriately restrained enforcement policy . . . justifies this . . . approach towards the imposition of forfeiture penalties.”<sup>13</sup> Just last week, the Commission reaffirmed this principle in the *Super Bowl Reconsideration Order*, holding that “it is sufficient that viewers in markets served by each of the CBS Stations filed complaints with the Commission” to justify a fine against each station.<sup>14</sup> This is a long-standing Commission policy — even the *Pacifica* case dealt with a complaint from a local listener “who stated that he had heard the broadcast while driving with his young son.”<sup>15</sup>

Here, however, there were no true complaints from actual viewers following the broadcast of the Episode. As the Affiliates demonstrated in the Opposition, across their 93 markets, covering 43.5 million television households, only 17 local viewers in total sent emails or letters about the Episode to any Affiliate station. As far as can be determined, none of these 17 local viewers filed FCC complaints, and no FCC complaints at all were received by any Affiliate relating to the 2004 broadcast of the Episode.<sup>16</sup> Indeed, the Affiliates learned of this indecency challenge only upon the issuance of the Notice.

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<sup>13</sup> *Id.*

<sup>14</sup> *Super Bowl Reconsideration Order*, ¶ 30.

<sup>15</sup> *Federal Communications Comm’n v. Pacifica Foundation*, 438 U.S. 726, 730 (1978).

<sup>16</sup> As the Affiliates pointed out in their Opposition, the fact that the Episode had been broadcast nationally in 2003 without notification from the Commission to the CBS Network or virtually any Affiliate that any complaint had been filed, with a subsequent apparent dismissal of complaints that were filed against that broadcast, raised the presumption that broadcasting the Episode some 13 months later would not be seen to violate indecency regulations.

The “complaints” on which the Notice was based were stock, mass emails from campaigns by two advocacy groups. These emails were insufficient under the Commission’s own announced standards to constitute complaints for at least two reasons. *First*, there is no clear evidence that any purported complainant actually viewed the Episode. Indeed, only two suggested that they had seen any material from it, most likely only the out-of-context video hosted by PTC on its website. *Second*, it is clear that the emails were submitted not because viewers had seen the Episode but because advocacy groups hoping to influence television content generally exhorted them to contact the Commission. Such mass emails should not be accorded the status of viewer “complaints” sufficient to support a finding of a violation of federal law.<sup>17</sup>

**A. Virtually None of the 4,211 Correspondents Claims To Have Actually Viewed the Episode.**

Of the 4,211 emails received by the Commission that related to the broadcast of the Episode in the Affiliates’ markets, 4,137 (more than 98 percent) were completely identical copies of the form PTC and AFA models. None of these form emails contained any language indicating that the authors of the emails had viewed the Episode on broadcast television or, indeed, anywhere. Only 74 senders of the blast emails added any text at all to the stock language prepared by PTC and AFA, and hardly

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<sup>17</sup> The issues at stake in indecency proceedings are not policy issues or rule changes but actual allegations that Commission licensees have violated federal law. As Commissioner Adelstein recently pointed out, “it is still unclear how the Commission determines the sufficiency of a viewer’s complaint in light of this new enforcement policy.” *Super Bowl Reconsideration Order*, Statement of Commission Jonathan S. Adelstein Concurring in Par, Dissenting in Part. A lack of clarity on this essential point has significant real-world consequences for Commission licensees, whose license renewals and transactions may be subject to delay on the basis of even baseless indecency allegations, and who may later be subjected to claims that they have engaged in a “pattern of violations” based on allegations in insufficiently documented complaints.

any of the changes involved more than two or three lines of text. Of the communications that were modified in any substantive way, several actually *supported* the Affiliates' airing of the program.<sup>18</sup>

Most importantly, of the 4,211 emails on which the Commission relied in issuing the Notice against the Affiliates, a grand total of two claimed that the sender had actually seen some content from the Episode.<sup>19</sup> Those two messages, which comprised less than five hundredths of one percent of the total correspondence received by the Commission about the Affiliates' broadcast of the Episode, were submitted from the PTC web site on January 13 and January 15, respectively, two weeks after the Episode aired. Significantly more of the emails candidly admitted that they did not watch the Episode:

I did not actually see the show since I usually watch the History Channel or old movies on AMC or FMC or TCM, but I am outraged that our youth are exposed to this. I did watch a clip via the parentstv.org link and was disgusted.<sup>20</sup>

Likewise, another e-mailer wrote that “[t]his is one episode that i [sic] will not be watching. . . .”<sup>21</sup>

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<sup>18</sup> One “complaint,” for instance, advised the Commission: “Please keep free speech alive. I support the right of parents to not have their kids watch things they deem inappropriate. But that’s their job, not the FCC.” KGMB Page 1401. Another correspondent modified the form text of the PTC complaint to read: “This is a formal COMPLAINT of outrageous attempts to destroy our First Amendment Rights by censoring informative television. Let the show air without penalty....” KPHO-TV Page 2989. Another “complainant” attached the form language of the PTC e-mail and opined, “THIS IS GREAT TELEVISION.” KHOU-TV Page 1937.

<sup>19</sup> KHOU-TV Page 1840, KOLR Page 2641.

<sup>20</sup> KMOV Page 2231.

<sup>21</sup> KIDK Page 1962. Another parent, who had also not seen the Episode prior to logging onto the PTC web site, detailed the appropriate solution for parents concerned with their children’s viewing of broadcast television. That parent explained, “I am very shocked by your [PTC’s] veiwing [sic] of this scene. I have a pre-teen son that at timees [sic] has watched this show. We will not watch in the future.” KMOV Page 2371.

The remaining messages that included any additions to the form emails — together, not even two percent of the total volume of correspondence received relating to the Affiliates’ broadcast of the Episode — often related to concerns that had nothing to do with an indecency analysis. The additions to the messages discussed, for example, the Commission’s settlement with Viacom,<sup>22</sup> the correspondent’s belief that the Episode promotes low self-esteem among teenage girls,<sup>23</sup> general concerns about the veracity of former CBS news anchor Dan Rather,<sup>24</sup> the correspondent’s belief that broadcast programming “is . . . causing the deaths annually of many High-School-level and College-level students,”<sup>25</sup> and concern over the fact that interracial couples were depicted.<sup>26</sup> These views, of course, are irrelevant to the Commission’s indecency analysis, and they are entitled to no weight in this proceeding.

Finally, there is no evidence that any of the purported complainants viewed the Episode on over-the-air television — a fact that is, as the Affiliates pointed out in their Opposition, essential to any rational consideration of the appropriate standard to be applied to broadcast television in a multichannel world.<sup>27</sup> Because the combined cable and satellite home penetration rate exceeds 86 percent, it is quite likely that most, if not all, of the email contributors would have received the Episode amidst multiple

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<sup>22</sup> See, e.g., KPHO-TV Page 3211, KHOU-TV Page 1938.

<sup>23</sup> KMOV Page 2244, KGWC-TV/KGWN-TV Page 1420.

<sup>24</sup> KHOU-TV Page 1621.

<sup>25</sup> WHNT-TV Page 5981.

<sup>26</sup> KTVQ-TV Page 3601.

<sup>27</sup> See, e.g., *Super Bowl Reconsideration Order*, Statement of Commissioner Jonathan S. Adelstein, Concurring in Part, Dissenting in Part, at 2 (“it was completely unclear whether the complainant even watched the program on over-the-air broadcasting or on cable”).

channels of diverse programming containing materials far edgier than the Episode (that is, if they had watched the Episode on television at all). These subscribers, moreover, would have had additional blocking technologies available to them in addition to the V-Chip by virtue of the standard features of their cable or satellite set-top boxes. The Commission cannot properly determine the standard to be applied here in the absence of this information.

**B. No “Complaint” Was Filed for Almost Two Weeks After the Episode Was Broadcast Nationally.**

The Affiliates’ review of the “complaints” reveals that not one of the 4,211 communications received by the Commission relating to the airing of the Episode by the Affiliates was filed within the twelve days after the Episode aired. That is, none of the millions of viewers watching *Without a Trace* on December 31, 2004 switched from viewing the program to register a complaint of broadcast indecency. In fact, none did so for almost two weeks. It was not until January 12, 2005, that emails relating to the Episode began arriving at the Commission.

It is more than coincidental that January 12, 2005 was the date on which PTC issued an e-alert to its members and supporters, urging them to “flood the FCC with thousands of complaints about this . . . episode.”<sup>28</sup> Except to say that the Episode “feature[s] scenes of teen group sex” and to characterize it as “vile,”<sup>29</sup> the PTC alert itself contained *no description* of the episode. In order to view a summary and video clip of the flashback scenes – not the entire episode and therefore the context in which the scenes were shown — visitors to the PTC web site would have had to view the E-Alert,

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<sup>28</sup> Parents Television Council, *CBS Reruns Teen Orgy Scene*, PTC E-Alert (Jan. 12, 2005), available at <http://www.parentstv.org/ptc/publications/ealerts/2005/0112.asp>.

<sup>29</sup> *Id.*

click through to the complaint form, and scroll down to another link at the bottom of the complaint form.<sup>30</sup> An additional rush of e-mails came on January 17, 2005, when AFA, another advocacy group, followed in PTC's footsteps and initiated a second blast e-mail campaign.<sup>31</sup> The AFA alert, like PTC's release, included no description of the Episode. A short excerpt of the flashback scenes — but not the entire Episode — was available on the AFA web site.

It is impossible to avoid the conclusion that these correspondents were not reacting to the broadcast programming of the Episode at all, but to the inflammatory and misleading *descriptions* of the Episode in the stock email form drafted by PTC and AFA. This distinction is no mere procedural quibble. Although the Commission purports to apply a national standard as opposed to a community-based standard in its evaluation of indecency cases, it has nonetheless been careful in past cases to require a community-based complaint against a licensee that broadcasts a network program — so as to be sure it would not punish a station for broadcasting a program about which no station viewer was concerned. As the Commission has noted, this approach constitutes an effort to restrain enforcement to real cases.

The danger of relying on complaints prompted by an email campaign, rather than the broadcast itself, is underscored in this proceeding. It is obvious that

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<sup>30</sup> See Parents Television Council, *Without a Trace TV Show FCC Indecency Complaint Form*, <https://www.parentstv.org/ptc/action/withoutatrace/main.asp>.

<sup>31</sup> Am. Family Ass'n, *AFA Action Alert: File an FCC complaint against CBS* (Jan. 17, 2005), *archived at* <http://web.archive.org/web/20050207032723/http://www.afa.net/activism/IssueDetail.asp?id=148>. Several AFA complaints purported to be sent from the organizations "OneMillionDads" and "OneMillionMoms." These e-mails contained materially the same text and were generated by AFA's web site. See Am. Family Ass'n, *Tell the FCC to stop cutting deals with CBS*, <http://www.afa.net/videos/withoutatrace.asp>.

complainants unquestioningly accepted that the Episode as telecast was accurately described in the texts of the emails that they were encouraged to send to the Commission. But it is equally obvious that the program as broadcast bore little resemblance to those descriptions, which at a minimum could only have been produced by a frame-by-frame slow-motion analysis that selectively described, in emotionally charged detail, actions and depictions that were at best mischaracterized and that in any event simply could not have been noticed by a viewer watching the program at normal speed — the way it was intended to be viewed.<sup>32</sup>

The scene in question was intended to suggest dangerous sexual activity, in the context of a dramatic program describing the life-threatening risks of that behavior, so that it necessarily had to depict the performers in relatively provocative poses. But how that depiction appears on the television screen is the only matter of significance in this case. The emails, on the other hand, were obviously responding to subjective, overheated, exaggerated and loaded language designed not to describe the actual scene as it was broadcast but rather to persuade readers to take a political action — to write to a government agency. It is for this reason significant that there were no complaints submitted contemporaneously with the broadcast, and that all the complaints came only in response to a third party's self-interested description of what the broadcast contained.

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<sup>32</sup> Both the AFA and PTC letters rely on inflammatory and totally subjective language that offers no clear sense of what the scene in question might actually have looked like on the air. Thus, couples are said to be engaged in acts that “simulate sexual intercourse,” there is a “moving mound of bare arms and legs” indicating “a group of teens having sex,” couples are said to be “rocking back and forth in a sexual motion,” and many participants are described as “fondling” one another. Such language, separated from the actual visual images, can evoke an enormous range of images. The terms are not self-defining, as is proven by the fact that the actual broadcast images are far less explicit than these words would have suggested.

The mass emails that were produced here may constitute political or policy arguments or opinions, but they cannot reasonably be considered “documented complaints” from viewers in the community of license that can form the basis for an asserted individual violation of federal law against 93 Commission licensees.

### **III. CONCLUSION**

The Notice is based on a mass email campaign and not a single direct viewer complaint. The Commission permissibly may, and indeed should, honor public participation in its policymaking. It should not, however, base findings of a violation of federal law, particularly in an area that is fraught with First Amendment sensitivities, on mass email campaigns rather than true viewer complaints. Here, the submission of slightly more than 4,000 emails compared to a universe of more than 8.2 million viewers of the Episode is not an indication that the Commission should take action against the Affiliates, particularly when virtually no negative communications were received by stations directly from their viewers. Permitting enforcement reliance on a uniform, national mass email campaign is akin to simply permitting the Commission to single out programming which it dislikes — even in the absence of any viewer complaint — and to target that programming for punishment. The Commission wisely has eschewed playing the role of a roving enforcer of indecency policy in the past, and it should continue to do so here.

The Commission has held that it will not find an indecency violation in the absence of a documented viewer complaint. As we have shown, not a single actionable viewer complaint was submitted against the Episode. The Notice should therefore be vacated.

Respectfully submitted,

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