Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Complaints Against Various Licensees Regarding	)	File No. EB-03-IH-0162[1]
Their Broadcast of the Fox Television Network	)	
Program "Married By America" on April 7, 2003	)	

FORFEITURE ORDER

Adopted: February 21, 2008 **Released: February 22, 2008**

By the Commission:

I. INTRODUCTION

1. In this Forfeiture Order, issued pursuant to section 503 of the Communications Act of 1934, as amended, and section 1.80 of the Commission's rules,[2] we find that the FOX Television Network stations listed in Attachment A, *infra*, broadcast indecent material during an episode of the program "Married By America" on April 7, 2003, in willful violation of 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.[3] Based on our review of the facts and circumstances in this case, we conclude that the licensees of these stations are liable for a forfeiture in the amount of $7,000 per station.

[1] The NAL Acct. No. and FRN No. for each licensee subject to this Forfeiture Order are listed in Attachment A, *infra*.

[2] *See* 47 U.S.C. § 503; 47 C.F.R. § 1.80.

[3] *See* 18 U.S.C. § 1464; 47 C.F.R. § 73.3999. The Notice of Apparent Liability for Forfeiture in this proceeding included 169 FOX Television Network stations that are owned and operated, or ultimately controlled by, FOX Entertainment Group, Inc. (collectively "FOX O&Os") and other television stations that are network program affiliates of the FOX Television Network (collectively "FOX Affiliates"). *See Complaints Against Various Licensees Regarding Their Broadcast Of The FOX Television Network Program "*Married *By America" On April 7, 2003*, Notice of Apparently Liability for Forfeiture, 19 FCC Rcd 20191 (2004) ("*NAL*"). Consistent with our policy of restrained enforcement in indecency proceedings, we have limited the instant Forfeiture Order to stations in markets from which we received indecency complaints about the subject episode of "Married By America." *See Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, Order on Reconsideration, 21 FCC Rcd 6653, 6665 ¶ 30 (2006) ("*Super Bowl Order on Reconsideration*"), *pet. for review pending, CBS Corp. v. FCC*, No. 06-3575 (3d Cir. Filed July 28, 2006); *In the Matter of Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005,* 21 FCC Rcd 2664, 2673 ¶ 32 (2006), *vacated in part on other grounds*, 21 FCC Rcd 13299 (2006) (*"Omnibus Order"*) (subsequent history omitted). Accordingly, the stations listed in Attachment A, *infra*, are a subset of those named in the *NAL*.

II. BACKGROUND

2. "Married By America" was a weekly, hour-long "reality-based" program that was carried on the FOX Television Network in the spring of 2003. It featured several single adults who agreed to be engaged to and potentially marry each other, even though they had never previously met. The April 7, 2003 episode of the program focused on Las Vegas bachelor and bachelorette parties for two couples that featured sexually oriented entertainment provided by male and female strippers. Following the broadcast, the Commission received complaints alleging that the "Married By America" episode contained indecent material. After reviewing the complaints and a videotape of the subject episode, the Enforcement Bureau directed a letter of inquiry to TVT License, Inc., licensee of Station WTVT(TV), Tampa, Florida, seeking further information about the episode.[4] By letters dated August 11 and September 9, 2003, FOX Entertainment Group, Inc. ("FEG") responded to the LOI.[5] In its LOI responses, FEG identified the licensees of 169 FOX Television Network Stations that had aired the April 7, 2003 episode prior to 10:00 p.m. FEG maintained that the "Married By America" episode in question did not contain descriptions or depictions of sexual or excretory organs or activities and, even if it did, the material was not patently offensive as measured by contemporary community standards for the broadcast medium.

3. On October 12, 2004, the Commission released the *NAL*, finding that the material at issue apparently violated the broadcast indecency standard. Applying its two-prong indecency analysis, the Commission first found that the material depicted sexual or excretory organs or activities.[6] The Commission then concluded that the material satisfied the second prong of the indecency analysis, finding it patently offensive as measured by contemporary community standards for the broadcast medium. Looking to the three principal factors in our contextual analysis, we first determined that the material presented in the episode was "sufficiently graphic and explicit to be indecent."[7] Turning to the second principal factor in our patent offensiveness inquiry, whether the material dwells on or repeats at length depictions or descriptions of sexual or excretory organs or activities, the Commission rejected FOX's claim that the sexual material in the episode is fleeting, instead finding that the sexual matter is plainly dwelled upon.[8] Finally, the Commission concluded that the material was pandering and titillating, explaining, among other things, that "[t]he episode depicts the prolonged appearance of strippers attempting to sexually arouse the party-goers . . . ."[9]

4. Accordingly, the NAL found the licensees of 169 stations that broadcast the episode apparently liable for forfeitures in the amount of $7,000 per station for broadcasting indecent material, in apparent willful violation of 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules. In response to the NAL, numerous letters and pleadings were filed[10] with the Commission.[11]

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[4] *See* Letter to TVT License, Inc., from Maureen F. Del Duca, Chief, Investigations and Hearings Division, Enforcement Bureau, dated July 10, 2003 ("LOI").

[5] *See* Letter to Melanie A. Godschall, Investigations and Hearings Division, Enforcement Bureau, from John C. Quale, Skadden, Arps, Slate, Meagher & Flom, LLP, dated August 11, 2003; Letter to William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, from John C. Quale, Skadden, Arps, Slate, Meagher & Flom, LLP, dated September 9, 2003.

[6] *NAL*, 19 FCC Rcd at 20193-194.

[7] *Id.* at 20194.

[8] *Id.* at 20195.

[9] *Id*.

[10] In accordance with Section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, the *NAL* ordered each licensee, within 30 days of release thereof, to either pay its respective proposed forfeiture in full or file a written statement

(continued …)

III. DISCUSSION

5. Respondents raise multiple arguments, each of which is discussed below. Generally, they assert that the subject episode of "Married By America" is not actionably indecent under the Commission's prevailing indecency standard.[12] Respondents further contend that, even if the episode is actionably indecent, the FOX Affiliates against whom the NAL was directed should not be sanctioned for having broadcast the program. Moreover, they argue that the Commission's indecency standard is unconstitutional on its face and as applied in the NAL. We reject these arguments, but, for the reasons noted above, confine our forfeiture action to those stations about which we received complaints.[13]

A. Application of Indecency Test to "Married By America"

6. Respondents collectively argue that the NAL should be rescinded because the episode in question of "Married By America" does not satisfy the Commission's indecency test. In this regard, Respondents, such as FOX/Affiliates Group, argue that the subject bachelor and bachelorette scenes included no descriptions or depictions of sexual organs or activities,[14] and, even if they did, the material was not presented in a context that could reasonably be construed as patently offensive because the material was not explicit or graphic; the episode did not dwell on or repeat any indecent material; and the broadcast did not pander to, titillate, or shock the audience.[15] We reject Respondents' arguments.

7. Before addressing these arguments in detail, however, it is instructive to briefly summarize the material in question. The program focuses on a bachelorette party for two brides-to-be and a separate bachelor party for the would-be grooms. It depicts various scenes from the two parties, each of which features sexually oriented entertainment provided by nude or semi-nude female and male "strippers." In one of the first scenes of the bachelorette party, a male stripper wearing pants and no shirt performs on top of a woman wearing a miniskirt who is lying on her back on the floor. From the rear, the camera shows him thrusting his crotch into her face and then moving down her body toward her upper thighs, where whipped cream is shown on her bare legs just below her crotch. He places his face directly above the spot, apparently to lick off the whipped cream. Then, another woman is shown kneeling behind a topless male stripper, her hands smearing whipped cream on his stomach. The dancer is then shown from the front, wearing only shorts, holding the woman's hand by the wrist and moving it down his chest and stomach towards his crotch, apparently about to place her hand in his shorts. One of the brides-to-be is shown placing her lips over a stripper's nipple, which is covered in whipped cream.

(Continued from previous page)
seeking reduction or cancellation of the proposed forfeiture. *See* 19 FCC Rcd at 20196 ¶ 19. In response to multiple requests, the Commission granted extensions of time, to December 3, 2004, within which to respond to the *NAL*. Mission Broadcasting, Inc. asked for and was granted an extension until December 7, 2004 to interpose a response. Although some licensees have styled their filings as oppositions to the *NAL*, the Commission's rules do not contemplate the filing of an opposition to a proposed action. Consequently, each filing is appropriately characterized herein as a "response," pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. § 1.80(f)(3). The entities that filed responses are hereafter collectively referred to as "Respondents."

[11] *See* Attachment B, *infra*, for a list of these submissions.

[12] One respondent, Sunbeam Television Corporation, licensee of Station WSVN(TV), Miami, Florida, paid its forfeiture in full, subject to the outcome of the Commission's final action with respect to the FOX/Affiliates Consolidated Response.

[13] *See supra* note 2.

[14] *See* FOX/Affiliates Consolidated Response at 26-30.

[15] *See id*. at 31-39.

8. Meanwhile, at the bachelor party, two female strippers arrive. Initially, they are wearing tops but their buttocks are pixilated, presumably to obscure portions of their buttocks as well as the g-strings that cover their genitals. The camera shows close-ups of their stomachs, crotches and hips as they dance and remove their clothing. One of the grooms-to-be is shown from above and behind, sitting on a couch without his shirt as the two performers, now topless, straddle him, apparently kissing one another as a female voice sings seductively in the background. On the voice-over, the groom-to-be states the strippers' names and informs the audience that they are sisters. He also informs the audience that they removed his shirt and pants, and he is then shown on all fours on the floor. The two strippers, who are clad only in thongs (their breasts are pixilated), remove his pants. One kneels beside him as the other spanks him from behind with a whip or a belt. He is finally shown lying on his back, shirtless, with the two strippers above him caressing his chest.

9. Back at the bachelorette party, a female stripper arrives. She sits on the laps of the two brides-to-be and kisses one. She is then shown lying topless on a couch, cupping her breasts with her hands as a bride-to-be straddles her. The other bride-to-be states that they both had fun with the stripper. "I was touching her. Jill was touching her. I licked the whipped cream off her…" The first bride-to-be is then shown leaning over the stripper, who is again lying on the couch cupping her breasts, this time with whipped cream on her chest and stomach. The bride-to-be's face moves up from the stripper's breasts toward her mouth as both women stick out their tongues, apparently about to kiss. The other bride-to-be's refusal to engage in this same activity engenders hard feelings between the two brides-to-be, but she observes that she "didn't have to lick whipped cream off her stomach or her boobs."

10. The program then returns to the bachelor party as one groom-to-be retires to a back room with one stripper (who is again shown wearing a top and with pixilated buttocks) while the other groom-to-be receives a lap dance. As he describes his reluctance to engage in such activity in the voice-over, a stripper is shown straddling him on the couch, thrusting her crotch toward his, and removing her top (again, her breasts are pixilated) so that her breasts are a foot or so from his face. The scene ends with one of the grooms-to-be, who is shown kissing one of the strippers, stating that there's "nothing wrong with kissing a stripper before you're married. Kissing a stripper after you're married, that's when the trouble begins."

11. Indecency findings involve two fundamental determinations. First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition, *i.e.,* "the material must describe or depict sexual or excretory organs or activities."[16] The material contained in the episode in question clearly described or depicted sexual activities and sexual organs. With respect to sexual activities, the scenes at issue contained depictions or descriptions of a myriad of activities designed to stimulate sexual arousal, including, among other things, the massaging and caressing of naked chests and stomachs, the thrusting of a male stripper's crotch into a woman's face, a topless female stripper performing a lap dance for one of the grooms-to-be, the licking of whipped cream off of naked "stomachs" and "boobs," a topless female stripper spanking with a whip or a belt the buttocks of a topless man who is on all fours, two topless female strippers kissing while straddling a shirtless man, and a female stripper cupping her own bare breasts and puckering her lips. Respondents' suggestion that the Commission's indecency definition is limited to the specific act of sexual intercourse finds no support in our precedent or in common sense. By any reasonable definition, many of the activities depicted and described at the bachelor and bachelorette parties constitute sexual activities. The scenes at issue also depicted sexual organs. While it is true that the nude female breasts and buttocks shown were pixilated,

[16] *See Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency,* Policy Statement, 16 FCC Rcd 7999, 8002 ¶ 7 (2001) *("Indecency Policy Statement").*

the Commission has never held that the full exposure of sexual or excretory organs is required to satisfy the first prong of the broadcast indecency standard.[17]

12. We also find that, in context and on balance, the complained-of material is patently offensive as measured by contemporary community standards for the broadcast medium. Turning to the three principal factors in our contextual analysis, we first examine whether the material was explicit and graphic. Here, we reject Respondents' claims that the material was not explicit or graphic. To be sure, the pixilation of the female strippers' naked breasts and buttocks does render the material less explicit and graphic than it would have been in the absence of pixilation. However, the material is still sufficiently graphic and explicit to support an indecency finding. As discussed above, the party scenes were graphic in their depictions of strippers luring partygoers into engaging in sexual behavior. For example, they included the thrusting of a male stripper's crotch into a woman's face, a topless female stripper performing a lap dance for one of the grooms-to-be, a topless female stripper spanking with a whip or a belt the buttocks of a topless man who is on all fours, and a female stripper cupping her own bare breasts and puckering her lips. The fact that isolated body parts were "pixilated" did not obscure the overall graphic character of the depiction. The mere pixilation of sexual organs is not necessarily determinative under our analysis because the material must be assessed in its full context. Here, despite the obscured nature of the nudity, it is unmistakable that the partygoers are participating in sexual activities and that sexual organs are being exposed.[18] Likewise, the fact that the scenes were carefully edited so that the camera cut away an instant before, for example, a bride-to-be licked a male stripper's whipped cream-covered nipple or locked tongues with a female stripper, does not prevent a finding that the scenes were sufficiently graphic and explicit to support a finding of patent offensiveness. Despite a few missing pieces of the visual jigsaw puzzle, a child watching this program easily could discern that partially nude adults are attending a party and participating in sexual activities.

13. We also reject Respondents' claims that the material was fleeting. While FOX/Affiliates Group argues that the strippers' images that the Commission found to be offensive appeared on screen for a mere 10.5 seconds,[19] the party scenes in this episode contain persistent sexual activities and run for six minutes, which is not fleeting as we have construed that term.[20] Indeed, the scenes in question were imbued throughout with highly charged sexual content. Moreover, a central point of the entire episode -- indeed the very drama which FOX/Affiliates Group insists the party scenes were intended to evoke -- centered on whether the participants could be enticed into engaging in sexual conduct with male and female strippers.

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[17] *See Omnibus Order*, 21 FCC Rcd at 2671 ¶ 24 (pixilated views of nude breasts and a nude body, as well as other sexual images and innuendo, depicted or described sexual activities and organs for purposes of first prong of indecency analysis). *See* FOX/Affiliate Group's reliance on *KSAZ License, Inc.*, 19 FCC Rcd 15999 (2004) (denying indecency complaint against "Will and Grace" episode), is misplaced. *See* FOX/Affiliates Consolidated Response at 27. The Commission's decision in that case was based on the conclusion that the material in question failed to satisfy the *second* prong of the indecency standard because "[b]oth characters are fully clothed, and there is no evidence that the activity depicted was dwelled upon, or was used to pander, titillate or shock the audience." *KSAZ License, Inc.*, 19 FCC Rcd at 16001. Further, the context in which the activity at issue in "Will and Grace" was presented arguably made it more difficult to determine whether activity itself was sexual in nature, whereas here the subject of the scenes in question was sexually oriented entertainment provided by strippers.

[18] *See Omnibus Order*, 21 FCC Rcd at 2672 ¶ 25.

[19] *See* FOX/Affiliates Consolidated Response at 34-35.

[20] *See, e.g., Young Broadcasting of San Francisco, Inc*., Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 1751, 1755 ¶ 12 (2004) (finding that a broadcast of a performer's penis was fleeting in that it occurred for less than a second), response pending.

14. Finally, we find that the material, in context, was presented in a pandering and titillating manner. Indeed, the whole point of the strippers' performances appears to be to titillate the brides- and grooms-to-be, and, by extension, the audience. Furthermore, in context, it is clear that the sexual activities were presented not to educate or inform but to arouse the participants and the viewers. Among other things, the episode depicted a topless female stripper spanking with a whip or a belt the buttocks of a topless man who is an all fours, a topless female stripper lying on a couch, cupping her breasts with her hands as a woman straddles her, two topless female strippers, who are characterized as sisters, straddling a shirtless man and kissing one another as a female voice sings seductively in the background, and those same strippers caressing the chest of the same shirtless man. This series of events and the others recounted above were clearly presented in a pandering and titillating manner.[21]

15. Contrary to FOX/Affiliate Group's contentions, we did not in the NAL and are not here paying "lip service" to the importance of context in making an indecency determination. Indeed, it is in large part because of the context in which the material in question was presented that we conclude that the broadcast was indecent. There is no merit to FOX/Affiliate Group's claim that, because the material in question was supposedly an integral part of the episode in question, as it was in the movie "Saving Private Ryan," we are precluded from finding the broadcast to be indecent. This case is decidedly different from our decision involving ABC's broadcast of the movie "Saving Private Ryan."[22] In denying complaints alleging that the broadcast contained indecent material because of the use of explicit language, the Commission reasonably determined that the language at issue in "Saving Private Ryan," reflecting "the soldiers' strong human reactions to, and often, revulsion at, those unspeakable conditions and the peril in which they find themselves," was not used to pander, titillate or shock.[23] It was entirely reasonable for the Commission to conclude that, in that context, the explicit language was not pandering or titillating. By contrast, in the instant case, the scenes showing strippers seducing bachelor and bachelorette partygoers clearly pandered to and titillated the viewing audience. It is no defense to argue that the lurid sexual activities depicted in the party scenes related to the theme of the program. Indeed, under FOX/Affiliate Group's reasoning, a graphic and explicit depiction of sexual intercourse could not be deemed patently offensive so long as it related to the show's theme of tempting engaged couples into sexual dalliances with hired strippers.

16. We also reject Respondents' claims that the "contemporary community standards for the broadcast medium" criterion is not ascertainable. The "contemporary community standards for the broadcast medium" criterion is that of an average broadcast listener or viewer and does not encompass any particular geographic area.[24] Our approach to discerning community standards parallels that used in obscenity cases, where the jury is instructed to rely on its own knowledge of community standards in determining whether material is patently offensive.[25] Here, however, the Commission has the added

[21] Respondents' reliance (*see* FOX/Affiliates Consolidated Response at 32) on *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of The UPN Network Program "Buffy the Vampire Slayer" on November 20, 2001*, 19 FCC Rcd 15995, 15998 (2004), lacks merit. Both scenes may have involved "kissing and straddling," but they are not "strikingly similar." *Id.* The "Buffy" scene depicted two fully-clothed actors ostensibly fighting one another, whereas the instant case, as set forth above, featured sexually oriented entertainment performed by partially clad strippers.

[22] *See Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan*," Memorandum Opinion and Order, 20 FCC Rcd 4507 (2005) ("*Saving Private Ryan Order*").

[23] *Id.* at 4512-13 ¶ 14.

[24] *Indecency Policy Statement*, 16 FCC Rcd at 8002 ¶ 8 & n.15.

[25] *See Smith v. United States*, 431 U.S. 291, 305 (1977).

advantage of being an expert agency, and as we have explained before, "[w]e rely on our collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups and ordinary citizens, to keep abreast of contemporary community standards for the broadcast medium."[26]

17. It is also important to stress that our decision to commence an investigation and, where appropriate, to impose administrative sanctions, is not based on whether a particular program receives high ratings or is the subject of multiple complaints. As a general matter, we will commence an investigation on the basis of even one properly filed complaint that raises legitimate concerns as to whether a licensee has engaged in misconduct. We have followed this course in the past[27] and will continue to do so in the future.

B. Culpability of FOX Affiliates

18. Respondents argue in the alternative that, even if the material that was broadcast during the April 7, 2003, episode of "Married By America" is actionably indecent, licensees of stations affiliated with the FOX Network should not be subject to a forfeiture penalty. Although we have already determined that this forfeiture order should be limited to licensees whose stations served markets from which we received complaints, we believe it appropriate nonetheless to address all parties' arguments regarding the subject of affiliate culpability.

1. Pre-Broadcast Preview

19. Cunningham,[28] Falls/Compass Group,[29] FOX/Affiliates Group,[30] Ft. Smith Group,[31] Hill,[32] Independent,[33] Mission,[34] Pappas Group,[35] Sinclair,[36] and Warwick/White Knight Group[37] argue that FOX Affiliates had no role in the selection, planning or approval of the episode in question, which was transmitted by the network to the FOX Affiliates "precisely at the moment that the program was scheduled to air."[38] Respondents rely on *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. Sept. 22, 2004), in which the Commission declined to sanction

[26] *Infinity Radio License, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 5022, 5026 (2004).

[27] *See, e.g.*, *FCC v. Pacifica*, 438 U.S. 726 (1978) (A father who heard an indecent broadcast while driving with his young son complained to the Commission, which, after forwarding the complaint for comment to and receiving a response from the licensee, issued a declaratory order granting the complaint.).

[28] *See* Cunningham Response at 2-3.

[29] *See* Falls/Compass Joint Response at 5-6.

[30] *See* FOX/Affiliates Consolidated Response at 41-47.

[31] *See* Ft. Smith Consolidated Response at 1-2.

[32] *See* Hill Response at 2-5.

[33] *See* Independent Response at 2-3.

[34] *See* Mission Response at 3.

[35] *See* Pappas Consolidated Response at 2-6.

[36] *See* Sinclair Response at 1-2.

[37] *See* Warwick/White Knight Joint Response at 1-2.

[38] Pappas Consolidated Response at 3.

licensees of the CBS affiliate stations that broadcast the 2004 Super Bowl halftime show because the affiliates "could not have reasonably anticipated" that the show would contain apparently indecent material. Respondents argue that the FOX Affiliates in the instant case were in the same position with respect to the subject episode of "Married By America" as the CBS affiliates were with respect to the 2004 Super Bowl halftime telecast.[39] Consequently, according to Respondents, they should receive the same treatment as the affiliates in the *Super Bowl* case. FOX/Affiliates Group argues that, because "Married By America" was a reality show which involved audience participation, producers were constrained by tight production schedules and the need to protect the integrity of the voting process. Consequently, FOX/Affiliates Group maintains that "Married By America" was more akin to a live sporting event than a scripted drama or comedy show, making it difficult for FOX Affiliates to have had a meaningful opportunity to review the program in advance.[40] Ft. Smith Group further argues that, even if the episode had been available for advance review, "it is unrealistic to assume that individual stations, and especially small market affiliates, could muster the resources to review and analyze every network program."[41]

20. We find no merit in these arguments. While "Married By America" producers may not have had the luxury of being able to film and edit each episode weeks in advance of air time as they might ordinarily do for a scripted series, Respondents fail to explain why FOX Television Network could not have provided FOX Affiliates with a tape of the episode in question at *some time* prior to April 7, particularly in light of the type of material that the producers intended to include in the episode. Indeed, FOX/Affiliates Group claims that the tight production schedule only makes it "difficult," not impossible, for affiliates to review the program's content prior to air time. Furthermore, we note that, at the conclusion of the program episode that was broadcast a week earlier, FOX Television Network provided highlights of the then-upcoming April 7 episode. Such highlights included many of the scenes that are the subject of this Forfeiture Order. Consequently, although the April 7 episode may still have been in production a week before air time, FOX Television Network knew that it would include the subject bachelor/bachelorette party scenes, and FOX Affiliates were provided with advance notice of the nature of the material that was scheduled for broadcast. Thus, they should have been prepared to screen the program before airing it.

21. We also reject FOX/Affiliates Group's contention that "Married By America" is akin to a live sporting event because it involved audience participation. According to FOX/Affiliates Group, FOX Television Network transmitted the episode to FOX Affiliates at air time in order to safeguard the show's voting process. However, the decision not to provide an advance tape of the episode to FOX Affiliates appears to have been discretionary, not the result of circumstances over which FOX Television Network lacked control. Indeed, none of the Respondents contends that FOX Television Network was prevented from providing FOX Affiliates with a tape of the episode prior to broadcast, had they requested one. Under these circumstances, we believe that the comparison between "Married By America" and a live sporting event is not valid, and Respondent's reliance on our *Super Bowl* decision is accordingly misplaced.

22. Finally, we reject Ft. Smith Group's claim that it is unfair and unreasonable to expect affiliates to review and analyze the network programs that they broadcast. It is bedrock Commission policy that broadcast licensees are ultimately responsible for the material that they air, regardless of the

[39] *See, e.g.*, Independent Response at 2-3; Mission Response at 1.

[40] *See* FOX/Affiliates Group Consolidated Response at 41-43.

[41] Ft. Smith Consolidated Response at 2.

source.[42] It is fundamentally inconsistent with the obligations of a broadcast licensee to broadcast programming without regard to – and without even being aware of -- its content.

2. Network Affiliation Agreement

23. Hill[43] and Pappas Group[44] assert that their network affiliation agreements with FOX prevent them from discharging their obligations as licensees by impeding their ability to determine which programming is suitable for viewers in their communities. They explain that their affiliation agreements place strict limits on the number of occasions that they may preempt network programming without advance approval from FOX and that an excessive number of "unauthorized preemptions" could result in FOX severing its affiliation with them, a consequence that could be financially devastating. They further maintain that obtaining advance approval to preempt a particular program is not practical when, as here, an affiliate is unable to preview the episode because it is being delivered to the station at the moment it is scheduled to be broadcast.[45] Hill and Pappas Group conclude:

> 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 . . . ."[46]

24. We do not agree that these circumstances serve to eliminate or diminish an affiliate's liability for having broadcast indecent material. First, as indicated above,[47] the entitlement to hold a Commission license carries with it certain fundamental obligations, one of which is to ensure compliance with our rules and to take responsibility for the programs that a licensee airs. Second, our rules relating to network affiliation agreements specifically provide that network affiliation agreements can not prevent or hinder licensees from rejecting or refusing network programs "which the station reasonably believes to be unsatisfactory or unsuitable or contrary to the public interest . . . ."[48] Third, as noted above,[49]

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[42] *See Report and Statement of Policy re: Commission en banc Programming Inquiry*, 44 FCC Rcd 2303, 2313 (1960). *See also Yale Broadcasting Co. v. FCC*, 478 F.2d 594 (D.C. Cir.), *cert. denied*, 414 U.S. 914 (1973) (affirmed action of Commission reminding broadcast licensees of their duty to have knowledge of the content of their programming and on the basis of this knowledge to evaluate the desirability of broadcasting music dealing with drug use); *Gaffney Broadcasting, Inc.,* 23 FCC 2d 912, 913 (1970) ("licensees are responsible for the selection and presentation of program material over their stations, including . . . acts or omissions of their employees"); *Alabama Educational Television Commission,* 50 FCC 2d 461, 464 (1975) (AETC lost its license in part because it failed to maintain exclusive authority over all of its programming decisions); *WCHS-AM-TV Corp.,* 8 FCC 2d 608, 609 (1967) (maintenance of control over programming is a most fundamental obligation of the licensee).

[43] *See* Hill Response at 5-7.

[44] *See* Pappas Consolidated Response at 6-8.

[45] *See* Hill Response at 5-7; Pappas Consolidated Response at 6-8.

[46] Hill Response at 6; Pappas Consolidated Response at 8.

[47] *See supra* paragraph 22.

[48] 47 C.F.R. § 73.658(e).

Respondents and the public at large were provided with notice of the kind of material that the April 7 episode was likely to contain a full week in advance of its scheduled broadcast. Neither Hill nor Pappas Group contends that it even attempted to seek permission from FOX Television Network to preempt the show. Consequently, we find no merit to their claims that the network affiliation agreements into which they voluntarily entered and from which they derive substantial benefits provide a basis for excusing them from liability for airing the indecent material at issue here.

C. Other Arguments

25. JW, licensee of Low Power Television Station K02NQ, Columbia Missouri;[50] Mission, licensee of Stations KHMT(TV), Hardin, Montana, and WBAK-TV, Terre Haute, Indiana;[51] and Smith, permittee of Station WFFF-TV, Burlington, Vermont,[52] request cancellation of the NAL on the basis that they did not hold the authorizations for their respective stations at the time of the subject broadcast. We have already determined that the NAL should be cancelled as to all licensees whose stations serve markets from which no specific complaints were received, a category which includes these markets. Accordingly, the arguments herein raised by JW, Mission, and Smith are dismissed as moot.

26. In response to the NAL, Sunbeam, licensee of Station WSVN(TV), Miami, Florida, tendered a check made payable to the Commission in the amount of $7,000, subject to final agency action with respect to the FOX/Affiliates Consolidated Response. Having determined that the NAL should be canceled as to all licensees against which no specific complaint was filed, including Sunbeam, Sunbeam may file appropriate documents requesting a refund of the amount it tendered.

D. Constitutional Issues

27. Respondents argue that the Commission's indecency standard is unconstitutional on its face. In support, they collectively assert that the justifications that existed for adopting the current indecency standard are no longer valid; the current indecency standard is impermissibly vague; the availability of new blocking technologies has rendered the current indecency standard overbroad; and the Commission has not demonstrated that children are harmed by indecent broadcasts. Respondents also argue that the Commission's application of its indecency test in the instant case was unconstitutional because the Commission failed to exhibit restraint and caution during its investigation and because the Respondents were denied due process. For the reasons discussed below, we reject Respondents' arguments.

28. *Validity of Indecency Test.* FOX/Affiliates Group argues that the underpinnings of the Commission's current indecency standard date back to the Supreme Court's decision in *Federal Communications Commission v. Pacifica Foundation,*[53] and that the justifications upon which the Court relied in its decision – the uniquely pervasive presence of the broadcast medium and the unique accessibility of broadcasting to children -- are no longer viable. In this regard, FOX/Affiliates Group argues that cable and satellite transmissions now reach the vast majority of the nation's television households and offer hundreds of channels as well as the signals of broadcast stations.[54] FOX/Affiliates

(Continued from previous page)

[49] *See supra* paragraph 20.

[50] *See* JW Response at 1.

[51] *See* Mission Response at n. 3.

[52] *See* Smith Response at 1.

[53] *See* 438 U.S. 726 (1978).

[54] *See* FOX/Affiliates Consolidated Response at 7.

Group also maintains that younger people today have ready and unfettered access to numerous video sources as well as the Internet.[55]

29. We disagree with Respondents' claim that the justifications upon which the Supreme Court relied in *Pacifica* are no longer valid and note that the D.C. Circuit has rejected this precise argument: "Despite the increasing availability of receiving television, such as cable . . . there can be no doubt that the traditional broadcast media are properly subject to more regulation than is generally permissible under the First Amendment."[56] Notwithstanding Respondents' arguments to the contrary, the broadcast media continue to have a "uniquely pervasive presence" in American life. The Supreme Court has recognized that "[d]espite the growing importance of cable television and alternative technologies, 'broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population."[57] In 2003, 98.2% of households had at least one television, and 99% had at least one radio.[58] Although the majority of households with television subscribe to a cable or satellite service, millions of households continue to rely exclusively on broadcast television,[59] and the National Association of Broadcasters estimates that there are some 73 million broadcast-only television sets in American households.[60] Moreover, many of those broadcast-only televisions are in children's bedrooms.[61] Although the broadcast networks have experienced declines in the number of viewers over the last several years, the programming they offer remains by far the most popular and is available to almost all households.[62]

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[55] *See id*. at 7-8.

[56] *Action for Children's Television v. FCC*, 58 F.3d 654, 660 (D.C. Cir. 1995) (en banc) ("*ACT III*"). *See also Prometheus Radio Project v. FCC*, 373 F.3d 372, 401-402 (3d Cir. 2004) (rejecting argument that broadcast ownership regulations should be subjected to higher level of scrutiny in light of rise of "non-broadcast media").

[57] *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 190 (1997) (*quoting U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968)). According to the Court in *Turner Broadcasting*, although broadcast television is "but one of many means for communication, by tradition and use for decades now it has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression." 520 U.S. at 194.

[58] *See* U.S. Census Bureau, *Statistical Abstract of the United States* 737 (2006).

[59] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, ¶¶ 8, 15 (2006) ("*Annual Assessment*").

[60] *See id.* at 2552 ¶ 97. It also has been estimated that almost half of direct broadcast satellite subscribers receive their broadcast channels over the air, *Media Bureau Staff Report Concerning Over-the-Air Broadcast Television Viewers*, MB Docket No. 04-210, ¶ 9 (MB Feb. 28, 2005), and many subscribers to cable and satellite still rely on broadcast for some of the televisions in their households. *See Annual Assessment*, 21 FCC Rcd at 2508 ¶ 15.

[61] *See* Kaiser Family Foundation, *Generation M: Media in the Lives of 8-18 Year-olds* 77 (2005). According to the Kaiser Family Foundation report, 68 percent of children aged 8 to 18 have a television set in their bedrooms, and nearly half of those sets do not have cable or satellite connections.

[62] A large disparity in viewership still exists between broadcast and cable television programs. For example, during the week of February 4, 2008, each of the top ten programs on broadcast television had more than 12.5 million viewers, while only two programs on cable television that week – both professional wrestling programs – managed to attract more than 5 million viewers. *See* Nielsen Media Research, "Trend Index," available at http://www.nielsen.com/media/toptens_television.html (visited Feb. 14, 2008). Indeed, that same week, 90 of the top 100-rated programs appeared on broadcast channels, and the highest rated cable program was number 71. *See* Television Bureau of Advertising, "Top 100 Programs on Broadcast and Subscription TV: Households," *available at* http://www.tvb.org/nav/build_frameset.aspx (visited Feb. 14, 2008).

30. The broadcast media are also "uniquely accessible to children." In this respect, broadcast television differs from cable and satellite television. Parents who subscribe to cable exercise some choice in their selection of a package of channels, and they may avoid subscribing to some channels that present programming that, in their judgment, is inappropriate for children. Indeed, upon the request of a subscriber, cable providers are required by statute to "fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it."[63] In contrast, as the D.C. Circuit has observed, "broadcast audiences have no choice but to 'subscribe' to the entire output of traditional broadcasters."[64] The V-chip provides parents with some ability to control their children's access to broadcast programming, but, as explained in further detail below, it does not eliminate the need for the Commission to vigorously enforce its indecency rules.[65] Broadcast television is also significantly different from the Internet. The Internet, unlike television, is not accessible to children "too young to read."[66] And parents who wish to control older children's access to inappropriate material can use widely available filtering software -- an option that, whatever its flaws, lacks an effective analog in the context of broadcast television[67] in light of the numerous problems with the V-chip and program ratings discussed below. Accordingly, there is no merit to Respondents' claim that *Pacifica* – and more importantly, our indecency rules – are invalid, obsolete or outdated.

31. *Vagueness and Overbreadth.* FOX/Affiliates Group argues that the Commission's indecency standard is unconstitutionally vague, citing *Reno v. ACLU*,[68] a case addressing the constitutionality of provisions of the Communications Decency Act ("CDA") which sought to protect minors from harmful material on the Internet. The Court determined that the CDA's indecency standard was impermissibly vague because it failed to define key terms, thereby provoking uncertainty among speakers and preventing them from discerning what speech would violate the statute.[69] FOX/Affiliates Group asserts that, because the CDA definition of indecency was determined by the Court to be fatally imprecise, and the Commission's definition of indecency is similar to the CDA definition, it follows that the Commission's definition is similarly flawed.[70] FOX/Affiliates Group further argues that the

[63] 47 U.S.C. § 560 (2000). *See United States v. Playboy Entertainment Group*, *Inc.*, 529 U.S. 803 (2000).

[64] *Act III*, 58 F.3d at 660.

[65] *See infra.* paragraph 36.

[66] *Pacifica*, 438 U.S. at 749. *See, e.g., Youth, Pornography, and the Internet,* ed. by Dick Thornburgh and Herbert S. Lin, p. 115 (National Academy Press 2002) ("As a general rule, young children do not have the cognitive skills needed to navigate the Internet independently. Knowledge of search strategies is limited if not nonexistent, and typing skills are undeveloped.").

[67] *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 877 (1997). Filtering software, for example, can block access to a website based on the software's evaluation of the site's content. The V-chip, in contrast, does not evaluate television programs itself and therefore is only effective if the programs have been given accurate ratings. However, to the extent that filtering software is ineffective and children are still able to access indecent material on the Internet, we note that Congress has sought to address this problem through the Child Online Protection Act, a statute whose validity is still being litigated. *See Ashcroft v. ACLU*, 542 U.S. 656 (2004) (affirming preliminary injunction).

[68] *See* 521 U.S. 844 (1997).

[69] *See id*. at 871.

[70] *See* FOX/Affiliates Consolidated Response at 10-11.

Commission's vague indecency standards and fear of government sanctions create a chilling effect on broadcasters' exercise of their First Amendment rights.[71]

32. We reject Respondents' arguments that the Commission's indecency standard is vague. That standard is essentially the same as the one used in the order that was reviewed in *FCC v. Pacifica Foundation*,[72] and the Supreme Court had no difficulty applying that definition and using it to conclude that the broadcast at issue in that case was indecent. We therefore agree with the D.C. Circuit that "implicit in Pacifica" is an acceptance of the FCC's generic definition of 'indecent' as capable of surviving a vagueness challenge."[73]

33. We also believe that Respondents' reliance on *Reno* is without merit. The Court in *Reno* expressly distinguished *Pacifica*, giving three different reasons for doing so.[74] Thus, far from casting doubt on *Pacifica's* vagueness holding, *Reno* recognizes its continuing vitality. In addition, contrary to Respondents' claims, we do not believe that requiring broadcasters to exercise care to avoid airing a patently offensive depiction of sexual activity prior to 10 p.m. unduly "chills" exercise of their First Amendment rights. As reviewed above, we do not believe that our indecency standard is unconstitutionally vague and as the D.C. Circuit observed, "some degree of self-censorship is inevitable and not necessarily undesirable so long as proper standards are available."[75]

34. FOX/Affiliates Group further argues that, even if the Commission's indecency standard is not impermissibly vague, it is unconstitutionally overbroad, again relying on *Reno v. ACLU*, wherein the Court held that a "burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve."[76] According to FOX/Affiliates Group, the Commission's current approach to regulating indecency relegates protected

[71] By way of example, FOX/Affiliates Group states that a number of ABC Television Network affiliates refused, out of fear of government sanctions, to carry ABC's unedited broadcast of the Oscar-winning movie *Saving Private Ryan* on Veterans Day in 2004, despite the fact that the network had broadcast the same uncut version of the movie on Veterans Day in 2001 and 2002 without sanction. *See* FOX/Affiliates Consolidated Response at 12-13. We note that, in *Saving Private Ryan Order, supra* note 22, the Commission concluded that the unedited version of "Saving Private Ryan" did not, when considered in the context in which it was broadcast, contain indecent material.

[72] *See* 438 U.S. at 732.

[73] *Action for Children's Television v. FCC*, 852 F.2d 1332, 1339 (D.C. Cir. 1988) ("*ACT I*"); *accord ACT III*, 58 F.3d at 659.

[74] *Reno v. ACLU*, 521 U.S. 844, 867 (1997). First, the Court noted that the Commission is "an agency that [has] been regulating radio stations for decades," and that the Commission's regulations simply "designate when—rather than whether—it would be permissible" to air indecent material." *Id.* The CDA, in contrast, was not administered by an expert agency, and it contained "broad categorical prohibitions" that were "not limited to particular times." *Id.* Second, the CDA was a criminal statute, whereas the Commission has no power to impose criminal sanctions for indecent broadcasts. *See id.* at 867, 872. Third, unlike the Internet, the broadcast medium has traditionally "received the most limited First Amendment protection." *Id.* at 867.

[75] *Action for Children's Television v. FCC,* 59 F.3d 1249, 1261 (D.C. Cir. 1995) ("*ACT IV*"); *see ACT III*, 58 F.3d at 666 ("Whatever chilling effect may be said to inhere in the regulation of indecent speech, these have existed ever since the Supreme Court first upheld the FCC's enforcement of section 1464 of the Radio Act.").

[76] 521 U.S. at 868. Fox/Affiliates Group also relies on *Ashcroft v. American Civil Liberties Union*, in which the Court stated that unnecessarily broad content-based regulation will not survive scrutiny if there is "a more specific technological solution that [is] available to parents . . . ." 124 S. Ct. 2783, 2794 (2004) (citing *United States v. Playboy Entertainment Group, Inc*., 529 U.S. 803, 825 (2000)).

speech to the "wee hours of the morning"[77] and impedes the First Amendment rights of broadcasters. We disagree. By channeling indecent broadcasting to times of day in which fewer children are in the audience, but which nonetheless remain accessible to adult viewers and listeners, the Commission permissibly advances the government's interests "without unduly infringing on the adult population's right to see and hear indecent material."[78] Indeed, 10:00 PM hardly qualifies as the "wee hours of the morning," and the D.C. Circuit upheld the "safe harbor" period in *ACT III*.

35. FOX/Affiliates Group also assert that television viewers today are able to effectively prevent reception of any programming that they consider unsuitable for children through the use of voluntary ratings of programs by the entertainment industry and so-called "V-Chip" technology.[79] The existence of a less intrusive solution, according to FOX/Affiliates Group, thus renders the Commission's regulatory scheme unconstitutionally overbroad.[80]

36. We reject this argument. While we agree that the V-chip provides some assistance in protecting children from indecent material, it does not eliminate the need for the Commission to enforce its indecency rules. Numerous televisions do not contain a V-chip, and most parents who have a television set with a V-chip are unaware of its existence or do not know how to use it.[81] In addition, we note that some categories of programming, including news and sports, are not rated and, therefore, are not subject to blocking by V-chip technology.[82] Finally, numerous studies have raised serious questions about the accuracy of the television ratings on which the effectiveness of a V-chip depends.[83]

37. *Harm to Children.* FOX/Affiliates Group argues that the Commission's indecency test is flawed because the Commission has never made the requisite showing of harm to children from indecent

[77] FOX/Affiliates Consolidated Response at 21.

[78] *ACT III*, 58 F.3d at 665.

[79] *See* FOX/Affiliates Consolidated Response at 15-21.

[80] *Id*. at 20-21.

[81] *See Super Bowl Order on Reconsideration*, 21 FCC Rcd at 6667 ¶ 37. In congressional testimony given after Fox's broadcast of "Married by America", Fox's President of Entertainment acknowledged that the V-chip and television ratings were "underutilized." *H.R. 3717, the 'Broadcast Decency Enforcement Act of 2004': Hearing Before the Subcommittee on Telecommunications and the Internet of the House Comm. On Energy & Commerce*, 107th Congress (Feb. 26, 2004) (statement of Gail Berman). According to a 2003 study, parents' low level of V-chip use is explained in part by parents' unawareness of the device and the "multi-step and often confusing process" necessary to use it. Annenberg Public Policy Center, *Parents' Use of the V-Chip to Supervise Children's Television Use* 3 (2003). Only 27 percent of mothers in the study group could figure out how to program the V-Chip, and "many mothers who might otherwise have used the V-Chip were frustrated by an inability to get it to work properly." *Id.* at 4.

[82] *See Implementation of Section 551 of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 8232, 8242-43 ¶ 21 (1998).

[83] *See, e.g.,* Barbara K. Kaye & Barry S. Sapolsky, *Offensive Language in Prime-Time Television: Four Years After Television Age and Content Ratings*, 48 Journal of Broadcasting & Electronic Media 554, 563-64 (2004) (finding that there was more coarse language broadcast during TV-PG programs than those rated TV-14, just the opposite of what these age-based ratings would lead a viewer to believe); Henry J. Kaiser Family Foundation, *Parents, Media and Public Policy: A Kaiser Family Foundation Survey* 5 (2004) (nearly 4 in 10 parents of children aged 2-17 stated that most television programs are not rated accurately); David A. Walsh & Douglas A. Gentile, *A Validity Test of Movie, Television, and Video-Game Ratings*, 107 Pediatrics 1302, 1306 (2001) (study finding that parents concluded that half of television shows the industry had rated as appropriate for teenagers were in fact inappropriate, "a signal that the ratings are misleading.").

programming. This argument is without merit. The Supreme Court did not require such evidence in *Pacifica* and the D.C. Circuit rejected the need for such evidence in *ACT III*, noting that "the Supreme Court has never suggested that a scientific demonstration of psychological harm is required in order to establish the constitutionality of measures protecting minors from indecent speech."[84] It cannot reasonably be disputed that the government has a "compelling" interest "in protecting the physical and psychological well-being of minors," nor that this interest "extends to shielding minors from the influence of literature that is not obscene by adult standards."[85] The government's interests in the "well-being of its youth" and in supporting "parent's claim to authority in their own household" can justify "the regulation of otherwise protected expression."[86] Just as clearly, "the Government has a compelling interest in protecting children under the age of 18 from exposure to indecent broadcasts."[87]

38. *Cautious Approach to Enforcement.* FOX/Affiliates Group and others challenge on various grounds the Commission's issuance of the NAL against stations that were not the subject of viewer complaints regarding the April 7, 2003 "Married By America" episode. We need not address these arguments in light of our decision, consistent with our commitment to an appropriately restrained enforcement policy and recent Commission practice, to limit the imposition of forfeiture penalties to licensees whose stations serve markets from which specific complaints were received.[88] FOX/Affiliates Group,[89] Cunningham,[90] and Falls/Compass Group also accuse the Commission of impermissibly denying all of the licensees that were subject to the NAL, save the one to which the letter of inquiry was directed, any opportunity to respond to the Commission's concerns before the Commission issued its NAL. According to FOX/Affiliates Group, the Commission's "blunderbuss approach is both unfair to licensees and contrary to the First Amendment."[91] We find no merit to this argument, which demonstrates a misunderstanding of the nature of the Commission's forfeiture process and confuses a notice of apparent liability for a forfeiture with a forfeiture order. Pursuant to section 1.80 of the Commission's rules, before imposing a forfeiture penalty, the Commission must provide each licensee with a written notice of apparent liability which includes an explanation of the nature of the misconduct, the rule section that the Commission believes was violated, and the proposed forfeiture amount. The NAL in this instance provided such required notice. There is no requirement that the Commission direct a letter of inquiry to a licensee as part of an investigation of alleged indecent programming aired by a broadcast station before issuing an NAL. Moreover, section 1.80 of the Commission's rules specifies that each licensee to which such notice is provided may file a written response demonstrating why a forfeiture penalty should not be imposed or should be reduced. By their various filings, Respondents availed themselves of the opportunity to respond the Commission's concerns, belying their claims to the contrary.

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[84] *ACT III*, 58 F.3d at 661-62.

[85] *Sable Communications of California v. FCC*, 492 U.S. 115, 126 (1989).

[86] *Pacifica*, 438 U.S. at 749.

[87] *ACT III*, 58 F.3d at 656. *See Pacifica*, 438 U.S. at 750 ("The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg* [*v. New York,* 390 U.S. 629 (1968)], amply justify special treatment of indecent broadcasting.").

[88] *See supra* note 2.

[89] *See* FOX/Affiliates Consolidated Response at 25, 40.

[90] Cunningham Response at 3.

[91] FOX/Affiliates Consolidated Response at 25.

IV. CONCLUSION

39. Section 503(b) of the Act, 47 U.S.C. § 503(b), and section 1.80(a) of the Commission's rules, 47 C.F.R § 1.80, both state that any person who willfully or repeatedly fails to comply with the provisions of the Act or the rules shall be liable for a forfeiture penalty. For purposes of section 503(b) of the Act, the term "willful" means that the violator knew it was taking the action in question, irrespective of any intent to violate the Commission's rules.[92] Based on our determination that the stations in question willfully broadcast this episode of "Married by America" and the material before us, we find that the FOX Television Network Stations listed in Attachment A willfully violated 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules, by airing indecent programming during the "Married By America" program on April 7, 2003.[93]

40. The Commission's *Forfeiture Policy Statement* sets a base forfeiture amount of $7,000 for the transmission of indecent or obscene materials.[94] The *Forfeiture Policy Statement* also specifies that the Commission shall adjust a forfeiture based upon consideration of the factors enumerated in Section 503(b)(2)(D) of the Act, 47 U.S.C. § 503(b)(2)(D), such as "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[95]

41. We have thoroughly considered Respondents' arguments as well as the factors listed in Section 503(b)(2)(D) of the Act. On reflection, we believe that the forfeiture penalty in the base amount of $7,000 proposed against each of the stations listed in Attachment A in the *NAL* is unduly low in light of the nature and gravity of the violation and the ability of the licensees to pay. If we were proposing a forfeiture for the first time here, we would be inclined to propose a significantly higher forfeiture per station.[96] However, we cannot, consistent with our rules,[97] increase the forfeiture amount without issuing another *NAL*, and we are concerned that issuing another NAL at this late date could jeopardize our ability

[92] *See Southern California Broadcasting Co*., 6 FCC Rcd at 4387-88.

[93] We reject Ft. Smith's undeveloped argument that the broadcasts were not "willful" due to the alleged unavailability of the program for advance review and the impracticality of individual episode review. Ft. Smith Consolidated Response at 2 n.1. Here, the affiliate stations consciously and deliberately broadcast the episode at issue, and, as discussed above, the relevant legal standard does not require any intent to violate the Commission's rules. In addition, the episode was taped in advance, and, as discussed above, there is no merit to Respondents' argument that they are not culpable for their actions in airing the episode. *See supra* paragraphs 9-22. Moreover, the affiliates were provided with notice of the type of material that the episode would contain. In particular, the conclusion of the prior week's episode provided highlights of the upcoming episode that included many of the scenes that are the subject of this Forfeiture Order. Finally, the sexually explicit material in the episode lasted for six minutes, and the affiliates did not terminate the broadcast even though the nature of the material was readily apparent near the beginning of the bachelor and bachelorette parties.

[94] *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Memorandum Opinion and Order, 12 FCC Rcd 17087, 17113 (1997), *recons. denied* 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement");* 47 C.F.R. § 1.80(b).

[95] *Forfeiture Policy Statement*, 12 FCC Rcd at 17110.

[96] The maximum forfeiture permitted at the time this program was aired was $27,500.

[97] *See* 47 C.F.R. § 1.80(f)(1) (NAL must specify, *inter alia*, amount of apparent forfeiture penalty), § 1.80(f)(4) (if the proposed forfeiture is not paid in full in response to the NAL, the Commission will issue an order cancelling or reducing the proposed forfeiture or requiring that it be paid in full).

to enforce the forfeiture.[98] Therefore, we will impose the forfeiture proposed in the NAL on each of the stations listed in Attachment A.

V. ORDERING CLAUSES

42. **ACCORDINGLY, IT IS ORDERED**, pursuant to section 503(b) of the Communications Act of 1934, as amended, and section 1.80 of the Commission's rules,[99] that each of the stations listed in Attachment A of this Forfeiture Order is liable for a forfeiture in the amount of $7,000 for broadcasting indecent material, in willful violation of 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.

43. **IT IS FURTHER ORDERED** that the *NAL* is cancelled as to all other licensees referenced in the NAL.

44. **IT IS FURTHER ORDERED** that the Commission will entertain appropriate documents filed by Sunbeam requesting a refund of the $7,000 forfeiture that it previously paid in this proceeding.

45. **IT IS FURTHER ORDERED**, pursuant to section 1.80 of the Commission's rules, that within thirty (30) days of the release of this Forfeiture Order, the stations listed in Attachment A of this Forfeiture Order **SHALL PAY** the full amount of its respective forfeiture.

46. **IT IS FURTHER ORDERED** that payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the appropriate NAL Account Number and FRN Number referenced in Attachment A. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment[s] by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures.

47. **IT IS FURTHER ORDERED** that the Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

[98] *See* 28 U.S.C. § 2462.

[99] 47 C.F.R. § 1.80.

48. **IT IS FURTHER ORDERED** that a copy of this Forfeiture Order shall be sent, by Certified Mail/Return Receipt Requested, to each of the licensees identified in Attachment A hereto and to their respective counsel and representatives identified in Attachment C hereto.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

ATTACHMENT A

Licensees and Stations

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID No.	Forfeiture Amount
FOX Television Stations, Inc. 5151 Wisconsin Ave., N.W., Washington D.C. 20016	1529056	200832080064	WJBK, Detroit, MI	73123	$7,000
FOX Television Stations, Inc. 5151 Wisconsin Ave., N.W., Washington D.C. 20016	1529056	200832080065	KMSP-TV, Minneapolis, MN	68883	$7,000
FOX Television Stations, Inc. 5151 Wisconsin Ave., N.W., Washington, D.C. 20016	1529056	200832080066	WTTG, Washington, DC	22207	$7,000
TVT License, Inc. 5151 Wisconsin Ave., N.W., Washington, D.C. 20016	1811074	200832080067	WTVT, Tampa, FL	68569	$7,000
WDAF License, Inc. 5151 Wisconsin Ave., N.W., Washington, D.C. 20016	3476421	200832080068	WDAF-TV, Kansas City, MO	11291	$7,000
GB Roanoke Licensing LLC 915 Middle River Drive, Suite 409, Ft. Lauderdale, FL 33304	17270307	200832080069	WFXR-TV, Roanoke, VA	24813	$7,000
Journal Broadcast Corporation 3355 S. Valley View Blvd., Las Vegas, NV 89102	2710192	200832080070	WSYM-TV, Lansing, MI	74094	$7,000

Licensee Name and Mailing Address	FRN No.	NAL Acct. No.	Station Call Sign and Community of License	Facility ID No.	Forfeiture Amount
KDSM Licensee, LLC Pillsbury Winthrop Shaw Pittman LLP, Attn. Kathryn R. Schmeltzer, 2300 N Street, N.W., Washington, D.C. 20037	5019195	200832080071	KDSM-TV, Des Moines, IA	56527	$7,000
Lingard Broadcasting Corporation P.O. Box 1732, Tupelo, MS 38802	4348322	200832080072	WLOV-TV, West Point, MS	37732	$7,000
Meredith Corporation 1716 Locust Street, Des Moines, IA 50309	5878004	200832080073	WHNS, Greenville, SC	72300	$7,000
Mountain Licenses, L.P. 2111 University Park Drive, Suite 650, Okemos, MI 48864	6175939	200832080074	KCYU-LP, Yakima, WA	58694	$7,000
WVAH Licensee, LLC 2000 W. 41st. Street, Baltimore, MD 21211	7283054	200832080075	WVAH-TV, Charleston, WV	417	$7,000
WZTV Licensee, LLC Pillsbury Winthrop Shaw Pittman, LLC, Attn: Kathryn R. Schmeltzer 2300 N Street, N.W., Washington, D.C. 20037	6551758	200832080076	WZTV, Nashville, TN	418	$7,000

ATTACHMENT B

Responses to NAL

- Letter to William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, from Henry Goldberg, Esquire, Goldberg, Godles, Wiener & Wright, counsel for Bluenose Broadcasting of Savannah, LLC ("Bluenose"), dated December 3, 2004 ("Bluenose Response");

- Cunningham Opposition to Notice of Apparent Liability for Forfeiture, filed by Cunningham Broadcasting Corporation ("Cunningham") on December 3, 2004 ("Cunningham Response");

- Joint Response in Opposition to the Notice of Apparent Liability for Forfeiture, filed jointly by Falls Broadcasting Company and Compass Communications of Idaho, Inc. (collectively, "Falls/Compass Group") on December 2, 2004 ("Falls/Compass Joint Response);

- Opposition to Notice of Apparent Liability for Forfeiture, filed by FOX Broadcasting Company and the Licensees of the Television Broadcast Stations Affiliated with the FOX Television Network ("FOX/Affiliates Group") on December 3, 2004 ("FOX/Affiliates Consolidated Response");

- Letter to William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, from Peter Tannenwald, Esquire, Irwin, Campbell & Tannenwald, P.C., counsel for Ft. Smith 46, Inc., Marquette Broadcasting, Inc., Montana License Sub, Inc., Montgomery Communications, Inc., and TV67, Inc. (collectively, "Ft. Smith Group"), dated December 3, 2004 ("Ft. Smith Consolidated Response");

- Response to Notice of Apparent Liability for Forfeiture, filed by Hill Broadcasting Company, Inc. ("Hill") on December 3, 2004 ("Hill Response");

- Response to Notice of Apparent Liability for Forfeiture, filed by Independent Communications, Inc. ("Independent") on November 12, 2004 ("Independent Response");

- Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Gregory L. Masters, Esquire, Wiley Rein & Fielding LLP, counsel for JW Broadcasting LLC ("JW"), dated November 5, 2004 ("JW Response");

- Opposition to Notice of Apparent Liability for Forfeiture, filed by Lingard Broadcasting Corporation ("Lingard") on December 3, 2004 ("Lingard Response");

- Letter to William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, from Howard M. Liberman, Esquire, Drinker Biddle & Reath, LLP, counsel for Mission Broadcasting , Inc. ("Mission"), dated December 7, 2004 ("Mission Response");

- Response to Notice of Apparent Liability for Forfeiture, filed jointly by KMPH(TV) License, LLC; KPTM(TV) License, LLC; and Pappas Telecasting of Sioux City, L.P.

(collectively, "Pappas Group") on December 3, 2004 ("Pappas Consolidated Response").

- Opposition to Notice of Apparent Liability for Forfeiture, filed by Sinclair Broadcast Group, Inc. ("Sinclair") on December 3, 2004 ("Sinclair Response");

- Letter to William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, from Jeffrey J. Gee, Esquire, Dow Lohnes & Albertson, PLLC, counsel for Smith Media License Holdings, LLC ("Smith"), dated December 3, 2004 ("Smith Response");

- Letter to Forfeiture Collections Agency, Finance Branch, Federal Communications Commission, from Marvin Rosenberg, Esquire, Holland & Knight, counsel for Sunbeam Television Corporation ("Sunbeam"), dated November 29, 2004 ("Sunbeam Response");

- Opposition to Notice of Apparent Liability for Forfeiture, filed by United Communications Corporation ("United") on December 3, 2004 ("United Response"); and,

- Opposition to Notice of Apparent Liability for Forfeiture, filed jointly by Warwick Communications, Inc. and White Knight Broadcasting of Natchez License Corp. (collectively, "Warwick/White Knight Group") on December 3, 2004 ("Warwick/White Knight Joint Response").

ATTACHMENT C

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