

December 7, 2004

Via Hand Delivery

William H. Davenport,
Chief, Investigations and Hearings Division
Enforcement Bureau
Federal Communications Commission
The Portals, Room 4-C330
445 Twelfth Street, SW
Washington, DC 20554

Re: NAL/Acct. No. 200432080352, File No. EB-03-IH-0162

Dear Ms. Dortch:

On behalf of Mission Broadcasting, Inc. ("Mission"), the licensee of television broadcast stations WFXP, Erie, Pennsylvania; WBAK-TV, Terre Haute, Indiana; KJTL, Wichita Falls, Texas; KCIT, Amarillo, Texas and KHMT, Hardin, Montana (collectively, "Mission's Fox Affiliates"), this letter is in response to the above-referenced Notice of Apparent Liability for Forfeiture ("NAL") with respect to the April 7, 2003 broadcast of the program *Married By America* by the Fox Television Network.

On October 12, 2004, the Commission issued an NAL of \$7,000 against each of the Fox owned and operated stations as well as the Fox network affiliated stations, including Mission's Fox Affiliates, for each station's broadcast of the April 7, 2003 episode of *Married By America*. The NAL found that the stations apparently broadcast indecent material during the referenced episode in violation of the federal restrictions regarding the broadcast of indecent material. NAL at ¶ 1. The NAL stated that the Commission was imposing fines not just against the Fox owned and operated stations, but also on the Fox affiliates, because the *Married By America* broadcast differed from the 2004 Super Bowl half-time incident that did not result in fines against the CBS affiliates for indecent programming broadcast by the CBS network.¹ Specifically, the Commission determined that the Fox affiliates could have preempted the April 7 episode because it was a pre-recorded episode in a series of pre-recorded programs. NAL at ¶ 16.

Mission hereby requests that the Commission cancel or reduce the \$7,000 fines imposed against the Mission Fox Affiliates because (1) Mission has a long history of compliance with the Commission's rules and policies; (2) none of the Mission Fox

¹ 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 (rel. September 22, 2004).

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Affiliates received a complaint concerning the program; and (3) contrary to the Commission's assertion, Mission did not have advance warning of the material broadcast on the April 7, 2003 episode of *Married By America*.

Mission, or a co-owned predecessor, has been a Commission licensee for several years.² Mission acquired the first Mission Fox Affiliate (WFXP) on November 30, 1998.³ In the several years that Mission has owned these stations, it has not received a single Notice of Violation, Notice of Apparent Liability, Notice of Apparent Liability of Forfeiture or any other Commission notice indicating that it has not complied in full with the Commission's rules and policies. Further, none of the other stations previously owned by David S. Smith, Mission's sole shareholder, has been party to a Commission notice of violation while under Mr. Smith's ownership.⁴

In addition, none of the Mission Fox Affiliates received a viewer complaint about the April 7 episode of *Married By America*. (Although the Commission received complaints from 23 persons regarding this program, to Mission's knowledge, none of these "received" complaints involved a Mission Fox Affiliate.) Historically, Commission enforcement actions arise from documented complaints of indecent broadcasts received from the public against a specific station with respect to a program viewed (or heard).⁵ However, the Commission in this instance issued fines against stations where there was no direct complaint involved – a clear departure from precedent. Given this change in precedent, Mission did not have the requisite notice to justify the penalty imposed. Furthermore, the Commission fined the Mission Fox Affiliates without ever providing Mission with an opportunity to be heard. At the very least, fundamental fairness dictates

² Mission's co-owned predecessor licensees of the Mission Fox Affiliates include Bastet Broadcasting, Inc. and Mission Broadcasting of Amarillo License, Inc.

³ Mission acquired KCIT in May 1999 and KJTL in June 1999. However, Mission did not acquire two of the Mission Fox Affiliates until well after the April 7, 2003 broadcast (acquiring KHMT in December 2003 and WBAK-TV in April 2004) and these acquisitions were asset only acquisitions (and not the stock). Therefore, even if the Commission determines to continue the fine against KHMT and WBAK-TV, the NAL should be issued to the prior owners of these stations, not Mission.

⁴ David S. Smith previously owned Mission Broadcasting I, Inc., the licensee of station WUXP-TV, Nashville, Tennessee, and Mission Broadcasting II, Inc., the licensee of WUPN-TV, Greensboro, North Carolina. Both stations were sold to Sinclair Broadcast Group in January 2002. (David S. Smith is not related to David D. Smith of Sinclair Broadcasting Group.)

⁵ In fact, the Commission's website states that if the staff determines a violation may have occurred, the staff will commence an investigation by sending a letter of inquiry to the broadcast station (emphasis added). <http://www.fcc.gov/eb/broadcast/obscind.html>. Mission received no such letter.

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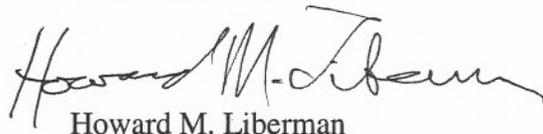
that the Commission not sanction a station without allowing it an opportunity to be heard with respect to the complaint.

Finally, the Commission is incorrect in its assumption that Mission or the Mission Fox Affiliates had prior knowledge of the contents of the April 7 broadcast of *Married by America*. *Married By America* was a reality program with audience participation. Therefore, Fox Broadcasting Company ("FBC") kept tight control over the distribution of the program episodes and delivered the April 7 episode to the Mission Fox Affiliates only on April 7. Moreover, FBC provided Mission with only a brief synopsis of the episode, and the synopsis made no mention of the bachelor party which contained the alleged indecent scenes. Consequently, Mission had no prior knowledge that the episode would contain the material that it did. Mission did not select, plan or approve or have a chance to review this program prior to its broadcast. Thus, Mission is in a position analogous to the CBS affiliates with respect to the 2004 Super Bowl half-time incident and the Commission should treat the Mission Fox Affiliates in a similar manner.

Because Mission was not the licensee of WBAK-TV or KHMT on April 7, 2003, Mission requests that the Commission cancel entirely the fines against Mission for stations WBAK-TV and KHMT. Mission further requests that the Commission cancel entirely or reduce the \$7,000 fines imposed against each of KCIT, KJTL and WFXP (and WBAK-TV and KHMT if the Commission continues to impose the fines against Mission) based on Mission's outstanding record as a Commission licensee, the lack of a specific complaint against Mission's stations and Mission's and the Mission Fox Affiliates' lack of prior knowledge regarding the contents of the April 7, 2003 broadcast.

Please address any questions regarding this response to Elizabeth Hammond of this firm at (202) 842-8843 or to the undersigned.

Very truly yours,


Howard M. Liberman