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December 3, 2004

Via Hand Delivery

Marilyn H. Dortch
Secretary
Federal Communications Commission
236 Massachusetts Avenue, N.E.+
Suite 110
Washington, DC 20002

ATTN: William H. Davenport, Chief
Investigations and Hearings Division, Enforcement Bureau

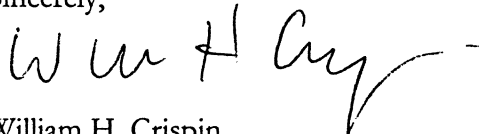
Re: Response to Notice of Apparent Liability for Forfeiture; NAL/Acct. No. 200532080003, File No. EB-03-IH-0162

Dear Madame Secretary:

Enclosed for filing on behalf of Hill Broadcasting Company, Inc. the licensee of primary television station KTVG (TV), Grand Island, Nebraska, is the Response of the Hill Broadcasting to the Commission's Notice of Apparent Liability for Forfeiture in the above-referenced matter, In re Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married by America" On April 7, 2003, FCC 04-242 (released October 12, 2004).

If there are any questions regarding this matter, please do not hesitate to contact the undersigned.

Sincerely,



William H. Crispin

Enclosure

INVESTIGATIONS &
HEARINGS DIVISION
2004 DEC -7 A 11:59
FCC ENFORCEMENT BUREAU

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

In the Matter of)	
)	
Complaints Against Various Licensees Regarding)	NAL/Acct. No. 200532080003
Their Broadcast of The Fox Television Network)	File No. EB-03-IH-0162
Program "Married by America" On April 7, 2003)	

RESPONSE TO NOTICE OF APPARENT LIABILITY FOR FORFEITURE

On October 12, 2004, the Commission released a *Notice of Apparent Liability for Forfeiture* (the "*Married by America NAL*"),¹ pursuant to Section 503(b) of the Communications Act of 1934, as amended ("the Act"), and Section 1.80 of the Commission's Rules, to 169 television stations either under common ownership with, or separately owned but affiliated with, the Fox Television Network. Included among the licensees of the stations named in the *Married by America NAL* is Hill Broadcasting Company, Inc., licensee of KTVG, Grand Island, Nebraska ("Hill Broadcasting") Hill Broadcasting is affiliated with, but not under common ownership with, the Fox Television Network. In the *Married by America NAL*, the Commission found that the stations named therein had broadcast indecent material during the April 7, 2003 episode of the Fox Television Network program *Married by America*, and, as a result, are apparently liable for monetary forfeitures in the amount of Seven Thousand Dollars (\$7,000) each. For the reasons set forth herein, the Commission should rescind the *Married by America NAL* with respect to Hill Broadcasting.

¹ *In re Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married by America" On April 7, 2003, Notice of Apparent Liability for Forfeiture*, FCC 04-242 (released October 12, 2004).

- I. **The Commission should not sanction Hill Broadcasting because it had no opportunity to pre-screen the April 7, 2003 episode of *Married by America*, and were given no indication by the Fox Network prior to air time of its objectionable content; Hill Broadcasting was therefore unable to exercise a right to reject the network-supplied program prior to the time of its scheduled broadcast.**

In all material respects, this instant case is indistinguishable from that considered by the Commission earlier this year in its decision in *In re Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show* (the “*Super Bowl NAL*”).² In that decision, the Commission assessed a \$550,000 forfeiture against various television station licensees that are under common ownership with the CBS Television Network for broadcasting the 2004 Super Bowl halftime show, which contained a musical performance that the Commission deemed to be indecent, due largely to the on-camera exposure of performer Janet Jackson’s breast.³ However, in the *Super Bowl NAL*, the Commission declined to sanction stations that were affiliated with the CBS Television Network, and that broadcast the program in question, but that were not under common ownership with the CBS Television Network, because the Commission found “. . . no evidence that the licensee of any of the non-Viacom-owned CBS Affiliate [*sic*] was involved in the selection, planning or approval of the apparently indecent material.”⁴ In addition, the Commission found that the non-Viacom-owned affiliates “. . . could not have reasonably anticipated . . .” that the Super Bowl halftime show would contain such apparently indecent material.⁵ Chairman Powell stated that “.

² *In re 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).

³ *See id.* at ¶ 15.

⁴ *See id.* at ¶ 25.

⁵ *Id.*

. . fundamental fairness” was the reason that affiliates not owned by Viacom should not be penalized for airing content that they could not have reasonably anticipated.⁶

In this case, Hill Broadcasting faced virtually the same set of circumstances as those faced by the non-Viacom-owned CBS affiliates that broadcast the 2004 Super Bowl halftime show. In the first instance, Hill Broadcasting had no role in the selection, planning, or approval of the April 7, 2003 episode of *Married by America*; that program is produced for the Fox Television Network, and the episode in question was transmitted by the network to KTVG(TV) for broadcast precisely *at the moment that the program was scheduled to air*. Having received the network feed of that episode just at the time that it was to be broadcast, Hill Broadcasting had no opportunity to pre-screen the episode.

The Fox Television Network’s distribution to its affiliates of programming only at the point in time when the program is scheduled to be broadcast precludes the affiliates, such as Hill Broadcasting, from an opportunity to pre-screen network feeds for material that may be profane, indecent, offensive, or deemed by the affiliates to be inappropriate for local viewing audiences in their communities, and to pre-empt such material. This practice essentially eviscerates the statutory right and obligation of Hill Broadcasting and other Commission licensees to ensure that they air programming that serves the interests of their viewers, and to ensure that their viewers are not subjected to profane, indecent, or otherwise objectionable content.

As previously stated, Hill Broadcasting had no reason to believe that the April 7, 2003 episode of *Married by America* would contain content that might run afoul of the Commission’s indecency regulations. To the contrary, a synopsis of the upcoming April 7, 2003 episode transmitted by the Fox Network to its affiliates via the network’s website on March 21, 2003

⁶ *Id.*, Statement of Chairman Michael K. Powell.

provided a description of the episode that misleadingly suggested entirely innocuous content. That synopsis offered no specific details of the episode's content, and made no mention of the bachelor and bachelorette parties that were depicted in the episode and that are the core concern of the *Married by America NAL*. The synopsis simply read as follows:

This groundbreaking series follows five singles who put their trust in the American viewing public to play matchmaker. These men and women and their potential spouses are successful in every aspect of their lives, except at finding a mate by conventional means. Once face-to-face, these new couples will embark on a journey toward matrimony in hopes that they have indeed found their one true love. The five engaged couples have been narrowed down to two by the relationship experts on the show (DR. JENN BERMAN, MS. P. AND DON ELIUM). Tonight America will once again be given the opportunity to vote by telephone for the couple they feel is the perfect match.

The content description contained in that synopsis is so benign that no affiliate relying upon it would have had any basis for concern that the April 7, 2003 episode of *Married by America* could contain content that could result in Commission sanction.

The Commission implied in the *Married by America NAL* that the Raleigh, North Carolina affiliate of the Fox Television Network, WRAZ-TV, had declined to air the April 7, 2003 episode of *Married by America* on the grounds of concern about that episode's possibly-indecent content.⁷ However, a close examination of the press release issued by WRAZ-TV and cited by the Commission in the *Married by America NAL* demonstrates that WRAZ-TV had decided nearly a month prior to the episode in question, on March 9, 2003, to discontinue broadcasting the entire program series, after viewing the first two episodes, out of a concern that the show was "... demeaning to the institution of marriage," not because the station had actually pre-screened and rejected an episode that was not even to have been delivered until April 7, 2003. Moreover, the press release explicitly stated that WRAZ-TV "... was never afforded the

⁷ See *Married by America NAL*, at ¶ 16.

opportunity to preview . . .” episodes of *Married by America*, just as Hill Broadcasting was denied that opportunity with respect to the April 7, 2003 episode. Hence, the *Married by America* NAL’s attempt to distinguish the posture of the non-Fox-owned affiliates in this case from the posture of the non-Viacom-owned affiliates in the *Super Bowl* NAL is based upon an inaccurate inference drawn from the actions of WRAZ-TV. Since Hill Broadcasting had no ability to preview the episode in question it should not be held liable and the *Married by America* NAL should be rescinded.

II. Affiliates must be given a reasonable opportunity to discharge their statutory obligation to preview and pre-empt network-supplied programming that may be deemed inappropriate for the local audiences in the communities in which the stations of those affiliates operate.

Under the Act and the Commission’s Rules, Hill Broadcasting, as a public trustee, has both the right and the duty to determine what programming is to be broadcast to the viewers in their local communities. The power to accept or reject network-supplied programs⁸ is fundamental to the proper exercise of that right and the proper discharge of that duty. In fact, that right and duty are effectively eviscerated if the affiliate is afforded no opportunity to preview network programming. That right and duty are rendered meaningless when circumscribed by network affiliation agreements that often threaten what would prove to be an economically disastrous withdrawal of the network’s affiliation with a station, if a network program is pre-empted on more than a handful of occasions over the term of the agreement, or when network programs are delivered to the affiliates precisely at the moment that the programs are scheduled to be broadcast, as in this case. For example, under the Fox Broadcasting

⁸ See, e.g., 47 C.F.R. § 73.658(e).

Company Station Affiliation Agreement, the Fox Television Network may elect either to terminate an affiliated station's right to broadcast any one or more series or other network programs, or terminate the Agreement itself, should the station make more than three "Unauthorized Preemptions" of Fox programming within a 12-month period.⁹ The termination by the network of a station's affiliation, or the cancellation of the station's right to air certain network-supplied programs, could be financially devastating to an affiliate attempting to discharge its duty to preview and pre-empt network programming that it may find unsuitable for its local audience.

Thus, the contractual and practical deprivation to the affiliates of a meaningful power to review and reject undesirable episodes of otherwise acceptable network program series forces the affiliates into a Hobson's Choice: either to acquiesce in the network's programming choices and potentially face Commission sanctions for content which the affiliates had no role in planning, producing, or approving, as well as suffer local viewer and advertiser wrath for airing programming that is deemed offensive to local tastes; or to decline to air an entire series of a program that is deemed (on the basis of one or more episodes) to run a risk of containing indecency or other actionable content, which will likely incur network reprisal, including possible withdrawal of the affiliation, and may cause many episodes of the program in question

⁹ While the Fox Broadcasting Company Station Affiliation Agreement permits pre-emptions based upon the affiliate's reasonable belief that the pre-empted program would not meet prevailing contemporary standards in its community of license, the agreement also requires that the affiliate give the network at least 72 hours advance notice of such pre-emption (or as soon thereafter as possible). Obviously, in circumstances where the program in question is only delivered to the affiliate at the moment it is scheduled to be broadcast, that requirement cannot be met, and hence, the affiliate exercising its right to engage in such pre-emption could be found to have violated the affiliation agreement.

that are not indecent or offensive to be withheld from local viewers who want access to such non-offensive episodes.

III. The current ambiguous state of the Commission's indecency regulation creates difficulty for licensees striving to decide what types of content may expose them to regulatory sanctions.

Although Hill Broadcasting, had it been afforded an opportunity to have pre-viewed the April 7, 2003 episode of *Married by America*, would have rejected the episode as offensive to viewers in the communities in which those stations operate -- irrespective of whether the program contained actionable indecency -- the current ambiguous state of indecency regulation and enforcement by the Commission makes it difficult for stations to know what constitutes indecency. One example of such inconsistency is the previously-mentioned Commission decision to refrain from sanctioning the non-Viacom-owned CBS affiliates for broadcasting the 2004 Super Bowl halftime show, because they had no role in planning that show and had no basis for anticipating that it would include an instance of possible indecency,¹⁰ contrasted with the *Married by America NAL*, which now proposes to sanction non-Fox-owned affiliates that broadcast the April 7, 2003 episode of *Married by America* without any participation in planning that episode and without any pre-screening opportunity or any other basis for anticipating that the program would contain possible indecency. Another example of the Commission's inconsistency in this area is the Commission's proposal to sanction the stations named in the *Married by America NAL* for broadcasting certain unclothed body parts and activities that were obscured by pixilation, when the Commission has not done so in the past.

Conclusion

¹⁰ See *Super Bowl NAL* at ¶ 25.

For the reasons set forth hereinabove, Hill Broadcasting respectfully urges the Commission to rescind the *Married by America NAL*, insofar as the *Married by America NAL* applies to Hill Broadcasting.

Respectfully submitted,

Hill Broadcasting Company, Inc.

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