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Writer's Direct Access

October 16, 2006

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The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 Twelfth St., S.W.
8th Floor
Washington, D.C. 20554

Re: Video News Releases

Dear Chairman Martin:

The National Association of Broadcast Communicators (NABC) is a newly formed organization that represents the interests of Video News Release (VNR) production companies.¹ NABC writes to express its serious concern with regard to a report by the Center for Media and Democracy (the "*CMD Report*") that creates the false impression that numerous broadcast stations across the country are violating the Commission's sponsorship identification requirements in connection with their use of VNRs.² NABC also is concerned that the Commission -- apparently based only on the unfounded allegations in the *CMD Report* -- has launched a wide ranging investigation into the use of VNRs by numerous broadcast stations.³

The *CMD Report* grossly mischaracterizes the Commission's sponsorship identification requirements and in the process unfairly tarnishes a host of broadcasters along with the entire VNR industry. From a public policy and First Amendment perspective, the Commission's apparent reliance on the *CMD Report* to initiate enforcement action against numerous individual broadcaster stations is troubling.

¹ VNRs are the electronic version of printed press releases. VNRs cover a wide variety of useful and informative topics such as new products or services, health and medical news, special events, and so on. VNRs generally take two forms: unnarrated footage and interview clips (called "B-roll" in the industry), and fully narrated, "packaged" news stories. A list of NABC's membership is attached hereto. For further information concerning NABC, please see www.broadcastcommunicators.org.

² See Diane Farsetta & Daniel Price, *Fake TV News: Widespread and Undisclosed*, (Center for Media and Democracy) April 6, 2006.

³ See FCC Releases Unprecedented Video News Release Probe; Adelstein Committed to Full and Thorough Investigation, *Public Notice* (August 14, 2006). See also, Commission Reminds Broadcast Licensees, Cable Operators and Others of Requirements Applicable to Video News Releases and Seeks Comment on the Use of Video News Releases by Broadcast Licensees and Cable Operators, *Public Notice*, MB Docket No. 05-171 (April 13, 2005).

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The Radio-Television News Directors Association ("RTNDA") -- representing local and network journalists in more than 30 countries -- already has objected to the *CMD Report* and demonstrated that much of it is inaccurate, misleading and unreliable.⁴ Rather than analyzing the FCC's sponsorship identification requirements and applying them to particular factual situations, the *CMD Report* espouses an artificial "wish list" of what CMD wants the rules to be, then castigates broadcasters across the country for violating it.

RTNDA notes the chilling effect of the Commission's pending investigation of VNR practices by stations targeted in the *CMD Report*.⁵ Some stations have cut back on their use of VNRs; others have decided to err on the side of eliminating their use of outside video altogether.

While CMD may be delighted with such a result, it hardly serves the public interest. Broadcasters' journalistic discretion has been curtailed by precipitous government action, and countless viewers have lost access to video that might enhance coverage of news, sports, entertainment and educational items, including access to such critical consumer items as VNRs illustrating the promises of a newly released life-altering drug or showing potentially fatal dangers posed by a common food.⁶

CMD, however, is not concerned about the *content* or public interest value of any particular VNR. Instead, CMD focuses solely on the *disclosure* of the sponsor.⁷ Regardless of the content of the VNR, in CMD's opinion, *any* use of *any* VNR at *any* time must be accompanied by sponsorship identification by the broadcaster. Without disclosure of each use of every VNR, CMD claims that broadcasters are abusing the public's trust, misinforming viewers and blatantly violating the Commission's sponsorship identification rules.

But CMD's view does not reflect the Commission's sponsorship identification requirements, let alone the public interest, nor does it recognize the broadcasters' substantial First Amendment rights in using VNRs. Despite CMD's wish list, the Commission's actual rules regarding disclosure are based on the specific content of any given VNR. There is no

⁴ See Letter from Kathleen A. Kirby, Lawrence W. Secret III, Counsel for RTNDA, to Marlene H. Dortch, Secretary, FCC (October 5, 2006) ("*RTNDA Letter*").

⁵ See *RTNDA Letter*, at 8.

⁶ *Id.*

⁷ In CMD's view, "the issue at hand is not VNR *content*, but VNR *disclosure*." Diane Farsetta, Rebuttal of the Radio-Television News Directors Association's "Fake TV News" Report Critique, <http://www.prwatch.org/node/5282>, Item No. 4 (last visited October 12, 2006).

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requirement in the Commission's rules that *all* use of *all* VNRs be identified by *all* broadcasters *all* of the time.

Under the clear language of the Commission's rules and decades of precedent, sponsorship identification is required *only* when VNRs relate to (1) controversial issues of public importance,⁸ (2) political matters,⁹ or (3) matters for which money or other consideration has been provided to the broadcaster or associated entity to induce the inclusion of certain material in a broadcast.¹⁰

Broadcasters are free to use VNRs that reference commercially available products or services (and that do not deal with controversial or political matters or involve the payment of money or other valuable consideration to the broadcasters), without violating Commission sponsorship identification requirements. CMD, nevertheless, cites so-called VNR "abuses" that have nothing to do with controversial or political matters and do not involve the alleged payment of money or other consideration to the broadcaster, including:¹¹

- the use of candy flavored lip gloss;
- Holiday gift ideas;
- the making of a Super Bowl advertisement;
- a shortage of qualified automobile technicians;
- an Internet game;

⁸ See 47 C.F.R. §§ 73.1212, 76.1615.

⁹ *Id.*

¹⁰ The Communications Act of 1934, as amended, ("Act") restricts outside parties from tainting the broadcasting editorial discretion process by, in essence, "bribing" stations, station employees or similarly situated individuals who have the ability to exercise influence over the decision to air particular materials. See 47 U.S.C. §§ 317, 507. See also H.R. Rep. No. 1800, Section 7 (1960), as reprinted in 1960 U.S.C.C.A.N. 3516, 3527. The act of furnishing services or property to broadcasters without charge, however, is specifically exempted from the "payola" restrictions under the statute as well as the Commission's implementing rules. See 47 U.S.C. §§ 317(a)(1); 47 C.F.R. § 73.1212(a)(2); 76 C.F.R. §1615. As a result, VNRs provided free of charge for use in the broadcasters' sole discretion (as virtually all of them are) can never violate the payola rules.

¹¹ See *CMD Report*, at 102, 49, 77, 72, 106, 94, 98, 108, 79, respectively. CMD does not allege the improper payment of "payola" in any of these examples.

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- Super Bowl party tips;
- Holiday travel tips;
- Floral care tips; and
- the versatility of pancakes.¹²

On their face, these instances of VNR usage do not violate Commission rules nor longstanding Commission precedent -- yet CMD has publicly accused the stations at issue (and, by implication, the entire VNR industry) of serious and improper conduct detrimental to the public interest.

In an attempt to fit a square peg into a round hole, CMD argues that any non-disclosure of any VNR is "inherently controversial," thereby satisfying the Commission's legal requirement for controversiality.¹³ This interpretation, of course, is nonsense. The Commission has long recognized that applying the sponsorship identification requirements every time any film, record, transcription, talent, script or other material, including VNRs, is used by a broadcaster would so intrude into the newsroom as to inhibit television and radio and destroy a good part of their usefulness to the public.¹⁴

¹² Contrast these examples with actual instances in which the Commission found that controversial issues of public importance were not presented: the use of Ritalin for the treatment of hyperactivity, *See in re* Complaints of National Welfare Rights Organization, Against Gilmore Broadcasting Corp., Licensee of Station WSVA-TV, Harrisonburg, Va.; American Academy Of Pediatrics, and Ciba Pharmaceutical Co., Memorandum Opinion and Order, 41 F.C.C.2d 187 (1973); announcements sponsored by the National Association of Broadcasters advocating the position that "commercial television is responsively serving the needs and interests of the American viewing public," *See in re* Barry G. Silverman V. Station KOOL-TV, Phoenix, Arizona, 59 F.C.C.2d 659 (1976); the immigration of minority groups and the impact of this immigration on the economy, *See in re* Cattle Country Broadcasting, *Hearing Designation Order and Notice of Apparent Liability*, 50 FR 37272-02 (1985). These were serious, important public policy issues (unlike lip gloss, floral care and pancakes), yet the Commission deemed them not to be controversial matters of sufficient public importance within the community at that time.

¹³ *See* Letter from Timothy Carr, Campaign Director, Free Press and John Stauber, Executive Director, CMD to Chairman Kevin J. Martin, Federal Communications Commission at 3 (April 6, 2006).

¹⁴ *See in re* Complaint of Barry G. Silverman Against Station KOOL-TV, Phoenix, Arizona, *Memorandum Opinion and Order*, 63 F.C.C.2d 507 at para. 15 (1977) ("[The sponsorship identification] rules reflect Congress' view that not all material broadcast requires or necessitates sponsorship identification"). *See also in re* Cattle Country Broadcasting, *Hearing Designation Order and Notice of Apparent Liability*, 50 FR 37272-02 (1985) ("newsworthiness is not sufficient, and application of the doctrine to every "newsworthy" dispute would so inhibit television and radio as to destroy a good part of their public usefulness").

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Under the Commission's rules, the "controversiality" that triggers the sponsorship identification requirements has a specific meaning related to the *content* (not the use) of the VNR: it depends on "the degree of attention paid to a particular issue by government officials, community leaders, and the media ... or whether this issue is the subject of vigorous debate with substantial elements of the community in opposition to one another."¹⁵

In addition to being "controversial," the issue must be "public" or "of public importance." The principal test of public importance is "the impact that the issue is likely to have on the community at large." Mere community interest does not constitute controversiality.¹⁶

Nor does the mere use of a noncontroversial VNR (*e.g.*, one related to lip gloss, floral care or the versatility of pancakes) somehow render the VNR controversial. If the use of any VNR without disclosure were inherently controversial, as CMD alleges, then the Commission need not have bothered with detailed, specific sponsorship identification rules in the first place. Instead, the rules simply would have required that *all* VNRs be disclosed *all* of the time (as CMD would prefer).

Rather than imposing a blanket requirement that all VNRs be disclosed all the time, the Commission established specific sponsorship identification rules applicable only in particular situations. The Commission chose to rely on broadcaster discretion to determine which matters were so controversial and of such public importance within the community as to require disclosure. In the process, the Commission recognized that the government's role was not to substitute its judgment for that of the broadcaster, but to determine only whether a broadcaster acted reasonably and in good faith.¹⁷

¹⁵ See *e.g.*, *in re* Complaint of Barry G. Silverman Against Station KOOL-TV, Phoenix, Arizona, *Memorandum Opinion and Order*, 63 F.C.C.2d 507 (1977).

¹⁶ See *in re* Cattle Country Broadcasting, *Hearing Designation Order and Notice of Apparent Liability*, 50 FR 37272-02 (1985).

¹⁷ "Commission policy has been, and continues to be, that the threshold question as to what constitutes a controversial issue of public importance is to be answered in the first instance by the licensee. As has been often stated, the Commission's role in this area is not to substitute its judgment for that of the licensee, but rather to determine whether the licensee can be said to have acted reasonably and in good faith." See *in re* Request for Declaratory Ruling by Straus Communications, Inc.; Office of Communication, United Church of Christ; and Consumer Federation of America, *Memorandum Opinion and Order*, 46 FCC 2d 262 (1974). See also *in re* Complaint by David S. Tillson, Brockport, N.Y. Concerning Fairness Doctrine Re Station WHAM, Rochester, N.Y., 19 F.C.C. 2d 511 (August 11, 1969).

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CMD urges the Commission to ignore the specific language of the sponsorship identification rules, as well as decades of precedent, and to impose a new rule (without the benefit of public input during a rulemaking proceeding) that is more to CMD's liking. Under CMD's approach, broadcasters would not "need" to determine whether a particular topic is political or controversial...since *all* VNRs would require disclosure.¹⁸ Instead of relying on broadcaster discretion, the government would invade the newsroom and examine each and every VNR used by any broadcaster at any time.¹⁹

As recognized in the *CMD Report*, VNRs are independently produced and are provided to broadcast stations without charge and without commitment of any nature. The stations are under no obligation to air VNRs, in whole or in part, as a quid pro quo for their production. Stations are free to edit the VNRs as they see fit in their discretion to ensure that their editorial standards are satisfied.²⁰

The *RTNDA Letter* provides ample evidence that stations are exercising their editorial discretion in their usage of VNRs. They are incorporating select footage into their own internally produced news pieces and are otherwise airing VNRs as a direct result of a newsroom decision that the information contained in the VNRs is newsworthy.²¹

¹⁸ See *CMD Report*, at 28.

¹⁹ In the context of the Fairness Doctrine, a now defunct policy that shares its roots with the sponsorship identification rules and that relied on an identical standard for determining "controversiality", the Commission found that rules intended to encourage informed debate instead served as a disincentive for broadcasters to air potentially divisive, albeit newsworthy, material. Restricting *all* VNRs undoubtedly would have the same effect. See e.g., *Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, Report*, 102 FCC 2d 145 (1985) ("the chilling effect on the presentation of controversial issues of public importance resulting from our regulatory policies affirmatively disservices the interest of the public in obtaining access to diverse viewpoints.").

²⁰ As noted by RTNDA, there is no "pay for play" when it comes to VNRs. See *RTNDA Letter*, at 11. Even the *CMD Report* recognizes that VNRs are "a gambling proposition" for clients and their publicists. See *CMD Report*, at 85. If a newsroom does air a VNR, it has the absolute freedom to alter the story in whatever way it deems appropriate, even if it negates the VNR's original promotional message. The *CMD Report* actually cites -- yet complains about -- instances where broadcasters clearly exercised their editorial discretion and actually changed the thrust and content of a VNR (sometimes completely reversing the message contained in the original VNR). See *CMD Report*, at 85, 112.

²¹ Broadcasters typically evaluate VNRs usage based on news content, local relevance, broad impact and high interest. See *RTNDA Letter*, at 11; See also *RTNDA Letter*, Attachment A.

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The *CMD Report* confirms that VNR producers clearly and accurately identify their clients and funding information.²² VNR producers and their clients routinely provide this type of information so that broadcasters can exercise their discretion and fulfill their editorial responsibility in a manner that complies with applicable FCC sponsorship identification requirements.²³

NABC supports the FCC's efforts to ensure compliance with the sponsorship identification requirements. As described by RTNDA²⁴ and in press reports,²⁵ however, CMD's unfounded accusations and the Commission's subsequent investigation have created a severe chilling effect in the broadcast community that is not supported by the Commission's rules or the public interest.

As RTNDA has pointed out, the Commission would never dream of inserting itself into a print newsroom to dictate how newspaper editors utilize written press releases.²⁶ The Commission should decline to take similar action in the context of broadcast newsrooms and VNRs.

²² See *CMD Report*, at 34-35.

²³ 47 C.F.R. §§ 73.1212, 76.1615.

²⁴ See *RTNDA Letter*, at 6-8.

²⁵ See Bayne Hughes, *WHNT Admits Using Fake News*, *The Decatur Daily*, Aug. 17, 2006, available online at: <http://www.decaturdaily.com/decaturdaily/news/060817/fake.shtml> (last visited October 9, 2006).

²⁶ See *RTNDA Letter*, at 16.

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NABC is confident that the Commission will consider CMD's allegations within the framework of existing rules and precedent, with due respect for the First Amendment rights of newscasters, and that the result of this investigation will be confirmation of a high degree of compliance with applicable Commission requirements.

Sincerely,



Jack Richards
Greg Kunkle

Counsel for NABC

ATTACHMENT: NABC Membership

cc: Commissioner Michael Copps
Commissioner Jonathan Adelstein
Commissioner Deborah Taylor Tate
Commissioner Robert McDowell
Catherine Bohigian, Chief, FCC Office of Strategic Planning & Policy Analysis
Sam Feder, FCC General Counsel
Kris Monteith, Chief, FCC Enforcement Bureau
John Stauber, Center for Media and Democracy
Timothy Karr, Free Press

National Association of Broadcast Communicators – Membership List

Auritt Communications Inc.

D S Simon Productions

DWJ Television

Gordon Productions Inc.

Gourvitz Communications

Home Front Communications

KEF Media Associates

MediaLink Worldwide Inc.

MultiVu

News Broadcast Network Inc.

On The Scene Productions Inc.

PLUS Media

VNR-1 Communications Inc.

West Glen Communications Inc.