

## **Briefing Paper: Workers Independent News v. FCC**

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Background: Workers Independent News (WIN) is the first syndicated labor radio news program to be launched in the United States in more than 50 years.<sup>1</sup> Based in Madison, Wisconsin and founded in 2001, the fully credentialed non-profit news organization produces daily headline newscasts and longer-form feature programs for distribution on the air and online.

Workers Independent News was created because labor news has all but disappeared from the public airwaves. Although it once enjoyed prominent attention (primarily in newspapers and on the radio), the trends of consolidation and hyper-commercialism in the U.S. media environment over the last 30 years have decimated labor news coverage. As a result, news and issues by, for, and about working Americans have all but disappeared from commercial media, or are provided with no meaningful context.

To break this blackout, Workers Independent News adopted an innovative distribution model. Not only does it offer its programs for free to any broadcast outlet that desires to carry it, but it also purchases airtime on commercial stations for carriage. The logic is simple: commercial broadcasting is based on a market-model, and if these outlets do not deign to provide labor news, WIN will pay for the privilege of being heard.

Furthermore, most labor news (and many other forms of independent media) has been ghettoized to non-commercial, community media outlets; while these platforms are authentically valuable in their own right, the majority of working Americans do not engage with them. But by providing news of direct contextual importance within the conduits of media they typically consume, Workers Independent News could boost its potential reach and impact.

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1. <http://www.laborradio.org/>.

Federal Communications Commission rules require commercial stations that are paid to carry Workers Independent News to run an announcement disclosing that WIN paid for the airtime, in compliance with sponsorship identification regulations. For nearly 13 years, this distribution model worked very well: WIN has been broadcast on hundreds of commercial and noncommercial radio stations in the United States, including carriage on news/talk stations in major markets such as New York, Los Angeles, Chicago, and St. Louis, to name just a few.

The FCC Case: In 2009, a complaint was filed with the FCC regarding the carriage of Workers Independent News by WLS-AM in Chicago. WLS is one of Chicago's oldest radio stations; its 50,000-watt signal covers much of the Midwest and can be heard across most of the continental United States at night. The complaint alleged that, in a fraction of the instances where WLS aired Workers Independent News material, it failed to run the required sponsorship announcement. In 2013, the FCC issued a Notice of Apparent Liability to WLS for violating the sponsorship identification rules, and in February 2014 formalized its ruling and fined WLS \$44,000.<sup>2</sup>

On a purely technical level, the FCC is simply upholding the law: if someone pays for airtime, and the material does not explicitly promote a product or service, the station needs to disclose that.

But the FCC's decision did not stop there. In explaining the severity of the fine, the Commission is quite explicit in its journalistic determination: Workers Independent News is, in fact, not news. After first defining it as "informational program material" (p. 2) and transcribing an entire WIN newscast (p. 2-3), the FCC then discusses the legal merits of the case. It first insinuates that Workers Independent News may meet the criteria of being misleading or deceptive program material, thus triggering the fine (p. 5).

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2. Federal Communications Commission, *In the Matter of Radio License Holding XI, LLC*, File No. EB-09-IH-0574, February 10, 2014, [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2014/db0210/FCC-14-10A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0210/FCC-14-10A1.pdf) (March 18, 2014).

I strongly encourage you to read the transcribed newscast. In a nutshell, the story is about federal economic stimulus funding in Illinois. It quotes a state representative, who hopes the Legislature uses the money to rehabilitate the state's infrastructure, and the state's secretary for veterans affairs, who hopes that some of those construction jobs might go to veterans, who are historically underemployed. All things considered, it's fairly milquetoast, and certainly pitches no product, service, or persuasive ideology—nothing out of line with what commercial news operations regularly air.

In assessing the severity of the fine, "the Commission considered the nature, circumstances, and gravity of the violations in noting that the announcements in question were formatted and presented as news" (p. 7), and chastised WLS for not correcting the record: "e.g. broadcast announcements notifying listeners that the 11 90-second advertisements previously aired were not, in fact, news stories...the station's listeners were exposed to material that appeared to be objective news stories deprived of the knowledge that the material was, in fact, prepared to convey the particular point of view of the organization that paid...the Licensee...to air it." (p. 8).

The Implications: Although Workers Independent News is a third party in the FCC's dispute with WLS, and believes that the FCC's fine against WLS for failing to provide sponsorship identification is appropriate, the agency's journalistic determination is extremely troubling. Indeed, it is the first time in the history of U.S. broadcasting that the FCC has declared a news organization illegitimate.

When the FCC first proposed the WLS fine last year, Workers Independent News executive producer Frank Emspak reported a definite chilling effect. "Before the FCC fine was announced, we had two radio stations that were interested in airing our news," he said. "Now we can't get those stations to call us back. It feels like we might be on some sort of blacklist, but we're not sure."<sup>3</sup>

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3. Mike Elk, "FCC Fines Radio Station for Airing 'Fake News' from Labor News Show," *In These Times*, February 28, 2012, [http://inthesetimes.com/working/entry/12806/fcc\\_fines\\_illinois\\_radio\\_state\\_for\\_fake\\_news\\_about\\_workers](http://inthesetimes.com/working/entry/12806/fcc_fines_illinois_radio_state_for_fake_news_about_workers) (March 18, 2014).

There are two planes of irony to this case. The first is that commercial broadcast journalism regularly engages in practices that fall below the ethical standards of Workers Independent News. One need look no further than the use of Video or Audio News Releases in newscasts. VNRs are typically produced by a company seeking to promote a product or service, and are formatted and presented just like a commercial television news segment, often with a generic narration.

When they are fed to television stations (for free), the VNR packages are tagged with a slate that identifies their sponsor—but television stations do not run these disclosures in their newscasts. In fact, stations often re-brand video news releases as their own reportage by having a local reporter voice the story and use their own on-screen graphics during the story, but otherwise run the VNR unedited.

In 2006, the Center for Media and Democracy conducted an investigation into the use of video news releases and found them quite widespread. Over a 10-month period, they identified 77 television stations in markets large and small that aired some 36 VNRs without disclosure.<sup>4</sup> In a follow-up six-month study, the Center identified another 46 stations in 22 states that had aired VNRs without disclosure.<sup>5</sup>

When this information was brought to the attention of the Federal Communications Commission and it began to investigate the practice as a violation of its sponsorship identification rules, the Radio Television Digital News Association (RTDNA) intervened, claiming that full disclosure of video news releases violated the First Amendment editorial privileges of broadcast journalism. Even if some television news was indeed not news (i.e., a VNR), the practice “provides no

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4. Diane Farsetta, “Fake News: Widespread and Undisclosed,” *Center for Media and Democracy*, April 6, 2006, <http://www.prwatch.org/fakenews/execsummary> (March 18, 2014).

5. Diane Farsetta and Daniel Price, “Still Not the News: Stations Overwhelmingly Fail to Disclose VNRs,” *Center for Media and Democracy*, November 14, 2006, <http://www.prwatch.org/fakenews2/execsummary> (March 18, 2014).

credible basis upon which the FCC can justify the extraordinary step of inserting itself into broadcast newsrooms and questioning their exercise of editorial discretion.”<sup>6</sup>

The Center for Media and Democracy, in conjunction with Free Press, filed sponsorship identification complaints with the FCC against 111 television stations for airing video news releases without disclosure. In 2007, the FCC fined one of Comcast’s regional television news networks \$20,000 for violating the sponsorship identification rules,<sup>7</sup> and in 2011 it fined two television stations in Minneapolis and New Jersey \$4,000 each for airing unattributed VNRs.<sup>8</sup>

*In all of these cases, the FCC made no determinations on the news value of video news releases themselves.* Yet in 2014, when a bona-fide news organization pays for commercial carriage and the station fails to disclose, the FCC determines, on no evidentiary basis, that propaganda of some sort must be afoot. Something does not compute.

The deeper irony resides within the FCC itself. Less than three weeks after the agency ruled on the legitimacy of Workers Independent News, Republican FCC Commissioner Ajit Pai launched a campaign against a proposed FCC study of Critical Information Needs. The study would have deeply explored the news ecosystems of several U.S. media markets to better understand how the mix of stories and media outlets that make up our public discourse actually become "the news."

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6. John Eggerton, “RTDNA Slams VNR Study, FCC Investigation,” *Broadcasting & Cable*, November 14, 2006, <http://www.broadcastingcable.com/news/local-tv/rtdna-slams-vnr-study-fcc-investigation/40379> (March 18, 2014).

7. Diane Farsetta, “Four More Fines for Fake News: FCC Says VNRs Are “Valuable Consideration,” *Center for Media and Democracy*, October 1, 2007, <http://www.prwatch.org/news/2007/10/6504/four-more-fines-fake-news-fcc-says-vnrs-are-valuable-consideration> (March 18, 2014).

8. See James Rainey, “On the Media: FCC takes belated action on ‘fake news’,” *Los Angeles Times*, March 30, 2011, <http://articles.latimes.com/2011/mar/30/entertainment/la-et-onthedia-20110330> (March 18, 2014), and David Oxenford, “FCC Fines Two TV Stations \$4,000 for Airing Video News Releases Without Sponsorship Identification, Even Though the Stations Were Not Paid for the Broadcast,” *Broadcast Law Blog*, March 25, 2011, <http://www.broadcastlawblog.com/2011/03/articles/fcc-fines-two-tv-stations-4000-for-airing-video-news-releases-without-sponsorship-identification-even-though-the-stations-were-not-paid-for-the-broadcast/> (March 18, 2014).

As a work of journalism research, the FCC's proposal was unprecedented: there's never been a truly systematic analysis of entire media markets with such ambitious depth and breadth, and the data collected would have had implications far beyond the FCC itself, as it addresses fundamental questions about the operation of the "public sphere" in modern America.<sup>9</sup>

Commissioner Pai perceived the Critical Information Needs Study as a step toward the FCC becoming "newsroom police," and after using the bully pulpits of Fox News, CNBC, and the *Wall Street Journal* to decry the proposed study, the FCC capitulated and canceled the entire project. Pai reveled in his accomplishment: "In our country, the government does not tell the people what information they need. Instead, news outlets and the American public decide that for themselves."<sup>10</sup>

Yet this is precisely what the FCC has done in backhandedly impugning the legitimacy of Workers Independent News. The irony has not been lost on Emspak. "Fox News isn't fined by the FCC for being liars, but here [WLS is] fined for carrying so called 'fake news' about workers."<sup>11</sup>

Next Steps: Although it was correct in determining that WLS violated its sponsorship identification rules, this does not give the Federal Communications Commission the authority to determine what is or is not journalism. Such precedential decisions, albeit minor in the moment, can lead to deleterious outcomes over the longer term. Thus the FCC must be persuaded to rescind its determination on the legitimacy of Workers Independent News.

I have filed a Freedom of Information Act request with the FCC for the entire file of its case involving WLS, in order to better understand the rationale behind the initial complaint and the

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9. See John Anderson, "Abusing the Bully Pulpit," DIYmedia.net, February 25, 2014, <http://diymedia.net/wordpress/2014/02/25/abusing-the-bully-pulpit/> (March 18, 2014).

10. Federal Communications Commission, "Commissioner Pai Statement on the Cancellation of the CIN Study," February 28, 2014, <http://www.fcc.gov/document/commissioner-pai-statement-cancellation-cin-study> (March 18, 2014).

11. Elk, *supra* note 3.

agency's decision. I am also working with legal and communication scholars on a plan to appeal the FCC's decision on the grounds that it abridges the First Amendment rights of Workers Independent News and the journalists who have (and still) work for the organization, and that the FCC's determination has caused WIN material harm.

It is highly likely that the FCC will deny this appeal, for WIN does not have direct standing in the WLS case as it is not a licensed radio broadcaster. However, exhausting administrative remedies is required before moving on to the D.C. Circuit Court of Appeals—the federal court directly tasked with adjudicating FCC regulatory decisions.

Precedent does exist at this level for third parties to appeal decisions of regulatory agencies, especially when they violate the Constitutional rights of those parties, and there is a reasonable likelihood of succeeding on the merits of the case.

The FCC says it will respond to my FOIA request by no later than April 14, 2014, and the information gleaned from this process will help shape the details of this appeal. I am also reaching out to fellow journalists and scholars for advice and solidarity on this arduous yet necessary journey.