



November 2, 2007

**VIA HAND DELIVERY**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Attn: Hillary S. DeNigro  
Chief, Investigations and Hearings Division  
Enforcement Bureau

*Re: Comcast Corporation, Notices of Apparent Liability for Forfeiture,  
NAL/Acct. Nos. 200732080035 & 200732080035*

Dear Ms. Dortch:

The National Association of Broadcast Communicators (“NABC”) respectfully submits these *amicus curiae* comments in response to the Enforcement Bureau’s (“Bureau”) proceedings against Comcast Corporation (“Comcast”) for its affiliate CN8’s airing of portions of video news releases (“VNRs”) without sponsorship identification, allegedly in violation of section 76.1615 of the Commission’s rules.<sup>1</sup> NABC is a membership organization that represents the interests of VNR production companies.<sup>2</sup> NABC’s comments seek to ensure that the Commission appreciates the public interest benefits of VNR use and to underscore NABC’s deep concern that the agency has embarked on an unprecedented and improper government intrusion into the newsroom.

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<sup>1</sup> 47 C.F.R. § 76.1615. See *Comcast Corporation*, Notice of Apparent Liability for Forfeiture, File No. EB-06-IH-3723, NAL/Acct. No. 200732080035, DA 07-4005 (EB Sept. 21, 2007) (“*Comcast NAL I*”); *Comcast Corporation*, Notice of Apparent Liability for Forfeiture, File No. EB-06-IH-3723, NAL/Acct. No. 200732080039, DA 07-4075 (EB Sept. 26, 2007) (“*Comcast NAL II*”). The Commission has previously accepted *amicus curiae* comments in other forfeiture proceedings raising broad public policy issues. See, e.g., *Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 19 FCC Rcd 4975, 4976 n.6 (2004); *Infinity Broadcasting Operations, Inc.*, 18 FCC Rcd 26360, 26363 n.1 (2003); *The KBOO Foundation*, 18 FCC Rcd 2472, 2472-73 n.2 (EB 2003) (subsequent histories omitted).

<sup>2</sup> Members of NABC are actively engaged in the production and/or distribution of VNRs. NABC was created to establish standards and guidelines for the professional activities of its member companies and to represent the profession before policymakers. More information can be found at NABC’s website, [www.broadcastcommunicators.org](http://www.broadcastcommunicators.org).

## **I. Introduction**

Newscasters and electronic journalists make independent editorial judgments every day regarding stories to be covered and material to be aired in their programming. VNRs, like traditional written press releases, are one of the source materials that reporters can choose from in developing a story. The Notices of Apparent Liability for Forfeiture (“NALs”) against Comcast, however, insert the government into the newsroom and single out the use of VNR material for government sanction. In effect, the NALs establish the government as gatekeeper, analyzing the content of news outlets’ programming to judge whether “there is too much focus on a product or brand name in the programming.”<sup>3</sup> Neither the statute, the Commission’s rules, nor the First Amendment permit such an intrusive government role.

Specifically, the NALs ignore the letter and spirit of the sponsorship identification requirements spelled out in section 317 of the Communications Act of 1934, as amended (the “Act”) and section 76.1615 of the Commission’s rules.<sup>4</sup> As discussed more fully below, these provisions expressly provide that no disclosure is required for programming material provided free or at a nominal charge where there is no agreement express or implied regarding the use of that material. The NALs, however, suggest that news organizations must provide sponsorship identification whenever they use third-party video footage, without regard to any such agreement, if the FCC deems the programming too promotional. This analysis represents an unprecedented and improper intrusion into the newsroom that will have a significant chilling effect on news, thereby raising serious First Amendment concerns.

The Commission should reject the approach adopted in the NALs and adhere instead to its own precedent, which emphasizes “the need for caution with respect to complaints implicating the editorial judgment of broadcast licensees in presenting news and public affairs programming, as these matters are at the core of the First Amendment’s free press guarantee.”<sup>5</sup> Indeed, as the Commission previously observed, enforcement of the sponsorship identification rules must maintain the “delicate balance between insuring that licensees operate in the public interest and reducing to a minimum possible involvement in the day-to-day operations of those licensees.”<sup>6</sup>

## **II. The NALs Mischaracterize VNRs, What They Are, and How They Are Used**

Corporations, non-profit organizations, government agencies, and any other entities that seek to obtain news coverage send information to news outlets everyday with the hope that

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<sup>3</sup> *Comcast NAL I* at ¶ 7; *Comcast NAL II* at ¶ 7.

<sup>4</sup> NABC notes the legal question of whether the Commission has authority to impose sponsorship identification requirements on cablecasting but does not address that issue here.

<sup>5</sup> *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Order, 21 FCC Rcd 13299, 13327 ¶ 69 (2006) (citation omitted, subsequent history omitted).

<sup>6</sup> *Liability of Community Broadcasters, Inc., Licensee of WGHN and WGHN-FM, Grand Haven, MI, For Forfeiture*, 55 FCC 2d 28, 30 ¶ 8 (1975).

journalists exercising their independent editorial judgment will find the material of sufficient interest to disseminate it to the public. Many such entities fax or email written press releases; some also use VNRs – the electronic version of a press release. Unfortunately, the NALs dismiss VNRs as “promotional material” that is “furnished by a product manufacturer.”<sup>7</sup> This description is overly narrow and fails to apprehend the nature of the VNR industry, VNRs’ positive impact on newsgathering, and the fact that VNR material is aired only if newscasters and journalists deem the information newsworthy.

VNRs often contain the same information as written releases but in a format that electronic journalists can readily use. Just like written press releases, VNRs generally are provided without charge and without any express or implied agreement to air the material or any specific portions thereof. They typically consist of unnarrated footage and interview clips or sound bites (collectively referred to as “B-roll”), frequently accompanied by a packaged narrative as well as written material covering suggested scripts or ways to localize a story. NABC members abide by a professional code that requires attribution and source information for all VNR material, and VNRs contain editorial contact information, just as press releases include contact information. Frequently, news outlets will use this contact information to follow-up with requests for fact sheets and local contacts for interviews.

Broadcasters are free to accept or reject VNRs, to incorporate select footage into news segments they produce, and to craft the storyline or message that the stations air in any way they wish.<sup>8</sup> Whether and how to include VNR material in a broadcast is solely within the newscasters’ editorial discretion – in fact, news outlets sometimes use material from VNRs in stories of a negative nature. VNR producers and their clients have no influence over the decision to use VNR material and how it is used.

VNRs have been a mainstay of communication between organizations and broadcast stations since the dawn of television. VNRs today cover a wide variety of newsworthy and informative topics. These may involve events of interest to the public, important consumer information and health awareness, the introduction of new products or services, and public education. VNRs often provide footage that otherwise would not be available – the moon landing is perhaps the most well known VNR material ever broadcast. They can provide unique access, such as images inside a manufacturing plant or footage of a soon-to-be-released movie. VNRs are produced and distributed on behalf of non-profit organizations and governmental bodies, as well as corporate entities. Examples include:

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<sup>7</sup> *Comcast NAL I* at ¶ 8 (“We do not believe that this type of promotional material, furnished by a product manufacturer, can or should be considered within the scope of the proviso, which is direct to material that contains only fleeting or transient references to products or brand names.”); *see also Comcast NAL II* at ¶¶ 8-11 (same).

<sup>8</sup> As the Radio-Television News Directors Association has observed, “[t]he material contained in VNRs is more likely to be used as background footage or excerpted in stories that the newsrooms produce themselves.” Letter from Kathleen A. Kirby and Lawrence A. Secrest, III, Counsel to RTNDA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-171 at 8 (filed Oct. 5, 2006).

- Teen driver safety education summit featuring a young man who, while texting, crashed and killed his best friend (produced on behalf of an insurance company);
- Product recall providing description of the affected toy and specific instructions on what to do (produced on behalf of a toy manufacturer in cooperation with the Consumer Products Safety Commission);
- A reminder about smoke detectors that highlights hazardous materials that household items release when on fire (produced on behalf of an independent safety testing organization);
- Professional golfer and adoptive father Kirk Triplett discussing what adoption has meant to him (produced on behalf of a foundation dedicated to adoption);
- Information regarding how to detect and avoid investment fraud schemes (produced on behalf of a national association serving the elderly);
- Unveiling of the 2008 Olympic Torch (produced on behalf of an Olympic sponsor);
- Accurate, up-to-date information for volunteer efforts and aid opportunities immediately following Hurricane Katrina (produced on behalf of a national relief organization);
- Vehicle crash tests and safety ratings (produced on behalf of a national safety organization);
- New child physical fitness program at Boys & Girls Clubs (produced on behalf of a soft drink company); and
- Congressional interviews on matters of interest to constituents (produced on behalf of U.S. Representatives or Senators).

These are just a few examples that reflect the wide and diverse array of issues that VNRs cover with the hope – but with no “agreement” express or implied – that news outlets will deem the subject matter worthy of coverage, and if so, make use of the material provided. This marketplace of information is at the core of newsgathering. Government should not, and legally it cannot, seek to regulate the newsroom’s judgment about programming or a news outlet’s exercise of its independent editorial judgment. Efforts to regulate VNR use are nothing less.

### **III. The NALs Misconstrue the Law on Sponsorship Identification and Have a Significant Chilling Effect on News, Raising Serious First Amendment Concerns**

#### **A. Sponsorship Identification Is Not Required Where There Is No Inducement or Agreement Regarding Use of the Third Party Material**

Nearly 50 years ago, in response to an unprecedented and misguided FCC initiative to expand the scope of the sponsorship identification law, Congress modified section 317 to clarify that disclosure is required where there is inducement for the selection of programming to be aired and not where program material is selected solely in the station's editorial discretion.<sup>9</sup> Today, section 317 requires sponsorship identification where material is broadcast "for which any money, service or other valuable consideration is directly or indirectly paid."<sup>10</sup> The proviso in section 317 expressly allows for the routine use of material and services supplied by third parties for free or at a nominal charge with no agreement regarding its use:

*Provided*, That "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so *furnished in consideration for* an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.<sup>11</sup>

The extensive legislative history accompanying adoption of the proviso explains that Congress intended to establish "a general rule that an announcement shall not be required under section 317" where material is provided for free or at a nominal charge.<sup>12</sup> Further, Congress made clear the proviso was adopted to provide relief and clarity in the face of the Commission's overly aggressive application of the announcement requirements to program material provided free.<sup>13</sup> Congress therefore recognized only limited exceptions to this rule – the one at issue here involves disclosure where material provided for free is "furnished *in consideration for* an identification in a broadcast" beyond that which is reasonably related to its use on the broadcast.<sup>14</sup>

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<sup>9</sup> H.R. Rep. No. 86-1800 (1960) *reprinted in* 1960 U.S.C.C.A.N. 3516, 3528.

<sup>10</sup> 47 U.S.C. § 317(a).

<sup>11</sup> *Id.* (emphasis added).

<sup>12</sup> 1960 U.S.C.C.A.N. at 3527-28. *See also Sponsorship Identification of Broadcast Material*, 40 FCC 69, 73 (1960).

<sup>13</sup> *Id.* at 3526.

<sup>14</sup> 47 U.S.C. § 317(a) (emphasis added). Congress also allowed the Commission to require disclosure in the case of programming that covers a political matter or an issue of controversy where material was provided for free or at a nominal charge as an inducement to broadcast. 47 U.S.C. § 317(a)(2); *see also* 1960 U.S.C.C.A.N. at 3528.

The highlighted phrase “furnished in consideration for” expressly requires that there be some agreement or meeting-of-the-minds in order to trigger a disclosure where material is provided for free or at a nominal charge. In other words, where material is made available for free or at a nominal charge, the proviso requires a sponsorship announcement only if there is a *quid pro quo* where, in exchange for the VNR material, the station agrees to air an identification of the service or property in a manner that is not reasonably related to its use. No other reading of the statute gives due weight to all of the words in the proviso. “It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.”<sup>15</sup>

The legislative history also provides 27 examples illustrating the intended effect of the proviso. A few of those examples are particularly instructive here:

- “News releases furnished to a station by Government, business, labor and civic organizations, and private persons, with respect to their activities, and editorial comment therefrom is used on a program. No announcement is required.”<sup>16</sup> This is the only example that involves news outlets – and Congress clearly directed the Commission to provide newscasters with wide latitude regarding the use of third party releases provided for free with no agreement for use. There is no basis for the Commission to treat *video* material any differently from written news releases.<sup>17</sup>
- “A record distributor furnishes copies of records to a broadcast station or a disc jockey for broadcast purposes. No announcement is required unless the supplier furnished more copies of a particular recording than are needed for broadcast purposes. Thus, should the record supplier furnish 50 or 100 copies of the same release, with an agreement by the station, express or implied, that the record will be used on a broadcast, an announcement would be required because consideration beyond the matter used on the broadcast was received.”<sup>18</sup> As noted above, there is no additional consideration provided to induce VNR use, and there is no agreement with the news outlet, express or implied, to air material from the VNR.
- “A university makes one of its professors available to give lectures in an educational program series. No announcement is required.”<sup>19</sup> A broadcaster, in its editorial

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<sup>15</sup> 2A SUTHERLAND STATUTORY CONSTRUCTION § 46:6, at 230 (7<sup>th</sup> ed. Singer & Singer 2007) (citations omitted).

<sup>16</sup> 1960 U.S.C.C.A.N. at 3529; *see also Applicability of Sponsorship Identification Rules*, 40 FCC 141, 146 (1963).

<sup>17</sup> Indeed, it makes no sense to conclude that sponsorship identification is *not* required where a reporter reads from a press release provided for free, but *is* required if the same reporter uses video footage provided in conjunction with the press release.

<sup>18</sup> 1960 U.S.C.C.A.N. at 3528.

<sup>19</sup> *Id.* at 3530.

discretion, can choose to air presentations provided by a third party. Under the NALs' analysis, however, the programmer could be subject to enforcement action if the Bureau decides that the presentation involves too much discussion of the university's work or the lectern displays the University's logo.

Consistent with the express language of the proviso, these examples demonstrate that a sponsorship announcement is not required where material is provided for free, with no consideration above and beyond the matter to be aired, and no agreement express or implied regarding use of the material.

Section 76.1615, the rule at issue in the NALs, mirrors the proviso language of section 317 of the Act. Indeed, the proviso's language "furnished in consideration for" appears unchanged in section 76.1615(a) and should be given the same meaning. Thus, section 76.1615 must be read to require sponsorship identification for VNR material only where there is some agreement or meeting-of-the-minds regarding the use of that material. The NALs ignore the plain language of the proviso by failing to address the "in consideration for" requirement. The interpretation of the proviso is unprecedented and flatly inconsistent with the relevant legislative history and Commission precedent discussed above.

#### **B. The NALs Will Have a Significant Chilling Effect on News, Raising Serious First Amendment Concerns**

The NALs assert that because the VNR material is "promotional," disclosure of its use in a news story must occur if, in the subjective judgment of the Commission, the station's news story (and apparently not just the VNR material itself) focused "too much" on the product or entity at issue.<sup>20</sup> This analysis ignores a fundamental aspect of VNR use – the news outlet in its sole editorial discretion decides whether and how to use material provided in a VNR, just like a written news release.

Most troubling, this interpretation expands the government's control over the way news organizations employ their editorial judgments regarding the sources of information they use. Already, the Commission's investigations into VNR use have caused a significant chilling effect on newscaster use of VNRs and the dissemination of news. Simply put, the NALs' new interpretation will expose Commission licensees to regulatory sanction based on an inherently vague and highly subjective standard. The regulatory risks include forfeitures from the Commission, the denial of license renewal for broadcasters, and the cost of defending against claims, even frivolous claims, brought against them. Thus, given these risks, news outlets may choose to forgo use of outside video that would otherwise expand their news coverage. In turn, news organizations and their viewers will lose access to newsworthy and informative content, and to video footage that might not otherwise be accessible to local stations.

This result would be in direct contravention of the First Amendment. The Supreme Court has held that "constitutional violations may arise from the deterrent or 'chilling' effect of

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<sup>20</sup> *Comcast NAL I* at ¶¶ 7, 8; *Comcast NAL II* at ¶¶ 7, 8-11.

governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment Rights.”<sup>21</sup> The Commission must be particularly cautious here, where the chilling effect of its regulation relates to news. As the Supreme Court has recognized, the “choice of material to go into” the news “constitute the exercise of editorial control and judgment. It has yet to be determined how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press.”<sup>22</sup> Yet the NALs inject the government into the newsroom, without regard to the careful balance set by Congress, and without any consideration of the First Amendment consequences.

#### **IV. Conclusion**

In sum, the NALs are an unprecedented and improper expansion of Commission oversight regarding the way news organizations employ their editorial judgment and will thus have a significant chilling effect on the dissemination of news, contrary to the public interest, section 317 of the Act, the Commission’s rules, and the First Amendment. The Commission should therefore step back and re-evaluate its interference with the editorial judgments of news programmers, and cancel the NALs.

Respectfully Submitted,

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<sup>21</sup> *Bd. Of County Comm’rs, Wabaunsee County, v. Umbehr*, 518 U.S. 668, 674 (1996) (quoting *Laird v. Tatum*, 408 U.S. 1, 11 (1972)); see also *Reporters Comm. For Freedom of the Press v. AT&T*, 593 F.2d 1030, 1052 (D.C. Cir. 1978).

<sup>22</sup> *Miami Herald Pbl’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).