

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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 ^{1/}
Program "Married By America" On April 7, 2003)	

To: Office of Secretary
Attn: Chief, Investigations and Hearings Division
Enforcement Bureau

**CUNNINGHAM OPPOSITION
TO NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

Cunningham Broadcasting Corporation ("Cunningham"), the ultimate parent of the four Fox Television Network affiliates listed in the Attachment hereto and on behalf of those licensee affiliates, hereby opposes the Commission's Notice of Apparent Liability for Forfeiture ("NAL") issued in the above-captioned proceeding. In the NAL, the Commission found that the licensees of 169 Fox owned or affiliated stations "apparently broadcast indecent material" during the April 7, 2003 episode of the Fox network program *Married by America*. Concurrently herewith, Fox Broadcasting Company and the Fox network affiliates are filing a joint opposition to the NAL (the "Joint Opposition"). The Joint Opposition fully demonstrates that the April 7 *Married by America* episode did not fall within the subject matter scope of the indecency definition, nor was the program patently offensive so that the NAL should be rescinded in its entirety. Cunningham

^{1/} The Attachment hereto lists the FCC Registration Numbers, Facility Identification Numbers, and NAL account numbers for the Cunningham subsidiary licensees and their stations that are involved in this proceeding.

has joined in that Joint Opposition and does not repeat those arguments here. However, even if the Commission determines that the episode was indecent, it should not sanction Cunningham.

As fully explained in the Joint Opposition, affiliates had no meaningful opportunity to review the April 7 *Married by America* episode prior to broadcast due to Fox's inability to deliver the program in advance of air time. Thus, none of the Cunningham stations had any way to predict that the April 7 program would be any different from any of the preceding episodes, none of which contained objectionable sexual content. The affiliates were in the same position as the CBS affiliates with respect to the Super Bowl. For the same reasons that the Commission chose not to sanction the CBS affiliates, sanctioning of the Fox affiliates is inappropriate here. *See Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, File No. EB-04-IH-0011, Notice of Apparent Liability for Forfeiture (September 22, 2004) (noting, in determining that a fine of the CBS affiliates was unwarranted, that "[W]e have no evidence that the licensee of any of the non-Viacom-owned CBS Affiliate[s] was involved in the selection, planning or approval of the apparently indecent material. Moreover, we find that the licensee of each such station could not have reasonably anticipated that the CBS Network production of a prestigious national event such as the Super Bowl would contain material that included the on-camera exposure of Ms. Jackson's breast."). As in the Super Bowl case, none of the Fox affiliates was involved in the selection, planning or approval of any portion of the *Married by America* program, nor could any of the affiliates reasonably have anticipated that the April 7 episode would suddenly veer into objectionable content. Although in the Super Bowl decision the Commission urged network affiliates to take reasonable precautions, such as tape delay, to prevent recurrences of indecent programming in the future, this advice could be of no value to the Fox affiliates in this case since

the Super Bowl decision was released almost a year and a half after the April 7 *Married by America* episode had aired.

Moreover, not one of the Cunningham stations received a single complaint regarding its airing of any of the *Married by America* episodes, including the April 7 episode. Nor have any of the Cunningham stations ever been fined for broadcasting indecent programming.

Accordingly, factors such as the unique circumstances surrounding the violation, the low degree of culpability of the Cunningham stations, and the stations' history of compliance with the indecency standard all dictate leniency in this case. *See The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, ¶ 27 (1997), *recon. denied*, 15 FCC Rcd 303 (1999), *WLDI, Inc.*, 16 FCC Rcd 9571, ¶ 14 (2001) (reduced forfeiture based on licensee's overall history of compliance with the Commission's rules).

Additionally, Cunningham notes with grave concern the procedural irregularity whereby its stations and all the other Fox affiliates have been charged with a violation and found guilty without first being given an opportunity to hear the charges or defend themselves. Fundamental fairness dictates that a licensee be given notice and an opportunity to respond prior to imposition of a sanction.^{2/} The Notice of Apparent Liability for Forfeiture in this case reflects a Commission pre-judgment on the merits of the matter without Cunningham being apprised that its programming had been challenged, without Cunningham being apprised of the nature of the

^{2/} Indeed, this very procedure is required by Section 1.89 of the Commission's Rules, which calls for any licensee who appears to have violated the Communications Act or the Commission's Rules to be served with a written Notice of Violation ("NOV") calling such matters to the attention of the licensee and giving the licensee an opportunity to provide a statement on the matter. *See* Section 1.89 of the Commission's Rules, 47 C.F.R. §1.89. While Section 1.89 permits a Notice of Violation to "be combined with a Notice of Apparent Liability to Monetary Forfeiture" that was not done here.

challenge, and without Cunningham ever having had an opportunity to tell its side of the story before the Commission made both factual and legal conclusions and held Cunningham in violation of the Commission's indecency rules. It is as if the judge held a criminal trial *in camera*, took evidence, found the defendant guilty, and assessed a fine, all without notifying the defendant, and then sent a notice to the defendant to pay up or face the consequences. The fundamental lack of due process in such a process is obvious and undercuts the validity of the Commission's actions in this case.

Finally, Cunningham notes that the Commission's NAL is facially inconsistent with the results reached in the most recent indecency decisions. In *NBC Telemundo License Co.*, FCC 04-235, released November 23, 2004, the FCC cleared *Coupling* of numerous indecency complaints despite repeated episodes that the Commission found to have featured sustained shocking, titillating or pandering sexual references because sexual organs or activities were not explicitly depicted and the sexual language used in the program did not qualify as indecent or profane.^{3/} Similarly, *Married by America* did not feature explicit depiction of sexual organs or activities, nor was indecent or profane language involved. The much more graphic program *Keen Eddie* also escaped an indecency challenge even though its plot is so distasteful that Cunningham will not repeat it here, because "the material contains no graphic or explicit dialogue, discussion, depiction or description of any particular sexual or excretory organ or activity." *Keen Eddie*, FCC 04-233, released November 23, 2004. *Married by America* was far

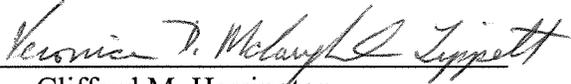
^{3/} Cunningham is troubled by the Commission's offhanded reference in the *Coupling* decision to "kissing" as a sexual activity. Cunningham is aware of no reported case in any court or before any agency which finds the mere act of kissing to be a sexual activity which might give rise to an indecency determination. This may be *dicta*, but it may have the unfortunate effect of deterring broadcasters from showing wholesome and healthy personal and family relationships featuring this age old means of showing love and caring.

less graphic and featured no sexual or excretory organ, activity or language. Similarly, the NAL cannot be squared with the decision in *WBDC Broadcasting, Inc.*, FCC 04-234, released November 23, 2004, in which repeated references in two episodes of *Off Centre* to excretory activities and sexual organs which the Commission conceded had been presented in a pandering, shocking and titillating manner were found not to be indecent because the broadcast did not explicitly depict sexual activities or organs or use indecent or profane language. Neither did the episode of *Married by America* found to be indecent by the Commission.

For the foregoing reasons, Cunningham hereby requests that the Commission rescind the NAL in its entirety or at least with respect to the Cunningham stations.

Respectfully submitted,

CUNNINGHAM BROADCASTING
CORPORATION

By: 
Clifford M. Harrington
Veronica D. McLaughlin Tippet

Its Attorneys

SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, D.C. 20037-1128
(202) 663-8000

Dated: December 3, 2004

ATTACHMENT

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID No.	Time of Broadcast (Local Time)	Proposed Forfeiture Amount	Fox Station or Fox Affiliate
Columbus (WTTE-TV) Licensee, Inc., 2000 West 41st Street, Baltimore, MD 21211	9053299	200432080312	WTTE, Columbus, OH	74137	9-10 p.m.	\$7,000	Fox Affiliate
WRGT Licensee, LLC, 2000 West 41st Street, Baltimore, MD 21211	9529082	200432080409	WRGT-TV, Dayton, OH	411	9-10 p.m.	\$7,000	Fox Affiliate
WTAT Licensee, LLC, 2000 W. 41ST Street, Baltimore, MD 21211	7282957	200432080414	WTAT-TV, Charleston, SC	416	9-10 p.m.	\$7,000	Fox Affiliate
WVAH Licensee, LLC, 2000 W. 41st. Street, Baltimore, MD 21211	7283054	200432080419	WVAH-TV, Charleston, WV	417	9-10 p.m.	\$7,000	Fox Affiliate