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December 17, 2003

VIA FACSIMILE (202) 208-3333

Ms. Mary Dove, Secretary
Federal Election Commission
999 E Street, NW
Washington, D.C. 20042

Re: Comments on Draft Advisory Opinion 2003-34

Dear Ms. Dove:

These comments are submitted to the Federal Election Commission ("the Commission" and "the FEC") on behalf of the National Rifle Association, a 501(c)(4) non profit corporation and its 4 million members ("NRA") regarding the above-referenced draft Advisory Opinion 2003-34, a request submitted by Viacom, Inc. ("Viacom") and its wholly-owned subsidiary, Showtime Networks, Inc. and their producers ("Requesters").

NRA takes exception to the Commission's proposed finding that the 'series is generally not subject to regulation under the Federal Election Campaign Act ("the Act")' and the Bipartisan Campaign Reform Act ("BCRA"). The Commission should not issue *carte blanche* to the Requesters and, by this precedent, other media corporations authorizing such corporations to 'depict or discuss' actual federal candidates and to expressly advocate such candidates' election or defeat outside the specific statutory exemption for a "news story, commentary or editorial".

Viacom is a multi-billion dollar for-profit corporation which reported sales of $25 billion and assets of $90 billion in 2002 and a profit of $9.7 billion for 2002. Viacom also lobbies Congress, reporting lobbying expenditures of over $1,000,000 for 2000, the last year for which expenditures have been compiled.

Viacom has a registered political action committee which reported receipts of more than $200,000 during the 2004 election cycle as of September 30, 2003.

Clearly, Viacom and other media companies are no different from any corporation, including a non-profit corporation, for purposes of the Act. The Commission's analysis should not be colored by the mere fact that Viacom is a media corporation. The only authorized exception to the Act's prohibitions on corporate expenditures for broadcast communications referencing federal candidates must be within the very narrow language of the statute, within which exception these communications are clearly not contained.

Congress and the Commission's regulations specifically and only exempt corporate expenditures referencing or depicting clearly identified federal candidates from the definition of electioneering communications if those expenditures are for institutional press purposes,

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to-wit:

> "The term 'electioneering communication' does not include a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by an political party, political committee or candidate." 2 U.S.C. §434(f)(3)(B)(i).

Likewise, the Commission's regulations mirror the statutory press exemption:

> "Electioneering communication does not include any communication that appears in a news story, commentary, or editorial distributed through the facilities of any broadcast, cable, or satellite television or radio station unless such facilities are owned or controlled by an political party, political committee or candidate." 11 C.F.R. §100.33(c)(2).

Requesters acknowledge that the press exemption does not authorize or include corporate expenditures which reference or depict clearly identified federal candidates if such references are made by a corporation *outside* the scope of a 'news story, commentary or editorial.' Further, Requesters acknowledge that the 'series' at issue in the AOR will include not only fictional candidates in a non-documentary format, but also possibly actual, federal candidates. Requesters do not contend or pretend that these references or depictions will be broadcast in a news story, commentary or editorial format. Accordingly, Requesters should be denied their request to expand the definition of 'news story, commentary or editorial' to include their proposed series if any references, depictions or appearances of actual federal candidates are contained within the series.

All of the Advisory Opinions cited by Requesters were rendered prior to BCRA, prior to the new FEC regulations promulgated under BCRA and prior to the Supreme Court's review of the definition of 'electioneering communications' and are, therefore, inapposite to a construction of BCRA's provisions.

Despite the efforts of Requesters to urge the Commission's expansion of the statutory definition of 'press exemption', no legal authority exists for the Commission to expand the press exemption to corporate expenditures for broadcast (including cable) communications that reference and/or depict an actual federal candidate within thirty (30) days of a primary election or sixty (60) days of a general election.

Even more disturbing is the language in the Commission's draft advisory opinion on page 3, Lines 9 through 16 which constitutes a breathtaking expansion of the statute and the FEC's regulations and would allow Viacom and other media conglomerate corporations to expend unlimited corporate resources referencing, depicting and *expressly advocating* at will the election or defeat of clearly identified federal candidates. A multi-billion dollar corporation such as Viacom, which lobbies Congress and whose PAC contributes to federal political campaigns and candidates,

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is not and should not be allowed by the Commission to circumvent the statute and the FEC's regulations under BCRA.

The United States Supreme Court on December 10, 2003, in *McConnell v. FEC, et al.*,540 U.S. _____ (2003) upheld the constitutionality of the prohibition on corporate expenditures for 'electioneering communications' defined as certain broadcast communications during the 30/60 day period before a federal election, if such broadcasts reference or depict a clearly identified federal candidate.

The Court specifically addressed the arguments advanced by NRA and others that the electioneering communication restrictions violate constitutional principles by virtue of favoring media corporations. The Court noted:

> "In addition to arguing that Section 316(b)(2)'s segregated-fund requirement is under-inclusive, some plaintiffs contend that it unconstitutionally discriminates in favor of media companies. FECA Section 304(f)(3)(B(i) excludes from the definition of electioneering communications any "communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee or candidate." (citations omitted). Plaintiffs argue this provision gives free rein to media companies to engage in speech without resort to PAC money. Section 304(f)(3)(B)(i)'s effect, however, is much narrower than plaintiffs suggest. The provision excepts news items and commentary only; it does not afford *carte blanche* to media companies to generally ignore FECA's provisions. The statute's narrow exception is wholly consistent with First Amendment principles...Numerous federal statutes have drawn this distinction to ensure that the law does not hinder or prevent the institutional press from reporting on, and publishing editorials about, newsworthy events." *Ibid.* (citations omitted)" (emphasis added)

McConnell v. FEC, et al., 540 U.S. ___, 102 (2003).

It is wholly inconsistent with the Court's ruling in *McConnell* for the Commission, one week after the decision, to provide the *carte blanche* to media companies that the Supreme Court quite pointedly opined to be non-existent.

There is nothing contained in Requesters' proposed series that is 'newsworthy' or related to the normal functions of the institutional press. For the Commission to allow Requesters to spend unlimited corporate dollars promoting, supporting and opposing federal candidates is surely contrary to the Supreme Court's definitive statements merely one week ago.

Requesters should be precluded as *every* corporation is precluded from referencing or depicting a clearly identified federal candidate in a broadcast communication within 30/60 days of a

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federal election outside a news story, commentary or editorial as provided by law. Any other corporate expenditure which meets the definition of an electioneering communication should be made with PAC funds from the Viacom PAC, as required of every other corporate entity in America.

An additional issue that the Commission has utterly failed to consider in the draft Advisory Opinion is the extent to which actual federal candidates or their vendors and agents might serve on the Requesters' 'Blue Ribbon Leadership Panel' which would trigger BCRA's provisions on 'coordinated public communications' ("Coordination") and the Commission's regulations related to Coordination.

Requesters admit that the 'Blue Ribbon Leadership Panel' members could well include such persons – and all public communications which reference or depict a federal candidate (including the website and other communications in addition to the broadcasts themselves) would then be subject to the FEC regulations governing Coordination. The draft advisory opinion wholly ignores the presence of facts which give rise to Coordination under the Commission's regulations. 11 C.F.R. §109.21.

NRA urges the Commission to ensure that the corporate expenditures of Requesters are in keeping with the statute, the Commission's regulations and the specific language of the United States Supreme Court under BCRA. Any reference, depiction, mention or appearance of a clearly identified federal candidate under the facts provided by Requesters is not within the statutory exception for a 'news story, editorial or commentary'. Requesters should not be allowed by the Commission to present, depict or reference federal candidates and most certainly should not be allowed to expressly advocate the election or defeat of a federal candidate in broadcast communications paid for with Requesters' substantial corporate funds and assets. Funds used for such purposes must only be from federally permissible dollars within the limits authorized by Congress in BCRA.

Thank you for the opportunity to submit these comments. Please contact me if you have questions.

Sincerely,

Cleta Mitchell

Cleta Mitchell, Esq.
Counsel for NRA

cc: Mr. Wayne LaPierre, Executive Vice President
National Rifle Association

Mr. Larry Norton, General Counsel
Federal Election Commission VIA FACSIMILE (202) 219-3923