

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

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In the Matter of)	File No. EB-03-IH-0162
)	
Complaints Against Falls Broadcasting)	NAL/Account No. 200432080319
Company and Compass Communications)	FRN No. 0003-7085-42
of Idaho, Inc. Regarding Their Broadcast Of)	Facility ID #1255
The Fox Television Network Program "Married)	
By America" On April 7, 2003)	NAL Account No. 200432080315
)	FRN No. 0003-7683-97
)	Facility ID #78910
)	

**JOINT RESPONSE IN OPPOSITION TO THE NOTICE OF APPARENT LIABILITY
FOR FORFEITURE**

Introduction

Falls Broadcasting Company ("Falls"), licensee of FOX Affiliate KXTF(TV), Twin Falls, Idaho, and Compass Communications of Idaho, Inc. ("Compass"), licensee of FOX Affiliate KFXP(TV), Pocatello, Idaho file this joint response in opposition to the Notice of Apparent Liability For Forfeiture ("NAL"), released October 12, 2004, against various FOX television network ("FOX") affiliates for the broadcast of the program "Married By America" on April 7, 2003.¹ The NAL proposes to fine 169 FOX affiliates, including Falls and Compass, \$7,000 for content deemed indecent. Falls and Compass oppose the proposed forfeiture because the Commission failed to adhere to its own rules for issuing a NAL, and thus violated the due process rights of both Falls and Compass. Finally, the Commission should not issue the

¹ Falls and Compass are also participants in the *Opposition to Notice of Apparent Liability for Forfeiture* filed by Fox Broadcasting Company ("FOX Opposition"). Pursuant to its rights to exercise all procedural options, Falls and Compass submit this response to supplement the responses made in the FOX Opposition.

forfeiture against Falls and Compass because neither party has a history of prior offenses with the Commission.

Imposing Forfeiture on Falls and Compass Without Providing Evidence of a Complaint or an Opportunity to Respond is Procedurally Defective

“The Commission’s indecency enforcement is based on complaints from the public.”² Parties or individuals who wish to file a complaint concerning indecent or profane material must include in the complaint details of what was said or depicted in the program, the date and time the program was broadcast and “[t]he call sign of the station involved.”³ In the NAL, the Commission stated that it received 159 complaints regarding indecent content in the April 7, 2003 episode of “Married by America.”⁴ On October 19, 2004, Falls filed a Freedom of Information Act (“FOIA”) request asking the Commission to produce a list of the cities and states for each of the 159 complaints. On November 15, 2004, Falls received by the Commission copies of 90 complaints filed with the Commission regarding the Married By America episode. The FOIA response noted that “many of the complaints are duplicates”, and that “the 90 responsive complaints encompass correspondence from 23 individuals.”⁵ None of the 90 complaints are from communities served by either Falls or Compass. In fact, none of the complaints received at the Commission came from the state of Idaho. Of the 90 complaints, only one complaint followed FCC procedures by listing the station call sign.

² *Entercom Seattle License, LLC(KNDD(FM))*, DA-02-2402 at ¶ 7 (September 27, 2002).

³ <http://www.fcc.gov/eb/broadcast/opi.html>.

⁴ *See* Notice of Apparent Liability For Forfeiture (“NAL”) at ¶ 2 (October 12, 2004).

⁵ Letter from William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau to Jonathan Lichstein, dated Nov. 12, 2004 (FOIA Control No. 2005-029).

The fact that the Commission would consider these complaints is a disturbing trend. Only 1 complaint followed FCC procedure by listing a call sign of a FOX affiliate. It is not a coincidence that the one station identified, WTVT in Tampa, Florida, was the only station to receive a Letter of Inquiry. What is most peculiar is that ten of the ninety complaints received by the Commission came from Belgrade, Montana, a community of approximately 5,500 residents. The reason these complaints are so peculiar is that Belgrade, Montana has no access to over-the-air broadcast television from the FOX network.⁶ It would be somewhat difficult for a resident of Belgrade, Montana to pick up an over-the-air FOX network broadcast since the closest FOX affiliate is located in Hardin, Montana, 200 miles east of Belgrade. Another curious aspect of these complaints is when they were filed. The Commission sent its Letter of Inquiry (“LOI”) on July 10, 2003.⁷ Yet, 64 of the ninety complaints forwarded to Falls were submitted to the Commission after the LOI was sent.

The Commission has established a new, and dangerous, procedural standard with the issuance of this NAL. A licensee could be subject to forfeiture even if the licensee is not named in a complaint filed with the Commission. In this instance, not one person within the viewing areas of KXTF or KFXP, or anywhere in the state of Idaho, filed a complaint with the Commission regarding the Married by America episode. The Commission cannot impose any penalty against Falls, Compass or any other affiliate unless the affiliate is expressly identified in the complaint.

⁶ Belgrade, Montana has one low power television station licensed to the community. That license is currently held by Montana State University and provides the community with PBS programming. Belgrade is located approximately 10 miles west of Bozeman, Montana. Bozeman has a full-power CBS affiliate (KBZK), and low-power ABC and NBC affiliates.

⁷ NAL at Footnote 5.

If a complaint has merit, then the Commission's staff "will commence an investigation by sending a Letter of Inquiry ("LOI") to the broadcast station."⁸ In this particular proceeding, the Commission sent a letter of inquiry to the only identified licensee, TVT License, Inc. ("TVT"), the licensee of FOX affiliate WTVT(TV) in Tampa, Florida. The Commission notes that TVT responded to the LOI, but only on behalf of FOX owned and operated stations.⁹ At no time did the Commission distribute a LOI to Falls, Compass or any other affiliate not owned or operated by FOX.

If the Commission insists on issuing a NAL against affiliates like Falls and Compass, it must first provide a copy of the complaint to the licensee, and then provide the party an opportunity to respond. The Commission failed to meet either requirement. Instead, the NAL unfairly attaches a penalty against Falls and Compass for the responses made by another party and for complaints made by individuals nowhere near the viewing areas of KXTF or KFXP. This decision sets a frightening precedent because it allows the Commission to select the party to respond and then apply that party's response towards all other licensees. This is a blatant misuse of the Commission's authority against Falls and Compass.

The Commission's decision to incorporate rulings for events that occurred after the event in question is a violation of the First Amendment. In deciding to fine all FOX network affiliates, the Commission notes the differences between the incident in *Married by America* and Janet Jackson's "wardrobe malfunction" during the 2004 Super Bowl on CBS.¹⁰ Yet, the Commission should not have even considered the Janet Jackson decision for this NAL. The *Married by*

⁸ <http://www.fcc.gov/eb/broadcasting/opi.html>.

⁹ *See* NAL at Footnote 6.

¹⁰ *See* *Id.* at ¶ 16.

America episode in question was broadcast on April 7, 2003. The Commission sent its LOI to TWT on July 10, 2003, nearly seven months prior to the incident involving Janet Jackson and nearly a year and half before the Commission's decision on that particular incident. Applying the decision in the Janet Jackson proceeding against licensees in the Married by America proceeding amounts to an unconstitutional ex post facto act by the Commission. The forfeiture inflicts greater punishment against Falls and Compass because punishing all affiliates was not considered by the Commission at the time of its inquiry 2003. The concept of punishing all affiliates only became an issue after the Commission evaluated the events involving Janet Jackson.

Falls and Compass Should Not Face Sanctions Because Neither Party Has a History of Improper Conduct

In addition to the fact that no complaints were actually filed against Falls or Compass, the Commission should also rescind the proposed forfeiture because neither party has a history of improper conduct. Section 1.80(b)(4) of the Commission's rules provides that the Commission shall take into account factors including "culpability" and "any history of prior offenses." Falls and Compass have each operated within the boundaries of the Commission's rules and regulations and have never been subject to sanctions. Furthermore, Falls and Compass cannot be found culpable because neither party had an opportunity to preview the program before broadcast.

Under the network affiliation agreement with Fox Broadcasting Company ("FOX"), Falls and Compass must provide FOX seventy-two (72) hours notice if it intends to preempt network programming. Even if the affiliate determines that the programming is unsuitable for broadcast, Falls and Compass still must give FOX 72 hours notice before preempting the program.

"Married by America" is just one of a growing number of reality-based television shows. Many

of these reality television programs include viewer participation. This particular program allowed viewers to decide which contestants deserved the \$500,000 grand prize. In order to protect the contest's integrity, these programs are either live productions or are recorded mere hours before broadcast. Even if Falls or Compass found the programming objectionable, the production schedule would not have allowed either company to exercise its 72-hour preemption rights. The Commission's analysis that the program "was a taped episode in a taped series" paints an overly broad picture of network programming.¹¹ The fact that the program was "taped" does not mean it is available to preview. The short production schedule for "Married by America" made it impossible for Falls and Compass to exercise the preemption rights afforded in the network affiliation agreements.

The Commission's recognition of one broadcaster preempting the "Married by America" program is irrelevant for this proceeding.¹² Capitol Broadcasting Company ("Capitol"), licensee of WRAZ-TV in Raleigh, NC preempted the program "[a]fter viewing the second episode, which aired on March 5th."¹³ Like Falls and Compass, Capitol "was never afforded the opportunity to review these or future episodes."¹⁴ In fact, Capitol's decision to remove the program occurred one month prior to the episode in question and was not based on concerns of indecency or the content of the episode, but because "the show was clearly demeaning to the institution of

¹¹ NAL at ¶ 16.

¹² See Id.

¹³ Capitol Broadcasting Press Release, *WRAZ-TV/FOX 50 To Preempt Future Broadcasts of Married By America*, http://www.cbc-raleigh.com/inside_cbc/2003%20news/030903fx.htm (March 9, 2003).

¹⁴ Id.

marriage.”¹⁵ Capitol’s actions were not based on any of the content in this particular episode and should not be used against broadcasters like Falls and Compass.

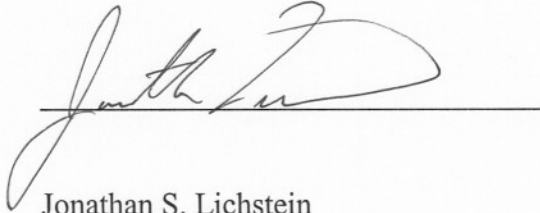
Both Falls and Compass take great pride in providing FOX programming to residents of Eastern Idaho. Neither KXTF nor KFXP has been the subject of a Commission sanction during each station’s broadcast history. Not one comment, positive or negative, was received by Falls or Compass for any episode of the “Married by America” program. Proposing to fine stations that have no prior history of malfeasance and without any evidence of public outrage from either Twin Falls or Pocatello places a great chill on free speech.

Conclusion

The NAL issued by the Commission is rife with errors and improper conclusions. The Commission has admitted that the 159 complaints received were actually 90 complaints received from a handful of individuals. The complaints failed to adhere to the standards set by the Commission for filing complaints. A number of complaints received by the Commission were from communities with no possible access to over-the-air FOX programming. Most importantly, not one complaint received by the Commission was from the viewing area served by Falls and Compass. The Commission should immediately rescind the proposed forfeiture amount of \$7,000 against Falls and Compass.

¹⁵ Id.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Jonathan S. Lichstein", is written over a solid horizontal line.

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