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A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION  
1400 SIXTEENTH STREET, N. W.  
WASHINGTON, D. C. 20036  
TEL (202) 939-7900 FAX (202) 745-0916  
INTERNET www.fw-law.com

AARON I. FLEISCHMAN

FLEISCHMAN AND WALSH, P. C.  
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January 30, 2001

VIA COURIER

Ms. Magalie Roman Salas, Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
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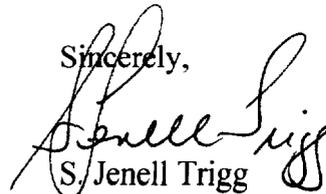
RE: Revised Reply Comments, Children's Television Obligations of  
Digital Television Broadcasters, MM Dkt. No. 00-167

Dear Ms. Roman-Salas:

Transmitted herewith on behalf The WB Television Network, are a revised original and five (5) copies of the Reply Comments for the above-mentioned proceeding to reflect corrections of typographical errors. The original version was timely filed on January 17, 2001.

Please communicate with the undersigned if there are any questions concerning this filing.

Sincerely,



S. Jenell Trigg  
Counsel for The WB Television  
Network

#130526v1

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BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

**RECEIVED**

JAN 30 2001

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Children's Television Obligations ) MM Docket No. 00-167  
of Digital Television Broadcasters )  
 )

**REPLY COMMENTS OF THE WB TELEVISION NETWORK**

**THE WB TELEVISION NETWORK**

John D. Maatta  
Senior Vice President and General Counsel  
The WB Television Network

Arthur H. Harding  
S. Jenell Trigg  
FLEISCHMAN AND WALSH, L.L.P.  
1400 Sixteenth St., N.W.  
Suite 600  
Washington, D.C. 20036

202-939-7900

Date: January 17, 2001

Its Attorneys

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**BEFORE THE**  
**Federal Communications Commission**  
**WASHINGTON, D.C. 20554**

In the Matter of )  
 )  
Children's Television Obligations ) MM Docket No. 00-167  
of Digital Television Broadcasters )  
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**REPLY COMMENTS OF THE WB TELEVISION NETWORK**

The WB Television Network ("The WB"), the fifth and fastest growing broadcast television network in the country,<sup>1</sup> by its attorneys, hereby submits the following Reply Comments in response to the above-captioned Notice of Proposed Rulemaking issued by the Federal Communications Commission ("FCC" or "Commission").<sup>2</sup>

**I. INTRODUCTION AND SUMMARY.**

The WB concurs that the welfare of children is an important issue and that consideration of the particular needs of children in the context of free-over-the-air television is a valid public

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<sup>1</sup> The WB is a limited partnership whose general managing partner is WB Communications, a division of Time Warner Entertainment Company, L.P. ("TWE"). The WB was launched on January 11, 1995, with two hours of prime time programming per week, carried by 48 affiliated stations nationwide. The WB is currently broadcasting thirteen hours of prime time programming on six nights. Over 80 stations are associated with The WB as either primary or secondary affiliates. The WB affiliates are independently owned local broadcast stations.

<sup>2</sup> In the Matter of Children's Television Obligations of Digital Television Broadcasters, Notice of Proposed Rulemaking, MM Dkt. No. 00-167, FCC 00-344 (rel. Oct. 5, 2000) ("Children's TV/DTV NPRM").

interest consideration. Broadcasters should be encouraged to continue their considerable voluntary efforts to provide programming responsive to the children's audience and to the needs of children. The WB's commitment to both entertaining and informing children has been extensive since the network's creation. Commencing with the start of the 1996-1997 Television Broadcast Season, The WB has made a significant commitment to providing children with world-class television programming. Currently, The WB broadcasts 19 hours a week (4 hours on Saturday and 3 hours on Monday through Friday) of programming produced to entertain, educate and inform children. During the 1999-2000 Television Broadcast Season, "Kids' WB" (as the WB children's programming dayparts are known) was the number one broadcast television network disseminating children's television programming. From "Pokemon" to "Jackie Chan," The WB is presenting children with programming that delights and entertains them. Additionally, The WB has made a serious commitment to presenting children with the opportunity to view engaging, educational and informational programming with programs such as "Histeria" and "Detention."

The WB, as a television network that is seriously committed to providing children's television programming, believes that in the fast changing multi-voiced video programming environment of today (including the increasingly competitive and converging broadcast, cable, DBS and Internet industries) additional regulations on commercial television networks and broadcasters under the guise of the Children's Television Act of 1990 ("CTA") are neither justified nor prudent at this time. Now, at the onset of the digital age, it is too soon to enact regulations that will govern the conduct of digital broadcasters, some of which have not yet

transmitted their first digital signal. The passage of some time, and the logging of practical experience is necessary before regulations are promulgated.

The WB files these Reply Comments in support of the comments previously filed in this proceeding that addressed the premature nature of the Children's TV/DTV NPRM and its proposed burdensome regulations over the still-developing digital broadcast television industry. Broadcasters already face daunting economic and technical challenges in accomplishing the Congressionally mandated transition to digital television. Additional regulatory burdens are not only premature, but counterproductive to the goal of a smooth and prompt roll-out of DTV. We also wish to comment on the specific proposals to restrict commercial website links and to impose mandatory promotional requirements. As the Commission is aware, the production of quality children's programming is an extremely expensive, high-risk proposition. Broadcasters should be encouraged to explore creative avenues to attempt to at least partially recover these production costs – including the use of website links. The WB is gravely concerned that the mere suggestion that the FCC might regulate the use of website links in children's programming could chill the ongoing efforts by The WB and other dedicated and responsible networks and broadcasters to fully implement the letter, spirit and intent of the CTA.

Finally, as an over-arching comment, The WB also wishes to express its concerns about the basic procedural aspects of this proceeding. Before any further action is taken with regard to this very important subject matter, The WB urges the Commission to: 1) reclassify this Children's TV/DTV NPRM as a Notice of Inquiry; 2) delay any rulemaking until the FCC has undertaken a separate inquiry to update its record and substantiate that there is evidence of harm

to children that will support increased regulatory action; and 3) to make express language of any actual proposed rules available for public comment. These measures will ensure that a sufficient administrative record exists, which is a statutory prerequisite to reasoned decision-making.

**II. THE FCC’S PROPOSED RESTRICTIONS ON WEBSITE LINKS ARE DETRIMENTAL TO THE INDUSTRY, CONTRARY TO THE CHILDREN’S TELEVISION ACT, AND VIOLATIVE OF THE FIRST AMENDMENT.**

**A. The FCC’s Proposed Prohibitions on Website Links Would Limit Innovation and Restrict the Ability of Networks, Stations, and Programmers to Create Financially Viable Children’s Programming.**

The FCC seeks comment on whether it should prohibit all direct links to commercial websites during children’s programming, or limit the duration of time the link appears on the screen.<sup>3</sup> It also asks how the appearance of a commercial website link should be counted in calculating the number of commercial minutes for the purposes of the CTA’s commercial limits.<sup>4</sup> The WB concurs with several commentors that the FCC should not define website links as commercial matter, nor should the Commission count links as part of the limitation on commercial time.<sup>5</sup> The duration of the URL or link appearance on the television screen should

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<sup>3</sup> Children’s TV/DTV NPRM, para. 32.

<sup>4</sup> *Id.*

<sup>5</sup> See Comments of the Association of Local Television Stations, Inc. (“ALTV), at 26 (opposing in general any attempt to regulate website links) (“ALTV Comments”); Comments of the Association of National Advertisers (“ANA”) and the American Association of Advertising Agencies (“AAAA”), at 1, 3 (opposing prohibition of direct links to commercial websites) (“ANA & AAAA Comments”); Comments of Maranatha Broadcasting Company, at 3-4 (prohibition on links restricts broadcasters’ ability to compete with unregulated, or substantially less regulated, industries) (“Maranatha Comments”); Comments of the National Association of Broadcasters, at 23 (“premature to determine how to treat interactive television”) (“NAB

(continued...)

also not be restricted by the FCC under its commercial advertising limit regulations.<sup>6</sup>

Given both the creative realities and financial difficulties surrounding the creation of compelling children's programming, the FCC's proposals are particularly burdensome. Networks, stations and program producers require the flexibility to create innovative multi-media programming and to forge strategic partnerships with other children's content providers and sponsors. A prohibition on commercial website links is both counterproductive and a

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<sup>5</sup>(...continued)

Comments"); Comments of the National Cable Television Association, at 3 (opposing "restrictions on linking or, indirectly, on the mix of 'commercial' and 'educational' content") ("NCTA Comments"); Comments of Sesame Workshop, at 22 (opposing prohibition on direct links, counting links toward commercial limits, and inclusion of links as commercial matter) ("Sesame Comments"); and Comments of Viacom Inc., at 29-30 (opposing restrictions on nascent interactive services) ("Viacom Comments"). All comments were filed on December 18, 2000.

<sup>6</sup> The Commission's reference to "website links" can be interpreted two ways: 1) the appearance of a website URL (e.g. [www.warnerbros.com](http://www.warnerbros.com)) during the television program; or 2) the appearance of an interactive link that will allow the website content to be accessed directly and displayed on the television. It is not clear which interpretation the FCC intends. The WB considers both to be included in its discussion regarding this issue.

A website URL included in television programming material would entail the website's Internet address (e.g. [www.warnerbros.com](http://www.warnerbros.com)) and may also include information encouraging the viewer to contact the website for more information about a specific topic.

Links are text, icons, or images located on a web page that allow the user, by the click of a mouse, to switch to another specific document - "an avenue to other documents located anywhere on the Internet." Reno v. ACLU, 521 U.S. 844, 852 (1997); see also ACLU v. Reno, 929 F. Supp. 824, 836-37 (E.D. Pa. 1996) (finding that links "are short sections of text or images which refer to another document. Typically the linked text is blue or underlined when displayed, and when selected by the user, the referenced document is automatically displayed, wherever in the world it actually is stored. . . . These links . . . are what unify the Web into a single body of knowledge, and what makes the Web unique.")).

disincentive to explore the use the Internet as a means to help promote educational programming, as well as children programming generally, and to pay for increased production costs.<sup>7</sup> Congress has acknowledged that "the financial support of advertisers assists in the provision of programming to children,"<sup>8</sup> and carefully balanced its advertising limitations with the need for commercial broadcasters to sell advertising to support their programming efforts. Adoption of a prohibition on website links would upset that careful balance, and would jeopardize the viability of children's programming initiatives by networks, stations, programmers and advertisers alike.

The FCC proposes to target commercial websites despite the fact that a commercial website can also offer educational and informational content, and would effectively be indistinguishable from a non-commercial website that also sells and merchandises its products.<sup>9</sup> Discrimination against commercial websites raises additional regulatory parity and constitutional issues.

A prohibition on website links presupposes that such links are not beneficial to the child or that they are harmful. The FCC has in no way supported the assertion that children are

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<sup>7</sup> See, e.g., Sesame Comments, at 25 (citing to the FCC's acknowledgment that children's product merchandising revenue is an important source of production funding) and Viacom Comments, at 29 ("[p]enaliz[es] efforts to enhance, promote and fund children's television channels [and] threatens the economics of operating television channels directed primarily to children"). The WB does not support Sesame Workshop's recommendation that only mixed-use websites should be permitted to link to a children's program and that host-selling on a linked website be prohibited. *Id.* at 23.

<sup>8</sup> 47 U.S.C. § 303a(3) note.

<sup>9</sup> See, e.g., ALTV Comments, at 26-27 and NAB Comments, at 23.

harmful by commercial website links.<sup>10</sup> In fact, the use of website links is in very early stages of development for analog broadcasters today, and is not yet a reality for digital broadcasters.<sup>11</sup> An absence of proof of harm brings this proposal into the realm of arbitrary and capricious rulemaking.<sup>12</sup>

**B. The FCC Does Not Have the Statutory Authority to Prohibit Website Links and Such Prohibition is Inconsistent With the Congressional Intent Behind the Children's Television Act.**

Any restrictions on a commercial broadcaster's inclusion of a website link in any television programming is outside of the FCC's statutory authority to implement the CTA and contrary to the congressional intent underlying that statute. At the time of its enactment, the rationale stated by Congress for passage of the CTA was that "special safeguards are appropriate to protect children from overcommercialization on television."<sup>13</sup> However, such safeguards do not extend to the prohibition of commercial website links because website links are not commercials "on television" and do not share the same properties as broadcast commercials.

For example, website links and website content are not the ubiquitously available type of commercial broadcast television content that was deemed by Congress to be appropriate for

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<sup>10</sup> See NCTA Comments, at 3 ("Notice does not identify any real- or even imagined-problems that would warrant Commission intervention").

<sup>11</sup> See, e.g., NCTA Comments, at 3 ("CME proposes an extreme solution to a non-existent problem") and NAB Comments, at 23 (the FCC should "let the various Internet technologies flower before deciding which parts to clip off for child audiences").

<sup>12</sup> 5 U.S.C § 551 et seq.; see also Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); see also MCI Telecommunications Corp. v. FCC, 842 F. 2d 1296 (D.C. Cir. 1998).

<sup>13</sup> 47 U.S.C. § 303a note (emphasis added).

regulation. In its deliberations regarding the CTA, Congress concluded that television is a "pervasive medium," thus requiring "a modest correction to excesses in children's TV advertising practices."<sup>14</sup> Limited restrictions on broadcasters' speech have been upheld because television and radio signals extend into the privacy of the home and it is difficult to completely avoid unwanted content.<sup>15</sup> Conversely, a website link does not expose a child directly or immediately to commercial content.<sup>16</sup> It takes an affirmative act for a child to access a website link.<sup>17</sup> For example, a child must have immediate access to a computer or similar technology while watching TV to access a website link at that time. A link, and thus, the website's content, may be readily avoided by any television viewer, and children in particular.

In short, a blanket prohibition on commercial website links by the Commission would go far beyond the intent of Congress to limit the amount of broadcast television commercials in

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<sup>14</sup> Cong. Rec. H 5247 (July 23, 1990) (remarks of Mr. Lent). "Thus, the record, including leading authorities, establishes that failure to create and maintain proper guides would irresponsibly allow our children to become the captive audience of advertisers." H.R. Rep. No. 101-385, at 10-11 (1990) (emphasis added) ("House Report"). See also S. Rep. No. 101-227, at 14 (1989) (citing to FCC v. Pacifica Foundation, 438 U.S. 726 (1978) as justification for the CTA) ("Senate Report"). In Pacifica, the Supreme Court cited the pervasive nature of broadcast media as one of the reasons for the distinction between First Amendment treatment of broadcasters and newspaper publishers. Pacifica, 438 U.S. at 748. It is important to note that even the Pacifica Court denied the FCC the authority to censor or specify programming. *Id.* at 735.

<sup>15</sup> Pacifica, 438 U.S. at 748.

<sup>16</sup> See House Report, at 7 (recognizing young children's limited ability to recognize and defend themselves against television advertising by changing the channel or by turning the TV off); see also Reno v. ACLU, 521 U.S. 844, 869 (1997) ("the Internet is not as 'invasive' as radio or television").

<sup>17</sup> Reno 521 U.S. at 869 ("Users seldom encounter content by 'accident.'") (citing ACLU v. Reno, 929 F. Supp. 824, 844 (1996)).

children's programming under the CTA.<sup>18</sup>

**C. The FCC's Proposal to Count Website Links as Part of the CTA's Commercial Advertising Limits Is Outside of its Statutory Authority and Congressional Intent.**

To address congressional concerns about overcommercialization, the CTA instituted commercial limitations on the number of minutes that can air in educational and non-educational children's programming.<sup>19</sup> Pursuant to the CTA, the FCC was instructed to "prescribe standards applicable to commercial television broadcast licensees with respect to the time devoted to commercial matter in conjunction with children's television."<sup>20</sup> A link, in and of itself, is not "commercial matter."<sup>21</sup> The link does not sell or promote a product or service, it serves primarily as a vehicle to assist in accessing content posted on a particular website.<sup>22</sup>

While the Commission does have the authority to revisit the advertising duration

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<sup>18</sup> Congress rejected a total ban on commercials in children's programming, recognizing practical, financial and First Amendment issues that such a ban would raise. See, e.g., House Report, at 8 ("The purpose of this legislation is . . . to protect the interest of children by limiting the amount of commercial matter presented during children's programs to the greatest extent possible without negatively impacting the viability of children's programming on commercial television) and 10 ("The time limits are manifestly reasonable . . . . These [commercial] limits set forth in H.R.1677 are far less restrictive than the complete bans . . . .").

<sup>19</sup> 47 U.S.C. § 303a(b)(limitations are not more than 10.5 minutes per hour on weekends and not more than 12 minutes per hour on weekdays). See also 47 C.F.R. § 73. 670.

<sup>20</sup> 47 U.S.C. § 303a(a)(emphasis added).

<sup>21</sup> The FCC defines "commercial matter" generally as "air time sold for the purposes of selling a product [or service]." In re Policies and Rules Concerning Children's Television Programming, Report and Order, MM Dkt. No. 90-570, 6 FCC Rcd 2111, para. 4 (1991).

<sup>22</sup> Links are "an avenue to other documents located anywhere on the Internet." Reno v. ACLU, 521 U.S. 844, 852 (1997); see also ACLU v. Reno, 929 F. Supp. 824, 836-37 (E.D. Pa. 1996) (finding that links are short sections of text or images which refer to another document.)

limitations under the CTA,<sup>23</sup> the necessary predicate for any modification of such limitations is subject to a "demonstration of the need for modification . . . ."<sup>24</sup> The FCC has offered no demonstration of need or harm to children in its NPRM to justify inclusion of website links as commercial matter subject to children's programming commercial minutes limitations, nor to limit the amount of time a link appears on the TV screen. Thus, the FCC has no clear authority to impose such a prohibition under the plain language of the CTA or its legislative history.

**D. The FCC's Proposed Prohibition on Website Links Violates the First Amendment.**

The WB submits that the regulation of website links by the Commission is in effect regulation of the Internet, and not simply the regulation of children's programming. If the Commission were to count a website link appearing in a children's programming as commercial matter merely because that website might contain material promoting the sale of goods or services, or if the FCC were to ban such links entirely, the effect would be to restrict commercial matter on the Internet, a result far beyond the FCC's statutory authority. Any such prohibition or restriction both serve to "limit the receipt and communication of information through the Internet based on the content of that information."<sup>25</sup> Thus, the FCC's proposed regulation of website

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<sup>23</sup> 47 U.S.C. § 303a(c).

<sup>24</sup> 47 U.S.C. § 303a(c)(2).

<sup>25</sup> Mainstream Loudoun v. Board of Trustees of the Loudoun County Library, 24 F. Supp. 2d 552, 563 (E.D. Va 1998); see also Reno v. ACLU, 521 U.S. 844 (1997) (holding portions of the Communications Decency Act to be unconstitutional because the statute suppressed a large amount of speech that adults have a constitutional right to send and receive.)

(continued...)

links raises numerous First Amendment issues.<sup>26</sup>

The WB assumes that the FCC's rationale for suggesting regulation of website links in television programs is based on the alleged commercial content of the link and the desire to protect children from overcommercialization. However, the FCC offers no empirical data to support this proposal, only the assertions of children's television advocates.<sup>27</sup> In fact, the FCC takes only one paragraph to discuss this critically important issue. A regulation that suppresses truthful and non-misleading commercial messages about lawful products and services must materially advance the FCC's interest in protecting children and must be narrowly-tailored.<sup>28</sup>

The Children's TV/DTV NPRM recites no recognizable governmental interest that would

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<sup>25</sup>(...continued)

The government's interest in the Communications Decency Act's was to protect children from patently offensive, indecent and harmful materials. Reno v. ACLU, 521 U.S. at 862. The governmental interest in the CDA is facially more compelling than the CTA's governmental interest in protecting children from overcommercialization on television, and yet the CDA was overturned.

<sup>26</sup> ANA & AAAA Comments, at 1.

For example, the proposed prohibition on website links would be classified as *overinclusive* if all commercial websites are targeted regardless whether they offer educational and informational program content, or alternatively, commercial matter as part of their link. See Mainstream Loudoun, 24 F. Supp. 2d, at 567.

"Content based blanket restrictions on speech cannot be properly analyzed as a form of time, place, and manner regulation." Mainstream Loudoun, 24 F. Supp. 2d, at 564 (citing Reno v. ACLU, 521 U.S. 844 (1997)).

<sup>27</sup> Children's TV/DTV NPRM, para. 32 (citing the joint comments filed by the Center for Media Education and nine other individuals and public interest organizations in the Notice of Inquiry for Public Interest Obligations of TV Broadcast Licensees, MM Dkt. No. 99-36-, 14 FCC Rcd 21633 (1999)).

<sup>28</sup> 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 505-07 (1996).

justify content-based regulation. "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."<sup>29</sup> The FCC merely speculates that website links are harmful to children. The absence of facts or empirical evidence to support such alleged dangers subjects the FCC's proposals to a finding that it has not narrowly-tailored its content based regulations.<sup>30</sup> "Such speculation certainly does not suffice when the [Government] takes aim at accurate commercial information for paternalistic ends."<sup>31</sup>

Any prohibition on website links would also penalize Internet websites oriented to children or children's products. It would limit the potential for strategic partnerships and revenue that could be generated through relationships with television broadcasters.<sup>32</sup> The most exacting scrutiny must be applied to regulations that "suppress, disadvantage, or impose differential burdens upon speech because of its content."<sup>33</sup> This is a situation which requires such

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<sup>29</sup> *Id.* at 503.

<sup>30</sup> Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 664 (1994).

<sup>31</sup> 44 Liquormart, 517 U.S. at 507.

<sup>32</sup> "A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." Simon and Schuster, 502 U.S. at 115 (citing Leathers v. Medlock, 499 U.S. 439, 447 (1991)); see also Arkansas Writer's Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987).

<sup>33</sup> Turner Broadcasting, 512 U.S., at 642 (citing Simon and Schuster, Inc. v. N.Y. State Crime Victims Board, 502 U.S. 105 (1991)); see also Mainstream Loudoun v. Board of Trustees of the Loudoun County Library, 24 F. Supp. 2d 552, (E.D. Va 1998) ("Because the Policy at issue limits the receipt and communication of information through the Internet based on the content of that information, it is subject to a strict scrutiny analysis and will only survive if it is 'necessary to serve a compelling [government] interest and . . . is narrowly drawn to achieve that

(continued...)

scrutiny.

Finally, the proposal to restrict broadcasters' use of website links runs counter to the long-standing policy against regulation of the Internet. Congress intended that the Internet be "unfettered by Federal or State regulation" as a means "to preserve the vibrant and competitive free market that presently exists."<sup>34</sup> "[F]or decades now, the FCC has expressly declined to regulate similar computer, data processing and information services for the very reason that such interference would undermine the energy and drive toward innovation that characterizes these highly competitive markets."<sup>35</sup>

In sum, the FCC would grossly exceed its statutory authority and would violate the First Amendment by imposing any restrictions on website links in children's television programming.

### **III. THE FCC CANNOT CHANGE THE DEFINITION OF COMMERCIAL MATTER NOR MODIFY ITS COMMERCIAL LIMITS.**

The WB supports the numerous comments that oppose the FCC's revision of the definition of "commercial matter" to include some or all of the types of program interruptions that do not currently contribute toward commercial limits, such as public service announcements or promotions for other programs.<sup>36</sup> We agree that the FCC does not have the statutory authority

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<sup>33</sup>(...continued)  
end.") (citations omitted).

<sup>34</sup> 47 U.S.C. § 230(b)(2) (emphasis added).

<sup>35</sup> Press Statement of Commissioner Michael Powell on the Approval of AOL-Time Warner Merger, at 2, CS Dkt. No. 00-30, (released January 11, 2001) (emphasis in original).

<sup>36</sup> See ALTV Comments, at 27; ANA & AAAA Comments, at 4-5; NAB Comments, at (continued...)

to modify the definition based on the CTA and its legislative history.<sup>37</sup>

The WB also concurs with various comments that expansion or change of the definition provides a disincentive to air PSAs, which also serve the public interest.<sup>38</sup> Moreover, practical application of a definitional change would reduce the amount of valuable commercial inventory to sell,<sup>39</sup> the adverse economic impact of which is likely to be more pronounced as to an emerging network such as The WB and its affiliated stations.<sup>40</sup> Because of typical program

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<sup>36</sup>(...continued)

21; NCTA Comments, at 2; Sesame Comments, at 25; State Broadcasters Joint Comments, at 16; Sinclair Comments, at 7; and Viacom Comments, at 35.

<sup>37</sup> See Sesame Comments, at 26 (citing to the Commission's Report and Order implementing the CTA that stated the statutory intent of using the definition contained in former FCC Form 303); Comments of Sinclair Broadcast Group, Inc., filed December 18, 2000, at 7-8 ("the congressional history indicates the framers of the Children's Television act of 1990 intended that the definition of 'commercial matter' be consistent with the definition used in the license renewal form.") ("Sinclair Comments"); Joint Comments of Named State Broadcasters Associations, filed December 18, 2000, at 17 ("The definition of 'commercial matter' must be used consistently with how it is defined on FCC form 303.") ("State Broadcasters Joint Comments"); and Viacom Comments, at 35-36 (citing Senate Report's [S. Rpt. No. 101-227 (1989)] express statement that "[t]he Committee intends that the definition of commercial matter will be consistent with the definition used by the FCC in its former FCC Form 303."). This definition of commercial matter did not include promotional announcements and PSAs. *Id.*

<sup>38</sup> See, e.g., ALTV Comments, at 28; NAB Comments, at 22 (also a disincentive to cross-promote); Sesame Comments, at 26-27; Sinclair Comments, at 7; and Viacom Comments, at 35-37.

<sup>39</sup> ANA & AAAA Comments, at 5 ("Including these types of messages within the definition of 'commercial matter' would further squeeze the amount of time available for commercial messages from program sponsors. . . such a change is further disincentive to the economic viability of children's television programming.").

<sup>40</sup> While all affiliated stations would lose advertising revenue in proportion to their unit rates, smaller stations are likely to suffer greater economic harm given their overall costs to transition to digital. ALTV Comments, at 9 ("Local television stations already are coping with  
(continued...)

formats, broadcasters currently need to fill odd time segments with a combination of commercials, PSAs, station IDs, and/or promos. If PSAs, station IDs, or promos will count as commercials, the result would be either a forced reduction of paid commercial time from advertisers (the lifeblood of a network and commercial broadcaster) or blank air in the odd time segments.<sup>41</sup>

Additionally, expansion of the definition does not serve the statutory intent to "protect children from overcommercialization on television" (i.e. the selling products and services).<sup>42</sup> By the Commission's own admission, PSAs and promos are not "commercial" nor "advertising" matter.<sup>43</sup> In fact, pursuant to the FCC's rules for children's programming, PSAs with a

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<sup>40</sup>(...continued)

considerable risks [associated with the DTV rollout], many which were anticipated, some of which were not. . . . The government's willingness to impose potentially costly regulations before the [DTV] service commences operation sends the wrong signal to the investment community."); Maranatha Comments, at 3-4 (independent or smaller-market stations are struggling to convert to digital television and any regulations that impose on programming obligations, including regulation of website links, "increase the economic risks associated with the conversion to DTV broadcasting"); and Sinclair Comments, at 5 ("the NPRM fails to consider the cost to DTV broadcasters of adding new requirements").

<sup>41</sup> For example, an hour children's program has a total allotted program breaks of 15 minutes (a combination of breaks internal to the program already pre-cut by the program producer and the commercial breaks at both program adjacencies). Children's programming on the weekends is limited to only 10.5 minutes per program hour. 47 C.F.R. § 73.670. A broadcaster airing twenty 30-second and one 15-second paid commercial spots would reach its limit of 10.5 minutes. However, the remaining four minutes and 15 seconds of time would go unfilled if PSAs, promotions and station IDs were deemed to be commercial matter. The result would be dead air.

<sup>42</sup> 47 U.S.C. § 303a(4) note.

<sup>43</sup> In re Policies of and Rules Concerning Children's Television Programming, Report  
(continued...)

significant purpose of educating and informing children can count toward the three hour per week processing guideline.<sup>44</sup> The FCC has offered no discussion or facts that would justify why it should change its long-standing policy on the definition of commercials. "It is axiomatic that an agency choosing to alter its regulatory course 'must supply a reasoned analysis indicating that its prior policies and standards are deliberately changed, not casually ignored.'<sup>45</sup> This is an issue of critical practical importance to all television networks and to all broadcasters. Accordingly, changes to the definition of commercial matter should not be undertaken absent compelling circumstances, and no such rationale for change has been presented in this proceeding.

Finally, expansion of the definition of commercial matter to include PSAs, promotional announcements and station IDs would promote favored speech (children's educational programming content) by restricting or displacing disfavored speech (commercials, PSAs, promos and station IDs). Content-based regulations that serve to promote government favored

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<sup>43</sup>(...continued)

and Order, MM Dkt. No. 90-570, 6 FCC Rcd 2111, para. 7 (1991). See also ALTV Comments, at 28; NAB Comments, at 21; Sesame Comments, at 25-26; and Viacom Comments, at 36-38.

<sup>44</sup> 47 C.F.R. § 73.671 NOTE 2.

<sup>45</sup> Action for Children's Television v. FCC, 821 F.2d 741, 745 (D.C. Cir. 1987) (citations omitted) (holding that the FCC failed to provide a "reasoned basis" for its decision to deregulate children's commercialization guidelines given the absence of facts or analysis to justify its change in regulation). In this case, the court remanded the FCC's decision for "elaboration" on that issue *Id.* at 750. In response to the court's directive, the FCC issued a Notice of Inquiry that sought further comment on the commercialization of children's television. House Report, at 5. In the instant proceeding, The WB urges the FCC to take this step on its own initiative and undertake further inquiry on the necessity of children's television regulation for the digital television service.

speech cannot withstand First Amendment scrutiny.<sup>46</sup> The definition of commercial matter should not be changed for programming airing in either an analog or digital format.

#### **IV. THERE IS NO BASIS FOR IMPOSING ADDITIONAL COMMERCIAL LIMITS ON DIGITAL BROADCASTS.**

The FCC seeks comments on how the limits on the amount of commercial matter in children's programming should apply in the digital environment.<sup>47</sup> The WB urges the FCC to first explore a threshold issue: Is the overcommercialization of children's programming still a valid problem? Can actual harm to children be documented? The findings that supported the CTA are more than a decade old. Much has changed in the broadcast industry over the past five years, not the least of which is the proliferation of educational and informational programming for children on commercial television. It is imperative that the FCC develop concrete evidence that demonstrates a continued existence of a problem before it expands the current limitations to DTV.

In the absence of such findings, the FCC's current three-hour processing guideline should only apply to the broadcasters' primary feed, whether analog or digital. Congress' justification for imposing the CTA's mandate to increase educational programming on commercial television broadcasters in the first place was to make sure that everyone had access to "free" educational

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<sup>46</sup> "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." Regan v. Time, Inc., 468 U.S. 641, 648-649 (1984).

<sup>47</sup> Children's TV/DTV NPRM, para. 30.

programming.<sup>48</sup> There has been no showing that the regulations that are currently in effect have not been successful at bringing about the salutary result for which they were intended.

**V. THE FCC'S CONCERN ABOUT OBJECTIONABLE PROMOTIONAL CONTENT AIRING IN CORE EDUCATIONAL AND INFORMATIONAL IS UNFOUNDED.**

The Children's TV/DTV NPRM asks whether the content ratings of programs promoted by broadcasters be consistent with the content ratings of the program during which the promotion runs.<sup>49</sup> This proposal appears to raise two distinct issues: 1) whether broadcasters should be prohibited from airing a promo when the promo itself contains material inconsistent with the content rating of the program in which the promo airs, and 2) whether a broadcaster should be prohibited from airing a promo for a TV program that carries a more restrictive content rating than the show the promo airs in.

As to the first issue, broadcasters currently endeavor to ensure that no objectionable content (based on the promo's actual content and not the actual program) runs in a children's program. This was the agreement reached as part of the recent White House/TV Networks Conference.<sup>50</sup> This review is done through the normal 'broadcast standards and practices' process of stations and networks.

Regarding the second issue, broadcasters currently do not (and did not agree to) take into

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<sup>48</sup> S. Rpt. No. 101-227, Hearing on S.707 and S.1215 (1989) (testimony of Dale Kunkel discounting the increase of educational programs on cable and DBS given the lack of access of such alternative media for the economically and culturally disadvantaged).

<sup>49</sup> Children's TV/DTV NPRM, para. 35.

<sup>50</sup> See MPAA Comments, at 17-18.

consideration whether the actual movie or program being promoted carries the same rating as the program in which the promo airs, even as to promos aired during children's programming. The WB submits that there are several problems with such a requirement: 1) it raises First Amendment issues regarding the restriction of the editorial control of a broadcaster's entire on-air presence, not just children's programming; 2) practical application of this rule may impose a tremendous burden for broadcasters to have to first check the program content ratings or actually review the content of a program before scheduling and airing the promo; and 3) such a rule would impose a severe restriction on the ability of a broadcaster to manage its commercial and promotional inventory.<sup>51</sup>

The WB concurs with several comments that raise the threshold issue of whether this promo/ad content issue in children's programming is a real problem deserving regulatory intervention.<sup>52</sup> The self-regulatory efforts of broadcasters, cable operators and advertisers is working admirably, and such voluntary efforts should be encouraged. Thus, the imposition of regulations would be unnecessary, arbitrary and not narrowly-tailored.

## **VI. THE FCC SHOULD NOT MANDATE PROMOTION OF CORE EDUCATIONAL AND INFORMATIONAL PROGRAMMING.**

The FCC inquires whether stations and networks are adequately promoting educational and informational programming to children and parents and whether such promotion is

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<sup>51</sup> See ANA & AAAA Comments, at 5-6 (also arguing that the Federal Trade Commission, not the Federal Communications Commission, has primary statutory authority (and the experience and expertise) to regulate advertising and promotions in the media).

<sup>52</sup> See, e.g., MPAA Comments, at 14-15.

effective.<sup>53</sup> The threshold issue raised by this inquiry is how will the FCC define "effective?" Will the Commission look at ratings? What is a good rating and what is a bad rating? How will it take into consideration that core programming often performs far below the ratings of non-educational programming, regardless of the production quality? How will it take into consideration that ratings are based on many variables (i.e., HUT levels, counter-programming) that are not always impacted by increased promotional support? What objective measurements are available to determine whether promotion of core programming has been "effective?" Until the Commission offers a concrete measurement for whether promotional efforts are "effective," it is impossible to address whether any additional efforts should be undertaken.

**A. Mandatory Promotion of Children's Educational Programming Would Be Unduly Burdensome.**

The FCC also asks whether it should require broadcasters to promote core children's E/I programs and, if so, whether such promotion should occur in prime time or other specific dayparts.<sup>54</sup> Such a requirement would effectively turn the current voluntary processing guidelines into an impermissible rule, with increased restrictions on speech because the FCC would have imposed an affirmative requirement on a broadcaster to air specific content.<sup>55</sup> The practical impact of this requirement would be the loss of valuable commercial and/or

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<sup>53</sup> Children's TV/DTV NPRM, para. 38.

<sup>54</sup> *Id.*

<sup>55</sup> See NAB Comments /Appendix B, Prof. Smolla Comments, at 8 ("the Supreme Court has never countenanced government regulations that impose specifically defined affirmative programming requirements on broadcasters") (emphasis in original).

promotional inventory for adult audiences, a larger and considerably more valued demographic than children for advertisers.

Forced promotion is also discriminatory against certain broadcasters. Networks and stations that carry more core educational programming would be subject to greater FCC-mandated promotional requirements. It would also create a disincentive for broadcasters to air more core programs if coupled with an FCC-mandated promotional requirement. Those networks and stations that have fewer prime shows whose content would appeal to children and parents (thus ideal programming content for "core" promos) would suffer increased harm because FCC-mandated promos would be concentrated in only a few shows. This would result in a loss of paid commercial inventory in the same shows week after week.

The scheduling of promotional material is not a random exercise by a network or station, especially in the primetime daypart. There are numerous factors that an experienced advertising and promotions professional takes into account when executing a television or cable promotional effort. These factors include consideration of demographics for the program to be promoted and the program the promotion will air in, including continuity between programs. Thus, any regulation of a broadcaster's promotional efforts would disrupt the scheduling matrix for programming, promotional, and commercial content throughout a broadcaster's full programming day, not just the time periods where children's programming are scheduled.

**B. Mandatory Promotion Requirements Would Violate the First Amendment.**

The Commission must not ignore the First Amendment issues flowing from a