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William H. Davenport, Chief
Investigations and Hearings Division
Enforcement Bureau
445 – 12th St., S.W., Room 4-C330
Washington, DC 20554

Re: Complaints Against Various Licensees Regarding
Their Broadcast Of the Fox Television Network
Program “Married by America” on April 7th, 2003

File No. EB-03-IH-0162

NAL/Account No. 200432080320 – Ft. Smith 46, Inc. (KPBI-CA)
NAL/Account No. 200432080350 – Marquette Broadcasting, Inc. (WMQF)
NAL/Account No. 200432080353 – Montana License Sub, Inc. (KMMF)
NAL/Account No. 200432080354 – Montgomery Communications, Inc. (KTMJ-CA)
NAL/Account No. 200432080396 – TV67, Inc. (WOHL-CA)

Dear Mr. Davenport:

This letter is written on behalf of the five licensees (“the 5 Licensees”) named above, each of which received a Notice of Apparent Liability for Forfeiture (“NOALF”) in the above-captioned matter. Each of these licensees has joined in the response to the NOALF submitted today by Fox Broadcasting Company and many of its affiliate stations (“Fox Response”). While they endorse and join in the Fox Response, as small market broadcasters, the 5 Licensees wish to supplement the Fox Response to state why imposition of forfeitures on them is especially unjustified and harmful to the public interest.

This proceeding represents the first time that the Commission has struck out against all the affiliates of a network with respect to a program where at least those affiliates not owned by the network had no creative role. All that the 5 Licensees did was NOT to censor or pre-empt the program. As forcefully explained in the Fox Response, the nature of the program, including the production schedule and the need to keep content secret to preserve the surprise value of the ultimate outcome of the series, made it impossible as a practical matter for affiliates to review it

in advance.¹ But even if all network programs were available for advance review, as discussed *infra*, it is unrealistic to assume that individual stations, and especially small market affiliates, could muster the resources to review and analyze every network program.

Because of the impracticality of individual affiliate advance review of every program, it is difficult to escape the conclusion that the Commission's action is an expression of frustration with the fact that past forfeitures have not resulted whatever kind of change the Commission hopes to bring to network programs; so the Commission is striking at innocent parties in the hope of amassing a constituency of fearful parties to bring additional pressure on the networks. The 5 Licensees believe that such an approach is unfair and uncalled for in a free society, if not flat out in violation of the First Amendment. The Commission has not attacked the writers, producers, or performers of the program,² even though they had much more to do with the content than the 5 Licensees. If the Commission feels that a program violates the law, it should direct its sanctions to the parties who created the violation and not against independently owned affiliates, who may be able to influence a network over a period of time after the fact, urging that the tone of a program series be modified, but who in practice cannot, and should not be expected to, review in advance and second-guess the network on the content of individual program episodes.

The inability to review each and every program does not mean that licensees do not have control over the content of what they broadcast. They make choices in selecting their networks and other program suppliers, they can reject programming that they believe is unsuitable, and they can substitute programs of greater local importance, both emergency and non-emergency in nature. Supervision and control of program content cannot as a practical matter be taken to the level of requiring previewing every episode of every program. Such a requirement would mean the end of network affiliation as it is known and practiced today.

Make no mistake about it. The sanction imposed by the Commission is not trivial. The sum of \$7,000 is not "paltry" (as the Chairman described it) to a small market broadcaster.³ Even if Fox reimburses the payment, a stigma will have been imposed on the individual affiliate that

¹ The nature of this particular program, discussed in detail in the Fox Response, destroys the distinction between this case and the *Super Bowl NAL*, FCC 04-209 (Sep. 22, 2004), where the Commission declined to propose forfeitures against individual affiliates because the *Super Bowl* broadcast was live. It should also be remembered that the *Married By America* episode preceded the *Super Bowl* broadcast by several months, so the *Super Bowl NAL* was not available as precedent. Based on both the unavailability of the program for advance review and the impracticality of individual episode preview, and without conceding that the content was indecent, the 5 Licensees also urge that their broadcast of any indecent content could not be "willful," which is a prerequisite for imposing a forfeiture under 47 U.S.C. Sec. 503(b)(1).

² In an Op-Ed piece in today's *New York Times* (Dec. 3, 2004) ("*Op-Ed*"), Chairman Powell stated that "[a]lthough the Commission has the authority to fine an artist personally, we have never done so nor do I support doing so."

³ *Op-Ed*, n. 2, *supra*.

may be used by organized special interest groups to bring pressure at license renewal time, generating costs in both human resources and money that Fox has not committed to reimburse.

The Commission recently entered into a consent decree with Viacom, Inc.,⁴ pursuant to which Viacom will install a delay system to enable it to intercept and stop indecent content from getting to the airwaves on its stations. Assuming that such a system is effective, which may or may not be the case, it is an example of what the Commission may be able to negotiate with a wealthy, large-market broadcaster but is a completely impractical solution for small market stations.⁵ The cost of five-second delay equipment is enough of an obstacle; but even ignoring that cost, it is completely infeasible for very small market broadcasters to hire personnel to sit by the switch 24 hours a day, 365 days a year, and to make virtually instant decisions about program content. To even suggest such an approach in small markets would be seriously discriminatory against small business enterprises and would erect a major barrier contrary to 47 U.S.C. Sec. 257.

Moreover, even if small market broadcasters could afford the equipment, and even if they could find a way to have all programming monitored in real time, they would not have the resources to decide what the Commission might or might not find acceptable. Perhaps a constitutional legal scholar can distinguish between the *Married By America* episode and hiring a prostitute to extract horse semen,⁶ discussing a women with no panties and kissing and discussing a condom in a restroom stall,⁷ and joking about blocking a toilet with feces;⁸ but the 5 Licensees do not find it easy to make these distinctions, assuming that the distinctions exist at all or are Constitutionally valid. Thus the end result is either that the 5 Licensees have to stand back and take a beating by the Commission or pre-empt network programming excessively, well beyond the minimum required, to be sure of being safe. In other words, the inescapable ultimate impact of what the Commission is doing will be a significant chilling of speech that will deprive

⁴ *Viacom, Inc.*, FCC 04-268 (Nov. 23, 2004).

⁵ The largest market of any of 5 Licensees' stations is Ft. Smith, AR, No. 107. Topeka, KS, is No. 138, Marquette, MI, is No. 177, and Lima, OH is No. 191. Source: *Broadcasting & Cable Yearbook*, 2003-2004 ed. Even if some market rankings have changed, there has been no dramatic shift since publication of this source.

⁶ "*Keen Eddie*", FCC 04-243 (Nov. 23, 2004). Even if the subject of artificial insemination was not indecent, there appeared to be no reason to use a prostitute called a "filthy slut" other than to titillate.

⁷ *NBC Telemundo Licensee*, FCC 04-235, (Nov. 23, 2004).

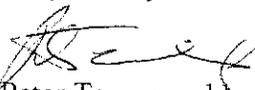
⁸ *WBDC Broadcasting, Inc.*, FCC 04-234 (Nov. 23, 2004).

much of the audience of material it wishes to view and will destroy decades of progress in the development of First Amendment rights.⁹

The 5 Licensees want to stress that they are responsible broadcasters and try to be responsive to their audiences. The Chairman noted that "we rely on public complaints to point out potentially indecent shows."¹⁰ But none of the 5 Licensees have reported receiving any complaints at all from any of their viewers regarding the *Married By America* episode at issue here. That means that with respect to the 5 Licensees, this proceeding is initiated entirely by the government and thus is the pursuit of the government's concept of indecency and not the concept of the 5 Licensees' viewers. As clearly explained in the Fox Response, the Commission's own initiation of punishment based on program content cannot survive past case law on content control when the public has not complained about the subject stations.¹¹

In sum, the Commission is pursuing the wrong party and is forcing small market licensees into a practical position that cannot result in other than a heavy chill on speech. The Commission must consider the reality of individual affiliate operation in small markets. Finally, the 5 Licensees ask that they be allowed to respond and react to their own viewers, and that the Commission not pursue this proceeding against licensees whose audiences have voiced no complaint.

Respectfully submitted,



Peter Tannenwald

Counsel for Fort Smith 46, Inc., Marquette
Broadcasting, Inc., Montana License Sub, Inc.,
Montgomery Communications, Inc., and TV67, Inc.

cc: John C. Quale, Esq.
R. Clark Wadlow, Esq.

⁹ The 5 licensees doubt that the Commission would advocate that small market broadcasters unable to engage in the detailed analysis that the Commission seems to require should disaffiliate with networks to protect themselves and leave small markets without major network service.

¹⁰ *Op-Ed*, n. 2, *supra*.

¹¹ Any complaints that may be received in the future must be disregarded, as the episode was broadcast a year and a half ago; so any new complaints will clearly be generated by national organizations and will not be truly locally based.