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December 3, 2004

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BY HAND DELIVERY

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

RECEIVED

DEC - 3 2004

Federal Communications Commission
Office of Secretary

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 KMPH (TV) License, LLC, the licensee of primary television station KMPH (TV), Visalia, California, and low-power television station KBFX-LP, Bakersfield, California; KPTM (TV) License, LLC, the licensee of primary television station KPTM (TV), Omaha, Nebraska; and Pappas Telecasting of Sioux City, L.P., the licensee of primary television station KPTH (TV), Sioux City, Iowa (collectively, the "Pappas Stations"), is the Response of the Pappas Stations 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.

Very truly yours,



W. Ray Rutngamlug
for PAUL, HASTINGS, JANOFSKY & WALKER LLP

Enclosure

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)

To: The Chief, Investigations and Hearings Division, Enforcement Bureau

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* are KMPH (TV) License, LLC, the licensee of primary television station KMPH (TV), Visalia, California, and low-power television station KBFX-LP, Bakersfield California; KPTM (TV) License, LLC, the licensee of primary television station KPTM (TV), Omaha, Nebraska; and Pappas Telecasting of Sioux City, a California Limited Partnership, the licensee of primary television station KPTH (TV), Sioux City, Iowa² (collectively, KMPH (TV) License, LLC, KPTM (TV) License, LLC, and Pappas Telecasting of Sioux City, a California

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).

² Pursuant to the Commission's prior consent thereto, effective November 30, 2004 the license for station KPTH (TV) was assigned by Pappas Telecasting of Sioux City, a California Limited Partnership, to Pappas Telecasting of Sioux City, L.P. (a Delaware limited partnership).

Limited Partnership, are referred to hereinafter as the "Pappas Stations"). The Pappas Stations are affiliated with, but are 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 the Pappas Stations.³

- I. **The Commission should not sanction the Pappas Stations because they 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 the program's objectionable content; the Pappas Stations were 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*").⁴ In that decision, the Commission assessed a Five Hundred Fifty Thousand Dollar (\$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

³ Pursuant to requests from counsel for the Pappas Stations to the Commission's staff in the Enforcement Bureau, the Pappas Stations were granted an extension of time to and including today's date in which to respond to the *Married by America NAL*.

⁴ *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).

indecent, due largely to the on-camera exposure of performer Janet Jackson's breast.⁵ However, in the *Super Bowl NAL*, the Commission declined to sanction stations that were affiliated with the CBS Television Network, and that had 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."⁶ 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.⁷ Chairman Powell stated that "... 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.⁸

In this case, the Pappas Stations 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, the Pappas Stations 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,⁷ and the episode in question was transmitted by the network to the Pappas Stations 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, the Pappas Stations had no opportunity to pre-screen the episode. Moreover, in the experience of the Pappas Stations, it has been the practice of the Fox Television Network to distribute all of its

⁵ See *id.* at ¶ 15.

⁶ See *id.* at ¶ 25.

⁷ *Id.*

⁸ *Id.*, Statement of Chairman Michael K. Powell.

programming to its affiliates in such a manner – namely, at the time that the episode is scheduled to air.⁹

Mindful of their statutory rights and obligations as Commission licensees, the Pappas Stations have complained to the Fox Television Network about this practice in the past, and has requested in writing that all pre-recorded network-supplied programming that is scheduled to be broadcast during prime time hours or late at night be fed to the stations no later than 3 PM Eastern Time each day.¹⁰ However, the network has to date declined to honor that request.

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 the Pappas Stations, 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 audiences in their communities, and to pre-empt such material. This practice essentially eviscerates the statutory right and obligation of the Pappas Stations 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, the Pappas Stations 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

⁹ In addition, the Fox Television Network provides its affiliates with unscrambled programming on a region-by-region basis only, such that an affiliate can only receive an unscrambled feed for its particular time zone. Hence, an affiliate in the Pacific Time Zone cannot access a program fed to another affiliate earlier in the day in the Eastern Time Zone.

¹⁰ See letter from Howard H. Shrier, Senior Executive Vice President and Chief Operating Officer of the Pappas Stations, to Tony Vinciguerra, President of Fox Broadcasting Company, dated December 12, 2003 (copy attached hereto as Appendix A). Similarly, a recent request from the Pappas Stations to the Fox Television Network to permit Pappas Stations personnel to screen the live feed of the upcoming Billboard Music Awards program on December 8, 2004 at the time that the program is distributed to affiliates on the East Coast, and hence prior to the scheduled broadcast of the program on the West Coast, was denied by the network.

indecent 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 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 might 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.¹¹ However, a close examination of the press release issued by WRAZ-TV and cited by the Commission in the *Married by America NAL*¹² demonstrates that WRAZ-TV had decided nearly a month prior to the episode in question, on March 9, 2003, to discontinue

¹¹ See *Married by America NAL*, at ¶ 16.

¹² See Capitol Broadcasting Company, Inc.'s press release, *WRAZ-TV/FOX 50 to preempt future broadcasts of Married by America* (March 9, 2003), a copy of which is attached hereto as Appendix B, and which was cited in the *Married by America NAL* at note 13.

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 opportunity to preview . . .” episodes of *Married by America*, just as the Pappas Stations were 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 the Pappas Stations had no ability to preview the episode in question – and especially in view of the fact that the Pappas Stations had expressly requested such an ability from the Fox Television Network – the Pappas Stations 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, the Pappas Stations, as public trustees, have 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 programs¹³ 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. Additionally, that right and duty are rendered meaningless when

¹³ See, e.g., 47 C.F.R. § 73.658(e).

circumscribed by network affiliation agreements and practices that often threaten a withdrawal of the network's affiliation with a station in the event network programming is pre-empted on more than a handful of occasions over the term of the agreement.¹⁴ For example, under the Fox Broadcasting 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.¹⁵ 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.

¹⁴ Pappas Telecasting Companies ("Pappas Telecasting"), of which the Pappas Stations are a part, have consistently worked to secure and enforce the right of network-affiliated broadcast stations to pre-screen and reject network material deemed to be inappropriate for local audiences. For example, the Chairman and CEO of Pappas Telecasting, Harry J. Pappas, has testified before the U.S. House of Representatives' Committee on Energy and Commerce's Subcommittee on Telecommunications and the Internet about the need to protect the ability of local stations to reject network programs that may be deemed unsuitable for local viewers and in support of a petition filed with the Commission by the Network Affiliated Stations Alliance that asks the Commission to review the practices of broadcast networks that inhibit the exercise of the rights of network-affiliated stations.

¹⁵ 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 that 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 Agreement.

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 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 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 the Pappas Stations, had they 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,¹⁶ 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,¹⁷ when the Commission has not done so in the past.¹⁸

Conclusion

For the reasons set forth hereinabove, the Pappas Stations respectfully urge the Commission to rescind the *Married by America NAL*, insofar as the *Married by America NAL* applies to the Pappas Stations.

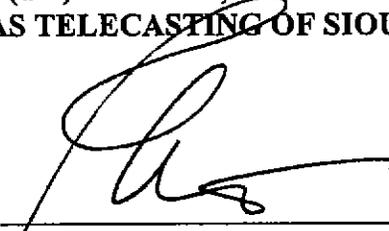
¹⁶ See *Super Bowl NAL* at ¶ 25.

¹⁷ See *id.* at ¶ 10.

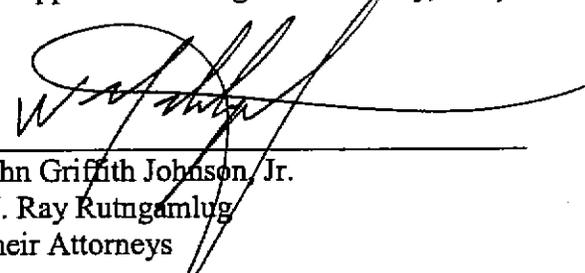
¹⁸ One example of a program which has, on occasion, obscured on-screen nudity through the use of pixilation is the Fox Television Network program *COPS*. To the best of the Pappas Stations' knowledge, the Commission has never suggested that such pixilation fails to remove such nudity from the realm of indecency.

Respectfully submitted,

**KMPH (TV) LICENSE, LLC
KPTM (TV) LICENSE, LLC
PAPPAS TELECASTING OF SIOUX CITY, L.P.**

By: 

Peter C. Pappas
Executive Vice President,
Legal and Governmental Affairs
Pappas Telecasting Incorporated (the sole
member of KMPH (TV) License, LLC), Pappas
Telecasting of Nebraska, Inc. (a general partner
of Pappas Telecasting of the Midlands, L.P., the
sole member of KPTM (TV) License, LLC), and
Pappas Telecasting Companies (a general partner
of Pappas Telecasting of Sioux City, L.P.)

By: 

John Griffith Johnson, Jr.
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Their Attorneys

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December 3, 2004

APPENDIX A



**PAPPAS
TELECASTING
COMPANIES**

Howard H. Shrier
SENIOR EXECUTIVE VICE PRESIDENT/
CHIEF OPERATING OFFICER

December 12, 2003

Mr. Tony Vinciguerra
President
FOX Broadcasting Company
10201 West Pico Boulevard
Building 100
Los Angeles, CA 90035

Dear Tony:

I am writing you to express our deep concern, and the deep concern of many of our viewers, at the instances of profane language that have been aired over the FOX network recently. As you are aware, on Wednesday evening's telecast of the Billboard Music Awards (December 10, 2003), several expletives were aired unbleeped and were completely audible to our viewers in the Midwest. We received many complaints from viewers about this in several of our markets, and, as you know, the Parents Television Council filed an indecency complaint yesterday regarding this telecast.

Just last month, FOX indicated to its affiliates in a letter from Bob Quicksilver to John Tupper, that the network "takes its obligation to provide its affiliate stations with appropriate programming very seriously" and that FOX had taken steps to strengthen the safeguards against inappropriate content through the network's Broadcast Standards and Practices group. Yet, in the last month, we have had instances of profanity unedited on closed captioning on the program "OC" (November 20, 2003), as well as very graphic and disturbing violence and depictions of narcotics use by syringe on "24" (November 25, 2003).

As broadcast licensees, we are ever mindful of the fact that we are charged with serving the needs and interests of the viewers in our respective communities and respecting contemporary community standards which we, in good faith, have undertaken the duty to consider in allowing content to be broadcast. As such, we continue to be deeply troubled by these events, by the justified upset they have caused many of our viewers, by the disrepute this brings upon your company and ours and by the potential liability that they may entail for our stations.

While you and others determine whether the fault lies with your people or your processes or both, and then attempt to remedy the failures, we must assure that we comply with our responsibilities as a broadcast station licensee. Therefore, we request that you feed to our stations, effective as soon as reasonably practicable, all pre-recorded programs that are to air in prime time or late night, no later than 3 PM EST daily. We will review and edit for illegal, obscene, profane or otherwise inappropriate content as it is our right and duty to do. In addition,

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we are purchasing time delay equipment to allow us to monitor live broadcasts and delete inappropriate content. We request that you inform us of what other appropriate action you shall take to ensure that such conduct is corrected.

Best regards,



Howard H. Shrier
Sr. Exec. V.P./COO

CC: Bob Quicksilver, President



APPENDIX B

For Immediate Release
March 9, 2003

WRAZ-TV/FOX 50 to preempt future broadcasts of *Married by America*

RALEIGH/DURHAM - WRAZ-TV/FOX 50 has decided to preempt future broadcasts of the FOX network reality series *Married by America* due to content that demeans and exploits the institution of marriage.

WRAZ-TV/FOX 50 expressed serious concerns with *Married by America* when the show's concept was first revealed. After viewing the second episode, which aired on March 5th, WRAZ-TV/FOX 50 decided that the program did not reflect prevailing standards of good taste and that the show was clearly demeaning to the institution of marriage.

Since WRAZ-TV/FOX 50 was never afforded the opportunity to preview these nor future episodes, the station can only assume that the program content will continue as is. WRAZ-TV/FOX 50 can only believe the FOX promotional announcements when they say: "Once engaged, they [the couples] move in to this romantic estate, living together, sleeping together...you'll witness their every move until the day they say 'I do,'" and, "all five engaged strangers will commit to marriage on this stage."

While WRAZ-TV/FOX 50 realizes that reality programming has become very popular on broadcast television, the station has made a decision that it will not broadcast reality programming that demeans marriage. This is consistent with our preemption of *Who Wants to Marry a Multimillionaire?* in February of 2000.

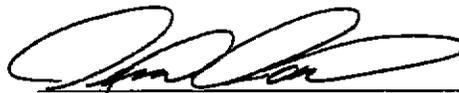
For more information call WRAZ-TV/FOX 50 General Manager Tommy Schenck, WRAZ-TV/FOX 50 Program Director Joanne Stanley, or WRAZ-TV/FOX 50 Promotion & Marketing Manager Kevin Kolbe at 919-595-5050.

Capitol Broadcasting Company, Inc. is a diversified communications company which owns and/or operates WRAL-TV (<http://www.wral.com>), WRAL-Digital (<http://www.wral-hd.com>), WRAL-FM (<http://www.wralfm.com>), Microspace Communications (<http://www.microspace.com>), DTV Plus (<http://www.dtvplus.com>), the North Carolina News Network (<http://www.ncnn.com>), Capitol Agribusiness (<http://www.ncnn.com/capag/>), Capitol Networks (<http://www.ncnn.com>), and Capitol Sports in Raleigh, NC; WJZY-TV (<http://www.wjzy.com>) and WFVT-TV (<http://www.wb55.com>) in Charlotte, NC; WILM-TV in Wilmington, NC; WRAZ-TV (<http://www.fox50.com>), WRAZ-DTV, and the Durham Bulls Baseball Club (<http://www.dbulls.com>) in Durham, NC; and the Myrtle Beach Pelicans Baseball Club (<http://www.myrtlebeachpelicans.com>) in Myrtle Beach, SC.

APPENDIX C

DECLARATION

My name is Dennis J. Davis. I am the President and the Chief Operating Officer of Pappas Telecasting Incorporated, which is the sole member of Respondent KMPH (TV) License, LLC; the President and the Chief Operating Officer of Pappas Telecasting of Nebraska, Inc., a general partner of Pappas Telecasting of the Midlands, L.P., which is the sole member of Respondent KPTM (TV) License, LLC; and the President and the Chief Operating Officer of Pappas Telecasting Companies, a general partner of Respondent Pappas Telecasting of Sioux City, L.P. I hereby declare, under penalty of perjury, that I have read the foregoing "Response to Notice of Apparent Liability for Forfeiture" filed on behalf of Respondents KMPH (TV) License, LLC, KPTM (TV) License, LLC, and Pappas Telecasting of Sioux City, L.P., and the facts stated therein are true and correct to the best of my information, knowledge and belief. Executed on December 2, 2004.



Dennis J. Davis